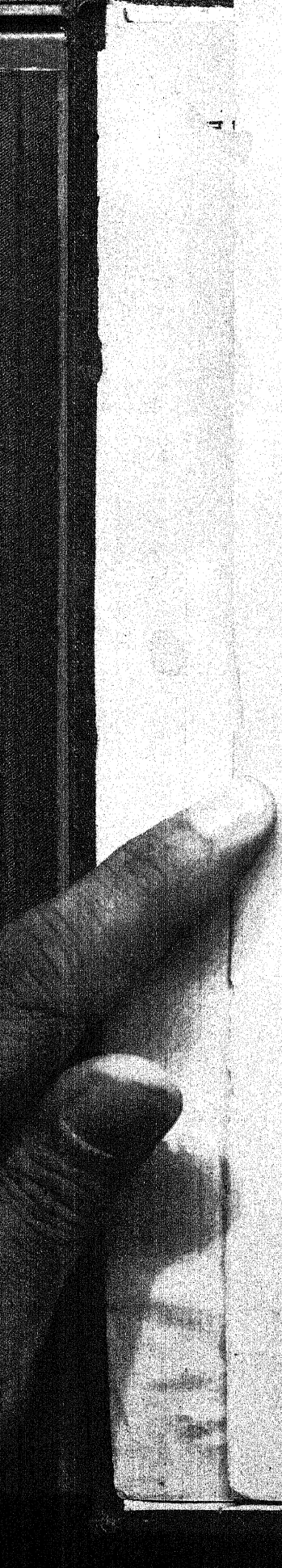
THE DIGEST

OF

ENGLISH CASE LAW.



THE DIGEST

OF

ENGLISH CASE LAW

CONTAINING THE

REPORTED DECISIONS

OF THE

SUPERIOR COURTS,

AND

A SELECTION FROM THOSE OF THE IRISH COURTS,

TO THE END OF

1897.

UNDER THE GENERAL EDITORSHIP OF

JOHN MEWS,

BARRISTER-AT-LAW.

VOL. XIII.

SHIPPING—TAXES.

LONDON:

SWEET AND MAXWELL, LIMITED; 3, CHANCERY LANE.

STEVENS AND SONS, LIMITED; 119, 120, CHANCERY LANE.

1898.

BRADBURY, AGNEW, & CO. LD., PRINTERS,
LONDON AND TONBRIDGE.

TABLE OF ABBREVIATIONS

OF THE NAMES OF THE

PRINCIPAL REPORTS CITED.

[1891] A. C.	Law Reports, Appeal Cases (1891 onwards).
A. & E.	Adolphus and Ellis. Q. B.
Addams Ecc.	Addams. Ecclesiastical.
Aleyn	Aleyn. K. B.
Amb.	Ambler. Ch.
Anderson	Anderson. C. P.
Andrews	Andrews. K. B.
Anst.	Anstruther. Ex.
App. Cas.	Law Reports, Appeal Cases (1876—1890).
Arn.	Arnold. C. P.
Arn. & H.	Arnold and Hodges. Q. B.
Asp. M. C.	Aspinall. Maritime Cases.
Atk.	Atkyns. Ch.
B. & Ad.	Barnewall and Adolphus. K. B.
B. & Ald.	Barnewall and Alderson. K. B.
B. & C.	Barnewall and Cresswell. K. B.
B. & S.	Best and Smith. Q. B.
B. C. C.	Lowndes and Maxwell. Bail Court.
B. C. Rep.	Saunders and Cole. Bail Court.
Ball & B.	Ball and Beatty. Ch. (Ireland).
Bar. & Arn.	Barron and Arnold. Election.
Bar. & Au.	Barron and Austin. Election.
Barnard. Ch.	Barnardiston. Ch.
Barnard. K. B.	Barnardiston. K. B.
Batty	Batty. K. B. (Ireland).
Beat.	Beatty. Ch. (Ireland).
Beav.	Beavan. Rolls Court.
Bell, C. C.	Bell. Crown Cases.
Bing.	Bingham. C. P.
Bing (N.C.)	Bingham. New Cases. C. P.
Bligh	Bligh. H. L.
Bos. & P.	Bosanquet and Puller. C. P.
Bos. & P. (N.R.)	Bosanquet and Puller. New Reports. C. P.
Bott P. L.	Bott's Poor Laws.
Br. & B.	Broderip and Bingham. C. P.
Br. & Lush.	Browning and Lushington. Adm.
Bro. C. C.	Brown. Ch.
Bro. P. C.	Brown. Cases in Parliament.
Buck	Buck. Bky.
Bull. N. P.	Buller's Law of Nisi Prius.
Bulst.	Bulstrode. K. B.
Bunb.	Bunbury. Ex.
Burr.	Burrows. K. B.
Burr. S. C.	Burrows. Settlement Cases.

[1891] Ch. .....Law Reports, Chancery (1891 onwards).
C. B. .....Common Bench Reports.
C. L. R. .....Common Law Reports (1853—1855).
C. P. D. .....Law Reports, Common Pleas Division (1875—1880).
Cab. & E. .....Cababé and Ellis. Nisi Prius.
Cald. S. C. .....Caldecott. Settlement Cases.
Camp. .....Campbell. Nisi Prius.
Car. & K. .....Carrington and Kirwan. Nisi Prius.
Car. & M. .....Carrington and Marshman. Nisi Prius.
Car. & P. .....Carrington and Payne. Nisi Prius.
Carter .....Carter. C. P.
Carth. .....Carthew. K. B.
Cary .....Cary. Ch.
Cas. t. Hardwicke ..Cases temp. Hardwicke. K. B.
Cas. t. Talbot .....Cases temp. Talbot. Ch.
Ch. Cas. .....Cases in Chancery.
Ch. Cas. Ch. .....Choice Cases in Chancery.
Ch. D. .....Law Reports, Chancery (1876—1890).
Ch. Pre. .....Precedents in Chancery.
Ch. Rep. .....Reports in Chancery.
Chit. .....Chitty. Bail Court.
Cl. & F. .....Clark and Finnelly. H. L.
Co. Rep. .....Coke. K. B.
Coll. C. C. .....Collyer. Ch.
Colles .....Colles' Cases in Parliament.
Colt. .....Coltman. Registration.
Comb. .....Comberbach. K. B.
Comyns .....Comyns. K. B.
Coop. t. Brough. ....Cooper. Cases temp. Brougham.
Coop. t. Cott. .....Cooper. Cases in Chancery temp. Cottenham.
G. Cooper .....Ch.
C. P. Cooper .....C. P. Cooper. Ch.
C. & J. .....Crompton and Jervis. Ex.
C. & M. .....Crompton and Meeson. Ex.
C. M. & R. .....Crompton, Meeson and Roscoe. Ex.
Con. & L. .....Connor and Lawson. Ch. (Ireland).
Cooper .....Cooper. Ch.
Ct. of Sess. Cas. ....Court of Session Cases (Scotland).
Cowp. .....Cowper. K. B.
Cox .....Cox. Ch.
Cox, C. C. .....Cox. Crown Cases.
Cr. & Ph. .....Craig and Phillips. Ch.
Craw. & D. .....Crawford and Dix (Ireland).
Curt. .....Curteis. Eccl.

D. P. C. .....Dowling. Practice Cases.
D. (N.S.) .....Dowling. Practice Cases, New Series.
D. & L. .....Dowling and Lowndes. Practice Cases.
D. & R. .....Dowling and Ryland. K. B.
Daniell .....Daniell. Ex. Eq.
Dans. & Ll. .....Danson and Lloyd. Mercantile.
Dav. & M. .....Davison and Merivale. Q. B.
Deac. .....Deacon. Bky.
Deac. & C. .....Deacon and Chitty. Bky.
Dears. & B. .....Dearsley and Bell. Crown Cases.
Dears. C. C. .....Dearsley. Crown Cases.
De G. .....De Gex. Bky.
De G. F. & J. .....De Gex, Fisher, and Jones. Ch. App.
De G. & J. .....De Gex and Jones. Ch. App.
De G. J. & S. .....De Gex, Jones, and Smith. Ch. App.
De G. M. & G. .....De Gex, Macnaghten and Gordon. Ch. App.
De G. & Sm. .....De Gex and Smale. Ch.

Den. C. C. .....Denison. Crown Cases.
Dick. .....Dickens. Ch.
Dod. .....Dodson. Adm.
Dougl. .....Douglas. K. B.
Dow .....Dow. H. L.
Dow & Cl. .....Dow and Clark. H. L.
Dr. & Sm. .....Drewry and Smale. Ch.
Drew. .....Drewry. Ch.
Dr. .....Drury. Ch. (Ireland).
Dr. & Wal. .....Drury and Walsh. Ch. (Ireland).
Dr. & War. .....Drury and Warren. Ch. (Ireland).
Drink. .....Drinkwater. C. P.
Dyer .....Dyer. K. B.

East. .....East. K. B.
East, P. C. .....East's Pleas of the Crown.
Eden .....Eden. Ch.
Edwards .....Edwards. Adm.
El. & Bl. .....Ellis and Blackburn. Q. B.
El. Bl. & El. .....Ellis, Blackburn and Ellis. Q. B.
El. & El. .....Ellis and Ellis. Q. B.
Eq. Ca. Abr. .....Equity Cases Abridged.
Eq. R. .....Equity Reports (1853—1855).
Esp. .....Espinasse. Nisi Prius.
Ex. .....Exchequer Reports (1848—1856).
Ex. D. .....Law Reports, Exchequer Division (1875—1880).

F. & F. .....Foster and Finlason. N. P.
Fl. & K. .....Flanagan and Kelly. Rolls (Ireland).
Falc. & F. .....Falconer and Fitzherbert. Election.
Fitzg. .....Fitzgibbon. K. B.
Fonb. (N.R.) .....Fonblanque. Bankruptcy.
Forrest .....Forrest. Ex.
Fort. .....Fortescue. K. B.
Foster .....Foster. Crown Cases.
Fox .....Fox. Registration.
Free. C. C. .....Freeman. Ch.
Free. K. B. .....Freeman. K. B.

G. & D. .....Gale and Davison. Q. B.
Gale .....Gale. Ex.
G. Coop. .....G. Cooper. Ch.
Giff. .....Giffard. Ch.
Gilb. Eq. .....Gilbert. Ch.
Glyn & J. .....Glyn and Jameson. Bky.
Godb. .....Godbolt. K. B.
Gow. .....Gow. Nisi Prius.

H. Bl. .....H. Blackstone. C. P.
H. L. Cas. .....House of Lords Cases.
H. & C. .....Hurlstone and Coltman. Ex.
H. & H. .....Horn and Hurlstone. Ex.
H. & M. .....Hemming and Miller. Ch.
H. & N. .....Hurlstone and Norman. Ex.
H. & R. .....Harrison and Rutherford. C. P.
H. & W. .....Harrison and Wollaston. Bail Court.
Hag. Adm. .....Haggard. Adm.
Hag. Cons. .....Haggard. Consistory.
Hag. Ecc. .....Haggard. Eccl.
Hall & Tw. .....Hall and Twells. Ch.
Hardr. .....Hardres. Ex.

Hare .....Hare. Ch.
Hawk. P. C. .....Hawkins's Pleas of the Crown.
Hay. & J. .....Hayes and Jones. Ex. (Ireland).
Hayes .....Hayes. Ex. (Ireland).
Hob. .....Hobart. K. B.
Hodges .....Hodges. C. P.
Hog. .....Hogan. Rolls (Ireland).
Holt .....Holt. K B.
Holt, Eq. .....Holt. Eq.
Holt, N. P. .....Holt. Nisi Prius.
Hopw. & C. .....Hopwood and Coltman. Registration.
Hopw. & P. .....Hopwood and Philbrick. Registration.
Hurl. & W. .....Hurlstone and Walmsley. Ex.

Ir. C. L. R. .....Irish Com. Law (1850—1866).
Ir. Ch. R. .....Irish Chancery (1850—1866).
Ir. Eq. R. .....Irish Equity Reports.
[1894] Ir. R. .....Irish Law Reports (1894 onwards).
Ir. R. C. L. .....Irish Com. Law (1866—1878).
Ir. R. Eq. .....Irish Equity (1866—1878).

J. & H. .....Johnson and Hemming. Ch.
J. & W. .....Jacob and Walker. Ch.
J. Kelyng .....Sir J. Kelyng. Crown Cases.
J. P. .....The Justice of the Peace.
Jacob .....Jacob. Ch.
Jenk. .....Jenkins. Ex.
Jo. & Lat. .....Jones and Latouche. Ch. (Ireland).
Johns. .....Johnson. Ch.
Jones .....Jones. Ex. (Ireland).
Jones & C. .....Jones and Carey. Ex. (Ireland).
Jur. .....The Jurist.

K. & G. .....Keane and Grant. Registration.
K. & J. .....Kay and Johnson. Ch.
Kay .....Kay. Ch.
Keb. .....Keble. K. B.
Keen .....Keen. Rolls Court.
Keilw. .....Keilway. K. B.
Kel. .....Kelyng, Sir John. K. B.
Ken. .....Kenyon. K. B.
Knapp .....Knapp. P. C.
Knapp & O. .....Knapp and Ombler. Election.

L. & C. .....Leigh and Cave. Crown Cases.
L. & M. .....Lowndes and Maxwell. Bail Court.
L. M. & P. .....Lowndes, Maxwell, and Pollock. Bail Court.
L. T. .....Law Times, New Series.
L. J. (o.s.) Ch. K.B.
etc. .....Law Journal Reports, 1822 to 1831.
L. J. Ch. .....Chancery.
,, Bk. .....Bankruptcy.
,, C. P. .....Common Pleas.
,, Ex. .....Exchequer.
,, M. C. .....Magistrates' Cases.
,, Q. B. .....Queen's Bench.
,, P. C. .....Privy Council.
,, P. & M. .....Probate and Matrimonial.
,, P. .....Probate, Divorce, and Admiralty.
,, Adm. .....Admiralty.
,, Ecc. .....Ecclesiastical.

From 1831 onwards.

L. R. H. L.	Law Reports, 1866 to 1875 inclusive.
L. R. P. C.	
L. R. Ch.	
L. R. Eq.	
L. R. Q. B.	
L. R. C. P.	
L. R. Ex.	
L. R. P. & M.	
L. R. A. & E.	
L. R. C. C.	
L. R. H. L. Sc.	
L. R. Ir.	Irish Law Reports (1879—1893).
Latch	Latch. K. B.
Leach, C. C.	Leach. Crown Cases.
Ld. Raym.	Lord Raymond. K. B.
Lev.	Levinz. K. B.
Lewin, C. C.	Lewin. Crown Cases.
Lit. Rep.	Littleton. C. P.
Ll. & G.	Lloyd and Goold. Ch. (Ireland).
Lofft	Lofft. K. B.
Longf. & T.	Longfield and Townsend. Ex. (Ireland).
Lush.	Lushington. Adm.
Lutw.	Lutwyche. C. P.
Lutw. Reg. Cas.	Lutwyche. Registration.
M. C. C.	Moody. Crown Cases.
M. & H.	Murphy and Hurlstone. Ex.
M. & M.	Moody and Malkin. Nisi Prius.
M. & P.	Moore and Payne. C. P.
M. & Rob.	Moody and Robinson. Nisi Prius.
M. & S.	Maule and Selwyn. K. B.
M. & Sc.	Moore and Scott. C. P.
M. & W.	Meeson and Welsby. Ex.
Macl. & R.	Maclean and Robinson. Scotch Appeals.
Mac. & G.	Macnaghten and Gordon. Ch.
M'Cle.	M'Cleland. Ex.
M'Cle. & Y.	M'Cleland and Young. Ex.
Macq. H. L.	Macqueen. H. L.
Madd.	Maddock. Ch.
Man. & G.	Manning and Granger. C. P.
Man. & Ry.	Manning and Ryland. K. B.
Manson	Manson. Bky. and Winding-up.
Marshall	Marshall. C. P.
Meg.	Megone. Company Cases.
Mer.	Merivale. Ch.
Mod.	Modern Reports.
Moll.	Molloy. Ch. (Ireland).
Mont.	Montagu. Bky.
Mont. & Ayr.	Montagu and Ayrton. Bky.
Mont. & B.	Montagu and Bligh. Bky.
Mont. & C.	Montagu and Chitty. Bky.
Mont & M'Ar.	Montagu and M'Arthur. Bky.
Mont. D. & D.	Montagu, Deacon, and De Gex. Bky.
Moore	Moore. C. P.
Moore Ind. App.	Moore. Indian Appeals.
Moore, P. C.	Moore. P. C.
Morrell	Morrell. Bky.
Moseley	Moseley. Ch.
Myl. & Cr.	Mylne and Craig. Ch.
Myl. & K.	Mylne and Keen. Ch.
N. & M.	Neville and Manning. K. B.
N. & P.	Neville and Perry. K. B.

N. R. .....New Reports (1862—1865).
Nelson .....Nelson. Ch.
New Sess. Cas. .....New Sessions Cases.

O'M. & H. .....O'Malley and Hardcastle. Election.

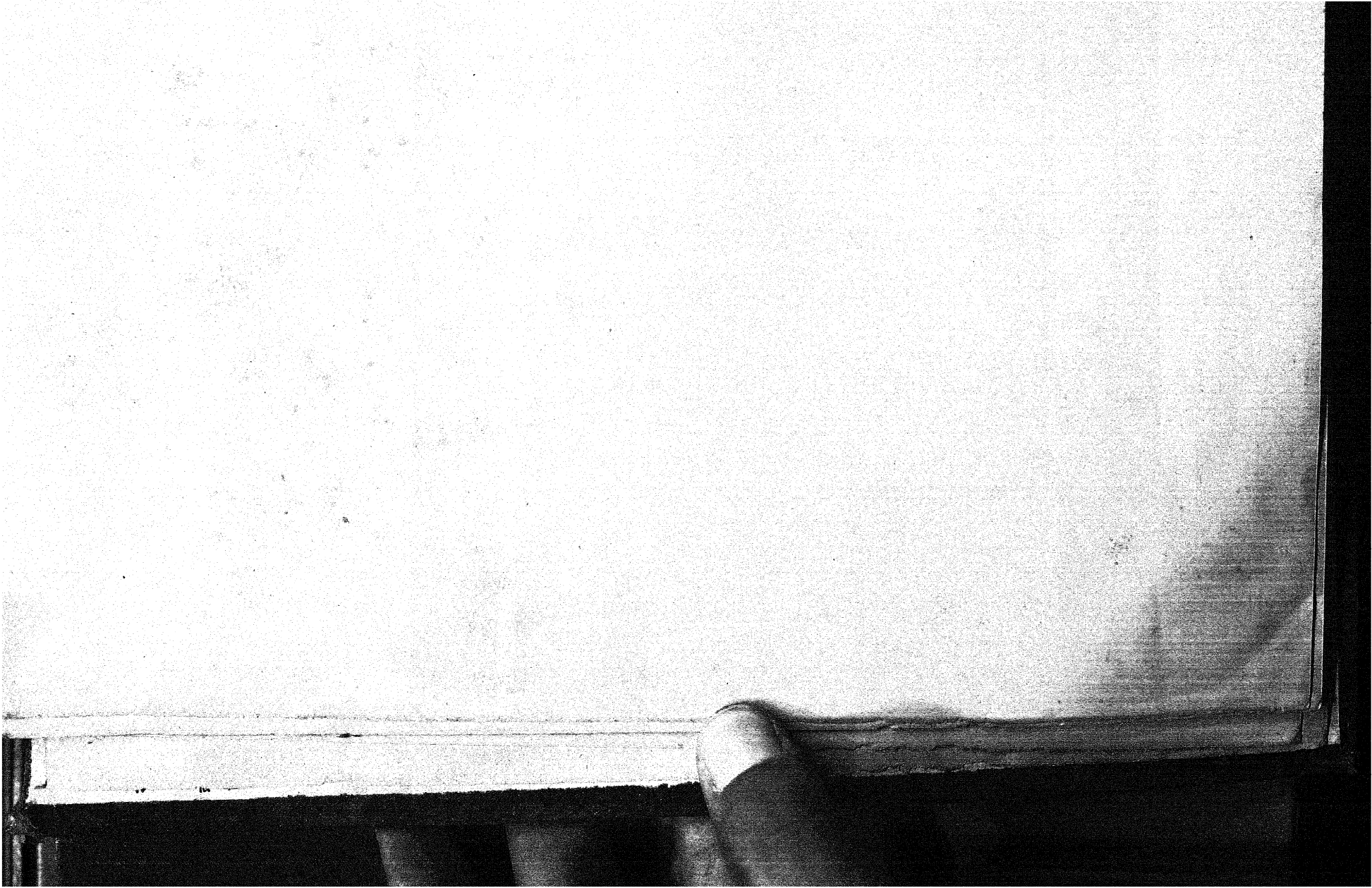
[1891] P. .....Law Reports, Probate (1891 onwards).
P. D. .....Law Reports, Probate Division (1876—1890).
P. & D. .....Perry and Davison. K. B.
P. & K. .....Perry and Knapp. Election.
Peake, Add. C. .....Peake. Additional Cases, Nisi Prius.
Peake, N. P. .....Peake. Nisi Prius.
P. Wms. .....Peere Williams. Ch.
Phillim. .....Phillimore. Eccl.
Ph. .....Phillips. Ch.
Pol. .....Pollexfen. K. B.
Pop. .....Popham. K. B.
Price .....Price. Ex.

Q. B. .....Queen's Bench Reports (1841—1852).
Q. B. D. .....Law Reports, Queen's Bench Division (1876—1890).
[1891] Q. B. .....Law Reports, Queen's Bench (1891 onwards).

R. .....The Reports, 1893—1895.
R. & R. .....Russell and Ryan. Crown Cases.
R. R. .....Revised Reports.
Railw. Cas. .....Railway and Canal Cases (1835—1854).
Raym. (Ld.) .....Lord Raymond. K. B.
Ridg. L. & S. .....Ridgway, Lapp and Schoales. K. B. (Ireland).
Ridgw. .....Ridgway. Parliamentary Cases.
Rep. Ch. .....Reports in Chancery.
C. Rob. .....Sir C. Robinson. Adm. (1798—1808).
W. Rob. .....W. Robinson. Adm. (1838—1847).
Rol. Abr. .....Rolle's Abridgment.
Rolle .....Rolle. K. B.
Rose .....Rose. Bky.
Russ. .....Russell. Ch.
Russ. & M. .....Russell and Mylne. Ch.
Ry. & Can. Traff. Cas. Rly. and Canal Cases (1874 onwards).
Ry. & M. .....Ryan and Moody. Nisi Prius.

Salk. .....Salkeld. K. B.
Sau. & Sc. .....Sausse and Scully. Rolls Ct. (Ireland).
Saund. .....Saunders. K. B.
Sayer .....Sayer. K. B.
Sch. & Lef. .....Schoales and Lefroy. Ch. (Ireland).
Scott .....Scott. C. P.
Scott (N.R.) .....Scott. New Reports, C. P.
Select Ca. Ch. .....Select Cases in Chancery.
Selw. N. P. .....Selwyn. Law of Nisi Prius.
Shower .....Shower. K. B.
Shower P. C. .....Shower. Parliamentary.
Sid. .....Siderfin. K. B.
Sim. .....Simons. Ch.
Sim. & S. .....Simons and Stuart. Ch.
Sm. & G. .....Smale and Giffard. Ch.
Smith .....Smith. K. B.
Smith .....Smith. Registration.

Spinks	Adm.
St. Tri.	State Trials.
Stark.	Starkie. Nisi Prius.
Str.	Strange. K. B.
Styles	Styles. K. B.
Swabey	Swabey. Adm.
Sw. & Tr.	Swabey and Tristram. Probate.
Swanst.	Swanston. Ch.
T. Jones	Sir T. Jones. K. B.
T. & M.	Temple and Mew. Crown Cases.
T. Raym.	Sir T. Raymond. K. B.
Tam.	Tamlyn. Rolls Court.
Taunt.	Taunton. C. P.
Term Rep.	Durnford and East. K. B.
Tothill	Tothill. Ch.
Turn. & R.	Turner and Russell. Ch.
Tyrw.	Tyrwhitt. Ex.
Tyrw. & G.	Tyrwhitt and Granger. Ex.
Vent.	Ventris. K. B.
Vern.	Vernon. Ch.
Vern. & S.	Vernon and Scriven. K. B.
Ves. sen.	Vesey, sen. Ch.
Ves.	Vesey, jun. Ch.
V. & B.	Vesey and Beames. Ch.
W. Bl.	Sir Wm. Blackstone. K. B.
W. Jones	Sir W. Jones. K. B.
W. Kelynge	Sir W. Kelynge. Ch.
W. R.	Weekly Reporter.
W. W. & D.	Wilmore, Wollaston and Davison. K. B.
W. W. & H.	Wilmore, Wollaston and Hodges. K. B.
West	West. H. L.
Wightw.	Wightwick. Ex.
Willes	Willes. C. P.
Wilmot	Wilmot's Notes. K. B.
Wils. Ch.	Wilson. Ch.
Wils. Ex.	Wilson. Ex.
Wils. K. B.	Wilson. K. B.
Wms. Saund.	Williams' Saunders. K. B.
Y. & C.	Younge and Collyer. Eq. Ex.
Y. & C. C. C.	Younge and Collyer. Ch.
Y. & J.	Younge and Jervis. Ex.
Yelv.	Yelverton. K. B.
Younge	Younge. Ex. Eq.



The Digest

OF

ENGLISH CASE LAW.

SHIPPING.

(Including MARINE INSURANCE.)

[By R. G. MARSDEN.]

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1. Contract for.

Contract to Build—Cost of Extras—Penalty for Non-completion.]—The plaintiff contracted with the defendant to build for the P. government a steam vessel of war for 10,400*l.*, such price to be inclusive of all charges except as thereinafter mentioned; the vessel to be built according to Lloyd's rules as specified to the satisfaction of S.; to be delivered on a day named "finished, fitted, found and equipped in manner similar in all respects to that which is practised with ships or vessels of the same class in her majesty's navy, under contracts with the admiralty, except machinery"—(which was being manufactured by the plaintiff under another contract)—"armament, furniture, stores, plate, linen, glass, crockery and opticians' instruments." And it was agreed that the sum of 10,400*l.* was to be "inclusive of all charges for the said ship or vessel finished and fitted perfectly in every respect, and no charges shall be demanded for extras; but any addition or additions which may be made by order in writing of the said S. as an extra or extras shall be paid for at a price to be previously agreed upon in writing." Penalty 5*l.* for each day upon non-delivery by the day named; provided that if the vessel should not be launched and delivered at the time appointed by reason of any cause not under the control of the plaintiff, the same to be certified by S., then the penalty should not be enforced for such time as S. should name. In the course of her construction large additions were made to the ship under verbal directions of servants of the P. government:—Held that the plaintiff could not recover the price of these. *Russell* v. *Sa Da Bandera (Viscount)*, 13 C. B. (N.S.) 149; 32 L. J., C. P. 68.

The vessel was not finished by the day named, and the defendant claimed to enforce the penalty of 5*l.* per day. The delay had in part arisen by reason of disputes and objections on the part of the defendant as to the construction of the contract:—Held, that the plaintiff was not liable for the penalty. *Ib.*

Sale of Ship to be built and delivered Abroad.]—A shipbuilder at Glasgow contracted to build and deliver a ship at St. Lucia. On her voyage out she was lost, and the buyer sued the builder for repayment of the price, which had been paid by instalments as the building went on:—Held, that, in the absence of proof that the buyer agreed to take delivery at Glasgow, the money must be repaid. *Henckell, Du Buisson & Co.* v. *Swan & Co.*, 17 Ct. of Sess. Cas. (4th ser.) 252.

Broker's Commission on Building Ship—Recovery by Purchasers.]—*Neilson* v. *Skinner*, post, col. 168.

Contract to Build and Deliver—Ship Sunk.]—See *Brewer* v. *Duncan*, VIII. SALE AND TRANSFER, post, col. 153.

Bills given for Purchase-money to be paid out of Freight—Priorities.]—See *Miln* v. *Walton*, post, col. 445.

Contract by Purchasing Company to Allot Shares to Builder—Payment in Cash.]—See *McMillan* v. *Liverpool and Texas Steamship Co.*, VIII. SALE AND TRANSFER, post, col. 153.

Chain Cable—Warranted Tested.]—In every contract for the sale of a chain cable, whether for use on a British ship or not, there is an implied warranty that it has been tested and stamped as required by law. *Hall* v. *Billingham*, 54 L. T. 387; 36 W. R. 122; 5 Asp. M. C. 538.

Contract for Repairs—Construction—Evidence.]—A firm of shipbuilders agreed to lengthen and repair an iron steamship; the object being that she might be classed 100 A 1 at Lloyd's. The specification forming part of the contract contained this stipulation—"Iron work: The plating of the hull to be carefully overhauled and repaired, but if any new plating is required the same to be paid for extra (fourteen words deleted, signed A. and J. I., D. G.). Deck beams, ties, diagonal ties, main and spar deck stringers, and all iron work to be in accordance with Lloyd's rules for classification":—Held, that the shipbuilders were bound to supply without extra charge any new plates required to enable the vessel to be classed 100 A 1 at Lloyd's; and that neither the letters of the parties before the contract was signed, nor the initialled deleted words in the contract, could be considered for the purpose of interpreting the intention of the parties. *Inglis* v. *Buttery*, 3 App. Cas. 552—H. L. (Sc.)

Held, also, the costs of Lloyd's survey, and the board of trade tonnage measurement, should be borne by the shipowner. *Ib.*

—— **Action under, before Completion.**]—A ship outward-bound with goods, being damaged at sea, put into a harbour to receive some repairs which had become necessary for the continuance of the voyage, and a shipwright was engaged and undertook to put her into thorough repair. Before this was completed, he required payment for the work already done, without which he refused to proceed; and the vessel remained in an unfit state for sailing:—Held, that the shipwright might maintain an action for the work already done, though the repair was incomplete, and the vessel thereby kept from continuing her voyage at the time when the action was brought. *Roberts* v. *Havelock*, 3 B. & Ad. 404.

—— **Tender of Reasonable Sum—Detention.**]—A declaration alleged that the defendant agreed to repair a ship for the plaintiff for a reasonable and proper price in that behalf, to be charged by him to the plaintiff, and to redeliver the ship when repaired upon payment of such price; that the plaintiff was ready and willing to pay such price, but that the defendant did not charge a reasonable price, and refused to redeliver the ship except upon payment of an exorbitant and unreasonable sum; and claimed damages for the detention of the ship:—Held, that it was not necessary that the plaintiff should aver a tender of a reasonable sum. *Watson* v. *Pearson*, 9 Jur. (N.S.) 501; 8 L. T. 395; 11 W. R. 702.

Damages for Breach of Contract.]—When a breach of contract with the owner of a ship has been committed, whereby he is prevented from employing her upon an adventure, the damages payable to him cannot be reduced on the ground that he has earned a profit by sending another ship upon the same adventure in place of the first-mentioned ship. *Jebsen* v. *East and West India Dock Co.*, 44 L. J., C. P. 181; L. R. 10 C. P. 300; 32 L. T. 321; 23 W. R. 624; 2 Asp. M. C. 505.

A company having contracted to supply a steamship with a propeller shaft and other fittings, supplied useless fittings, whereby the owners, besides being obliged to replace the fittings, lost the use of the ship for nine days:—Held, that the lost earnings of the ship for the nine days ought to be included in the damages recoverable. *Wilson* v. *General Screw Colliery Co.*, 47 L. J., Q. B. 239; 37 L. T. 789; 3 Asp. M. C. 536.

A shipbuilding company, at the time of being wound up, was under a contract with a steam-packet company to do certain repairs to a ship within a given time, and under orders obtained in the matter of the winding-up, the official liquidator was authorised to complete the repairs, the rights of all parties being reserved. The repairs not having been completed within the stipulated time, leave was given to the steam-packet company to go in under the winding-up order and prove in respect of any damage that might have accrued from the delay:—Held, that the measure of damages was the net profits which the steam-packet company might have made if the contract had been completed in time, but that the company was not entitled to prove for damages arising from imperfect workmanship during the delay. *Trent and Humber Shipbuilding Co., In re*, 38 L. J., Ch. 38; L. R. 4 Ch. 112; 19 L. T. 465; 17 W. R. 181.

Repairs Improperly Executed.]—Shipwright held entitled to agreed cost, less damages by reason of improper work and materials. *Strachan* v. *Paton*, 3 Bligh (N.S.) 359.

Payment for Use of Dock during Detention.]—A shipowner received an estimate for repairs, the last item of which was "the cost of use of graving dock for the job will be from 120 to 150 guineas." The ship was repaired, and the account was sent in with this item included. No objection was made to this item, but time was required for payment. The shipwright, who claimed and enforced his lien on the ship for payment, urged the removal of the ship, saying that from a certain day he should charge 20*l.* a day for the use of the dock:—Held, that these facts did not constitute an implied contract on the part of the shipowner to pay the additional charge, and that having paid it under protest, he might recover it back. *Somes* v. *British Empire*

Shipping Co., 8 H. L. Cas. 338; 30 L. J., Q. B. 229; 6 Jur. (N.S.) 761; 2 L. T. 54; 8 W. R. 707.

Repairs—Master—Power to Bind Owners—Bottomry.]—P. W. & Co. ordered a ship on commission for colonial purchasers, and advanced money for her outfit. They appointed a master and sent her out to New Zealand for the purchasers. The ship had been originally registered in the name of P. W. & Co., but before sailing was transferred to a bank manager to secure advances by the bank. On the voyage she suffered damage and put into a port to refit. The master, for money advanced for necessary repairs, gave a bond binding himself and also the ship and freight. At the same time he drew bills on P. W. & Co. for the amount. The purchasers became insolvent; P. W. & Co. got the ship transferred to them by the bank, sold her and received the price. In an action against them by the holders of the bills, which they had refused to accept:—Held that P. W. & Co. were liable, being employers of the master, and the real owners of the ship. *Miller* v. *Potter*, 3 Ct. of Sess. Cas. (3rd ser.) 105. *And see* post, X. BOTTOMRY.

Semble, the bond given by the master was not a valid bottomry bond. *Ib.*

—— **Liability of Owners—Payment to Agent.**]—Repairs done at Hull upon the order of the owner's agents at the instance and direction of the master. Account made out to the master and owners and sent in to the agents, but payment not demanded for some months. Meanwhile, the owner paid the agents for the repairs. The agents being in difficulties, the shipwright applied to the owner for payment:—Held, that he was liable. *Stewart* v. *Hall*, 2 Dow, 29.

See also IV. OWNERS.

2. ADVANCES FOR.

A mercantile house at Newry direct a house at Quebec to contract for the building of a ship, for which the Newry house would send out the rigging. The Quebec house contract with some shipbuilders accordingly. The Newry house then direct their correspondent at Liverpool to send out the rigging. He does so; and, it having been actually delivered to the Quebec house:—Held, that the property in it was vested in the Newry house, and that the Quebec house had a right to retain it against the Liverpool correspondent, on account of their lien on it for advances made to the builders, and payment of custom-house expenses, although, previously to the delivery, they had obtained an assignment of the ship to themselves from the builders, and had registered it in the name of one of the partners in their house. *Rogerson* v. *Reid*, 1 Knapp, 362.

By an agreement in 1861, but not executed till the 11th April, 1862, shipbuilders agreed to build a schooner for F. On the 12th April the agreement was assigned to the plaintiff to secure 500*l.* already advanced to them for the purpose of enabling them to complete her, and future advances up to a certain amount, and the vessel was assigned to the plaintiff, to be held by him in lien for such advances and interest. On the 19th May the agreement between the builders and F. was put an end to, and on the 20th they entered into a new contract with the plaintiff to complete and sell the vessel to him for 1,160*l.*, of which the advanced 500*l.* was to be taken as part payment. No registration of the vessel ever took place, but on the 20th May the builders certified, according to the provisions of the 17 & 18 Vict. c. 104, that they had built the schooner for the plaintiff. The advances did not appear to have been laid out exclusively upon the vessel, and before the 20th May the builders had discharged their workmen and were virtually insolvent, though this was not proved to have been brought to the plaintiff's knowledge. The vessel was unfinished on the 2nd June, when they were adjudicated bankrupts, and on the 19th the defendants were chosen assignees. On a bill to support and enforce the lien, as to the instrument of the 12th April:—Held, that the lien under it was destroyed, if not by the cancellation of the agreement with F., yet by the fact that the 500*l.* thereby secured was merged into and taken as part payment of the purchase-money, under the agreement of the 20th May. *Swainston* v. *Clay*, 1 N. R. 307; 8 L. T. 563; 11 W. R. 811. Affirmed on this point, 2 N. R.—L.JJ.

As to the memorandum of the 20th May:—Held, that under it the plaintiff was entitled to a lien on the unfinished ship for the 500*l.* actually advanced. *Ib.*

Held, also, that no registration under the 17 & 18 Vict. c. 36, was necessary. *Ib.*

Held, also, that the vessel was not within the order and disposition of the builders at the time of their bankruptcy. *Ib.*

L., who was executor of H., and manager of a bank, agreed to take a security on ship "E.," belonging to F., in lieu of a security given by F. to H. on another ship, and he abstracted money from the bank, which he advanced to F. to enable him to complete repairs on the ship "E.," taking from F. a security on the ship to himself, as executor, for these advances, as well as for the sum advanced by H. The bank, having discovered L.'s improper abstraction of their money, required security for it, and L. assigned to them the securities on the ship. The ship was sold for a sum much less than the amount originally advanced by H.:—Held, first, that as the bank took the assignment from L. to secure a pre-existing debt due from him personally to them, and had notice that the securities belonged to the estate of H., they could have no better title against the estate than L. would have had if he had advanced his own money, instead of that of the bank. *Collinson* v. *Lister*, 25 L. J., Ch. 38; 2 Jur. (N.S.) 75; 4 W. R. 133—L.JJ.

Held, secondly, that L. would in that case have had no claim against the estate, as he had not advanced the money for repairs from necessity and bonâ fide, and therefore could not set up his claim in respect of these advances against the security for the sum lent by H. *Ib.*

Held, thirdly, that the bank could not claim a lien on the proceeds of the sale of the ship on the ground of following trust moneys of theirs improperly disposed of by L., for that they had, by taking the security from him, treated the transaction as a loan from them to him; and moreover, as he was their agent, they were affected by his acts in making the advances. *Ib.*

Held, fourthly, that whether the title to the ship could or could not be affected by the trusts of the mortgage from F. to L., the moneys received from the sale of it were subject to those trusts, and that the registered transfer of the securities to the bank did not enable the bank to retain the moneys discharged from those trusts. *Ib.*

3. Property in Unfinished Hull.

When Property passes to Purchaser.]—The defendants contracted with a company to make and supply new boilers and certain machinery for a steamship of the company, and to alter the engines of such steamship into compound surface condensing engines according to a specification. The engines, boilers and connections were, by the contract, to be completed in every way ready for sea so far as specified, and tried under steam by the engineers (the defendants) previously to being handed over to the company; the result of such trial to be to the satisfaction of the company's inspector. The price of the work was to be 5,800*l.*, and was to be paid as the work progressed, in the following manner: viz. 2,000*l.* when the boilers were plated, and 2,000*l.* when the whole of the work was ready for fixing on board, and the balance, 1,800*l.*, when the work was fully completed and tried under steam. These payments were only to be made on the certificate of the company's inspector. The old materials removed from the ship were to become the property of the defendants. The specification contained elaborate provisions as to the fitting and fixing the new boilers and machinery on board the ship, and the adaptation of the old machinery to the new. The boilers and other new machinery contracted for were completed and ready to be fixed on board, and one instalment of 2,000*l.* had been paid under the contract, when the ship was lost by perils of the sea. The value of the work actually done by the defendants under the contract amounted to 4,118*l.* The second instalment of 2,000*l.* was subsequently paid, at the time of which payment the company knew of the loss of the ship, but the defendants did not. The company claimed delivery of the boilers and other machinery completed under the contract, and this being refused, brought an action for the detention of the same, or to recover back the 4,000*l.* paid by them to the defendants:—Held, that the contract was an entire and indivisible contract for work to be done upon the company's ship for a certain price, from further performance of which both parties were released by the loss of the ship: that the property in the articles manufactured was not intended to pass until they were fixed on board the ship; and that consequently the company was not entitled to the boilers and machinery, nor could they recover the 4,000*l.* already paid as upon a failure of consideration. *Anglo-Egyptian Navigation Co.* v. *Rennie*, 44 L. J., C. P. 130; L. R. 10 C. P. 271; 32 L. T. 467; 23 W. R. 626. The case was ultimately referred to arbitration. *See* L. R. 10 C. P. 571, n.

A builder contracted with the plaintiffs to build them a ship, and the plaintiffs from time to time advanced money for the building. Before the ship was completed the builder gave the plaintiffs a bill of sale, habendum "when the ship shall be completed and finished," and the vessel was thereupon registered in the plaintiffs' names. The builder afterwards registered the ship in his own name, and, having borrowed money from the defendants in order to finish her, executed a bill of sale to them, and gave them possession of the ship:—Held, that the plaintiffs could recover in trover against the defendants for conversion of the ship, and that the measure of damages was the value of the ship at the time of the conversion. *Read* v. *Fairbanks*, 13 C. B. 692; 1 C. L. R. 787; 22 L. J., C. P. 206; 17 Jur. 918.

Ship paid for by Instalments.]—Where a ship is contracted to be paid for by instalments, to be paid at different stages of her building, the property in the ship and her gear as approved and paid for passes to the vendee. *Woods* v. *Russell*, 5 B. & Ald. 942; 24 R. R. 621.

Ship Lost — Recovery of Advances.] — See *Henckell, Du Buisson & Co.* v. *Swan & Co.*, supra, col. 14.

Ship in Builder's Yard Distrained for Rent.]—A shipbuilder contracted to build a ship on premises which he held as tenant to the defendants. The ship was to be paid for by instalments. After the ship had been partly built and paid for, it was seized by the defendants as a distress for rent. The person for whom the ship was being built paid the rent under protest and sued to recover the amount:—Held, that, assuming the property in the ship to have passed to the plaintiff, the ship was nevertheless liable to distress. *Clarke* v. *Millwall Dock Co.*, 55 L. J., Q. B. 378; 17 Q. B. D. 494; 54 L. T. 814; 34 W. R. 698; 51 J. P. 5—C. A.

Purchaser acquires no Property until Ship finished.]—In the absence of a special agreement the purchaser of a barge or vessel ordered to be built acquires no property therein until she is finished and delivered, actually or constructively. Painting the purchaser's name on the stern held to be immaterial. *Mucklow* v. *Mangles*, 1 Taunt. 318; 9 R. R. 784.

Law of Scotland—Bankruptcy of Builder.]—B. and C. verbally agreed to make advances to A. on the security of a ship he was building on his own account, provided A. made an absolute contract for sale of the ship. A. thereupon agreed to complete and deliver the ship to B. and C. for a price to be paid in two instalments, with powers for B. and C., in case A. failed to complete the ship, to enter into possession of the ship and to complete and sell her. In a correspondence between A. and B. and C. and a shipbroker relating to the sale of the ship, she was called A.'s ship; but nothing was written to any one inducing him to deal with the ship as if she were the property of A. B. and C. after the contract made advances to A., taking a receipt as for payment of part of the purchase-money; at the same time. bills for the like amount were accepted by A. The advances amounted to the full purchase-money of the ship. Before she was completed A.'s estate was sequestrated (in Scotland). The bills were paid by B. and C. In a question between A.'s trustee and B. and C.:—Held, by the law of Scotland there was a bonâ fide sale, but no delivery; and that B. and C. were entitled to the ship. *M'Bain* v. *Wallace*, 6 App. Cas. 588; 45 L. T. 261; 30 W. R. 65—H. L. (Sc.)

See also 4. Bankruptcy of Owner or Builder, infra; *and cases* supra, cols. 17, 18.

4. Bankruptcy of Owner or Builder.

P. contracted with a shipbuilder to build him a ship for a named sum, to be paid by instalments as the work went on; an agent of P. to superintend the building. The ship was partly built and approved by P.'s agent when the builder became bankrupt. The assignees completed the ship. All the instalments of purchase-money were paid or tendered by P. In action

of trover by P. against the assignees:—Held, that upon each instalment being paid the property in the part finished vested in P., subject to the right of the builder to retain it for the purpose of completing the ship; and that each material subsequently added became the property of P., and that the ship did not pass to the assignees as being in the order and disposition of the bankrupt. *Clarke* v. *Spence*, 4 A. & E. 448; 6 N. & M. 399; 1 H. & W. 760; 5 L. J., K. B. 161.

In December, 1861, the bankrupt contracted with W. to build a barge for him, to be paid for in bricks, the barge to be completed on 5th June, 1862. The bankrupt hired a barge building-yard for a period which expired before the barge was built, and W. then hired the yard. In June it was agreed by the bankrupt in writing that the barge should be held by W. as security for advances made by him. In July the bankruptcy took place. The advances made by W. exceeded the amount of work done on the barge and materials supplied for her by the bankrupt:—Held, that W. had a lien upon and was entitled to hold the barge unless the assignees chose to complete her. *Watts, Ex parte, Attwater, In re*, 32 L. J., Bk. 35.

C. & Son, engineers in Scotland, agreed with the appellants to fit up engines in ships then being built by the appellants, who made advances to C. & Son as the work progressed. C. & Son being insolvent to the knowledge of the appellants, an agreement was entered into between them to the effect that upon payment being made in respect of any ship, the materials laid down and work done in respect of that ship should become the property of the appellants subject to the lien of C. & Son for any balance of the price of the same. C. & Son having become bankrupt, it was held that, by the law of Scotland, the appellants were not entitled as against the trustees in C. & Son's bankruptcy to materials in C. & Son's yard intended to have been used upon the ships. *Seath* v. *Moore*, 55 L. J., P. C. 54; 11 App. Cas. 350; 54 L. T. 690; 5 Asp. M. C. 586—H. L. (Sc.)

B. & Co. agreed to build a ship for F. S., before the agreement was signed, advanced money upon the terms that the benefit of the agreement should be assigned to him, and that he should have a lien on the ship. The agreement was cancelled. B. & Co. agreed to sell the ship, which was not finished, to S. Four days before this they had stopped payment and shortly after became bankrupts:—Held, that S. was entitled to a lien on the ship. *Swainston* v. *Clay*, 4 Giff. 187; 2 N. R. 345; 32 L. J., Ch. 503; 8 L. T. 563; 11 W. R. 811—L.JJ.

A. contracted to build a ship for B., the purchase-money to be paid by instalments partly in bills, the partly built ship to become the property of B. upon payment of the first instalment to the extent of his payments and subject to A.'s lien for unpaid instalments. B. gave acceptances to A. in payment of the instalments, which A. discounted. Before the ship was completed A. and B. became insolvent. B.'s creditors accepted a composition, B. abandoned the contract, and A.'s trustee in bankruptcy finished the ship. Bankers, holders of the bills, claimed to have a lien on the ship:—Held, that *Waring, Ex parte*, did not apply, and that the bankers were not entitled to a lien. *Lambton, Ex parte*, or *Greener, Ex parte, Lindsay, In re*, 44 L. J., Bk. 81; L. R. 10 Ch. 405; 32 L. T. 380; 23 W. R. 662; 2 Asp. M. C. 525—L.JJ. Affirming *S. C.*, nom. *Greener, Ex parte, Lindsay, In re*, 32 L. T. 205.

Engineers contracted with the owner of a barge to supply machinery to the barge in a certain dock, the price to be paid by bills. The barge was entered in the books of the dock company in the name of the engineers, who remained in possession of her until she was finished, when the owner filed a liquidation petition, and a receiver was appointed. Meanwhile, the engineers had been paid part of the price of the work, partly in bills which they had discounted, and partly in cash:—Held, that the engineers were entitled to a lien for the unpaid balance of the price of the engines. *Willoughby, Ex parte, Westlake, In re*, 16 Ch. D. 604; 44 L. T. 111; 29 W. R. 935.

A shipbuilder had in his possession at his bankruptcy a ship which he had sold but not completed:—Held, not to be in his order and disposition. *Holderness* v. *Rankin*, 2 De G. F. & J. 258; 29 L. J., Ch. 753; 6 Jur. (N.S.) 903, 928; 8 W. R. 713—L.JJ.

In consideration of periodical payments to be made by B., A. agreed to build a ship, to be launched on or before July 31st, 1853, with a proviso that if A. failed to complete the ship according to the agreement, it should be lawful for B. to take possession of the ship "which from and after the payment of the first instalment, shall be and be deemed and continue to be as soon as the said ship shall be commenced, in every respect, and for every purpose, the property of B."—and to finish her "using such of the materials of A. as shall be applicable to the purpose"—A. to repay to B. so much as he should expend thereon in excess of the contract price. A. failed to complete the ship, and B. took possession of her, and after an act of bankruptcy by A. proceeded to finish her, using materials in A.'s yard that had not been appropriated for the ship. None of these materials had been used upon the ship, but some had been selected and placed by B. in the ship's carcase before A. became bankrupt:—Held, that the assignees were entitled to recover against B. the value of these materials. *Baker* v. *Gray*, 17 C. B. 462; 25 L. J., C. P. 161; 2 Jur. (N.S.) 400; 4 W. R. 297.

In 1833, and until his bankruptcy, J. L. carried on business as a shipbuilder; and on June 10th he agreed to build for 1,750*l.* a ship then being built in his yard, payment to be made by various persons mentioned in the agreement in amounts there specified. The plaintiff signed in October, 1833, for one fourth of the ship, and J. L. signed underneath accepting the price and mode of payment. The plaintiff paid for his share by bills before J. L.'s bankruptcy. The T. C. Company signed the agreement for one fourth; and H., a member of the company, used to go down and superintend the building of the ship, J. L.'s foreman having instructions to work under H.'s orders. At the bankruptcy of J. L. the ship was on the stocks unfinished in J. L.'s yard; and after the bankruptcy some of the shipwrights continued to work on her and to receive their pay from H.:—Held, that the property in one fourth of the ship had not passed to T. L., the plaintiff. *Laidler* v. *Burlinson*, 2 M. & W. 602; 6 L. J., Ex. 160.

J. agreed to build an iron steamship for the plaintiff for 16,000*l.* payable by instalments, the first, of 1,000*l.*, to be payable immediately.

Plaintiff advanced money to J. in anticipation of instalments as the work went on. J. became bankrupt, the vessel being in his yard unfinished, together with her engines and part of her framework, which had not been fitted or built into her. The amount advanced by plaintiff to J. exceeded the value of the engines and unfixed framework. The plaintiff's name was stamped on the ship's keel before J.'s bankruptcy :—Held, that the ship's loose engines and framework were the property of the plaintiff and not of J.'s assignees ; and that the plaintiff was entitled to recover damages against the assignees for detention of the ship, but not of the engines and framework. *Wood* v. *Bell*, 6 El. & Bl. 355 ; 25 L. J., Q. B. 321 ; 2 Jur. (N.S.) 664 ; 4 W. R. 553. See also *Baker* v. *Gray*, 17 C. B. 462 ; 25 L. J., C. P. 161 ; 2 Jur. (N.S.) 400 ; 4 W. R 297, supra.

5. Lien.

a. Of Shipwright.

Nature of.]—A shipwright has a lien upon a ship for repairs. *Franklin* v. *Hosier*, 4 B. & Ald. 341 ; 23 R. R. 305.

But a shipwright in the river Thames has no lien on a ship taken into his dock to be repaired, without an express agreement for that purpose, because by the usage of the trade the credit is always given to the owner. *Raitt* v. *Mitchell*, 4 Camp. 146 ; 16 R. R. 765.

It is otherwise where the shipwright deals for ready money. *Ib.*

Priority of Rights.]—When a shipwright has received a vessel into his yard and repaired her, his rights are subject to all existing obligations then complete and due against the vessel. *The Gustaf*, Lush. 506 ; 31 L. J., Adm. 207 ; 6 L. T. 660.

Claims for salvage take precedence of a shipwright's lien in respect of subsequent repairs to the vessel. *Ib.*

A shipwright's lien is postponed to master's and seamen's wages earned prior, but not to such wages earned subsequently, to the time when the vessel entered the shipwright's yard. *Ib.*

The seamen and master are, in the case of a foreign vessel, entitled to an allowance for return to their own country, and this right takes priority also of such shipwright's claim. *Ib.*

The shipwright's lien takes precedence of all claims in respect of necessaries supplied subsequently to the time when the vessel entered the shipwright's yard. *Ib.*

Effect on Priorities of Material Men.]—The possessory lien of material men is not determined by the arrests of the vessel by warrant of the high court of admiralty in a suit for equipment and repair. *The Acacia, Hamilton* v. *Harland*, 42 L. T. 264 ; 4 Asp. M. C. 254.

Right of Sale.]—A lien upon chattels confers no right of sale upon the person holding such lien, though the retention of the chattels may be attended with expense ; and therefore, where shipbuilders having a lien on a ship built by them, according to contract, for the unpaid purchase-money, filed in equity a bill to e force their lien by a sale, a demurrer was allowed. *Thames Ironworks and Shipbuilding Co.* v. *Patent Derrick Co.*, 1 J. & H. 93 ; 29 L. J., Ch. 714 ; 6 Jur. (N.S.) 1013 ; 2 L. T. 208 ; 8 W. R. 408.

Unpaid Vendor.]—Plaintiff agreed to build a ship for P. and L. and got the ship built accordingly. P. paid his moiety of the price. L. did not. The builder gave a bill of sale of the ship to the plaintiff, and possession to L., from whom he took bills of exchange in payment of his half share in the ship. The bills were dishonoured, and L. died. His executors sold L.'s half of the ship to P., having notice ; P. sold the ship to S. without notice. Decree against P. that he pay the plaintiff one-half the purchase-money he received for the ship ; L.'s representatives to reimburse P. *Walker* v. *Preswick*, 2 Ves. Sen. 622 ; Belt's Suppl. 449.

Possession.]—A ship was placed on a patent slip for repairs. When part of the repairs were completed she was removed by the shipbuilders for their own convenience to a wet dock, into which the shipway opened, and the repairs were there completed, the ship being made fast to pawls on the shipbuilders' premises. She was moved from time to time for the convenience of persons using the slipway, chiefly by the shipbuilders' men, but under orders of the harbour master. The master was always on board during the day, and a shipkeeper at night :—Held, that the shipbuilders had not parted with their lien. *Barr* v. *Cooper*, 2 Ct. of Sess. Ca. (4th ser.) 14.

No Maritime Lien.]—On a ship's being repaired in the river Thames, and fitted out there with new rigging and apparel, the ship itself is not liable, but the owners. *Watkinson* v. *Barnadiston*, 2 P. Wms. 367. S. P., *Shank, Ex parte*, 1 Atk. 234.

Secus, if repaired or fitted out at sea, where the master alone may hypothecate. *Watkinson* v. *Barnadiston*, supra.

No lien on a ship abroad can be created by parol nor by bills of exchange drawn by the master ; unless, upon mistake clearly established, the instrument can be corrected. *Halkett, Ex parte*, 2 Rose, 194, 229 ; 19 Ves. 474.

A ship, while the possession of it is retained, is specifically chargeable in respect of the expense incurred in repairing it ; but the possession being parted with the lien is lost. *Bland, Ex parte*, 2 Rose, 91.

No lien on a ship or proceeds from sale of it for repairs done, except in course of a voyage ; liberty given to bring an action as to the personal liability of the part owners who received the benefit. Lord Hardwicke's decision in *Doddington* v. *Hallet* (1 Ves. 497) has been overruled, and now settled that part owners in a ship are not to be considered as partners. *Buxton* v. *Snee*, 1 Ves. 154 ; *Young, Ex parte*, 3 V. & B. 243.

—— **Under Mortgage.**]—A mortgagor of a ship, who remains in the ostensible ownership, has an implied authority to confer a right of lien for repairs to keep her seaworthy. *Williams* v. *Allsup*, 10 C. B. (N.S.) 417 ; 30 L. J., C. P. 353 ; 8 Jur. (N.S.) 57 ; 4 L. T. 550.

As against Admiralty Process.]—See *The Harmonie*, post, col. 979.

b. Of Others.

Consignees of Cargo—Lien on Cargo—Repairs.]—Consignees of cargo, who by agreement with the owner charter a ship and expend money in her to enable her to fetch the cargo, have without special agreement a lien on the cargo in the shipowner's hands for the money expended ; and one who is not consignee has under similar circumstances a similar lien, if he can arrest the

cargo before it comes to the hands of the shipper. *Young* v. *Neill*, 32 Beav. 529; 2 N. R. 212; 9 Jur. (N.S.) 976; 9 L. T. 9; 11 W. R. 1052.

Disputed Ownership.]—The plaintiffs bought a ship, upon a sale by the master abroad, and repaired her. The sale was disputed, and upon her arrival in England registration in the names of the plaintiffs resisted by her owners:—Held, that assuming that the plaintiffs had acquired no legal interest by the sale, they had no lien in respect of the money laid out by them in repairs, and that the bill of sale could not operate by way of bottomry. *Ridgway* v. *Roberts*, 4 Hare, 106.

Engines of new Ship—Engineer's Lien—Possession.]—Engineers contracted with a shipbuilder to put engines into a ship he was building on her being brought to Leith. The contract provided that the engines were to be the property of the engineers until paid for in cash, but should be subject to a lien in favour of the shipbuilders for moneys or bills paid by them to the engineers; that the ship was to be at the disposal of the engineers at Leith for the purpose of putting the engines on board; that she should be taken away by the shipbuilder when the engines were on board, the engineers providing men to work them; and that the ship should "throughout be in charge of the shipbuilders." The ship was towed to Leith and handed over by the shipwright in charge to the engineers, but a master remained on board. The engineers also put a man on board and moved the ship without consulting the master:—Held, that the engineers had no lien on the ship. *Ross* v. *Baxter*, 13 Ct. of Sess. Cas. (4th ser.) 185.

6. TONNAGE.

See cases XX. COLLISION, 7. LIMITATION OF LIABILITY, infra, col. 747.

Awning Deck.]—A vessel had an upper deck above her main deck, but such upper deck was not continuous from stem to stern of the vessel, and the hatches and other fittings in it were not water-tight:—Held, that such upper deck was not a third deck or spar deck within the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 21, sub-s. 5; and that the space between it and the main deck was not space available for cargo, or for accommodation of passengers or crew, within sub-s. 4, and consequently should not be reckoned in estimating her tonnage. *Lord Advocate* v. *Clyde Steam Navigation Co.*, L. R. 2 H. L. (Sc.) 409; 32 L. T. 287; 2 Ct. of Sess. Cas. (4th ser.) 23; 2 Asp. M. C. 502.

The 17 & 18 Vict. c. 104, s. 23, provides that in every ship propelled by steam or other power requiring engine room, an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship, to be estimated as provided by that act. Sect. 29 gives power to the commissioners of customs, with the sanction of the board of trade, to make such modifications and alterations as from time to time become necessary in the tonnage rules:—Held, that the commissioners had no power to alter the provisions of the act, as to estimating the tonnage of ships. *City of Dublin Steam Packet Co.* v. *Thompson*, 1 H. & R. 369; 35 L. J., C. P. 198; L. R. 1 C. P. 355; 12 Jur. (N.S.) 726; 15 L. T. 112; 14 W. R. 876—Ex. Ch. Affirming 19 C. B. (N.S.) 553.

—— For Dues—Deck Cargo—"Goods"—Horses and Cattle.]—Horses and cattle carried as deck cargo are "goods" within the meaning of s. 23 of the Merchant Shipping Act, 1876. *Richmond Hill Steamship Co.* v. *Trinity House Corporation*, 65 L. J., Q. B. 561; [1896] 2 Q. B. 134; 75 L. T. 8; 45 W. R. 6; 8 Asp. M. C. 164—C. A.

The proper method of measuring the space occupied by such goods for the purpose of ascertaining the additional tonnage upon which dues are payable, is to measure a rectangular space sufficient for the animals to live in during the voyage, allowing them reasonable facilities for moving. *Ib.*

Re-measurement on Alteration—At what Port.]—A vessel duly registered at D. in Ireland under 17 & 18 Vict. c. 104, was in 1862 altered at L. in England, where a surveyor appointed under the above act certified his measurement to the surveyor at that port. The owners objected to the measurement and applied for a mandamus to the registrar at D. to have the ship re-measured:—Held, that the court had no jurisdiction, since the act requires the registration to be at the port of alteration. *Reg.* v. *Gardiner*, 16 Ir. C. L. R. 349.

Closed in Space.]—The space on the main deck under a hurricane deck held not to be a "closed in space on the upper deck available for cargo or stores, or for the berthing or accommodation of passengers or crew," and therefore not to be included in the ship's measurement. *Leith, Hull and Hamburg Steam Packet Co.* v. *Lord Advocate*, 11 Ct. of Sess. Cas. (3rd ser.) 597.

II. NATIONAL CHARACTER.

Evidence.]—A ship's register, containing a statement of British ownership, even if, by 17 & 18 Vict. c. 104, s. 107, made primâ facie proof of such ownership, may be outweighed by circumstantial evidence to the contrary. *The Princess Charlotte*, Br. & Lush. 75.

The nationality of a British ship is sufficiently proved by statements of the master and crew that she is a British ship sailing under a British flag, without proof of her having been registered; and even if it appears that she has not been registered, a prisoner charged with committing a crime on board might be convicted. *Reg.* v. *Seberg*, 39 L. J., M. C. 133; L. R. 1 C. C. 264; 22 L. T. 523; 18 W. R. 935; 11 Cox, C. C. 520.

To prove that a ship is a British ship, it is not necessary to produce the registry or a copy thereof; it is sufficient to shew orally that she belongs to British owners, and carries the British flag. *Reg.* v. *Allen*, 10 Cox, C. C. 405.

A register is not a document required by the law of nations as expressive of a ship's national character. *Le Cheminant* v. *Pearson*, 4 Taunt. 367; 13 R. R. 636.

A native of the Ionian Islands purchased an American ship, and, upon a declaration that he was a British subject, obtained from the British consul at Cuba a provisional registry of the ship as British. The ship was afterwards seized and condemned for a breach of the Slave Trade Acts. Upon an objection taken on appeal to the jurisdiction of the court below, on the ground of the national character of the owner of the ship and cargo:—Held, that the registry, flag and pass of a ship carry with them the presumption that they

are true and correct, and that the owner was estopped from proving that he was not a British subject, and consequently the register of the ship was void. *The Laura*, 3 Moore, P. C. (N.S.) 181; 12 L. T. 685; 13 W. R. 369.

Register no Evidence by itself that Ship is British-built.]—See *Reusse* v. *Meyers*, 3 Camp. 474, infra, col. 257.

Illegal Colours.]—A British merchant ship was boarded, having an ensign with the St. George's cross, &c., colours other than those legally worn by merchantmen, contrary to 17 & 18 Vict. c. 104, s. 105. A warrant of arrest was directed to issue against the master, upon affidavits of the facts in lieu of declarations in support of them. *Reg.* v. *Ewen*, 2 Jur. (N.S.) 454.

Concealment of British Character—Forfeiture.]—When a British subject, the owner of a British ship, by a representation to the collector of customs at the port of registry that his ship has been sold to foreigners, procures the closing of the registry, and sails her under a foreign certificate of registry and under a foreign flag, whilst he continues to own her and to receive the profits of working her, doing such acts with the intent to conceal her British character from the officers of customs, and prevent her seizure as unseaworthy, he commits an offence against the provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 103, by reason of which his ship is liable to and will be condemned to forfeiture to her majesty. *The Sceptre*, 35 L. T. 429; 3 Asp. M. C. 269.

Forfeiture, as against bonâ fide Purchaser for Value.]—The forfeiture incurred under s. 103 of the Merchant Shipping Act, 1854, accrues at the time of the illegal and fraudulent act, and a subsequent seizure relates back to the date of the act constituting the cause of forfeiture; and this is so even as against a bonâ fide purchaser without notice of such act. *The Annandale*, 47 L. J., Adm. 3; 2 P. D. 218; 37 L. T. 139, 364; 26 W. R. 38; 3 Asp. M. C. 504—C. A.

A ship, with the consent of the British owners, sailed under the Belgian flag in 1874. In 1876 the defendant bought her bonâ fide, and for valuable consideration. The ship was claimed as forfeited to the crown under s. 103 of the Merchant Shipping Act, 1854. The defendant pleaded his bonâ fide purchase for valuable consideration:—Held, that such sale was of no effect as against the prior forfeiture, which accrued at the time of the act of sailing under foreign colours. *Ib.*

In Prize Cases.]—The flag and ship's documents are conclusive as to the nationality of the ship, but not of the cargo. *The Vreede Scholtys*, 5 C. Rob. 5, n. *The Vrow Elizabeth*, 5 C. Rob. 2.

Seizure of British Ship as Prize—Action against Commander of Captor.]—No action lies against the commander of a British ship of war for seizing and detaining a vessel on suspicion of her being hostile prize. *Faith* v. *Pearson*, 6 Taunt. 439; Holt, N. P. C. 113; 16 R. R. 649.

Trover of Ship—Illegal Seizure.]—Damages recovered against a king's officer illegally commissioned to seize interlopers in the Guinea trade. *Docwray* v. *Dickenson*, Comb. 366.

See also B. MARINE INSURANCE, VI. WARRANTIES, post, cols. 1149, 1170; XXVI. ADMIRALTY LAW AND PRACTICE, 12. ILLEGAL COLOURS, post, col. 951.

III. REGISTRATION.

1. *Under Merchant Shipping Acts.*
   a. Title by, 28.
   b. Foreign Owners—Foreign Ships, 29.
   c. Ships owned by Partners, 30.
   d. Certificate, 30.
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1. UNDER MERCHANT SHIPPING ACTS.

a. Title by.

Evidence.]—The registry of a ship is conclusive evidence of the property; even against the claim of creditors upon a joint purchase and various acts of apparent ownership, within the Bankrupt Act (21 Jac. 1, c. 19), s. 11. *Yallop, Ex parte*, 15 Ves. 60; 10 R. R. 24.

The registry of a ship is conclusive evidence of the property, even between creditors; excluding all trusts created by acts of the parties, as by payment of money on a purchase in the name of another. Distinction as to trusts arising by operation of law upon bankruptcy or death. *Houghton, Ex parte, Gribble, Ex parte*, 17 Ves. 251; 1 Rose, 177; 11 R. R. 73.

Sale by Mortgagee.]—The purchaser from a mortgagee selling improperly after the amount due on the mortgage has been tendered to him, having registered himself as owner under 17 & 18 Vict. c. 104, got a good title. *McLarty* v. *Middleton*, 4 L. T. 852. Affirmed, 10 W. R. 219—C. A.

Power of Attorney given by Mortgagor.]—A., the owner of forty-eight shares in a ship belonging to the port of Liverpool, gave a power of attorney to B., the other part owner, empowering him to sell A.'s share of the ship. The ship then sailed from Liverpool under the command of B., having on board her certificate of registry and the power of attorney. While she was at sea A. mortgaged his forty-eight shares in the ship and all future freight to the plaintiffs, who had no notice of the power of attorney, and a memorandum of the mortgage was entered in the Liverpool register. Subsequently B. sold all the shares in the ship and cargo at Sydney (as to A.'s shares by virtue of the power of attorney) to C., who had no notice of the mortgage made by A. The ship was thereupon registered de novo at Sydney, and was freighted by C. at his own expense with a new cargo for England. She sailed, and arrived in London without having been to Liverpool. The plaintiffs took possession of the ship and cargo in the London docks, and gave notice at all the wharves of their claim to forty-eight shares of the ship and freight. The defendants afterwards also took possession:—Held, that the plaintiffs had the better title under the registry act to forty-eight shares of both the ship and freight, and that they had properly taken possession of them under the circumstances. *Cato* v. *Irving*, 5 De G. & Sm. 210; 21 L. J., Ch. 675; 16 Jur. 161.

Mortgage of Ship at Sea—Registration—Policy of the Registration Acts.]—Mortgage of

a ship at sea, the forms required by the registry acts being observed, had valid injunction granted to restrain an improper indorsement on the register. The policy and effect of the registry acts discussed. *Thompson* v. *Smith*, 1 Mad. 395 ; see *Newnham* v. *Graves*, *Barker* v. *Chapman*, cited *Ib.*, p. 399.

Judicial Sale of Interest.]—A purchaser under a judicial sale of a beneficial interest in a British ship is not entitled to be registered as owner of it. *Chasteauneuf* v. *Capeyron*, 51 L. J., P. C. 37 ; 7 App. Cas. 127 ; 46 L. T. 65 ; 4 Asp. M. C. 489 —P. C.

Charge on Freight—Prior Transfer of Ship.]—An owner of a ship assigned twenty-four sixty-fourth parts to A., and the remaining forty sixty-fourth parts to B., and afterwards, representing himself to be the owner of the ship, gave C. a charge upon the freight then being earned. A. registered the transfer to him prior to the date of C.'s charge, but B. did not :—Held, that C. had a lien upon the freight in priority to B. *Lindsay* v. *Gibbs*, 22 Beav. 522 ; 2 Jur. (N.S.) 1039 ; 4 W. R. 788. See *S. C.*, col. 393.

Held, also, that the expenses incurred in earning the freight were the first charge upon it. *Ib.*

Action between Co-owners—Title.]—In an action between co-owners, title to ship held good, though the Registry Act (8 & 9 Vict. c. 29), s. 18, had not been complied with. *Carlyle* v. *Macalpin*, 2 Ct. of Sess. Cas. (3rd ser.) 882.

Ship Transferred to Infant Son—Arrestment—Scotch Law.]—*Bell* v. *Gow*, 1 Ct. of Sess. Cas. (3rd ser.) 183.

See also VIII. SALE AND TRANSFER, and *Langton* v. *Horton*, *Parr* v. *Applebee*, *Whitfield* v. *Parfit*, and *The Eastern Belle*, sub tit. MORTGAGE, infra, cols. 170, 171.

b. Foreign Owners—Foreign Ships.

Ships Owned by Company—Foreign Members.]—Semble, that the stat. 3 & 4 Will. 4, c. 55, s. 33, which authorises a particular mode of registering vessels belonging to joint-stock companies, does not apply to a joint-stock company in which foreigners are shareholders. *Benson* v. *Heathorn*, 1 Y. & C. C. C. 326.

Under 8 & 9 Vict. c. 89, s. 12, a corporation within the United Kingdom, some members of which were foreigners and persons residing abroad, might register ships which were the property of such corporation. *Reg.* v. *Arnaud*, 9 Q. B. 806 ; 16 L. J., Q. B. 50 ; 11 Jur. 279.

Old Registry Acts—Foreign Ships.]—A foreign-built ship, British owned, was not, under 38 Geo. 3, c. 76, s. 6, required to be registered, and might sail without convoy. *Long* v. *Duff*, 2 Bos. & P. 209.

It is not a fraud to cause a ship belonging to foreigners to be registered in the names of British subjects. *Two Sicilies (King of)* v. *Wilcox* or *Peninsular and Oriental Steam Packet Co.*, 19 L. J., Ch. 488 ; 1 Sim. (N.S.) 334 ; 14 Jur. 751.

Where an act of the legislative council of India enabled ships "owned by British subjects" to be registered as British :—Held, that a ship once owned by foreigners, but at the date in question owned by British subjects, could be registered as British, notwithstanding the imperial registry acts, which disqualified such a ship from being registered as British. *Crawford* v. *Spooner*, 6 Moore, P. C. 1.

c. Ships owned by Partners.

Ships purchased by one partner held separate property, as between creditors, after his bankruptcy and death of the other, upon circumstances, particularly the registry being made in the name of one party only, and being afterwards continued for a fraudulent purpose. *Curtis* v. *Perry*, 6 Ves. 739 ; 6 R. R. 28.

Under a commission of bankruptcy against two partners, ship registered in the name of one of them, but in the order and disposition of both, forms part of the joint estate. *Burn*, *Ex parte*, 1 Jac. & Walk. 378 ; 21 R. R. 186.

A ship, the property of a partnership and registered in the name of the partnership, is within the 3 & 4 Will. 4, c. 55, s. 32, and may therefore be dealt with as any other partnership property. *Howden*, *Ex parte*, *Litherland*, *In re*, 2 Mont. D. & D. 574.

Agreement between A., B., and C. that they shall purchase ship to be registered in names of A. and B., is against public policy, and demurrer allowed to bill for account in such transaction. *Battersby* v. *Smyth*, 3 Madd. 110.

Under 6 Geo. 4, c. 110, s. 32, where a ship belonged to three partners in business and the names of two only appeared on the register, it was held that the third, whose name did not appear, had no interest in the ship. *Slater* v. *Willis*, 1 Beav. 354.

Two co-owners of a ship took two partners but executed no transfer of the ship to them :—Held, under the old registry act, that the four partners had no such legal or equitable interest in the ship as enabled them to insure her in the names of the four. *Camden* v. *Anderson*, 5 T. R. 709. And see *S. C.*, 6 Term Rep. 725 ; 1 Bos. & P. 272.

d. Certificate.

Possession of Certificate—Jurisdiction of Chancery Court.]—See *Darby* v. *Baines*, infra, col. 46.

Vendor—Interest in.]—The vendor of a ship, with a covenant for title, retains after the sale (in order that he may fulfil his contract, and defend himself against an action brought upon his covenant) such an interest in the certificate of registry as enables him to sustain a suit for its delivery against a party unlawfully detaining it. *Gibson* v. *Ingo*, 6 Hare, 112.

Lien of Master on.]—A master has no lien on the certificate of registry, either for his wages or for moneys disbursed by him for the use of the ship ; nor have shipbrokers any lien on the certificate of registry for advances made by them to the owner for the use of the ship. *Ib.*

The admiralty division of the high court has power, upon the application of the owners of a ship, to order a master who has been dismissed from their employment to deliver up the certificate of registry and other papers and property belonging to the ship, where he refuses to surrender them. Semble, that a master, whether co-owner or not, can have no lien upon a certificate of registry or ship's papers in case of wrongful

dismissal by the managing owners. *The St. Olaf*, 2 P. D. 113; 35 L. T. 428; 3 Asp. M. C. 268.

—— **To secure Advances — Unregistered Owner.**]—The 8 & 9 Vict. c. 89, s. 30, did not prevent a lien being created on a certificate of an original registry, deposited by an unregistered owner to secure advances for the use of the ship. *Clarke* v. *Batters*, 1 K. & J. 242.

—— **Of Factor.**]—Where a factor for the owner of a ship at an English port had, by a request to the master, obtained a certificate of registry for the alleged purpose of paying the tonnage duties at the custom-house:—Held, that he had no lien on the certificate so obtained for the general balance due to him in respect of the ship. *Burn* v. *Brown*, 2 Stark. 272; 19 R. R. 719.

—— **Of Agent for Sale.**]—The former ship registry acts did not prevent a person from having a lien on papers, deposited with him, of a ship which he was commissioned to sell. *Mestaer* v. *Atkins*, 5 Taunt. 381; 1 Marsh. 76.

Equitable Mortgagee.]—Where a certificate of a ship's register had been deposited as a security for advances for the use of the ship:—Held, that this gave the holder a sufficient lien to defeat an action of trover for the certificate. *Bowen* v. *Fox*, 10 B. & C. 41; 5 M. & Ry. 5; 4 Car. & P. 452; 8 L. J. (o.s.) M. C. 68.

Refusal of Master to Deliver.]—After a ship had arrived at the port of discharge, but before it was discharged, the owner demanded the certificate of registry from the master, intending to dismiss him, but not communicating that intention to him:—Held, that the master was not liable to be convicted, under 17 & 18 Vict. c. 104, s. 50, for refusing to deliver up the certificate without a reasonable cause. *Harkle* or *Arkle* v. *Henzell*, 8 El. & Bl. 828; 27 L. J., M. C. 110; 4 Jur. (N.S.) 306.

A conviction under 6 Geo. 4, c. 110, s. 27, and 3 & 4 Will. 4, c. 55, s. 27, for detaining the certificate of a ship's registry, was bad, unless it stated the purpose for which the certificate was wanted, and the person who demanded it was the "proper" officer. *Rex* v. *Walsh*, 3 N. & M. 632; 1 A. & E. 481; 3 L. J., M. C. 100.

Under 34 Geo. 3, c. 68, s. 18, the master could not be convicted for refusing to deliver the ship's certificate of registry to the owner. *Rex* v. *Pixley*, 13 East, 91.

Pledge of.]—A pledge, by the master and sole owner of a ship, of the certificate of registry, though for a good and sufficient consideration, is illegal and void; and therefore an action will lie by the master and sole owner against the person detaining it, after a demand made upon him to return it for the purposes of navigation. *Wiley* v. *Crawford*, 1 B. & S. 253; 30 L. J., Q. B. 319; 7 Jur. (N.S.) 943; 4 L. T. 653; 9 W. R. 741—Ex. Ch.

Sale under Order of Court—Conversion of.]—An owner of a ship consigned her to persons abroad, who hypothecated her, and directed the captain to sign a bottomry bond; on her arrival in London, he, by their direction, delivered the register to the agent of the consignees, who gave it to their solicitor to institute proceedings in the court of admiralty on the bottomry bond; the ship was sold by order of that court, and the register decreed to be given up to the purchaser. The owner became bankrupt, and his assignees brought an action for the register:—Held, that they could not recover, as they might have appeared in the admiralty court and prevented the sale of the vessel, and as the delivery of the register to the purchaser, under the decree of that court, was not a conversion. *Hassack* v. *Masson*, 4 Moore, 361.

Possession of Certificate.]—Sale by mortgagee whilst ship under agreement between mortgagor and a company to run as one of the company's liners. See *The Celtic King*, post, tit. IX. MORTGAGE, col. 182.

—— **Admiralty Court.**]—The admiralty court would not formerly interfere to give possession of a ship's register to a person whose title is in doubt. *The Frances of Leith*, 2 Dods. 420.

e. Improper Registration.

Liability for Goods supplied.]—The registered owners of a ship are primâ facie alone liable for goods supplied, though so registered without their knowledge. *Machell, Ex parte*, 2 Ves. & B. 216; 1 Rose, 447.

Fraudulent Registration—Relief in Equity.]—A bill stated that the vendors of a ship executed a bill of sale to a purchaser, which was to be handed to him upon his paying the consideration in a manner stipulated, but that he took it away with some other paper, as it was supposed, by mistake, and afterwards returned it, saying, he could not comply with the terms. The bill further alleged, that the plaintiffs, the vendors, had discovered that the defendant, the purchaser, had taken advantage of his accidental possession of the document, to make himself the registered owner of the ship, and was about to sail in her:—Held, that the alleged fraud would not enable the court to interfere, and a demurrer to the bill was allowed. *Follett* v. *Delany*, 2 De G. & Sm. 235; 17 L. J., Ch. 254; 12 Jur. 549.

Where a person, having no title to a ship, procures it to be registered in his name, the court will compel him to retransfer it to the rightful owner, and account for the earnings, even though there has been no fraud, and notwithstanding the 17 & 18 Vict. c. 104. *Holderness* v. *Lamport*, 29 Beav. 129; 30 L. J., Ch. 489; 7 Jur. (N.S.) 564; 9 W. R. 327.

—— **Gives no Title.**]—Under the 17 & 18 Vict. c. 104, s. 79, the registry of a bill of sale, which though purporting to be valid, so that the registrar has no alternative but to register it, is in fact invalid, and gives no title, even at law, to the person thereby registered as sole owner of the ship. *Orr* v. *Dickinson*, 1 Johns. 1; 28 L. J., Ch. 516; 5 Jur. (N.S.) 672.

Therefore where a bill of sale, though executed by the person named for that purpose by the plaintiff, the then owner of the ship, and purporting in all other respects to be made in conformity with the certificate of sale, was, in fact, made for less than the minimum price specified in the certificate, and the ship was registered in the name of the purchaser as sole owner:—Held, that the registry was void; and the ship having been sold by arrangement pending a suit, that

the plaintiff was entitled to the net proceeds of the sale. *Ib.*

Quære, whether under the 17 & 18 Vict. c. 104, s. 79, and 18 & 19 Vict., c. 91, s. 10, the court of chancery has jurisdiction to interfere with a title required at law by the registration of a valid bill of sale of a ship. *Ib.*

The 65th section of the 17 & 18 Vict. c. 104, does not deprive the court of chancery of its ordinary jurisdiction to protect property during litigation. *Ib.*

Relief in Equity.]—Equitable relief may be given against the registered owner of a ship in cases of fraud. *Armstrong* v. *Armstrong*, infra.

Improper Registration abroad.]—Two British subjects, H. and B., owned an American built ship, which, in fraud of the American law, they caused to be registered in America in the name of C., an American citizen. After she had made several voyages between England and America, B. excluded A. from his share in the ship's earnings and against his will sent her on a further voyage to America:—Held, that assuming the registration and trading of the ship were contrary to American registration and British navigation law, A. was nevertheless entitled to an account and payment of his share of the ship's earnings, and that B. would be personally liable in case the ship or her proceeds were not forthcoming. *Sharp* v. *Taylor*, 2 Ph. 801.

Improper Indorsement—Injunction.]—Mortgage of ship at sea (the form of Registry Act being observed) held valid, and injunction granted to prevent an improper indorsement on certificate of registry of ship. *Thompson* v. *Smith*, 1 Madd. 395; and see *Rex* v. *Collector of Customs*, post, col. 44.

Agreement to Purchase—Improper Registration.]—Agreement between A., B. and C., that they shall purchase ship to be registered in names of A. and B., is against public policy, and demurrer allowed to bill for account in such transaction. *Battersby* v. *Smyth*, 3 Madd. 110.

Propriety of Registration—Evidence.]—The registry is conclusive as to the ship being in a fit state to be registered under 8 & 9 Vict. c. 89, although there may be evidence to shew that the ship was not completed at the time of registry. *Coombes* v. *Mansfield*, 3 Drew. 193; 3 Eq. R. 566; 24 L. J., Ch. 513; 1 Jur. (N.S.) 270; 3 W. R. 345.

Sale by Mortgagee—Discharge of Mortgage—Invalid Transfer—Registration of New Transfer.]—In 1888 a mortgagee of shares in a ship sold them for the amount of the mortgage debt. A discharge of the mortgage and bills of sale in favour of the purchaser were at the same time entered on the register. The bills of sale were not properly executed, and in 1892 the mortgagee granted new bills of sale. The purchaser tendered these for registration, but the mortgagor having claimed the shares, the registrar refused to register the new bills of sale:—Held, that an order should go to the registrar to enter them on the register. *Duthie* v. *Aiken*, 20 Ct. of Sess. Cas. (4th ser.) 241.

Wrong Name.]—The name of a vessel was the "City of Bruxelles," and was so described in a mortgage. It was registered by the owner and by the mortgagee as the "City of Brussels":—Held, that the misdescription did not vitiate or affect the validity of the registration. *Bell* v. *Bank of London*, 3 H. & N. 730; 28 L. J., Ex. 116.

Mandamus to Register.]—See *Rex* v. *Liverpool Collector of Customs*, 2 M. & S. 223, post, col. 44.

f. Equitable Interests.

Proceeds of Sale of Ship.]—The policy of the Ship Registry Act (8 & 9 Vict. c. 89), in disregarding interests not appearing on the register, is inapplicable both to the money arising from the sale of a ship, and to the produce of the freight. *Armstrong* v. *Armstrong*, 3 Eq. Rep. 973; 21 Beav. 78; 24 L. J., Ch. 659; 1 Jur. (N.S.) 859; 3 W. R. 563. *S. C.*, on motion for injunction, 2 W. R. 678.

When a party who appears on the registry to be the absolute owner of a ship, enters into an agreement for valuable consideration, admitting he is a trustee, and engaging to sell the ship, and hand over the produce to the true owner, the court, notwithstanding 8 & 9 Vict. c. 89, ss. 34–39, will enforce the agreement. *Ib.*

Shares in a ship purchased with A.'s money were registered in B.'s name. After A.'s death, B. entered into an agreement with his representatives, admitting their right, and for valuable consideration agreeing to sell the shares at the end of twelve months, and to account to the representatives for the proceeds. B. accordingly sold to C.:—Held, that though the 8 & 9 Vict. c. 89, prevented the representatives enforcing any right against the ship itself, still that they were entitled to recover the purchase-money in the hands of C. *Ib.*

Between the date of a bill of sale of shares of a ship, and the entry of the transfer on the register, the purchaser had notice that the vendor, though the shares were registered in his name, was a trustee. The case presenting a primâ facie appearance of fraud, the court granted an interim injunction to restrain the purchaser from dealing with the shares or indorsing the transfer on the certificate of registry, so as to insure the effective determination of the questions at the hearing. *S. C.*, 21 Beav. 71.

There is nothing in the policy of the Ship Registry Acts to prevent a third party not having any registered share in a ship from acquiring from the owner an interest in the proceeds of the sale of the ship in the hands of a purchaser, when the ship shall have been sold, the court not being required to recognise any interest in such third person in the ship itself, semble. *M'Calmont* v. *Rankin*, 8 Hare, 1; 19 L. J., Ch. 215; 14 Jur. 475.

But whether, under a contract by which a party has an interest in the proceeds of the sale of a ship, such party can compel the owner to sell the ship, or obtain a decree for the sale, quære. *Ib.*

The provisions of the Ship Registry Acts apply equally to contracts as to sales; and the whole frame of these acts negatives any equity resulting out of the doctrine of notice. An unregistered agreement, therefore, with the registered owner of a ship, which the owner subsequently transfers for value to another person who has notice of the agreement, cannot be enforced

either as against the ship or its proceeds. *S. C.*, 2 De G. M. & G. 403; 22 L. J., Ch. 554.

Non-registration of mortgage held not to affect mortgagee's title to proceeds of sale of ship. *Lister* v. *Payn*, 11 Sim. 348.

Unregistered Assignment — No Relief in Equity.]—An assignment of a ship by way of mortgage, which is defective by not having complied with the old registry act, cannot be made good in equity. *Bulteel, Ex parte*, 2 Cox, 243; 2 R. R. 39.

Jurisdiction of Chancery Courts.]—By 25 & 26 Vict. c. 63, the court has jurisdiction over equitable rights of mortgagees and owners. *Samuel* v. *Jones*, 7 L. T. 760.

The vendor sold a share in a ship, executed the bill of sale, and gave a receipt for the purchase-money, though it had not been paid. Relief given in equity. *Ryle* v. *Haggie*, 1 Jac. & Walk. 234.

Contract for Sale—Specific Performance.]—According to the proper construction to be put upon the 34th section of 8 & 9 Vict. c 89, a court of equity will not enforce specific performance of a contract for the purchase of a ship, although such contract does not affect to make a transfer of the ship, but is merely executory. Quære, whether an action may not now be maintained at law on such a contract, although it would have been void under the old registry acts (26 Geo. 3, c. 60, and 34 Geo. 3, c. 68). *Hughes* v. *Morris*, 2 De G. M. & G. 349; 21 L. J., Ch. 761; 16 Jur. 603.

Bill for specific performance of contract to buy ship dismissed. *Brewster* v. *Clarke*, 2 Mar. 75.

The act 54 Geo. 3, c. 68, s. 15, applied to an executory contract for sale of a ship. *Mortimer* v. *Fleming*, 4 B. & C. 120; 6 D. & R. 176.

Trust for Sale.]—An executory trust for sale of a ship cannot be enforced (under the old registry act). *Hodgson* v. *Brown*, 2 B. & Ald. 427.

Account of Freights—Purchaser unregistered—Payment out of Freights.]—An account of freights grounded on a contract for the sale of the ship, which was to be paid for out of freights received by the purchaser, taken in equity; although the ship was not registered in the name of the purchaser, and although (under the old Registry Acts, 3 & 4 Will. 4, c. 55, and 6 Geo. 4, c. 110) he had no equitable interest in the ship. *Davenport* v. *Whitmore*, 2 Myl. & Cr. 177.

Possession.—G. having entered into a contract for the purchase of a ship not binding under the registry acts, agreed with the plaintiff that he should set up engines in her, to be paid for at a specified price if a certain speed was attained, but if not, to be removed by the plaintiff. The plaintiff, with the knowledge and approbation of Y., the registered owner, set up the engines, which did not enable the vessel to attain the required speed. Y. then refused either to pay the stipulated price or allow the plaintiff to remove the engines:—Held, that the plaintiff's remedy against Y., if any, was at law, and that there was no ground for equitable interference. *Rennie* v. *Young*, 2 De G. & J. 136; 27 L. J., Ch. 753.

Unregistered Mortgagee—Right to Restrain Sale.]—Where the mortgagee of a ship omitted to procure the indorsement on the certificate of registry as required by the registry act, and after that period the registered owner became bankrupt:—Held, that he had no equitable right to restrain the assignees from sale of the ship, distinct from his legal right, and depending upon the rule of law regarding the bankrupt's having the order and disposition. *Campbell* v. *Thompson*, 2 Hare, 140; 7 Jur. 59.

High Court of Admiralty.]—Under the Registry Act of 1839, the high court of admiralty, in a cause of possession, refused to regard equitable interest in a ship. *The Valiant*, 1 W. Rob. 64.

And see, tit. TRANSFER AND SALE, post.

8. Old Registry Acts.

Transfer of a share in a ship to another part owner, void by not procuring the indorsement upon the certificate, within the time prescribed by the registry acts after the arrival of the ship. *Speldt* v. *Lechmere*, 13 Ves. 588.

The bill of sale passes the alsolute property in a ship at sea, subject only to be devested in case the indorsement on the certificate of registry not being made within ten days after the return of the ship to port; power of attorney to sign an indorsement on a certificate not revoked by bankruptcy of the vendor, subsequently to the execution of the power, but previously to the indorsement, being a power only to do a mere formal act, which the bankrupt himself might have been compelled to execute, notwithstanding his bankruptcy, and for a valuable consideration; therefore, in this case, the indorsement on the certificate being made within the ten days, under a power of attorney, the grantor of which had since become bankrupt:—Held, a sufficient compliance with the terms of the registry act. *Dixon* v. *Ewart*, 3 Mer. 322; Buck. 94.

Sale of a ship at sea valid, notwithstanding the bankruptcy of the vendor before her arrival in port; and, therefore, before the title is complete by the indorsement on the certificate of registry, if the other requisites of the ship registry act were previously complied with. *Mestaer* v. *Gillespie*, 11 Ves. 639; 8 R. R. 261.

Whether, the legal title under an assignment of a share in a ship failing under the Ship Registry Acts (26 Geo. 3, c. 60, 34 Geo. 3, c. 88), or for want of the indorsement upon the certificate, within ten days after the return of the ship to port, if that was prevented by fraud, relief can be had in equity, sed quære, in what form, and quære whether it may not be had as to the freight, if not as to the ship, though both were comprised in the same bill of sale. *Ib.* 621.

Sale of a share of a ship is good without actual delivery. Whether an executory agreement for the sale of a ship must recite the registry under the 26 Geo. 3, c. 18, s. 17, quære. *Addis* v. *Baker*, 1 Anstr. 222. *See* 6 R. R. 28, n.

If on sale of a ship there is no bill of sale or indorsement of certificate of registry, no relief can be given in equity on ground of accident or fraud. *Thompson* v. *Leake*, 1 Madd. 39.

The old registry acts did not apply to transfers by operation of law. *Bloxam* v. *Hubbard*, 5 East, 407.

Until registration, the bill of sale had no legal existence. *Boyson* v. *Gibson*, 4 C. B. 122; 16

L. J., C. P. 147; 7 Jur. (N.S.) 150; 3 L. T. 494; 9 W. R. 292..

A bill of sale of a ship was made a collateral security, and the papers, &c., delivered, but there was no recital in the bill of sale of the registry, pursuant to act 26 Geo. 3, c. 60. This cannot be supplied against assignee of a bankrupt, and bill for that purpose dismissed. *Hibbert* v. *Rolleston*, 3 Bro. C. C. 571.

The non-registration of a ship, required by the 8 & 9 Vict. c. 89, ss. 37, 38, by the first purchaser, did not affect the title of a subsequent bonâ fide purchaser. *The Australia, Lapraik* v. *Burrows*, 13 Moore, P. C. 132.

Sale of ship at sea; non-registration until after bankruptcy of vendor:—Held, invalid as against assignees of vendor. *Moss* v. *Charnock*, 2 East, 399.

Mortgage of ship held invalid where registry act, 26 Geo. 3, c. 60, not complied with. *Bulteel, Ex parte*, 2 Cox, 243.

The application of the doctrine as to order and disposition not affected by the old registry acts. *Hay* v. *Fairfield*, 2 B. & Ald. 193.

Two ships and sixteen sixty-fourths of a third were (in 1830) mortgaged, whilst the ships were at sea, to W. & Co.; the bill of sale was registered by the customs officers at the ships' port before their return to port. One ship afterwards returned, but no indorsement under 6 Geo. 4, c. 110, s. 39, was made on her register. After being insured she sailed on a fresh voyage within thirty days and was lost. But a subsequent bill of sale, to which W. & Co. were parties, after reciting the prior mortgage, the mortgagor assigned the same ships and shares, with policies upon two ships, and the sum payable under a charter of the third, with all his equity of redemption, &c., subject to the prior mortgage to W. & Co. This bill of sale was registered before the return to port of any of the ships. The mortgagor became bankrupt. Two of the ships returned, and upon their certificates of registry were duly indorsed within thirty days the two bills of sale in order of their date:—Held, that the second bill of sale was valid under 6 Geo. 4, c. 110, ss. 31, 37, against the assignees of the bankrupt, although the mortgagor became bankrupt within thirty days of the ships' arrival in port; and the same as to the policy and charter-party moneys. *Jones, Ex parte, Richardson, In re*, 2 Tyr. 671; 2 C. & J. 513; 1 L. J., Ex. 218.

Where A., having contracted for a ship to be built for him in the East Indies, agreed during the time of the building to sell a share to B., and B. paid a part of the price in pursuance of the agreement, and afterwards, on the ship's arrival in England, A. caused her to be registered, and accounted with B. as part owner; but B.'s name was never on the register as part owner:—Held, that B. had no legal interest in the ship. *Stringer* v. *Murray*, 2 B. & Ald. 248.

The old registry acts precluded any application of the equitable doctrine of notice. *Coombes* v. *Mansfield*, 3 Eq. Rep. 566; 3 Drew. 94; 24 L. J., Ch. 513; 1 Jur. (N.S.) 270; 3 W. R. 345. S. P., *McCalmont* v. *Rankin*, 2 De G. M. & G. 403; 22 L. J., Ch. 554; 14 Jur. 475.

A bill for an account of the earnings of a ship described some of the owners as resident in England and the others in India, and stated the ship to have been built by B. & Co., of Newcastle; but it did not contain any positive averment that the ship was British built:—Held, that for want of such averment, a demurrer founded on the ship registry acts could not be supported. *Smith* v. *Small*, 14 Sim. 119.

The following cases were decided upon points arising under the old registry acts:—*Kirby* v. *Hodgson*, 2 D. & Ry. 848; 1 B. & C. 588. *Biddell* v. *Leader*, 1 B. & C. 327. *Campbell* v. *Stein*, 6 Dow. 116. *Palmer* v. *Moxon*, 2 M. & S. 43. *Mair* v. *Glennie*, 4 M. & S. 240; 16 R. R. 145. *Jones, Ex parte*, 4 Man. & G. 150. *Cole* v. *Doyle*, 12 East, 471. *Batson, Ex parte*, 3 Bro. C. C. 362. *Monkhouse* v. *Hay*, 8 Price, 256; 4 Moore, C. P. 549; 2 Br. & B. 114. *Stadgroom, Ex parte*, 1 Ves. 163. *Liverpool Borough Bank* v. *Turner*, 30 L. J., Ch. 379; 7 Jur. (N.S.) 150; 3 L. T. 494—L. C. *Parr* v. *Applebee*, 7 De G. M. & G. 585; 24 L. J., Ch. 767; 3 W. R. 645, infra, col. 170. *Norris* v. *Williams*, 1 C. & M. 842; 2 L. J., Ex. 257. *Moss* v. *Mills*, 6 East, 144.

h. Miscellaneous.

When Unnecessary.]—It was decided under the repealed statute 8 & 9 Vict. c. 89, that if a vessel under fifteen tons burden, navigating on the coast of the United Kingdom, was registered by her owner, a British subject, he might transfer it to another British subject without any instrument in writing, or fresh registry, for s. 34 of that statute did not apply, inasmuch as 8 & 9 Vict. c. 88, ss. 13, 14, the original registration was unnecessary. *Benyon* v. *Cresswell*, 12 Q. B. 899; 18 L. J., Q. B. 1; 12 Jur. 1086.

Condemned Ships.]—The purchaser of a ship, which appeared by the sentence of condemnation in the vice-admiralty court abroad to have been taken and condemned for being engaged in the slave trade, was not entitled to register such ship at the custom-house under 26 Geo. 3, c. 60, as the owner of a ship taken and condemned as lawful prize, although he produced a certificate from the judge of the court abroad, certifying that she was condemned as lawful prize. *Rex* v. *London Collector of Customs*, 1 M. & S. 262.

Jurisdiction—Registration in Scotland.]—The registration of a ship in Scotland is no ground of jurisdiction over an English shareholder in an action of set and sale. *Anderson* v. *Sillars*, 22 Ct. of Sess. Cas. (4th ser.) 105.

Assignment of Barge—Whether Registration required.]—See *Gapp* v. *Bond*, post, col. 156.

Liability for Repairs—Evidence of Ownership.]—*See* OWNERS, infra.

2. REGISTRATION AT LLOYDS'.

Negligent Classification—Right of—Purchaser relying on.]—The defendants, the trustees of Lloyds' Register of Shipping, had on the request of the owners of the "Midas," caused her to be surveyed, and issued a certificate in the usual form that she was efficient and that she had been entered on the register as A 1 for seven years. The survey fees were paid by her owners. The plaintiff, relying on this certificate, bought the "Midas" from her owner. She was in fact defective, and the plaintiff in consequence suffered damage. It was admitted for the purposes of the action that the survey had been

negligently made, and that but for such negligence the plaintiff would not have sustained damage:—Held, that the plaintiff could not recover against the defendants, as there was no contract between them and the plaintiff, and no fraudulent misrepresentation. *The Midas, Bragington* v. *Chapman*, 7 Asp. M. C. 77, n. *See also* S. P., *Thiodon* v. *Tindall*, 60 L. J., Q. B. 526; 65 L. T. 343; 40 W. R. 141; 7 Asp. M. C. 76, infra, col. 151.

Removal of Ship from her Class—Damage.]—A shipowner whose ship was removed from her class by Lloyds' in consequence of non-compliance with a new rule passed with reference to scuppers, sued Lloyd's for damages:—Held, that there was no contract and that the action failed. *Henderson* v. *Lloyds' Register of British and Foreign Shipping*, 6 Ct. of Sess. Cas. (4th ser.) 835.

Suspension of Class—Right to notify Non-registry.]—Upon a motion for an injunction by subscribers to an association called the Underwriters' Registry, who had had a ship registered by the association in the highest class, to restrain the committee of the association from inserting, after a subsequent survey allowed by the plaintiffs, in their published registry of ships the words, "class suspended" against the plaintiffs' ship:—Held, that the committee was justified in notifying to their subscribers and the public their honest opinion as to the merits of the ship, and had a right to suspend the class until the plaintiffs should have altered the ship according to their requirements. *Clover* v. *Royden*, 43 L. J., Ch. 665; L. R. 17 Eq. 190; 29 L. T. 639; 22 W. R. 254.

Production of Documents—Action in Scotland—Commission against Chairman and Secretary of Lloyds'.] — There is no jurisdiction under 6 & 7 Vict. c. 82, s. 5, or otherwise, for a judge in chambers to order the chairman and secretary of Lloyds', not being parties to the action in Scotland to appear before a commissioner appointed by the Scotch court for examination or to produce documents specified in the commission. *Burchard* v. *McFarlane, Ex parte, Tindall and Dryhurst*, 60 L. J., Q. B. 587; [1891] 2 Q. B. 241; 65 L. T. 282; 7 Asp. M. C. 93.

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Barratry.]—*See* V. MASTER. 6, BARRATRY; B. MARINE INSURANCE, IV. NATURE OF RISK, 4. BARRATRY.

Liability for Wages.]—*See* VI., SEAMEN.

1. WHO ARE.

a. Evidence of Ownership—The Register.

Action on Contract made by Master.]—The register is by itself no evidence of ownership, so as to fix the party whose name appears thereon with liability for contracts entered into by the master on behalf of the ship. *Myers* v. *Willis*, 18 C. B. 886; 25 L. J., C. P. 255; 4 W. R. 637; Ex. Ch. S. P., *Pearson* v. *Nell*, 12 L. T. 607; 13 W. R. 967, infra, col. 64.

Action for Goods supplied.]—In an action against several for stores supplied to a ship by order of the captain, the register obtained on the oath of one is primâ facie evidence of ownership against all. *Stokes* v. *Carne*, 2 Camp. 339.

A declaration of ownership in a ship is primâ facie proof of ownership without the registry, and though the party has ceased to be owner: yet if he has been present when the work was done, giving directions about it, that will be evidence of liability for repairs. *Tibbald* v. *Wood*, 1 F. & F. 287.

But the bare production of a register containing the names of several owners will not be evidence to support a plea in abatement by one of them of nonjoinder of the others in an action against him alone. *Flower* v. *Young*, 3 Camp. 240. And see *Ditchburn* v. *Spracklin*, 5 Esp. 31.

Proof of the execution of a bill of sale of a ship to the defendant is not evidence to charge him as an owner with stores furnished to the ship, without shewing his assent to such sale. *Tinkler* v. *Walpole*, 14 East, 226. S. P., *Cooper* v. *South*, 4 Taunt. 802.

A person registered as owner without his knowledge held liable for goods supplied to the ship. *Machell, Ex parte*, 2 V. & B. 216; 1 Rose, 447.

In an action against the owner of a ship for stores supplied to her, the register purporting to be granted on the oath of the defendant, and stating him to be sole owner, is no evidence of ownership. *Smith* v. *Fogo*, 3 Camp. 456.

The fact of a person being the registered owner of a ship, is not of itself evidence that the master has authority to bind him by contracts for necessaries supplied to the ship, but it must be shewn that the master is his agent for that purpose. *Mackenzie* v. *Pooley*, 11 Ex. 638; 25 L. J., Ex. 124; 4 W. R. 262.

Where a ship sailed for a foreign port, the master having a power of attorney from the owner, and whilst the ship was at the port, the defendant purchased it:—Held, that he did not thereby become liable for necessaries supplied to the ship by order of the master. *Ib.*

The registered owner of a ship is primâ facie liable for goods furnished for the use of that ship, but such liability may be rebutted by evidence of the credit having been given to

others. *Cox* v. *Reid*, 1 Car. & P. 602; R. & M. 199. *See also Cases* ante, cols. 15, seq.

Liability while on Register.]—Where there were two joint owners of a ship, and one, by private agreement, parted with all his interest in his share to the other, to be paid for by bills at different dates, but kept his name on the register by way of collateral security for the payment of the bills:—Held, that he was liable for repairs done to the ship subsequently to such agreement, although he had never afterwards interfered in the concern or management of the vessel. *Dowson* v. *Leake*, D. & R., N. P. C. 52.

In order to charge a party, by reason of his name appearing on the ship's register as part owner, for repairs done to the ship, it must distinctly appear that they were done upon his credit, and that the order for them was given with his authority, express or implied. *Curling* v. *Robertson*, 8 Scott (N.R.) 12; 7 Man. & G. 336; 13 L. J., C. P. 137.

Where a party takes a share in a ship under a conveyance which is void for want of conformity with the provisions of the registry acts he is not liable to pay for goods supplied for her use, unless credit is given to him individually, or he has held himself out as owner, or unless he has made an express promise to pay, or has received profits from the ship. *Harrington* v. *Fry*, 9 Moore, 344; 2 Bing. 179; 1 Car. & P. 289; R. & M. 90; 3 L. J. (O.S.) C. P. 244.

The mere fact of a man's being registered as a part owner of a ship, under an absolute bill of sale, which was in fact given as security for advances, does not give the owner or the master (appointed by his co-owner) authority to pledge his credit for necessary repairs. *Hackwood* v. *Lyall*, 17 C. B. 124; 25 L. J., C. P. 44, n.; 2 Jur. (N.S.) 44, n. S. P., *Rands* v. *Thomas*, 5 M. & S. 244, infra, col. 64.

The vendor of a ship for a month after the sale neglected to have the register indorsed pursuant to 34 Geo. 3, c. 68, s. 15, remaining on the register as legal owner. Repairs were meanwhile ordered by the vendee. Held, that the vendor was not liable for them. *Young* v. *Brander*, 8 East, 10. S. P., *McIver* v. *Humble*, 16 East, 169.

—— **Liability for Wages.**]—Owners at Liverpool conveyed the ship to others and the certificate of registry was indorsed by the proper officer at Liverpool. The officer in London to whom the certificate was transmitted failed to enter the indorsement at the custom house in London:—Held, that the former owners were not liable for seamen's wages earned after the conveyance. *Ratchford* v. *Meadows*, 3 Esp. 69.

Bankruptcy of Owner—Collision—Application by Shipwright to have Sums found due in Admiralty Action paid out.]—See *The Endeavour*, XX. COLLISION, post, col. 729.

Evidence of Ownership in Criminal Cases.]—A murder was committed on board a ship on the high seas sailing under the British flag, and the accused was brought to England in custody, and put on his trial for the crime. To shew jurisdiction in the courts of this country, it was sought to establish that the ship was a British ship, and the register of the ship at the port of London was put in, wherein the owner's name was stated to be C. A. Rehder, of 14, London Street, city of London, merchant. Rehder was alien born, and it did not appear that he was a denizen of this country or naturalised. The ship was foreign built, and the officers and crew, including the accused, were foreigners:—Held, that although the register might be primâ facie evidence of the facts stated therein, and that the ship was a British ship, yet the proof that the owner was alien born rebutted the inference from the register that he was a British subject, and he was therefore disqualified by 17 & 18 Vict. c. 104, s. 18, from being the owner of a British ship. *Reg.* v. *Bjornsen*, L. & C. 545; 34 L. J., M. C. 180; 11 Jur. (N.S.) 589; 12 L. T. 473; 13 W. R. 664; 10 Cox, C. C. 74.

Held, also, that it would not be presumed that he was denizened or naturalised. *Ib.*

Entry in the book of registry pursuant to 6 Geo. 4, c. 110, s. 37, of the bill of sale of part of a ship held sufficient evidence of ownership in a criminal case. *Rex* v. *Philp*, 1 M. C. C. 263.

Bill for Discovery of Owners.] — Bill in chancery for discovery of the part owners of a ship to enable the plaintiff to sue at law for destruction of his goods on board by fire. *Morse* v. *Buckworth*, 2 Vern. 443. S. P., *Heathcote* v. *Fleete*, 2 Vern. 442.

Injury to Person—Liability.]—A ship, of which the defendant was the registered owner, was laid up in dock under the charge of a shipkeeper, by whom one of the hatchways was negligently left open, whereby the plaintiff, who was lawfully passing over the deck of the ship, fell through the hatchway and was injured. At the trial of an action to recover compensation, it did not appear by whom the shipkeeper was appointed, and the only evidence to charge the defendant with liability was the ship's register, in which he was described as owner:—Held, by Blackburn and Lush, JJ. (dissentiente, Mellor, J.), that this was primâ facie evidence, from which, if unrebutted, they might infer that the shipkeeper was appointed by the defendant. *Hibbs* v. *Ross*, 9 B. & S. 655; 35 L. J., Q. B. 193; L. R. 1 Q. B. 534; 12 Jur. (N.S.) 812; 15 L. T. 67; 14 W. R. 914.

Evidence of Possession.]—Property in a ship must be proved by evidence of possession in the plaintiff, his vendors or bailees, accompanied with a certificate of registry. *Pirie* v. *Anderson*, 4 Taunt. 652; 3 Camp. 242. And see *Paterson* v. *Hardacre*, 4 Taunt. 115.

Registered Owner—Denial of Interest.]—A., whose name has been registered as the part owner of a vessel on the oath of B., and has afterwards conveyed such share by deed to B., covenanting for the goodness of his title, cannot be admitted to prove by the evidence of B. that he has in fact no interest in the vessel. *Nickson* v. *Thomas*, 1 Stark. 85. And see *Watson* v. *Shelley*, 1 Term Rep. 301.

b. Other Evidence.

Parol.]—If a plaintiff in trover for a ship sought to prove his title by the register and failed:—Held, that he could not afterwards prove a possessory title by parol evidence. *Sherriff* v. *Cadell*, 2 Esp. 616.

Ownership in an action upon a policy may be

proved by parol evidence. *Robertson* v. *French*, 4 East, 130; 4 Esp. 246; 7 R. R. 535.

Appearance in Action.]—In an action against the owners of a ship it is primâ facie evidence of ownership to produce an undertaking to appear for them, given before the commencement of the action, by the person who subsequently acted as their attorney in defending it, in which he describes them as owners without further proof of agency. *Marshall* v. *Cliff*, 4 Camp. 133.

Declaration of Ownership.]—A declaration of ownership held to be primâ facie evidence of ownership without the register. *Tribbald* v. *Wood*, 1 F. & F. 287.

Bill of Sale—Defeasance.]—If there is a bill of sale of a ship not containing any qualification, and such unqualified bill of sale is entered properly on the register, and there is also a deed of defeasance, making void such bill of sale on the payment of a sum of money, the deed of defeasance may be given in evidence on the part of the defendant, in an action for goods on his liability as the registered owner, in order to shew the qualified nature of his ownership. *Cox* v. *Reid*, 1 Car. & P. 602; Ry. & M. 199.

c. Generally.

Dispossessing Owners on Register.] — The court cannot look behind a ship's register for the purpose of dispossessing an innocent purchaser for value whose name is on the register. *The Horlock*, 47 L. J., Adm. 5; 2 P. D. 243; 36 L. T. 622; 3 Asp. M. C. 421.

Co-ownership Action—Owners on Register—Jurisdiction — Admiralty Court Act, 1861.]—Quære, whether s. 8 of the Admiralty Court Act, 1861, giving the admiralty court jurisdiction to decide questions between co-owners, is not confined to questions between registered co-owners. *The Bonnie Kate*, 57 L. T. 203; 6 Asp. M. C. 149, infra, col. 48.

Infant Shipowner—Guardian.]—See *Michael* v. *Fripp*, infra, col. 160.

Within 17 & 18 Vict. c. 104, s. 147, sub-s. 1—Contract to purchase a Share, Effect of.]—A person who, though not a registered owner, has entered into a contract enforceable in equity for the purchase of a share of a ship, is an owner within the meaning of s. 147, sub-s. 1, of 17 & 18 Vict. c. 104. *Hughes* v. *Sutherland*, 50 L. J., Q. B. 567; 7 Q. B. D. 170; 45 L. T. 287; 29 W. R. 867; 4 Asp. M. C. 459; 46 J. P. 6.

Ship forfeited—Trover.]—The owner of a ship forfeited for breach of the Navigation Act (12 Car. 2, c. 18), could not maintain trover for the ship against the seizor. *Wilkins* v. *Despard*, 5 Term Rep. 112; 2 R. R. 559.

Ships captured in War—Ownership.]—At common law the subject is entitled to all that he can take in time of war from the king's enemies—per Wright, J. *Morrough* v. *Comyns*, 1 Wils. 211.

A British ship captured by the enemy and taken into his port is presumed to have been condemned, and the title of the former owner divested. *The Countess of Lauderdale*, 4 C. Rob. 283.

Any subject of her majesty may seize an enemy's ship, but she does not thereby become the prize of the seizor. *The Johanna Emilia*, 1 Spinks, 317.

Ships captured in war belong to the crown. *The Elsebe*, 5 C. Rob. 173, 181.

Admiralty Jurisdiction in Prize.]—Prize or no prize cannot be tried at common law; it is triable only before the judge of the admiralty by the law of nations. *Mitchell* v. *Rodney*, 2 Br. P. C. 423.

See also, further, as to Ownership sub tits. TRANSFER AND SALE; REGISTRATION; BUILDING AND REPAIRS; PART OWNERS.

2. PART OWNERS.

a. Are Tenants in Common.

Part owners of a ship are tenants in common, not joint tenants; the other partners have no lien therefore on the share of one, a bankrupt having been also managing owner for outfit, freight, &c. *Young, Ex parte*, 2 V. & B. 242; 2 Rose, 78, n.; 13 R. R. 78.

The owners of a ship are not interested in it as joint tenants, but as tenants in common; upon a bankruptcy, therefore, the bankrupt's share passes to the creditors under the bankruptcy, without being liable specifically to the claims of the other part owners in respect of their disbursements and liabilities for the ship. *Harrison, Ex parte*, 2 Rose, 76.

Part owners are tenants in common of a ship, but jointly interested in her use and employment; and the law as to the earnings of a ship, whether as freight, cargo or otherwise, follows the general law of partnership. *Green* v. *Briggs*, 6 Hare, 395; 17 L. J., Ch. 323; 12 Jur. 326.

A mandamus to the officers of customs to register a ship transferred by the survivor of two part owners, merchants, was refused on the ground that the executors of the deceased part owner ought to have joined in the transfer. *Rex* v. *Liverpool* (*Collector of Customs*), 2 M. & S. 223.

A mortgagee of a ship agreed with one of the part owners that he would pay all disbursements of a voyage, and in consideration was to have the proceeds of the freight handed over to him, in priority of all other charges. He failed to advance any money, and the part owner was obliged to do so instead. Both having become bankrupt and the ship having been sold:—Held, that the assignees of the mortgagee were entitled to their full share of the proceeds, as, though he had not fulfilled his contract, yet the ownership of a vessel is in common and not joint, and this agreement and dealing had not made it joint; and that the part owner had no claim on the share of the mortgagee for his advances. *Leslie, Ex parte, Drury, In re*, 3 L. J., Bk. 4.

A surviving merchant, who claimed a joint interest in a ship with another who was dead, sued the defendant for detaining the ship; plea in bar; judgment for the plaintiff; the plea should have been in abatement. *Kempe* v. *Andrews*, 3 Lev. 290; Carth. 170.

A master sued in chancery for 10*l.*, due to him on account of the ship, the executor of a deceased part owner:—Held, that the other part

owner must be a party. *Pierson* v. *Robinson*, 3 Swanst. 139.

Are not Partners.]—Part owners in a ship are not as such partners. *Buxton* v. *Snee*, 1 Ves. Sen. 155. And see *Helme* v. *Smith*, infra.

Part owners formerly held to have a lien on the shares of their co-owners for payments made for goods supplied to the ship. *Doddington* v. *Hallett*, 1 Ves. Sen. 496. But this overruled, see *Ib.*, Suppl. 87; 2 V. & B. 242. *Young, Ex parte*, supra. *Green* v. *Briggs*, supra. *Harrison, Ex parte*, supra.

May be Joint Tenants of a Share.]—Two or more persons may hold a share in a ship jointly. *Rex* v. *Philp*, 1 M. C. C. 263.

b. Rights and Liabilities between themselves.

Application of Freight — Ship's Outfit.]—A part owner of a ship has a right to require the gross freight to be applied, in the first place, in payment of the expense of the outfit of the ship for the voyage in which the freight was earned, nothwithstanding he might sue his co-owners for their proportion of the expenses before the adventure ends. *Green* v. *Briggs*, 6 Hare, 395; 17 L. J., Ch. 323; 12 Jur. 326.

The same rule applies to the expenses of repairs to the hull of the ship, where such repairs were done with a view to the particular adventure in which the earnings were made, and without which that adventure could not have been undertaken. *Ib.*

Where Part Mortgaged.]—A part owner of a ship, whose share was subject to a mortgage, agreed with the other part owner (whose share was not subject to any mortgage), but without the concurrence of the mortgagee, to purchase guano on the joint account of the two part owners, and bring it in the ship to England. On the completion of the voyage, and when the cargo was about to be discharged, the mortgagee took possession:—Held, that he had no claim against the owner of the mortgaged share for freight, and could, at the utmost, only claim to adopt the mortgagor's contract, and stand in his place as the profits of the adventure, after deducting all expenses. *Alexander* v. *Simms*, 5 De G. M. & G. 57; 23 L. J., Ch. 721; 2 W. R. 329. See *S. C.*, infra.

Ship owned by Partners.]—If the names of two partners in trade appear on the certificate of registry as owners of a ship, the registry acts do not prevent the shewing how and in what proportions the several owners are respectively entitled; and though the partners may derive title under different conveyances, yet, if their shares were purchased with the partnership funds, and treated by them as partnership property, and the partners became bankrupts, these shares will be considered as the joint property. *Jones, Ex parte*, 4 M. & S. 450.

A ship was purchased by a partner for himself, but was paid for out of the partnership assets. The firm became bankrupt:—Held, that the firm had no interest in the ship, or any lien on it for the amount of the purchase-money. *Walton* v. *Butler*, 29 Beav. 428.

Interest of Unregistered Partner of Registered Owner.]—See *Campden* v. *Anderson*, REGISTRATION, supra, col. 30.

Ship's Expenses—How Recovered.]—A. and others agreed to run a vessel during the winter between two places, and to share profits and pay expenses ratably according to the capital subscribed by each; if the ship's earnings should be insufficient to keep A. in funds, each of the subscribers to pay A. from time to time instalments of the capital subscribed. The ship's earnings were insufficient to meet her expenses, which were paid by A.:—Held, that the proper form of action for the recovery of such expenses was an action against the other subscribers for breach of the contract to pay up the instalments. *Brown* v. *Tapscott*, 6 M. & W. 119; 9 L. J., Ex. 139.

A part owner of a ship is not necessarily a partner; therefore, a part owner, who as ship's husband incurs expense in fitting her out may sue his co-owners separately for their shares of the expense. *Helme* v. *Smith*, 7 Bing. 709; 5 M. & P. 744; 9 L. J. (o.s.) C. P. 206.

Court of Chancery.]—A court of equity will not interfere by injunction to restrain a part owner of a ship from retaining part of the machinery of the ship, unless the admiralty court has been previously applied to, and refused to interfere, or can only afford a dilatory and inadequate relief. *Brennan* or *Brenan* v. *Preston*, 10 Hare, 331; 2 De G. M. & G. 813; 1 W. R. 69, 322.

No question arises as to the jurisdiction of this court in enforcing the rights of some against the other part owners of a ship, with regard to the management of the ship and the possession of the certificate of registry, where those rights are regulated by an agreement entered into between all the owners of the ship. *Darby* v. *Baines*, 9 Hare, 369; 21 L. J., Ch. 801.

—— **Bill for Account—Parties.**]—In a bill by some part owners for an account against others of profits of the ship, all those claiming the account must be parties. *Moffat* v. *Farquharson*, 2 Bro. C. C. 338. Overruled, *see Note, Ib.*

A suit between two shipowners, and the mortgagee of one, was dealt with as in an administration suit, by first directing the payment of all the costs (except the mortgagee's) out of the fund, and distributing the residue pro ratâ. *Alexander* v. *Simms*, 20 Beav. 123; 24 L. J., Ch. 618. See *S. C.*, supra.

A. and B., British subjects, purchased and repaired an American-built ship, on a joint speculation, with a view of employing her in the trade between the two countries, until an opportunity should occur for reselling her to advantage; for which purpose they procured her to be registered in the United States in the name of C., a citizen of that country, upon a false declaration that she was bonâ fide the sole property of C. After the ship had made several voyages, B., who had had the management of her, attempted to exclude A. from his share in the speculation, and, in spite of the dissent of A., sent her on another voyage to America:—Held, that even supposing the declaration above mentioned, and the registration thereby effected, to have been a fraud upon the American law, and the subsequent employment of the ship so registered to have been a

fraud upon the English navigation law, such fraud would not prevent A. from maintaining a suit against B. for an account and payment of his share of the realised profits of the speculation. And in decreeing such account the court also directed an inquiry what had become of the ship since she was sent on her last voyage, and what was her value when so sent, with a view to making B. personally liable for such value in case either the ship or the proceeds of her sale should not be ultimately forthcoming. *Sharp* v. *Taylor*, 2 Ph. 801.

A., in 1799, purchased shares in a ship of G. R., who, having also shares in the same ship, was intrusted by A. and the other part owners with the whole management of the ship, and to keep the accounts relating to it from the time of the purchase until the ship was sold by G. R., with the consent of all the owners in 1805. Upon the occasion of the sale, G. R. stated and settled accounts with W., one of the part owners, and paid him the balance due upon the earnings of the ship and the proceeds of the sale. In 1824, G. R. died. Upon a bill filed by A. in March 1826, for an account against the executors of G. R., it appeared by a ledger (found in a room wholly disused by G. R.) containing the accounts of the ship, that the credit and debit account between him and A. was not carried beyond 1805. On the debit side there were two items, one in 1811, and another in 1812. A. left England in 1820, and some time after his departure his brother-in-law called several times upon G. R. with messages from A., and on those occasions asked him to come to a settlement with A. respecting the ship; G. R. never stated that he was not indebted to A. An account was decreed against the executors of G. R., and that decree affirmed on appeal. *Robinson* v. *Alexander*, 8 Bligh (N.S.) 352; 2 Cl. & F. 717.

Action in Admiralty.]—Account of earnings of a ship ordered upon the petition of a part owner. *The Albion*, 6 L. T. 165.

Liability of Purchaser.]—A purchaser of shares in a ship, which at the time of the sale is on a voyage, is liable for the expenses of this voyage, and of the vessel's outfit for it, and is entitled to a share of the freight. *The Vindobala*, 58 L. J., Adm. 51; 14 P. D. 50; 60 L. T. 657; 37 W. R. 409; 6 Asp. M. C. 376—C. A.

A vessel was chartered for twelve months, and during the currency of the charter the charterers made default in certain payments and the charter lapsed. The vessel was rechartered by a voyage charter from K. to England. During the performance of this voyage the defendant purchased a share in this vessel:—Held, on objection to the registrar's report in a co-ownership action, that the defendant was not liable to bear any of the losses occasioned by the time charter. *The Meredith*, or *White* v. *Ditchfield*, 10 P. D. 69; 52 L. T. 520; 5 Asp. M. C. 400.

Liability of Trading Owners.]—Part owners who do not dissent from the employment of a ship, and are aware that other part owners have dissented, are liable to bear the expenses, and are entitled to receive the profits of the ship in the proportion which their shares bear to the number of shares in the ship, after the deduction of the shares of the dissentient part owners. *The Vindobala*, supra.

Transfer of Share—Bill of Sale.]—The managing owners of the steamship "B. K." in 1882, agreed to sell the defendant V. one sixty-fourth share in the "B. K.," for which he gave them a bill of exchange for 156*l.*, and received from them a receipt for the same as "being one sixty-fourth share in the s.s. 'B.K.'" In 1883 the managing owners sent V. 8*l.* in respect of profits on his share, and subsequently sent him a statement of accounts. No bill of sale was ever executed by the managing owners, and it appeared that their shares in the "B. K." were mortgaged at the time of the sale to V., and that subsequently they never were in a position to redeem them. Certain of the owners having paid losses incidental to the working of the ship, now sued V. as a co-owner for his proportion of the losses:—Held, that notwithstanding the receipt by V. of the 8*l.*, he was not, either in law or equity, a co-owner; that the managing owners had no authority to pledge his credit, and that therefore he was not liable. *The Bonnie Kate*, 57 L. T. 203; 6 Asp. M. C. 149.

Use of Ship by Part Owner—Freight.]—M. contracted with his co-owners for use of their ship on a voyage to S., and he shipped in her some thousands of bricks, which, on the arrival of the ship, were reduced to dust. No freight was paid at S., nor was the dust removed, but the agent of the other owners at S. used it as ballast on a voyage by the same ship from S. to C., where it was sold for a small sum. In taking the accounts between them, the chief clerk charged the ship's husbands with the freight of the bricks, although they had received no part of it; and a motion by them to vary was dismissed, with costs. *Garrett* v. *Melhuish*, 4 Jur. (N.S.) 943; 6 W. R. 491.

Fraudulently disposing of Co-owner's Share.]—A part owner cannot sue his co-owner for fraudulently disposing of his share in the ship. *Graves* v. *Saucer* or *Sawcer*, 1 Keb. 38; 1 Lev. 29; Sir T. Raym. 15.

Ship's Money received by Agent of one Part Owner—Action by Co-owners.]—A., B. and others were owners of a ship in the service of the East India Co. B. was managing owner, and employed C. as his agent for general purposes and to receive moneys on account of the ship; C. keeping a separate account with B. To obtain payment from the company on account of the ship it was necessary that the receipt should be signed by one or more of the owners, besides the managing owner, and upon a receipt signed by B. and another owner C. received from the company 2,000*l.* and placed it to B.'s credit in his books as managing owner. The part owners brought money had and received to recover the balance of that account:—Held, that C. had received the money as agent for B. and was accountable to him only, and that the action would not lie. *Sims* v. *Brittain* or *Britten*, 4 B. & Ad. 375; 1 N. & M. 594.

Share of Prize.]—Thirty shares in a privateer remaining unsubscribed for and taken by the managers of the concern on their own account, after a valuable capture, held to be the exclusive property of the managers. Bill on behalf of the other subscribers dismissed; since, if there had been a loss, they could only have been answerable to the amount of their own shares. *Blunt* v. *Cumyns*, 2 Ves. 331.

Liability for Damages.] — A. and B. were owners of a ship; A. working the ship, defraying all the expenses, and taking the uncontrolled management of her, and paying himself by taking two-thirds of the gross earnings; B. taking the remaining one-third as portion:—Held, that A. was a hirer of the share of B., and not the servant or agent of B., so as to render B. liable for damages caused by the negligence of A. *Bernard* v. *Aaron*, 9 Jur. (N.S.) 470.

Illegal Capture—Costs.]—Part owners of a privateer must bear costs proportionally of an illegal seizure of a prize at sea. *Walton* v. *Hanbury*, 2 Vern. 592.

Damages between Co-owners.] — Claim for damages by some of the part owners against the others in co-ownership action. *The Ceylon*, 18 L. T. 417.

Money paid for Appointing Master.]—Money paid to part owners for their votes in the appointment of a captain is no profit of the ship. *Moffatt* v. *Farquharson*, 2 Bro. C. C. 338.

Offer to buy Shares of Co-owners—Acceptance by Some only.]—In a Scotch action of set and sale the pursuer offered to buy the shares of his co-owners. One accepted the offer, the other did not:—Held, that the pursuer was not bound to buy the shares of one defender only. *Anderson* v. *Sillars*, 22 Ct. of Sess. Cas. (4th ser.) 105.

Cost of Insurance.]—Although one of two part owners of a ship has no authority as such to order insurances to be effected on account of the others, yet if they are in partnership together, an order to insure given by one renders all liable. *Hooper* v. *Lusby*, 4 Camp. 66.

One part owner cannot charge another with any part of the premium, unless the insurance is authorised or ratified by him. *Ogle* v. *Wrangham*, Abbott on Shipping, 13th ed. 96.

A., a part owner, assigned his proportion of the freight payable in respect of a voyage, to C.; B., his co-owner, subsequently, without notice of the assignment to C., concurred with A. in authorising a broker to pay the insurance of the ship and freight for the voyage:—Held, that the costs of such insurance were proper expenses of the voyage, and that they ought to be deducted from the freight before dividing it between B. and C. *Lindsay* v. *Gibbs*, infra.

—— **Broker's Bill.**]—Upon a settlement of accounts at the end of a voyage, one of the shipowners agreed to pay the broker's bill, and, in consideration, was allowed a large share of the profits. He omitted to pay the broker, who sued both owners for the amount. The other owner having paid it:—Held, that he might sue him for the amount. *Wilson* v. *Cutting*, 10 Bing. 436; 4 M. & Scott, 826.

Policy Moneys.] — Where a ship originally belonged to one of two partners, and had been conveyed to B. for securing a debt, and B. became the sole registered owner of the ship, and afterwards, as agent for both partners, insured the ship and freight, and charged them with the premiums; and, on a loss happening, received the money from the underwriters:—Held, that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner, to whom the ship originally belonged. *Dixon* v. *Hamond*, 2 B. & Ald. 310.

Expenses of Earning Freight.]—The wages of the captain and seamen of a ship, being the expenses which produce the income thereof, are proper deductions to be made from the gross freight, as between the part owners of the ship and the assignees of the freight belonging to the other co-owners. *Lindsay* v. *Gibbs*, 4 Jur. (N.S.) 779; 6 W. R. 733. Affirmed, 3 De G. & J. 690; 28 L. J., Ch. 692; 5 Jur. (N.S.) 376; 7 W. R. 320. See *S. C.*, col. 1047.

Advances for Supplies.]—A co-partner in a ship may sue the ship for advances made by him, but not if he is interested in the particular voyage for which the ship is supplied. *The Underwriter*, 25 L. T. 279; 1 Asp. M. C. 127.

Liability of Part Owners for Necessaries.]—See *Davison* v. *Donaldson*, infra, col. 52, and cases infra, cols. 66, 67.

Mode of Payment.]—The four defendants and B. were the owners in certain shares between them, of a ship to which the plaintiffs by order of W., the ship's husband, and with the authority and consent of the defendants, did certain repairs, and upon the account for such repairs being sent in to the owners, it was arranged between W. and the plaintiffs, that it should be paid partly in cash (subject to discount) and partly in good bills, and that the total amount of the contract should be apportioned between the several owners according and in proportion to their interest and the number of their respective shares in the ship. The necessary calculation having been made by W., the account was then paid to the plaintiffs through W., partly by a cheque of the defendant Andrews, payable to W.'s order, and indorsed by him for the amount of Andrews' proportion, partly by cash payments from each of the other three defendants for the amount of their respective proportions, and partly by a bill at six months, drawn by W. on and accepted by B., for the amount of B.'s proportion of the account. B.'s bill being dishonoured at maturity, the plaintiffs brought an action against the defendants to recover from them, as joint owners of the ship, the amount of such dishonoured bill, in answer to which the defendants contended that the plaintiffs, by taking B.'s bill, and giving him time, had placed his co-debtors, the defendants, in a worse position, and necessarily postponed their remedy against B., and had consequently discharged the defendants:—Held, that the defendants were bound by the mode of payment adopted, and that that circumstance distinguished the case from that of principal and surety. *Mould* v. *Andrews*, 35 L. T. 813; 3 Asp. M. C. 32.

Settlement of Accounts—Majority Bind the Rest.]—If the major part of part owners settle the ship's account, it shall bind the rest. *Robinson* v. *Thompson*, 1 Vern. 465.

In all sea-adventures the acts of the majority of partners shall bind the whole. *Falkland* v. *Cheney*, 5 Bro. P. C. 476.

Claim against Managing Owners—Reopening Account—Statute of Limitations.]—The relations between co-owners of a vessel engaged in foreign voyages and her managing owners are, in the absence of any evidence to shew that each voyage is a separate trading transaction, to be treated, in relation to the profit and loss on her voyages, as a continuous partnership or agency, as the case may be. Consequently the rule as to partnership accounts applies, the accounts may be gone into without any limit as to time, and the statute of limitations does not apply so long as the partnership or agency is continuous. *The Pongola*, 73 L. T. 512; 8 Asp. M. C. 89.

Ship's Register—Detention by Master Part Owner.]—A master, part owner, refusing to deliver up the ship's register to the managing owner, held not liable to penalty under 17 & 18 Vict. c. 104, s. 50. *Arkle* or *Harkle* v. *Henzell*, 8 El. & Bl. 828; 27 L. J., M. C. 110; 4 Jur. (N.S.) 306.

Contribution to Losses—Power of Majority to Bind All—Costs of defending Action.]—The owners of a ship, except A., who had one share, resided in England, and were found liable in an action in England to cargo owners for its loss. A., who resided in Scotland, did not join in the defence. The owners were insured by an association of which their managing agent was a member. The agent, in his own name, sued the association upon the policy. The action was not successful, and an appeal was abandoned upon a money payment being made by the association by way of compromise. In an action against A. by the other owners for contribution to the loss:—Held, that, notwithstanding the compromise with the insurers, he was liable. *Bennett* v. *McLellan*, 17 Ct. of Sess. Cas. (4th ser.) 800.

Held, also, that the costs of defending the action in England were included in A.'s liabilities. *Ib.*

Sale by Part Owners.]—*See* post, tit. VIII. SALE AND TRANSFER.

And see further, post, tit. XXVI. ADMIRALTY LAW AND PRACTICE.

c. Rights and Liabilities against and to Others.

Bankruptcy—Set-off.]—Part owners of a ship cannot set off their proportions of a debt to the bankrupt on account of the ship against debts due to them severally from the bankrupt. *Christie, Ex parte*, 10 Ves. 105.

Covenant with Part Owners—Joint or Several.]—A covenant with the part owners of a ship, and their several and respective executors, to pay money accruing for the hire of the ship for freight, and for use of the ship's tackle, to the covenanters, their and every of their several and respective executors, at a specified bank, in such proportions as were set against their several and respective names, is a several covenant, and cannot be sued on by the covenanters jointly. *Servante* v. *James*, 5 M. & Rob. 299; 10 B. & C. 410; 8 L. J. (O.S.) K. B. 64.

Part Owners suing for Injury to Ship in Separate Actions—Abatement.]—If one of two part owners of a ship sues alone for an injury done to the ship, and the defendant does not plead in abatement, the other part owner may afterwards sue alone, and the defendant cannot plead in abatement to the second action. *Sedgworth* v. *Overend*, 7 Term Rep. 279. Cf. *Addison* v. *Overend*, 6 Term Rep. 766.

Liability of Owner for Supplies—Acceptance of Agent's Draft for Price — Dishonour.]—A tradesman who had supplied goods to a ship took the acceptance of the shipowner's agent for the amount of his bill for the goods, and afterwards consented to the renewal of the bill twice. Upon the agent's failure and dishonour of the bill:—Held, that the shipowner was liable for the price of the goods, although the agent had throughout had in his hands money of his principal sufficient to pay for the goods. *Robinson* v. *Read*, 9 B. & C. 449; 4 M. & Ry. 349; 7 L. J. (O.S.) K. B. 236.

Joint Agent—Liability.]—If persons, separately interested in aliquot parts of a ship, employ a joint agent, they are liable in the aggregate. *Pasmore* v. *Bousfield*, 1 Stark. 296.

Surviving Part Owner—Trover.]—A surviving part owner may bring trover for the whole ship. *Dockwray* v. *Dickenson*, Comb. 366.

Necessaries—Liability of Part Owner.]—The plaintiff sold stores for a ship to T., who was ship's husband and managing owner. The defendant was part owner of this ship, and was also interested with T. in the adventure for which the ship was fitted out. The plaintiff applied to T. for payment, but did not obtain it. Three months after the goods were supplied, and again two years after that, the defendant settled accounts with T., and gave him credit for the price of the goods, supposing they had been paid for. More than three years after the goods had been supplied, T. having become bankrupt, the plaintiff for the first time applied for payment to the defendant, and brought his action for the price of them:—Held, that there had been no such conduct on the part of the plaintiff as would discharge the defendant from liability. *Davison* v. *Donaldson*, 9 Q. B. D. 623; 47 L. T. 564; 31 W. R. 277; 4 Asp. M. C. 601—C. A.

Liabilities in respect of Repairs.]—A., B. and C. being part owners in a ship, A. directed B. and C. not to order any repairs in their joint names, and informed them that he would no longer consider them as managing owners: repairs were done in their joint names upon the direction of the captain employed by B. and C.:—Held, that A. was jointly liable. *Gleadon* v. *Tinckler*, Holt, 586.

Liability for Repairs and Expenses.]—See *The Vindobala*, supra, col. 47. *And see* 4. LIABILITY ON CONTRACT, infra, cols. 61, seq.

Liability for Damage—Ship worked by One Part Owner — Liability of the Other.]—See *Burnard* v. *Aaron*, infra, col. 72.

d. Refusing to Navigate.

Chancery Jurisdiction.]—The court of admiralty is open all the year round to applications by part owners to restrain the sailing of ships without their consent until security given to the amount of the respective shares. But where the shares are not ascertained, the court of chancery

will exercise a concurrent jurisdiction, by injunction, to restrain the sailing of a ship until the share of the party complaining shall be ascertained, and security given to the amount of it. In this case it was referred to the master to make the inquiry and to settle the security accordingly. *Haly* v. *Goodson*, 2 Mer. 77; 16 R. R. 145.

Injunction to restrain the sailing of vessel containing goods sold to a person who had become insolvent, but over which the plaintiff retained a right of stoppage in transitu, refused. A court of equity has not jurisdiction in any case to stop goods in transitu, semble. *Goodhart* v. *Lowe*, 2 J. & W. 349; 22 R. R. 164.

Injunction to restrain the sailing of a ship upon the application of a part owner, refused, where the ship was intended to sail the next day, and it did not appear by the affidavit filed in support of the motion that there were any circumstances to account for the plaintiff's delay in applying. *Christie* v. *Craig*, 2 Mer. 137.

Semble, the court of chancery will not, in a case within its jurisdiction, interfere beyond or otherwise than the court of admiralty would interfere, at the suit of some part owners to restrain the sailing of a ship or control her management; there being no question as to the ownership, and the only dispute being as to the powers of the owners inter se. *Castelli* v. *Cook*, 7 Hare, 89; 18 L. J., Ch. 148; 13 Jur. 675.

The master of an American vessel arriving in England, authorised by the owners to sell or charter the ship, entered into a charterparty with the plaintiff for a voyage to Ceylon and back. A few days afterwards the defendant purchased the ship from a party acting under a power of attorney from one of the owners to sell her. The greater part of the cargo had been put on board under the charter-party. The defendant attempted to stop the sailing of the ship:—Held, that the master having authority to charter the ship, which he had done, and the defendant knowing of the charterparty, an injunction would lie to restrain the purchasers from interfering with the sailing of the ship, in pursuance of the charterparty. *Messageries Imperiales Co.* v. *Baines*, 7 L. T. 763; 11 W. R. 322.

Whether the court will grant an injunction restraining a party from taking a ship to any other than a certain port, thereby in effect compelling him to proceed to such port, quære. *Lidgett* v. *Williams*, 4 Hare, 465; 14 L. J., Ch. 459.

A shipowner of Hamburg made, at Hamburg, an agreement with a domiciled Englishman for the sale to the Englishman of a Hamburg ship whenever she might return from the voyage on which she then was. The ship returned, and was by the owner ordered to proceed to Sunderland. The master of the ship, who was authorised by the shipowner to act as his agent in the sale, refused to deliver the ship except on certain terms. The purchaser filed a bill against the owner and the master for specific performances. He obtained leave to substitute service on the master for the owner, and moved for an injunction to restrain the defendants from removing the ship out of the jurisdiction:—Held, that the court had jurisdiction to restrain the defendants from removing the ship, and injunction granted. *Hart* v. *Herwig*, 42 L. J., Ch. 457; L. R. 8 Ch. 860; 29 L. T. 47; 21 W. R. 663; 2 Asp. M. C. 63.

Held, that substituted service on the master was effectual and proper. *Ib.*

Application to Chancery to restrain Sailing by Minority Owner.]—The court of chancery will not restrain a ship from sailing on the application of the owner of the smaller ascertained share. The court only interferes where the shares are unascertained. The application is too late when the ship is on the point of sailing with emigrants. *Hallaran* v. *Donal*, 9 Ir. Eq. Rep. 217.

The proper application in such case is to the court of admiralty for security. *Ib.*

The defendant, a Spaniard, executed at Santander, in Spain, a mortgage to A. B. of a Spanish vessel, of which he was the master, to secure the repayment by the defendant to A. B., or whoever in future might represent his right, a sum of money and interest; and the mortgage deed contained a proviso that A. B., or whoever might represent him, might exact payment of the loan and interest at any time and in any manner. The plaintiff was the transferee of the mortgage, and the defendant and the vessel being at the port of Q., within the jurisdiction, the plaintiff commenced an action against the defendant to enforce the mortgage, and for an injunction to restrain the defendant from removing the vessel out of the jurisdiction, and duly served the defendant with a copy of the writ. He now moved for an interlocutory injunction to restrain the defendant from removing the vessel out of the jurisdiction until the hearing:—Held, that the court had jurisdiction to grant such an injunction, and it was granted accordingly. *Clavering* v. *Aguire*, 5 L. R., Ir. 97.

Certain persons entered into an agreement in writing for forming themselves into a company, one of their rules being to manage the affairs by a committee, but no time being fixed for the duration of the company. Four of the members took upon themselves the exclusive management of a ship, the property of the company, and were about to send her on a voyage disapproved of by some of the members, whereupon the latter filed a bill to restrain the four from proceeding otherwise than under the direction of the committee, and to obtain delivery up of books, &c. A demurrer for want of equity was allowed. *Miles* v. *Thomas*, 9 Sim. 606.

Ship taken Possession of by Minority Owners and Lost.]—A ship was forcibly taken possession of by a minority of the part owners, and sent on a voyage on which she was lost:—Held, that trover could not be maintained and damages for her loss recovered. *Knight* v. *Coates*, 1 L. R., Ir. 53. Following *Barnadiston* v. *Chapman*, cited, 4 East, 121; Bul. N. P. 34.

Action by Part Owner against Co-Owner—Sending Ship to Sea.]—An action does not lie at the suit of one part owner against another for sending the ship on a voyage without the plaintiff's assent, whereby the plaintiff lost his share. *Graves* v. *Sawcer*, 1 Lev. 29; 1 Keb. 38; Sir T. Raymond, 15.

And see tit. XXVI. ADMIRALTY LAW AND PRACTICE, 16. RESTRAINT, infra.

Dissenting Part Owners—Sharing Profits.—A part owner of a ship, which had been let to the East India Company for a voyage to India, after the other part owner had expended a large sum

in repairing and fitting it out for the voyage, arrested the ship by process out of the admiralty court, and compelled the other part owner to give security for his share; the ship afterwards sailed to India and returned home:—Held, that the part owner who had taken the security was not entitled to any share of the profits of the voyage, but was bound to pay his portion of the repairs and outfit. *Davis* v. *Johnston*, 4 Sim. 539.

A dissenting part owner who takes security in admiralty for the return of the ship is not entitled to share in her earnings. *Anon.*, Ca. in Ch., pt. 2, 36. And see *Anon.*, Skinner, 230, infra.

—— **Bearing Loss.**]—If the ship is lost, a part owner who does not dissent from the voyage bears his share of the loss. *The Vindobala*, 13 P. D. 42; supra, col. 47. Aliter, if he expressly dissents, *Horn* v. *Gilpin*, infra.

One part owner of a ship freighted against the express dissent of the other: the ship and cargo are lost; the loss falls wholly on the partner who freighted. *Horn* v. *Gilpin*, Ambl. 255. N. B., *Strelly* v. *Winson*, infra, is wrongly reported.

A., one of three part owners of a ship, refuses to navigate; B. and C., the other two, navigate without his consent, and ship is lost in the voyage. A. shall bear his proportion of the loss, for he would have been entitled to an account of the profits. *Strelly* v. *Winson*, 1 Vern. 297; Skinner, 230.

If a dissenting part owner does not expressly prohibit the voyage, he shall have an account of the profits; if the ship is lost, he shall not be answered his part. *Anon.*, Skinner, 230.

3. MANAGING OWNER AND SHIP'S HUSBAND.

Authority of Managing Owner to Bind other Owners for Ship's Necessaries.]—W. was the registered owner of certain shares in a ship, and had been entered on the register as managing owner. The defendant subsequently became the registered owner of other shares in the ship. The defendant was not aware in fact that W. was so registered as managing owner. W. sent the ship on a voyage without the defendant's knowledge, and contrary to the terms of an agreement made between them. The defendant did not participate in the adventure, and had previously informed W. that he did not intend to navigate the ship or take any part in her management. The plaintiffs supplied necessaries for the ship previous to such voyage, upon the order of W., without the knowledge or consent of the defendant. The plaintiffs, before supplying the goods, consulted the register, and found the defendant's name entered therein as part owner of the ship:—Held, that the fact that the defendant had allowed the entry on the register describing W. as managing owner to remain unaltered did not per se amount to a holding out of W. as his agent, so as to render the defendant liable for the necessaries supplied by the plaintiffs, and that inasmuch as W. had not in fact authority to bind the defendant, the plaintiffs could not recover against the defendant for such necessaries. *Frazer* v. *Cuthbertson*, 50 L. J., Q. B. 277; 6 Q. B. D. 93; 29 W. R. 396.

If a person who supplies stores to a ship, of which there are several owners, takes in payment the bill of the ship's husband (a part owner) only, and settles with him alone, he discharges the other owners, particularly if the bill is renewed. *Reed* v. *White*, 5 Esp. 122.

Necessaries were furnished to a ship on the order of the ship's husband (himself a part owner), by whom alone the ship was managed;—Held, that the co-owners were liable, although part of the supplies had been paid for by bills drawn by the ship's husband upon the brokers of the ship; and on the bankruptcy of the latter, the plaintiff had proved against their estate for the balance. *Whitwell* v. *Perrin*, 4 C. B. (N.S.) 412.

Necessaries supplied to foreign ship in England on order of part owner do not create a maritime lien. See *The Heinrich Bjorn*, post. tit. XXVI. ADMIRALTY LAW AND PRACTICE, col. 966.

—— **Recovery from Part Owners.**]—A part owner of a ship is not necessarily a partner; therefore a part owner, who, as a ship's husband, incurs the expense of the outfits, may sue the other part owners separately for their respective shares of the expense. *Helme* v. *Smith*, 7 Bing. 709; 5 M. & P. 744; 9 L. J. (O.S.) C. P. 206.

One of several co-owners who acts as ship's husband, is only entitled to charge the cost price of supplies to the ship furnished by him in the course of his business. *Ritchie* v. *Couper*, 28 Beav. 344.

In an action against one of the owners for work done to a vessel by the order of the ship's husband, such owner will be liable, unless it is shewn that the dealing was, that the person who directed the work to be done should be looked to exclusively. *Thompson* v. *Finden*, 4 Car. & P. 158.

Releasing Ship from Arrest.]—A managing owner has power to release a vessel from arrest under an order of the court of admiralty, in order that she may prosecute her voyage and earn freight; and he is not bound to do this at his own expense, but may release the ship according to the rules of the court, by procuring bail for damages and costs. *Barker* v. *Highley*, 15 C. B. (N.S.) 27; 32 L. J., C. P. 270; 10 Jur. (N.S.) 391; 9 L. T. 228; 11 W. R. 968.

Master Suing in his own Name.]—Where the master is part owner, but has the entire control and management of the ship, paying to his co-owner a third of the net profits, he is competent to sue in his own name. *Cawthron* v. *Trickett*, 15 C. B. (N.S.) 754; 33 L. J., C. P. 182; 9 L. T. 609; 12 W. R. 311.

Repairs.—Authority to pledge Credit of Co-owners—Underwriters liable for Damage.]—A managing owner, who has been deputed by his co-owners to employ a vessel for their benefit, in such trades as he may from time to time think fit, has authority to give orders for the repair, fitting and outfit necessary for such employment. *The Huntsman*, [1894] P. 214; 6 R. 698; 70 L. T. 386; 7 Asp. M. C. 431.

If the ship is damaged, a person repairing her may do so on the credit of the owners, by the orders of the managing owner, although there is reason to believe that the ship is insured, and that the underwriters are liable for the damage. *Ib.*

Aliter, where the repairs are not of necessity, see *Chappell* v. *Bray*, infra, col. 66. *And see further*, as to power of managing owner to order. *Steele* v. *Dixon*, infra, col. 62.

Ship's Husband—Duty to Account—Interest—Proceeds of Prizes.]—Owners of a privateer acting for themselves and crew in the sale of prizes, having neglected to render accounts and delayed distribution of proceeds, charged with interest on balances and costs. *Pearse* v. *Green*, 1 Jac. & Walk. 135; 20 R. R. 258.

Right to Advances out of Freight.]—The right of a ship's husband to be repaid out of the freight for advances made on account of the ship is a right of lien or retainer and not in the nature of a charge on the freight; and therefore if he is removed from his office by the owners before he is in a position to receive the freight, an assignee of his interest in the freight cannot maintain a claim to it as against the owners. *Beynon* v. *Godden*, 48 L. J., Ex. 80; 3 Ex. D. 263; 39 L. T. 82; 26 W. R. 672; 4 Asp. M. C. 10—C. A.

Appointment of Agent by.]—A. and B., joint part owners of a ship, intrusted the management to C., their co-part owner, as ship's husband; C. employed D. as his agent to raise and pay money in respect of the ship, and also for his general affairs. The ship was chartered by the East India Company, earning freight for them, which D. received, upon giving receipts signed (as required by the rules of the company) by one other part owner, in addition to C., the ship's husband. D., who knew that C. was only part owner, but was never controlled by the others, placed the amount of freights received to the account of C., as ship's owner, and kept a distinct general account with him. C. died insolvent:—Held, that A. and B. could not sue D. for the balance due from him on the ship's account, because there was no privity of contract between them; D.'s responsibility was to the executors. *Sims* v. *Britten* or *Brittain*, 1 N. & M. 594; 4 B. & Ad. 375. See *Walshe* v. *Provan*, post, col. 389.

Assignment of Freight to secure Private Debt.]—S. & Co. were owners of seven-eighths of an American vessel and ship's husbands. T. was owner of the remaining eighth, and was captain of the vessel, which was dispatched on a voyage to Liverpool. Before the voyage S. & Co. spent a large sum in repairs, and for the purpose of taking up bills which they had accepted on account of the repairs, they borrowed a sum of money from the plaintiffs, and assigned the freight to them by way of security. On the arrival of the vessel in Liverpool the plaintiffs obtained an injunction to prevent T. from receiving the freight:—Held, that a part owner, who is ship's husband, has not the right, as against other part owners, of making an assignment of the whole freight to secure moneys advanced to him; that the legal right to receive the freight was in the captain, and that, in the absence of any sufficient allegation and proof that he was about to misapply it, the injunction ought not to have been granted. *Guion* v. *Trash*, 1 De G., F. & J. 373; 29 L. J., Ch. 337; 6 Jur. (N.S.) 185; 1 L. T. 469; 8 W. R. 266.

Action for not Accounting.]—Part owners of a ship having agreed, "each and every of them with the others and each and every of the others," that the ship should proceed on a certain voyage under the exclusive management and control of one of them as ship's husband; and that after her return, "a full account should be made of the ship and her concerns," and the net profits be divided in proportion after deducting all charges; the duty of making out such account is cast upon the ship's husband; and for not doing so, and not dividing the net profits, after deducting all charges, within a reasonable time after the ship's return, an action lies against him upon the agreement by each of the part owners; though it is not averred in terms that the charges were or could have been ascertained before the account brought, for that is matter of defence. *Owston* v. *Ogle*, 13 East, 538; 12 R. R. 426.

When an action is brought in rem against a ship by the owners of certain shares therein, claiming possession and an account against the managing owner, and the latter makes default in appearing, the court will order such managing owner to be joined as defendant, so that his accounts may be investigated, and will give possession to the plaintiffs if they hold a majority of shares; but will not order, before the reference, a sale of the defendant's shares to satisfy the plaintiffs' costs and any sum found due at the reference. *The Native Pearl*, 37 L. T. 542; 3 Asp. M. C. 515.

Authority to pledge Owner's Credit for Costs of Action.]—A ship's husband has no authority to pledge his owner's credit for the expenses of a law suit. *Campbell* v. *Stein*, 6 Dow, 116.

May deduct Expenses from gross Freight.]—A ship's husband, who had advanced for outfits and disbursements of the ship sums considerably exceeding the money received under the charterparty at the commencement of the voyage, had, before the freight was delivered, obtained a loan by deposit of the charterparty to relieve himself from his advances on account of the ship. Motion by one of the part owners to restrain the ship's husband from receiving or dealing with the freight refused with costs, the ship's husband being entitled to receive the freight and deduct his disbursements, and his conduct not having been so improper as to justify the restraint of this right. *Harris* v. *Reynolds*, 4 W. R. 278.

Managing Part Owners—Right to sue for Supplies furnished.]—Some of the joint owners of a ship, acting as managers on behalf of the owners generally, furnishing supplies for the voyage, are entitled to sue for an account of the transactions between themselves and the other owners. *Vanner* v. *Frost*, 39 L. J., Ch. 626.

Cost Price only.]—One of several co-owners of a ship, who acts as ship's husband, is only entitled to charge the cost price of supplies to the ship furnished by him in the course of his business. *Ritchie* v. *Couper*, 28 Beav. 344.

As Charterers.]—The plaintiffs (who were part owners of the ship), having founded their title to relief on their rights as charterers, and stated that they were managing owners, not for the purpose of relief as managing owners, but in order to protect their rights as charterers, are not entitled to an injunction founded merely on their right as managing owners, but can only be so on the foundation of their rights as charterers. *Lidgett* v. *Williams*, 4 Hare, 464; 14 L. J., Ch. 459.

Retracting Authority of.]—Per Lord Esher, M.R.:—The managing owner of a ship is the

agent of each co-owner separately, and each co-owner may retract his authority to the managing owner without consulting the other co-owners. *The Vindobala*, supra, col. 47.

Duty to Account—Co-ownership Action.]—It is the duty of a managing owner to account to his co-owners for the ship's earnings and disbursements within a reasonable time, but what is a reasonable time must depend upon the circumstances of each case. There is no fixed rule that a ship's accounts are to be ready before she sails on her next voyage. *The Mount Vernon*, 64 L. T. 148 ; 7 Asp. M. C. 32.

Powers and Duties of.]—Powers and duties of the managing owners of a ship, as between themselves and the other part owners. *Darby* v. *Baines*, 9 Hare, 369 ; 21 L. J., Ch. 801.

Construction of an agreement, entered into by the part owners of a ship, with regard to the management of the ship, and the allowance for brokerage and commission. *Ib.*

Account with Banker.]—The managing owner of a ship chartered by the East India Company receives the warrants for the freight, and pays them into a banker's in his own name, drawing cheques from time to time for various sums out of the proceeds, part of which are applied for the use of the ship, and part for other purposes :—Held, that the other part owners have no lien on this fund in the hands of the bankers, nor any claim against the bankers as their debtors. *Gribble, Ex parte*, 3 Deac. & C. 339.

Cancelling Charterparty.]—A ship's husband, as such, has no authority to bind the shipowner to pay money to the charterer in consideration of the cancellation of the charterparty. *Thomas* v. *Lewis* or *Oxley*, 48 L. J., Ex. 7 ; 4 Ex. D. 18 ; 39 L. T. 669 ; 27 W. R. 111 ; 4 Asp. M. C. 51.

Mortgage of Warrant for Freight.]—Where A., as the managing owner of a vessel, was permitted by the other owners to have possession of two warrants or orders of the East India Company to pay to the owners or bearer the sum of money therein mentioned, for freight, and A. deposited those warrants in the hands of his bankers, and they received the money due on them, and gave him credit for it on account :—Held, in an action brought after A.'s death by the surviving part owners against the bankers, that on proof of these facts they could not recover the money, because it was not shown that the loan was upon their account, for the fact of the warrants being the property of all the part owners when placed in the banker's hands, was, upon the evidence, consistent with the supposition that the loan of the proceeds to the bankers was A.'s loan. *Sims* v. *Bond*, 2 N. & M. 608 ; 5 B. & Ad. 389.

Payment to—Misapplication—Rights of Owner paying.]—Where a part owner of a ship pays to the managing owner his contribution due upon the ship's accounts as agreed between the co-owners, the managing owner receives such contribution as agent for all the owners ; and in the event of the managing owner misapplying such payment to his own use, and not paying the ship's accounts therewith, the contributing owner is entitled to be credited with the amount so paid, but all the owners, including himself, must make good the defalcations in proportion to their shares. *The Ida*, 55 L. T. 59 ; 6 Asp. M. C. 21. See also *The Dora Tully*, post, col. 95.

Co-ownership Action—Accounts of Managing Owner.]—See *The Charles Jackson*, *Gowen* v. *Sprott*, post, col. 959.

Claim against Managing Owner—Statute of Limitations—Opening Account.]—See *The Pongola*, 73 L. T. 512, supra, col. 51.

Right to Commission.]—The managing owner of a ship is competent to appoint himself to act as broker to the ship in collecting and distributing the freight, there being no incompatibility between those services (as, semble, there would be between the services of a ship's chandler or a ship's carpenter) and his fiduciary character as managing owner. *Smith* v. *Lay*, 3 K. & J. 105.

But, before allowing him a commission in respect of the services in question, the court directed an inquiry whether, according to the custom of shipowners or otherwise, he, being managing owner, was entitled to any and what commission in respect of duties performed by him, and which duties are ordinarily performed by shipbrokers. *Ib.*

A part owner being the manager of a ship, is entitled to remuneration for his services, but there is no fixed rate applicable. *The Meredith*, or *White* v. *Ditchfield*, 10 P. D. 69 ; 52 L. T. 520 ; 5 Asp. M. C. 400.

The procuring of charters and freights is one of the ordinary duties incidental to the position of a managing owner of a ship ; and in the absence of a special contract he is not entitled to retain, as against the ship, commissions on the charters or freights procured, whether he is acting as shipbroker himself or employing other brokers. *Williamson* v. *Hine*, 60 L. J., Ch. 123 ; [1891] 1 Ch. D. 390 ; 63 L. T. 682 ; 39 W. R. 239 ; 6 Asp. M. C. 559.

A part owner acted as ship's husband without agreement for commission ; his predecessor had acted in the same way, and had received commission :—Held, entitled to reasonable remuneration. *Salter* v. *Adey*, 24 L. T. 229 ; 1 Jur. (N.S.) 930.

The directors of a company owning vessels cannot authorise one of themselves to act as husband of one of the vessels, and to receive the usual remuneration of a ship's husband. *Benson* v. *Heathorn*, 1 Y. & Coll. C. C. 326.

In the absence of an agreement, semble, a part owner acting as ship's husband is not entitled to charge commission. *Miller* v. *Mackay*, 34 Beav. 295 ; see also *S. C.*, 31 Beav. 77.

Ship's Husband—Commissions not accounted for—Right of a single Part Owner to sue.]—A single part owner may sue the ship's husband for an account of rebates of commissions allowed to him by brokers. *Manners* v. *Raeburn*, 10 Ct. of Sess. Cas. (4th ser.) 899.

Commission retained—Concealment.]—A., B. and C. being joint owners in a vessel, it was agreed that A. should act as the ship's husband and broker, and be entitled to commission on "gross freight" ; and in case of gross negligence or fraud on the part of A., that B. and C. might put an end to the agreement by notice and purchase of A.'s shares. A. effected a charterparty of the vessel, the charterer paying all expenses, and 130*l.* per week for the ship, and 4*l.* a week to

A., who, in the accounts he rendered to B. and C., represented the amount paid as 130*l.* a week only :—Held, that the concealment of the receipt of the 4*l.* a week was such a fraud on B. and C. that it entitled them to put an end to the agreement; that the fraud could not be justified on the ground that, had the charterparty been effected on the usual terms of the owners of the vessel paying the usual expenses of the ship, A. could have been entitled to as large a sum by way of commission on gross freight. *Brenan* v. *Preston*, 2 W. R. 138.

Semble, that B., having once signed the notice to put an end to the agreement, could not afterwards withdraw. *Ib.*

Charges given by—Right of Co-owners—Mortgagee.]—See *The Faust*, post, col. 182.

Authority of Master to Bind.] — *See* V. MASTER, post, cols. 83, seq.

Duty as to Cargo on Failure of Consignee to take Delivery.]—See *The Clan Macdonald*, post, col. 539.

Right to Sell Ship.]—*See* VIII. SALE AND TRANSFER.

4. LIABILITY ON CONTRACT.

a. Necessaries and Repairs.

Authority of Master to Bind.] — Whoever supplies a ship with necessaries has a treble security: 1, the person of the master; 2, the specific ship; and 3, the personal security of the owners. *Rich* v. *Coe*, 2 Cowp. 639; 1 Term Rep. 108, n. S. P., *Bland, Ex parte*, 2 Rose, 91; aliter later cases, *Allport* v. *Thomas*, Gilb. 227.

Contract by master for necessary goods supplied to the ship binds the owner; decree against part owners pro ratâ. *Speerman* v. *Degrave*, 2 Vern. 643; *Cary* v. *White*, 5 Brown, P. C. 323; 1 Abr. Eq. Ca. 722.

The plaintiff proved that he supplied goods, and did work to fit out the ship "Progress" then in London, in dock; that the orders were given by T., who appeared in the register as master, and that the defendant appeared on the register as owner. Some evidence was given, from which it might be inferred that T. was appointed by the defendant. The defendant proved that he had agreed to sell the ship to G.; that T. was appointed master by G., and gave the orders for G., and that the defendant afterwards resumed possession of the vessel. The judge directed the jury, that if T. acted as master with the defendant's privity and consent, and the goods were bonâ fide supplied on the credit of the owner, the defendant was liable, and that, though the defendant's evidence was believed, he was not conclusively entitled to a verdict:—Held, that the defendant was not liable for the goods ordered by T. unless he had sanctioned his appearing to be his captain, acting for him, and the goods were supplied on the faith of T.'s being so, and, consequently, that the direction was wrong. *Mitcheson* v. *Oliver*, 5 El. & Bl. 419; 25 L. J., Q. B. 39; 1 Jur. (N.S.) 900—Ex. Ch.

The liability of an owner to pay for repairs and equipments ordered by the master depends, not upon the ground of ownership of the vessel, but upon the ground of a contract made with the vendor by a person who was the owner's agent for the purpose of ordering such necessaries. *The Great Eastern*, L. R. 2 A. & E. 88; 17 L. T. 667.

The master's contract cannot bind the owner, unless authority to bind the owner has been actually given to him; or unless the owner has, by word or deed, held out the master as his master, and thereby induced the vendor to supply the necessaries upon the credit of the owner. *Ib.*

The master, both at home and abroad, has authority to bind the owners for repairs or stores ordered by him which are necessary for the equipment and navigation of the ship in the voyage or trade in which the owners employ her. *Frost* v. *Oliver*, 1 El. & Bl. 301; 1 C. L. R. 1003; 22 L. J., Q. B. 353; 18 Jur. 166.

Goods supplied on Order of Ship's Husband.]—Owners are liable for necessaries supplied to the ship upon the order of the ship's husband. *Tolson* v. *Hallett*, Ambl. 270.

Repairs—Power of Managing Owner.]—Where a vessel is in a home port and the owners accessible, the managing owner cannot, without authority, bind his co-owners for extensive structural repairs. *Steele* v. *Dixon*, 3 Ct. of Sess. Cas. (4th ser.) 1003.

Liability of Owner and Master.]—The repairer of a ship has his election to sue the master or the owner; but if he undertakes on a special promise from either, the other is discharged. *Garnham* v. *Bennett*, 2 Str. 816; *Hoskins* v. *Slayton*, Cas. t. Hard. 376.

Order for Repairs by one not Owner.]—A person who gives the order for repairs may be liable though he is not the owner. *Tibbald* v. *Wood*, 1 F. & F. 287.

Goods supplied on Master's Order at Home Port.] — The master has authority by law to pledge the credit of his owner, resident in England, for money advanced to the master in an English port where the owner has no agent, if such advance of money was necessary for the prosecution of the voyage; and whether it was so or not is a question for the jury. *Arthur* v. *Barton*, 6 M. & W. 138; 9 L. J., Ex. 187.

Where clothes have been supplied to a ship's crew on the orders of the master, in a port within a day's post of the residence of the owners of the vessel, and an undertaking to pay given by the master, the value of the goods cannot be recovered from the owners. *Curran* v. *Wood*, 15 L. T. 592.

In an action against an owner to recover money advanced to the captain for the use of the ship whilst in a home port:—Held, that the only question for the jury was, whether the captain's position was such as to constitute him the authorised agent of the owner, in order to procure such advances; and that the state of the accounts between the captain and the owner at the time had nothing to do with the case. *Williamson* v. *Page*, 1 Car. & K. 581.

In a home port, as well as a foreign one, the master has implied authority to borrow money on the owner's credit in case of necessity. *Stonehouse* v. *Grant*, 2 Q. B. 431, n.

But the master had no implied authority to pledge the owner's credit in respect of necessary supplies and advances for the use of the ship during several weeks while she lay at Newport,

Monmouthshire; the owner during all that time having resided at Plymouth, and nothing appearing to have prevented communication, if desired, between the master and owner. *Ib.*

In a home port, the master has the implied authority to borrow money for the necessary use of the ship, if the owner is absent, and no communication with him can be had without great prejudice and delay. *Johns* v. *Simons*, 2 Q. B. 425.

A vessel having been a fortnight wind-bound at Newport, her owner residing at Exeter, one day's post from Newport, the master borrowed 5*l.* from a broker, in order to enable him to purchase provisions necessary for the use of the ship:—Held, that the jury was justified in inferring that there was such a reasonable necessity for borrowing the money as to render the owner liable for it, though there was no proof that the goods might not have been obtained by the master on credit. *Edwards* v. *Havill*, 14 C. B. 107; 2 C. L. R. 1343; 23 L. J., C. P. 8; 17 Jur. 1103; 2 W. R. 12.

A shipowner (in England) is liable for money advanced to the master at his request, for the necessary use of the ship after her arrival in an English port, nor is the consent of the owner necessary to establish his responsibility. *Robinson* v. *Lyall*, 7 Price, 592.

Abroad.]—An owner of a vessel is liable for money supplied to the captain in a foreign port, provided the supply is absolutely necessary for the use of the vessel. *Rocher* v. *Busher*, 1 Stark. 27; 18 R. R. 742.

The plaintiff must shew that it was necessary to borrow the money, and must prove the actual application of it. *Bogle* v. *Atty*, Gow, 50.

It is not sufficient to prove the advance of a much larger sum than was necessary for the use of the ship, and an application of part of that sum to such uses, and that the residue was placed to the private account of the captain. *Palmer* v. *Gooch*, 2 Stark. 428.

A shipowner is not only liable for necessary repairs done to a ship by the master's order, but for such as are fit and proper for the vessel on her voyage, and such as a prudent owner, if present himself, would order. *Webster* v. *Seekamp*, 4 B. & Ald. 352; 23 R. R. 307.

An owner is not liable for money advanced to the master, and expended by him in the necessary use of the ship, unless the money is advanced expressly for that purpose. *Thacker* v. *Moates*, 1 M. & Rob. 79.

The master drew bills on his owners for disbursements at a foreign port by charterer's agent, which were dishonoured. The disbursements were not necessary:—Held, that the owners were not liable for exchange and re-exchange. *Strickland* v. *Neilson*, 7 Ct. of Sess. Cas. (3rd ser.) 400.

Liability of intended Transferee of Ship—Agreement to accept Bills of Owner for Repairs.]—A shipowner being indebted to his agent transferred the ship to the agent under an agreement that the agent should accept the shipowner's draft for the amount of repairs to the ship owing to the shipwright. The agreement was not communicated to the shipwright. The shipowner became bankrupt without having drawn upon the agent:—Held, that the shipwright could not recover for the amount of repairs against the agent. *Rattenbury* v. *Fenton*, 3 My. & K. 505; 3 L. J., Ch. 203.

Onus of Proof.]—In an action against a shipowner for goods supplied and money lent to the master at a foreign port, the onus is on the plaintiff to prove that the goods and money supplied were necessaries. *Mackintosh* v. *Mitcheson*, 4 Ex. 175; 18 L. J., Ex. 385.

The presumption that repairs to the ship ordered by the master are under an implied authority from the owner may be rebutted by circumstances, as where the master promises to pay cash and no mention is made of the owner. *Gordon* v. *Hare*, 1 L. J. (O.S.) K. B. 70.

Evidence of Ownership—Register.]—The defendant living at Yarmouth was one of the registered owners of a ship at Yarmouth. The plaintiff at the order of the master, through the direction of P., who had been ship's husband, supplied necessaries to the ship for her voyage. It did not appear whether P. was a registered co-owner, or whether he acted as ship's husband with the assent of the defendant. In an action by the plaintiff against the defendant for the price of the necessaries, the plaintiff was nonsuited. There was evidence that the defendant had been on board, and had made inquiries as to repairs which were being done to the ship:—Held, that there must be a new trial. *Burton* v. *Burton*, 1 L. T. 552.

The defendant in an action for goods supplied to a ship is not liable where, although on the register as part owner, he never was a part owner; although in order to clear the title after the supply of the goods, he executed a bill of sale containing a covenant for title. *Rands* v. *Thomas*, 5 M. & S. 244. S. P., *Rex* v. *Teal*, 11 East, 307; 10 R. R. 516.

In an action against A. for the costs of repairs ordered by the master it was proved that he said he was the largest part owner; that the repairs were necessary; that credit was given to the master only; and that the defendant was the sole registered owner. Verdict for the plaintiff; but new trial ordered on the ground that there was no evidence to go to the jury. *Pearson* v. *Nell*, 12 L. T. 607; 13 W. R. 967.

And see III. REGISTRATION, ante; *and Cases*, ante, col. 40.

Liability for Disbursements—Coals—Charter-party.]—See *The Durham City*, post, col. 249.

Ship transferred at Sea—Liability of Transferee on Contracts of Master.]—The liability of the owner for acts of the master arises solely from the relation of principal and agent; and in order to make a person liable, such relation must be shewn, either expressedly or impliedly, to exist between him and the master. *Myers* v. *Willis*, 18 C. B. 886; 25 L. J., C. P. 255; 4 W. R. 637—Ex. Ch.

The owner of a ship, which was then at sea, transferred it to the defendant by absolute bill of sale, and the transfer was duly registered. The bill of sale was in fact intended only as a collateral security for a loan, and the defendant in no way interfered with the ship. While abroad the master entered into contracts (which were within his general authority) with the plaintiff, neither party being aware of the transfer to the defendant:—Held, that he was not liable on these contracts, as there was no evidence of authority from him to the master to act as his agent. *Ib.*

Sale of Ship—Goods supplied before Sale completed.]—See *An Arranging Trader, In re*, 1 Ir. Rep. Eq. 216, infra, col. 68.

Where Covenant by Master to Repair.]—Though the master of a vessel is also lessee of it, by agreement with the owners, for a term of years, under a covenant on their part that he shall have the sole management of the ship, and employ her for his own sole benefit, and on his part that he shall repair her at his own sole cost and charge, the owners are still liable for necessaries furnished for the ship by order of the master, though without the knowledge, or without their being known to the person supplying them. *Rich* v. *Coe*, Cowp. 636; 1 Term Rep. 168, n.

The registered owners of a steam-boat let it to A., the captain, for one year; the boat to be repaired by A., the engines to be repaired by the owners, who were to appoint an engineer:—Held that the owners were not liable for repairs ordered by A., unconnected with the engine. *Ib.*

The registered owner is not liable for articles furnished without his order for the repair of a vessel, chartered for a year, by a party who has undertaken to repair the ship during that term. *Reeve* v. *Davis*, 3 N. & M. 873; 1 A. & E. 312.

Nor, when there is no charterparty unless the goods were ordered by the agent of the owner, or were beneficial to him. *Ib.*

Ship demised—Owner not liable.]—The registered owner of a ship having chartered her to the then captain at a rent for a certain number of voyages, is not liable for stores furnished to the ship by order of the charterer, during the charterparty. *Frazer* v. *Marsh*, 13 East, 238; 2 Camp. 517; 12 R. R. 336. See *Baumwoll Manufactur Von Carl Scheibler* v. *Furness*, post, col. 297.

Where Express Stipulation in Charterparty.]—Where A., charterer of a vessel, by the charterparty, agreed that, on the arrival of the ship at the outward port, he would, through his agent there, supply cash to the master for the disbursement of the vessel, to be repaid by bills to be drawn by the master on the owner; and on the arrival of the vessel there, the agent supplied goods for the use of the crew, and paid certain money demands made on the master, but did not advance any actual cash:—Held, that although it was not shewn that any bills were drawn by the master for the amount, A. might recover it from the owner in an action for goods sold and delivered and for money paid, the master having authority to obtain supplies of goods and money for the necessary use of the ship on the credit of the owner, independently of the express stipulation of the charterparty. *Weston* v. *Wright*, 7 M. & W. 396; 10 L. J., Ex. 329.

A chartered ship at her outward port being in want of money for her necessary disbursements, a merchant there being shewn the charterparty, by which the freighter covenanted to furnish what money might be required for the necessary disbursements of the ship, advanced the requisite sum to the master, and took a bill of exchange drawn by him for the amount upon the freighter:—Held, that, on this bill being dishonoured by the freighter, the owner of the ship was not liable for any part of the money advanced. *Harber* v. *Brotherstone*, 4 Camp. 254. *See also cases*, post, cols. 293, 411.

Where Solvent Agents Appointed.]—The master of a ship has no power to pledge the owner's credit for requisite supplies to her in a foreign port at which a solvent agent for her has been appointed; and a ship chandler who, in ignorance of there being an agent at the port, furnishes goods or advances money for the ship's use upon an order given by the master without the owner's authority, cannot recover the price of the goods or the amount of the loan from the owner, if at the time of supplying the goods or advancing the money he had the means of knowing that an agent able and willing to furnish what was requisite for the ship had been appointed by the owner to act at the foreign port. *Gunn* v. *Roberts*, 43 L. J., C. P. 233; L. R. 9 C. P. 331; 30 L. T. 424; 22 W. R. 652; 2 Asp. M. C. 250.

Abandonment to Underwriters.]—The owner is liable for stores and necessaries supplied by the order of the supercargo, after the detention and liberation of the vessel by a foreign power, although the supplies are afforded after an abandonment by the owner to the underwriters. *Mitchell* v. *Glennie*, 1 Stark. 230; 18 R. R. 765.

Disbursements—Advances for—Bills dishonoured—Liability of Owners and Master.]—Ship-brokers made disbursements for a German ship and took bills for the amount drawn by the master on the owners, which were returned unaccepted. The brokers sued the master in Germany on the bills but failed on a technical plea. They then sued the owners in Scotland on the debt; plea, that by electing to sue the master the brokers were barred from suing the owners:—Held, that not having obtained judgment, the brokers were not barred. *Meier* v. *Küchenmeister*, 8 Ct. of Sess. Ca. (4th ser.) 642.

Owners' Liability—Bond on Freight—Master.]—It was agreed by charterparty that disbursements at the port of loading should be advanced by charterers' agents on account of freight. The agents refused to make the advances without a bond on the ship. The master gave an obligation on the freight:—Held, that the master had power to give such obligation, and that the shipowners were liable to the charterers' agents for their advances. *Brun* v. *Porret*, 6 Ct. of Sess. Cas. (3rd ser.) 577.

Bill drawn by Master on Owner for Advances—Advance Freight.]—See *North Western Bank* v. *Bjornstrom*, XIII. FREIGHT, post, col. 413.

See also as to liability of owners for necessaries, XXVI. ADMIRALITY LAW AND PRACTICE, 19. NECESSARIES, post, cols. 960, seq.

b. Liability of Part Owners.

An express authority is necessary from a part owner to the ship's husband to order works not necessary as repairs; but such authority once given cannot be revoked after it has been acted upon, and it is for the part owner, when sued for contribution, to prove that it was revoked before the works were commenced, or a contract for them entered into. *Chappell* v. *Bray*, 6 H. & N. 145; 30 L. J., Ex. 24; 3 L. T. 278; 9 W. R. 17.

A. and B. being joint owners of a ship, A. conveyed his moiety to B.; but in the bill of sale the certificate of registry was not truly recited; B. took possession, and afterwards mortgaged the whole ship to A., who did not take possession;

Injury to Diver.]—Where a diver, while employed in diving in a navigable river within the body of a county, was injured by the paddle-wheel of a steamship, and instituted a cause of damage against the steamship in the court of admiralty for the recovery of damages in respect of the personal injuries he sustained:—Held, that the 24 Vict. c. 10, s. 7, gave the court of admiralty jurisdiction. *The Sylph*, 37 L. J., Adm. 14; L. R. 2 A. & E. 24; 17 L. T. 519.

Obstruction to Navigable Creek.]—The defendant with his barges obstructed a public navigable creek, whereby the plaintiff navigating his barges therein was put to expense in having to unload his goods and carry them over land:—Held, that this was special damage for which the plaintiff could recover in an action on the case. *Rose* v. *Miles*, 4 M. & S. 101; 16 R. R. 405.

Damage to Dolphin.]—A steamship, without negligence, came into contact with a mooring dolphin, which fell over under the pressure:—Held, in admiralty, that the dolphin being erected for the purpose of receiving the pressure of ships in the ordinary course of navigation, the owners of it could not recover. *The Albert Edward*, 44 L. J., Adm. 49; 24 W. R. 179.

Damage by Licensed Watermen in Thames.]—The owner of a barge on the Thames required by law to be navigated by licensed watermen is liable for damage done by her, although the licensed watermen have a monopoly of the navigation. *Martin* v. *Temperley*, 4 Q. B. 298; 3 G. & D. 497; 12 L. J., Q. B. 129; 7 Jur. 150.

Damage by Sunken Ship.]—The owner of a vessel sunk in a public navigable river, so long as he remains in possession is bound to take reasonable precautions that other vessels are not injured by striking on it; and this duty may be transferred with the possession of the sunken ship; on abandonment of the wreck the obligation ceases. *White* v. *Crisp*, 10 Ex. 312; 23 L. J., Ex. 317.

—— **Duty to Buoy.**]—There is no duty in the owner of a ship sunk without his fault to mark her with a buoy. *Brown* v. *Mallett*, 5 C. B. 599.

The owner of a vessel sunk in a navigable channel is bound to place a buoy over it. *Harmond* v. *Pearson*, 1 Camp. 515.

Indictment for Obstruction by.]—An indictment cannot be maintained against the owner of a vessel sunk by accident or misfortune in a navigable river for not removing the wreck. *Rex* v. *Watts*, 2 Esp. 675; 5 R. R. 766.

Damage by Unbuoyed Anchor.]—Declaration for damage done to plaintiffs' ship by defendants' anchor unbuoyed in a river, without shewing how it got there, bad. *Hancock* v. *York, Newcastle and Berwick Ry.*, 10 C. B. 348.

See also, infra, cols. 721, 890, seq., as to sunken ships.

Expense of Raising Wrecks.]—As to liability of owners for expense of raising wrecks, see *The Crystal*, and cases infra, col. 993.

Ship damaged during Arrestment.]—In an issue whether a foreign ship arrested and taken from her anchorage was injured by the negligence of the defenders it is immaterial whether the damage occurred before or after the arrestment. *Peterson* v *M'Llean*, 6 Ct. of Sess. Cas. (3rd ser.) 218.

Damage to Telegraph Cable.]—A ship let go her anchor so as to foul and damage a telegraph cable lying at the bottom of the sea:—Held, that whether the damage was done within or without the three-mile limit from British shores, the action would lie. *Submarine Telegraph Co.* v. *Dickson*, 33 L. J., C. P. 139.

Ship worked by one Part Owner—Liability of the Other.]—A. and S. were part owners of a ship. A. worked the ship, paying all expenses and managing her entirely himself. A. took two thirds of her gross earnings and S. the remaining one third:—Held, that S. was not a partner with A. so as to render him liable for injury to the plaintiff's horses by a piece of timber let fall upon them whilst unloading the ship. *Burnard* v. *Aaron*, 31 L. J., C. P. 334.

Damage by Foreign Ship—Loss of Life.]—Sect. 527 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which gives a remedy in certain cases against the owner of a foreign ship for damage done to a British subject in any part of the world, is confined to damage to property, and does not extend to injury to the person. *Harris* v. *Owners of the Franconia*, 46 L. J., C. P. 363; 2 C. P. D. 173.

Wilful Act of Crew—Liability—Fishing Boat worked "on Deal"—Crew cutting Nets adrift.]—The owner of a fishing boat let out "on deal" held liable for loss of nets of a stranger cut adrift by the crew to save their own. *M'Ghee* v. *Anderson*, 22 Ct. of Sess. Cas. (4th ser.) 274.

Collision—Liability for.]—*See* tit. COLLISION, infra.

Wrongful Arrest—Of Seaman by Master—Liability of Owner—17 & 18 Vict. c. 104, s. 246.]—A shipowner is not liable for a misuse by the master of the power to arrest a deserting seaman under the above enactment. *O'Neil* v. *Rankin*, 11 Ct. of Sess. Cas. (3rd ser.) 538.

—— **Of Passenger.**]—See *Lundie* v. *Maebrayne*, infra, col. 79.

Sea Fisheries Act, 1883, Sched. Art. XIX.—Damage to Long Lines by Trawler.]—The crew of a fishing boat shot their long lines at sea near a buoy round which two trawlers were fishing within a radius of a mile. The crew of the trawler could have seen that the lines were being shot, it being daylight; they trawled over the lines and injured them:—Held, that the trawler was liable, and that she had no exclusive right to the fishing round the buoy. *Mason* v. *Nicholson*, 20 Ct. of Sess. Cas. (4th ser.) 176.

Shipowner and Stevedore joint Wrong-doers—Right to Contribution—Damages.]—The relatives of a man killed by the negligent use of improper tackle in unloading a ship, sued the ship's owner and the stevedore, and got a decree against them jointly and severally for the whole amount of damages and costs. The shipowner paid the whole sum and took an assignment of the decree, and sued the stevedore for contribution. The stevedore refused to pay his moiety

upon the ground that he and the shipowner were joint wrong-doers:—Held, that the stevedore was liable, the foundation of the claim being the civil debt created by the judgment. *Palmer* v. *Wick*, [1894] App. Cas. 318—H. L. (Sc.)

b. Injury to Crew.

See also VI. SEAMEN, infra.

Expense of curing Seaman injured—Shipowner liable—17 & 18 Vict. c. 104, ss. 228, 229.]—Injury received by a seaman by a sea striking the ship and making her a complete wreck is "an injury received in the service of the ship to which he belongs"; and the shipowner is liable for the expense of curing them. *Lord Advocate* v. *Grant*, 1 Ct. of Sess. Cas. (4th ser.) 447; 32 L. T. 287.

Volenti non fit injuria.]—The common law rule that a servant working in the face of known danger cannot claim damages from his master does not apply to seamen on board ship. *Rothwell* v. *Hutchinson*, 13 Ct. of Sess. Cas. (4th ser.) 463.

Shipowner and Stevedore joint Wrong-doers—Contribution.]—See *Palmer* v. *Wick*, supra.

Seaworthiness of Ship—Negligent Use of Appliances.]—*See cases* tit. UNSEAWORTHINESS, infra.

Liability to Seaman for Negligence of Captain.]—The shipowner is not responsible for injury to or death of seaman by the negligence of the master. *Hedley* v. *Pinkney & Sons' Steamship Co.*, 63 L. J., Q. B. 419; [1894] A. C. 222; 70 L. T. 630; 42 W. R. 497; 7 Asp. M. C. 135—H. L. (E.) Not following *Ramsey* v. *Quin*, Ir. Rep. L. R. 10 C. L. 322; infra, col. 726.

Master and Servant—Common Employment—Shipowner and Stevedore—Injury to Seaman.]—Where a stevedore had contracted to discharge a vessel for a lump sum, the fact that the master of the vessel had some control over the discharging held not to make the servants of the stevedore the servants of the shipowner, so as to free the stevedore from liability for injury to one of the seamen by their negligence. *Cameron* v. *Nystrom*, 62 L. J., P. C. 85; [1893] A. C. 308; 1 R. 362; 48 L. T. 772; 7 Asp. M. C. 320—P. C.

Maintenance of Injured Seaman.]—See *Organ* v. *Brodie*, supra, col. 68.

Compulsory Pilot—Injury to—Common Employment.]—See *Smith* v. *Steele*, infra, col. 145.

c. Unseaworthiness—Overloading.

Duty of Shipowner to Crew—"Seaworthy for the Voyage."]—The words "seaworthy for the voyage" in s. 5 of the Merchant Shipping Act, 1876, mean that the ship must be "in a fit state as to repairs, equipment and crew, and in all other respects, to encounter ordinary perils of the voyage." They do not include "a neglect properly to use the appliances on board a vessel well equipped and furnished." *Dixon* v. *Sadler* (5 M. & W. 405) approved. *Hedley* v. *Pinkney & Sons' Steamship Co.*, 63 L. J., Q. B. 419; [1894] A. C. 222; 6 R. 106; 70 L. T. 630; 42 W. R. 497; 7 Asp. M. C. 483—H. L. (E.)

Carriage of Grain—Shifting-boards—Feeders.]—A ship having two decks and loaded with a cargo of barley in bulk at a port in the Mediterranean must, upon the proper construction of s. 4, sub-s. (*c*), of the Merchant Shipping (Carriage of Grain) Act, 1880, and the Board of Trade Regulations of August, 1881, be provided with shifting-boards in the lower hold. By paragraph 4 (*b*) of these regulations—which directs that feeders shall be fitted to feed the grain carried in the between-decks, such feeders to contain not less than 2 per cent. of the compartments they feed—it is intended that the feeders feeding the grain carried in the between-decks shall contain not less than 2 per cent. of the grain in the compartments in the between-decks which they feed, and of the grain in the hold below which is fed by such compartments. *The Rothbury*, 57 L. J., Adm. 99; 13 P. D. 119; 59 L. T. 672; 37 W. R. 158; 6 Asp. M. C. 332.

Timber—Excessive Deck Cargo—Merchant Shipping Act, 1894, s. 451.]—See *Morris* v. *Thormodsen*, 60 J. P. 644, infra, col. 503.

6. LIABILITY AS CARRIER.

a. Apart from Contract.

Contract to carry Goods at Through Rate—Damage by Peril of the Sea.]—The defendant undertook to carry the plaintiff's wool, partly by sea and partly by land, at an agreed through rate per ton including insurance. The insurance was effected by the defendant through his own brokers at an amount per bale which was in accordance with directions given by the plaintiff. There was no bill of lading or any stipulation as to excepted perils of the sea. The wool was damaged by sea-water in the course of the carriage by sea:—Held, that the defendant was liable for the damage sustained, inasmuch as he had undertaken the duty of a common carrier, and had neither expressly nor impliedly limited his liability as a common carrier, and also that he had effected the insurance on the wool, not as agent for the plaintiff, but in order to protect himself against damage to or loss of the wool. *Liver Alkali Co.* v. *Johnson*, infra, followed. *Hill* v. *Scott*, 65 L. J., Q. B. 87; [1895] 2 Q. B. 713; 73 L. T. 458—C. A.

Notice—Liability limited by.]—A shipowner may bind the freighter by notice given that he will not be liable except for the negligence of his servants. *Evans* v. *Soule*, 2 M. & S. 1.

Liability of Shipowner as Common Carrier.]—A barge owner let out his vessels for the conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. He did not ply between any fixed termini, but the customer fixed, in each particular case, the points of arrival and departure. In an action against the barge owner by a hirer for not safely and securely carrying his goods:—Held, that in exercising this employment he had incurred the liability of a common carrier, and was liable though the goods were lost without negligence on his part. *Liver Alkali Co.* v. *Johnson*, 43 L. J., Ex. 216; L. R. 9 Ex. 338; 31 L. T. 95; 2 Asp. M. C. 332—Ex. Ch. See also *Nugent* v. *Smith*, infra.

The barge owner was not a common carrier nor liable as such, but was liable as a shipowner carrying goods for hire upon the custom applicable to him as such. *Ib.*

Hoyman on the Thames.]—A hoyman between London and Milton in Kent held liable upon the custom of the realm and at common law for loss of a passenger's portmanteau. *Rich* v. *Kneeland*, Hob. 17; 2 Cro. 330.

Liability for Theft by Crew.]—The shipowner is liable for cargo lost or embezzled by the negligence of the master. *Boucher* v. *Lawson*, Ca. temp. Hardw. 85; Cun. 241.

The master of a general ship, on board which goods have been laden in the Thames for a foreign port, is liable for the loss of them by robbery in the river. *Barclay* v. *Cuculla y Gama*, 3 Dowl. 389; cited 1 Term Rep. 33, nom. *Barclay* v. *Heygena*.

Liability for Robbery—Custom of Realm.]—Action on the custom of the realm against the master of a ship bound from London to Cadiz for the loss of goods taken from her by robbers whilst lying in the Thames at Stepney:—Held, that the master was liable. *Morse* v. *Slew* or *Slue*, 1 Vent. 190, 238; 2 Keb. 72, 112, 135, 866; Sir T. Raym. 220; 1 Mod. 85.

"In the case of *Morse* v. *Slew*, supra, if the ship had been robbed at sea the master had not been answerable, yet he was chargeable at land"—per Holt, C.J. *Lane* v. *Cotton*, 4 Taunt. 628; 12 Mod. 484.

Damage to Goods by Ship striking an Unbuoyed Wreck.]—Shipowners are liable as carriers for damage to goods in their ship, which was sunk by striking on an anchor of another ship negligently left unbuoyed:—Held, that they could not sue the goods owner for the expenses of recovering the goods. *Trent* (or *Trent and Mersey*) *Navigation* (*Proprietors of*) v. *Wood*, 3 Esp. 127; 3 Dougl. 287.

Pleading—Action on Custom or in Assumpsit.]—Action for negligent carriage of wines by common carrier from Bristol to Gloucester; plea, not guilty; issue found against defendant; in error held that the issue was erroneous, the action being in assumpsit. *Bradley* v. *Benney*, Noy, 114.

Refusal to carry Plaintiff—Action against Shipowners as Common Carriers.]—See *Bennett* v. *Peninsula and Oriental Steamboat Co.*, 6 C. B. 755, infra, col. 78.

Loss by Act of God.]—A mare on board a steamer trading regularly between London and Aberdeen, was injured during bad weather, which caused her to kick and strain herself, without negligence on the part of the ship's crew or owners:—Held, that the shipowner was not liable. *Nugent* v. *Smith*, 45 L. J., C. P. 697; 1 C. P. D. 423; 34 L. T. 827; 24 W. R. 237; 3 Asp. M. C. 198—C. A.

Loss by act of God is loss occasioned by agency of nature not to be prevented by ordinary care. *Ib.*

Semble, carriers by sea are not subject to the liabilities of a common carrier. *Ib.*

—— **Jettison, to save Life.**]—A box of specie was thrown overboard to save life:—Held, that the barge owner was not liable; semble, act of God. *Gravesend Barge Case*, 1 Rolle, 79.

—— **Must be immediate—Striking on Sunken Wreck.**]—The act of God, to excuse a shipowner for loss of the goods, must be immediate. *Smith* v. *Shepherd*, Abbott on Shipping, Ed. 13, p. 459.

The defendant's ship struck on a mast of a sunken ship in the Humber, being on her passage from Selby to Hull, and sank, and the goods were spoiled:—Held, that the shipowner was liable. *Ib.*

—— **Rats.**]—A hoyman carrying goods is insurer against everything except act of God and the king's enemies, and is therefore liable for damage to goods by water let into the ship by a hole eaten by rats. *Dale* v. *Hall*, 1 Wils. 281. See also *Goff* v. *Clinkard*, cited 1 Wils. 282, n. where the carriage was from London to Amsterdam.

—— **Hoyman—Capsizing by Sudden Squall.**]—Hoyman held not liable for upsetting of his hoy by a sudden gust of wind (act of God). *Amies* v. *Stephens*, 1 Str. 127.

—— **Collision between Tug and Craft in Tow.**]—Goods on board a boat in tow of a steamer in the Solent were damaged by reason of the boat in tow being pitched by the sea upon the rudder of the steamer (which had stopped to avoid another), whereby she sprang a leak. The defendants, the owners of the steamer and towboat, were carrying the goods as common carriers:—Held, that the loss was not an act of God, and the defendants were liable. *Oakley* v. *Portsmouth and Ryde Steam Packet Co.*, 11 Ex. 618.

b. Under Contract of Carriage.

Leakage—Notice as to Liability.]—Where carriers by sea received a cask of brandy to carry, on the terms that they should not be liable for any loss or damage arising from any cause whatever during the transit:—Held, that they were not liable, as common carriers, for an injury to the cask. *Phillips* v. *Edwards*, 4 H. & N. 813; 28 L. J., Ex. 52.

Owners of a steam vessel plying between London and Bristol, issued every month handbills of the times of their vessels' sailing, and which contained a notice that they "received goods for shipment on the conditions and agreement only that they are not liable for inward condition, leakage and breakage, and that they would not receive any goods for conveyance by their vessels except upon the terms that they should not be responsible for any loss or damage of or to such goods from any cause whatever during the voyage." On the 8th March, the plaintiffs, who had received these handbills, shipped on board one of the defendants' vessels two casks of brandy to be carried to Falmouth. On the 11th March the shipping broker delivered to the plaintiffs a freight note, at the foot of which was a notice that the defendants did not hold themselves liable for leakage of oils, spirits or other liquids, unless from bad stowage. In the course of the voyage one of the casks of brandy was stayed in and nearly all its contents lost:—Held, that the notice in the handbills constituted the terms of the contract under which the goods were shipped, and that those terms were not qualified by the notice at the foot of the freight note, and, consequently, that the defendants were not responsible. *Ib.*

Loss of Bullion—Covenant for good Behaviour of Master.]—Shipowner held liable for non-delivery of moidores, where ship let to charterer for the voyage, the shipowner having covenanted for the good behaviour of the master. *Parish* v. *Crawford*, 2 Str. 1251.

Railway Company—Notice as to Nonliability—17 & 18 Vict. c. 31.]—A railway company owning and working steamships cannot by notice limit its liability for loss of passengers' luggage, being subject to the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, s. 7, and the Regulation of Railways Act, 1868, 31 & 32 Vict. c. 119, s. 16. *Cohen* v. *S. E. Ry.*, 46 L. J., Ex. 417; 2 Ex. D. 253; 36 L. T. 130; 25 W. R. 475; 3 Asp. M. C. 248—C. A.

A condition in a contract for carriage of animals by steamboats worked or chartered by a railway company that the company should not be liable for negligence of master or crew is unreasonable and void. 17 & 18 Vict. c. 31; 26 & 27 Vict. c. 92, s. 31; 34 & 35 Vict. c. 119, s. 12. *Doolan* v. *Midland Ry.*, 2 App. Cas. 792; 37 L. T. 317; 25 W. R. 882; 3 Asp. M. C. 685.

Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68.]—The Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68, held to apply to a railway company carrying passengers and goods partly by land and partly by sea (from London to Jersey). *Pianciani* v. *L. & S. W. Ry.*, 18 C. B. 226.

Carriage of Goods partly by Land and partly by Sea—Negligence of Crew of Steamship—17 & 18 Vict. c. 31, s. 7; 31 & 32 Vict. c. 119, s. 16—34 & 35 Vict. c. 78, s. 12—Void Condition.]—A railway company contracted to carry goods "through," partly by land and partly by sea. A condition exempting them from liability for negligence of the captain and crew of a steamship, owned and worked by a steamship company who had made arrangements with the railway company for through booking, is no answer to an action for loss of goods caused by the negligence of the crew of the steamship, being unreasonable and void. *Moore* v. *Midland Ry.*, Ir. R. 9 Ch. 20. And see *S. C.*, Ir. R. 8 C. L. 232.

—— **Railway Company and Shipowners Joint Contractors—Carriage of Pigs.**]—A. shipped pigs on a steamship belonging to B. that plied between Cork and Milford, and paid to B. a through freight for the carriage of the pigs to London by the South Wales and Great Western Railways. Over B.'s door was painted "South Wales Railway Office"; also over the adjoining cattle yard. The shipping agents were paid by B., and the signboards were not sanctioned by the railway company; but there was an agreement between B. and the railway company as to dividing the freights:—Held, that the railway company and B. were both liable for breach of contract to carry the pigs; and that the railway company were liable in an action for money had and received for money produced by the sale of carcases of pigs destroyed on the voyage. *Hayes* v. *South Wales Ry.*, 9 Ir. C. L. R. 474.

Landing Goods at Sufferance Wharf.]—See *Barber* v. *Meyerstein*, 39 L. J., C. P. 187; L. R. 4 H. L. 317; 22 L. T. 808; 18 W. R. 1041, infra, col. 535.

Passengers' Luggage.]—*See* infra, XXI. PASSENGER SHIPS, col. 867.

Improper Abandonment—Salvage—Recovery against Shipowner.]—Salvage paid by cargo owner by reason of improper abandonment by master is recoverable against the ship and her owner. *The Princess Royal*, 39 L. J., Adm. 43; L. R. 3 A. & E. 41; 22 L. T. 29.

See also tits. XI. CHARTERPARTY; XII. BILL OF LADING; XXII. ADMIRALTY LAW AND PRACTICE, 20, DAMAGE TO CARGO.

c. Liability to Passengers.

Passengers' Luggage.]—The plaintiff, a passenger in the defendant's ship from New York to Galway, signed a ticket, upon which it was stated that the shipowners would not be accountable for passengers' luggage, unless bills of lading were signed. The ship and luggage were lost by the master's negligence:—Held, the shipowners were not liable. *Wilton* v. *Atlantic Royal Mail Steam Nav. Co.*, 10 C. B. (N.S.) 453; 30 L. J., C. P. 369; 8 Jur. (N.S.) 232; 4 L. T. 706; 9 W. R. 748.

Notice as to Nonliability.]—A passenger took and signed a ticket for Colon by the defendant's steamship, upon which was printed "The company will not be responsible for any loss or damage to luggage in any circumstances." The passenger was put ashore ill and insensible at Jamaica, with his box, which was lost:—Held, that he could recover nothing for the loss. *Thompson* v. *Royal Mail Steam Packet Co.*, 5 Asp. M. C. 190, n.

Delay in Sailing.]—For unreasonable delay in sailing, passengers may recover damages, even in the absence of a fixed time being advertised—per Alderson, B. *Ellis* v. *Thompson*, 3 M. & W. 456; 7 L. J., Ex. 185.

Separate Actions by Passengers—Stay—Insufficient Accommodation.]—Stay of proceedings in seven out of eight actions brought against a shipping company by passengers, for insufficient accommodation on board ship, refused. *Westbrook* v. *Australian Royal Mail Steam Nav. Co.*, 14 C. B. 113.

Refusing to Carry Plaintiff—Common Carrier.]—Declaration against shipowners as common carriers, for refusing to take plaintiff as passenger from Southampton to Gibraltar. Verdict for the plaintiff sustained. *Bennett* v. *Peninsular and Oriental Steamboat Co.*, 6 C. B. 775.

Injury by Negligence of Crew.]—See *Dalyell* v. *Tyrer*, infra, XX. COLLISION—LIABILITY. *Monaghan* v. *Buchanan*, infra, XXI. PASSENGER SHIPS.

Ferry Boat—Negligence in Landing Passengers' Goods.]—The plaintiff's phaeton, containing a case of watches and jewellery, was being landed from the Woodside ferry, at Liverpool, when it overpowered the men who were landing it, ran backwards violently, and the watches and jewellery were injured:—Held, that it was a question for the jury whether there was a contract to land the carriage and contents, and whether the landing had been completed without negligence. *Walker* v. *Jackson*, 10 M. & W. 161; 12 L. J., Ex. 165.

Held, also, that the plaintiff's right of action

was not affected by his not having communicated the fact of the jewellery being in the carriage. *Ib.*

—— **Injury to Horse in Landing.**]—The lessees of a ferry on the Mersey held liable for injury to a horse under the charge of its owner caused by the giving way of a side rail of the gangway or brows used between the ship and the shore. *Willoughby* v. *Horridge*, 12 C. B. 742.

Liability for Arrest of Passenger—Purser.]—A passenger sued a shipowner for an alleged wrongful arrest by the purser:—Held, that the action would lie, the purser having a statutory power to arrest. *Lundie* v. *Macbrayne*, 21 Ct. of Sess. Cas. (4th ser.) 1085.

Passengers forwarded from Wreck.]—See *The Mariposa*, infra, col. 87.

7. Limitation of Liability.

Loss by Fire—26 Geo. 3, c. 86.]—The statute 26 Geo. 3, c. 86, limiting shipowners' liability for loss by fire, did not protect the owners of a "gabbert" (lighter) on board which goods were burnt; the statute applied to seagoing ships only. *Hunter* v. *McGowan*, 1 Bligh, 573.

Master, Part Owner—53 Geo. 3, c. 159.]—In an action against several defendants, shipowners, for loss of goods on board their ship:—Held, under 53 Geo. 3, c. 159, s. 1, that their liability was limited to the value of the ship and freight, although the loss was caused by the fault of one of the defendants, who was master and part-owner; the value of the ship to be taken at the time of the loss; and money paid as advance freight to be included in the item of freight. *Wilson* v. *Dickson*, 2 B. & Ald. 2; 20 R. R. 331.

Ransom Bill.]—Owners were not liable upon a ransom bill beyond the value of ship and freight. *Helly* v. *Grant*, cited 1 Term Rep. 76.

In case of Collision.]—*See* tit. XX. Collision, infra.

8. Offences by.

Certificated Master—Icemaster.]—A whaling ship went to sea with a certificated master and an icemaster, who was in fact in charge of the ship by the owner's orders. The owner was convicted, under 17 & 18 Vict. c. 104, s. 136, for employing a master who had no certificate. Conviction quashed. *Heslop* v. *Cadenhead*, 14 Ct. of Sess. Cas. (4th ser.) 35.

Excessive Deck Load—Timber — Merchant Shipping Act, 1894, s. 451, sub.-s. 3 (*a*).]—See *Morris* v. *Thormodsen*, infra, col. 503.

Grain Cargo — Unseaworthiness.]—See *The Rothwell*, supra, col. 74.

Overloading by Master without Knowledge of Owner—Liability of Owner.]—A shipowner does not "allow" the overloading of his ship within the meaning of s. 28 of the Merchant Shipping Act, 1876, and thus render himself liable to the penalty thereby imposed, merely by appointing the master who was in charge of the ship at the time of overloading. *Massey* v. *Morris*, 63 L. J., M. C. 185; [1894] 2 Q. B. 412; 10 R. 342; 70 L. T. 873; 42 W. R. 638; 7 Asp. M. C. 586 58 J. P. 673.

Discharging Seamen Abroad—Wages.]—*See* VI. Seamen, infra.

Ships' Lights.]—*See* XX. Collision, infra.

V. MASTER.

1. *Position, Duties and Liabilities*, 80.
2. *Authority to bind Owners*, 83.
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7. *Certificate*, 106.

1. Position, Duties, and Liabilities.

Must give Whole Time to Ship.]—The master of a ship is bound to employ his whole time and attention in the service of his employer; and, semble, a custom allowing such master to trade on his private account during the voyage cannot be maintained. *Gardner* v. *M'Cutcheon*, 4 Beav. 534.

If A., whilst employed as master of a ship, of which B. is owner, gives part of his services for an agreed payment to C., and C. pays this sum to B., an action to recover it will not lie at the suit of A. against B. *Thompson* v. *Havelock*, 1 Camp. 526.

Must account for Trading Profits.]—A master of a ship who, having authority to employ the vessel on freight to the best advantage, but not to purchase a cargo on the owner's account, and being unable to procure remunerative freight, loaded the ship with a cargo of his own:—Held, liable to account to the owners for all profits made by the sale of the cargo, and not merely for a proper freight. *Shallcross* v. *Oldham*, 2 J. & H. 609; 5 L. T. 824; 10 W. R. 291.

May Sue Wrongdoer.]—The master may sue a wrongdoer who takes possession of the ship. *Pittes* v. *Gainee*, 1 Ld. Raym. 558.

Trespass to Cargo.]—The master may sue for trespass to cargo. *Mikes* v. *Caley*, Holt, 467.

Authority of Master to Sue for Collision.]—See *The Reinbeck*, infra, col. 85.

Robbery—Liability for.]—Where goods were taken by robbers on the Thames, the master was held liable. *Mors* v. *Slew* or *Slue*, supra, col. 75.

And see as to the duties of the master with reference to cargo, tit. XV. Cargo, infra.

Pilot—Master not liable for Fault of.]—For a collision caused by the fault of the pilot, the master is not liable. *The Octavia Stella*, 57 L. T. 632; 6 Asp. M. C. 182.

The captain is not responsible to the owner for the fault of the pilot. *Aldrich* v. *Simmons*, 1 Stark. 214. *And see* VII. Pilot, XX. Collision, post.

Penalties.]—The master is not liable to penalties for infringement of rules of navigation where the ship is in charge of a compulsory pilot. *Oakley* v. *Speedy*, 40 L. T. 881; 4 Asp.

M. C. 134. S. P., *Michell* v. *Brown*, 28 L. J., Adm. 53.

Assaults by.]—A captain is not justified in throwing a stone at a person in a boat who has fastened it to the ship, and thereby impeded and endangered it, for the purpose of making him let go, unless it was not possible, either at the time or before the immediate pinch of the danger, to adopt any other mode for the purpose. *Eyre* v. *Norsworthy*, 4 Car. & P. 502.

An action lies against the master for purposely firing a cannon at negroes, and thereby preventing them trading with the plaintiff; and it is no answer that the plaintiff had not conformed to the law of the country in paying the duty due to the king for his licence to trade. *Tarleton* v. *M'Gawley*, Peake, 270; 3 R. R. 689.

False Imprisonment of Passenger.]—Damages 25*l*., recovered by a passenger for false imprisonment by the master. The authority of the master over passengers is limited to the necessities of the case, the preservation of discipline, and the safety of the ship. *Aldworth* v. *Stewart*, 4 F. & F. 957; 14 L. T. 862.

Justifiable Force against Passenger.]—Semble, the master may use force to passengers, as in compelling them to fight an enemy, if the safety of the ship or those on board her requires it. *Boyce* v. *Bayliffe*, 1 Camp. 60; *Boyce* v. *Douglass*, 1 Camp. 59. Or to preserve order. *Noden* v. *Johnson*, 16 Q. B. 218; 20 L. J., Q. B. 95; 15 Jur. 424.

Seaman—Authority of Master to Punish.]—*See* tit. SEAMEN.

—— **Entry of Offences in Log.**]—See *Hill* v. *Thompson*, infra, col. 136.

Infringement of Patent by.]—An action was brought against the master of a ship to restrain him from using pumps which were an infringement of the plaintiff's letters patent. He denied having used any pumps which were an infringement of the patent, and did not suggest that the owners ought to be parties. It was shewn that the ship was fitted up exclusively with pumps which were an infringement of the letters patent, but had been so fitted up before the defendant, who was not a part owner, had taken command of her; he had nothing to do with putting them on board, and they had never been worked in British waters:—Held, by Brett and Cotton, L.JJ. (dissentiente, James, L.J.), that the injunction was rightly granted, on the ground that the defendant, being in command of a ship exclusively fitted up with pumps which were an infringement of the letters patent, was intending to use the patented invention. *Adair* v. *Young*, 12 Ch. D. 13; 40 L. T. 598—C. A.

Service without Agreement.]—The law will presume that the terms of a master's engagement for one voyage extend to a succeeding voyage performed without a new agreement, express or clearly implied. *The Gananoque*, Lush. 448.

Wrongful Dismissal—Jurisdiction.]—A claim for damages for wrongful dismissal is within the cognisance of a court having original admiralty jurisdiction, and, semble, of a county court having admiralty jurisdiction by statute. *The Blessing*, 3 P. D. 35; 38 L. T. 259; 26 W. R. 404; 3 Asp. M. C. 561.

—— **Measure of Damages.**]—A master engaged for a voyage out and home, if wrongfully discharged abroad, is entitled to wages until he can obtain other employment. *The Camilla*, Swabey, 312; 6 W. R. 840.

Notice of Dismissal.]—The master of a ship, in the absence of express stipulation in the contract of hiring, is entitled to reasonable notice of dismissal from the shipowner. *Creen* v. *Wright*, 1 C. P. D. 591; 35 L. T. 339; 3 Asp. M. C. 254.

Certificate of Master — Suspension.] — The Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), does not extend the jurisdiction to suspend or cancel the certificate of the master to cases not within the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), ss. 242, 432. There is, therefore, no power to suspend the master's certificate where a ship has merely been stranded without material damage to the ship or loss of life. *Story*, *Ex parte*, 47 L. J., Q. B. 266; 3 Q. B. D. 166; 38 L. T. 29; 26 W. R. 329; 3 Asp. M. C. 549.

See further, XXII. BOARD OF TRADE PROCEEDINGS.

Removal of.]—By 17 & 18 Vict. c. 104, s. 240, the court of admiralty has power, on an application by the owner or part-owner, to remove the master of a ship, if satisfied that the removal is necessary. *The Royalist*, Br. & Lush. 46; 32 L. J., Adm. 105; 9 Jur. (N.S.) 852.

The removal is necessary if the master has committed a fraudulent breach of trust against the owners, such as making a payment of 5*l*. on ship's account, and fraudulently claiming 25*l*. of the owners, and the court will make the order of removal on the application of one part owner only, notwithstanding another part owner (the ship's husband) is dissentient. *Ib*.

Authority to raise Seaman's Rating.]—The master has authority to engage a seaman to serve at higher wages as steward, the steward being dead. *Hicks* v. *Walker*, 4 W. R. 511.

—— **To Hire Steward.**]—A., master of a ship in the temporary possession of B., has implied authority from B. to hire a steward for the ship's purposes. *Luttrell* v. *China Navigation Co.*, 1 N. R. 329.

Liability of Master for Necessaries.]—See *The Marco Polo*, and cases infra, col. 92.

Ship let to Master—Liability for Repairs, &c.]—See *Reeve* v. *Davis*, ante, col. 65.

Refusing to give Seaman Certificate of Discharge.]—*See* VI. SEAMEN.

Master refusing to deliver up Certificate of Registry.]—See *Rex* v. *Pixley*, ante, col. 31.

Effects of Master dying on Board—Succeeding Master Trustee thereof.]—The master dies. The succeeding master takes possession of money

on board belonging to him and trades with it :—Held, that he was a trustee and accountable to the widow for what he made of it. *Brown and Litton's Case*, 2 Eq. Ca. Abr. 722 ; Lucas' Rep. 20.

Weighage — Custom of London — Master liable.]—The master of a ship is liable for weighage on goods brought into London. *London (Corporation)* v. *Hunt*, 3 Lev. 37.

Official Log—Ship's Draught—M. S. A. Amendment Act (34 & 35 Vict. c. 110), s. 5.]—A shipmaster sailed from Batavia for other ports in Java, 500 miles from Batavia, to take in his cargo. He did not record his ship's draught of water in the official log, until he finally sailed for home :—Held, that he had not complied with the act. *Board of Trade* v. *Brown*, 13 Ct. of Sess. Cas. (4th ser.) 58.

Commander of King's Ship—Trespass—Seizure as Prize.]—No action at common law lies against the commander of a king's ship for seizing a ship as prize, or for false imprisonment of her crew. The only remedy is in admiralty. *Faith* v. *Pearson*, Holt, N. P. 113 ; 16 R. R. 649.

Not fellow-servant of Seamen.]—The captain of a merchant ship is not a fellow-servant of the sailors, but is the agent or representative of the owners of the vessel during the voyage, and the owners of the vessel are responsible for the injury to, or death of, a sailor resulting from the negligence of the captain during the voyage. *Ramsay* v. *Quinn* (Ir. R. 8 C. L. 322), not followed. *Hedley* v. *Pinckney & Sons S. S. Co.*, supra, col. 73.

Impressment.]—Semble, the master of a trading vessel is not free from impressment. *Chalacombe, Ex parte*, 13 East, 550, n. ; 12 R. R. 431, n. : *Burrows' Case*, 14 East, 346.

Seaman—Entry of Offence in Log—Slander.]—See *Hill* v. *Thompson*, infra, col. 136.

Not Agent of Cargo Owner.]—The master is not the agent of the cargo owners unless expressly so constituted by them—Per Lord Stowell. *The Mercurius*, 1 C. Rob. 80, 84.

Bill of Lading.]—Duty of master as to delivering goods under. See *The Stettin*, infra, col. 314.

2. Authority to bind Owners.

To substitute Voyage.]—A captain of a ship has no authority, as such, to agree to a substitution of another voyage in the place of one agreed upon between his owners and the freighters in England, and on which he has sailed to a foreign country. *Burgon* v. *Sharpe*, 2 Camp. 529 ; 11 R. R. 788.

Usual Course of Business.]—If the master makes a particular engagement or warranty relating to the conveying of merchandise according to the usual employment of the ship, the owners will be bound thereby, although made without their consent. *Ranquist* v. *Ditchell*, 3 Esp. 64 ; 2 Camp. 556, n.

As Servant of Charterer.]—Where the owner has let the ship to freight for a specific voyage, the master is the agent of the freighter, and consequently the owner is not liable for the non-delivery of the goods on the contract of the master. *James* v. *Jones*, 3 Esp. 27.

By Charterparty.]—A master has no authority to bind his owners by writing forward to a broker in a foreign port, prior to the ship's arrival therein, authorising the broker to charter his ship. The authority of a master to bind his owners by charterparty arises when he is in a foreign port, and his owners are not there, and there is difficulty in communicating with them. A master is not the agent for his owners to hold out a person as authorised to charter his ship, so as to bind the owners. *The Fanny, The Matilda*, 48 L. T. 771 ; 5 Asp. M. C. 75—C. A.

The master chartered the ship abroad to M. & Co., with a view to secure to them payment of a debt due from the shipowners. The freight being in court, it was claimed by M. & Co. ; by mortgagees of the ship under an assignment of freight by the master to secure advances made to the ship ; and by assignees of the owners :—Held, that the assignees were entitled; the master having no power to bind the owners by charter or assignment of freight. *The Sir Henry Webb*, 13 Jur. 639.

The master of an American vessel arriving in England, authorised by the owners to sell or charter the ship, entered into a charterparty with the plaintiff for a voyage to Ceylon and back. A few days afterwards the defendant purchased the ship from a party acting under a power of attorney from one of the owners to sell her. The greater part of the cargo had been put on board under the charterparty. The defendant attempted to stop the sailing of the ship :—Held, that the master having authority to charter the ship, which he had done, and the defendant knowing of the charterparty, an injunction would lie to restrain the purchasers from interfering with the sailing of the ship, in pursuance of the charterparty. *Messageries Imperiales Co.* v. *Baines*, 7 L. T. 763 ; 11 W. R. 322.

By what Law Governed.]—The power of a master to bind his owners personally is but a branch of the general law of agency ; and where the master contracts as such in a foreign port to carry goods for a foreigner, his authority to bind his owners is that conferred by the law of the country to which the ship belongs ; and the flag of the ship is notice to all the world that his implied authority is limited by the law of that flag. *Lloyd* v. *Guibert*, 6 B. & S. 100 ; 35 L. J., Q. B. 74 ; L. R. 1 Q. B. 115 ; 13 L. T. 602—Ex. Ch. Affirming 10 Jur. (N.S.) 949 ; 12 W. R. 953.

Where a master of a French ship contracted in the West Indies to carry goods of an Englishman thence to Liverpool, and on the voyage was obliged to put into a port of refuge, and there properly borrowed money on bottomry bonds for the use of the ship and crew, and the owner of the goods was obliged to pay money to the holder of the bonds in order to redeem his goods:—Held, that the owner of the goods had no claim against the owners of the ship, if they chose to abandon the ship and freight : inasmuch as by the law of France, it was lawful for them to free themselves from the acts and engagements of the master, in all that concerned the ship and

voyage, by the abandonment of the ship and freight. *Ib.*

Power to ransom Ship.]—The master had power (when ransom was legal) to bind ship and cargo by an agreement with the captors.—Per Lord Stowell. *The Gratitudine*, 3 C. Rob. 240, 259.

Authority to institute Action for Collision.]—The master of a ship carrying cargo where his ship and cargo have been damaged by collision in or near a foreign port, has authority to institute an action in rem in the foreign port against the offending ship on behalf of both ship and cargo, and the owners of the cargo cannot, so long as that suit is pending in their names, be allowed to deny his authority. *The Reinbeck*, 60 L. T. 209; 6 Asp. M. C. 366—C. A.

May bind Owner beyond Value of Ship.]—The master may by contract bind his owners beyond the value of ship and cargo. *Yates* v. *Hall*, 1 Term Rep. 73.

Special Contract with Seamen.]—A promise by a captain on behalf of his owners to pay monthly wages to one of the sailors, in order to induce him to become a hostage, is binding on the owners, although they abandon the ship and cargo. *Ib.* And see *Helly* v. *Grant*, 1 Term Rep. 76.

Settling Demurrage.]—A., the owner of a ship, entered into a charterparty containing stipulations as to demurrage. The ship was detained in South Africa beyond the time stipulated for. The captain was in possession of the ship: he was to be paid freight and demurrage by bill in South America. After making the charterparty, and before the settlement hereinafter mentioned, the ship with the charter was sold to F. The captain became a part owner of the ship. The captain having settled the account for freight, demurrage and delay with the charterer by taking a bill in South America:—Held, that F. and A., in whose names he was suing, were bound by such settlement. *Alexander* v. *Dowie*, 1 H. & N. 152; 25 L. J., Ex. 281.

Collecting Freight.]—An order by an owner of a ship to a house abroad to collect freight, takes the freight out of the hands of the master. *The Edmond*, Lush. 58; 29 L. J., Adm. 76; 2 L. T. 192.

Salvage.]—Observations of Brett, M.R., as to the implied authority of shipmasters to bind owners by salvage agreements. See *The Renpor*, 52 L. J., Adm. 49; 8 P. D. 115; 48 L. T. 887; 31 W. R. 640—C. A.; infra, SALVAGE.

Power to bind Owners for Necessaries.]—*See cases* ante, cols. 61, seq.

—— **For Repairs.**]—See *Miller* v. *Potter*, ante, col. 17, and *cases* ante, cols. 61, seq.

Duty as to Repair.]—If a vessel after she has started on her voyage receives damage, the master, in considering what steps he shall take in regard to carrying on the cargo or first repairing the ship, is bound to consider not one individual interest, but the interests of all concerned; whether it be to return to his port of loading and repair, or repair at the nearest possible place before proceeding, or go on without repairing; but if it be in his power to effect the repairs without any great delay or expense to the interests intrusted to his charge, it is his duty to repair before proceeding. *The Rona*, 51 L. T. 28; 5 Asp. M. C. 259.

Authority to make Towage Agreements.]—See *The Alfred, Wellfield (Owners)* v. *Adamson*, post, col. 681.

Liability—Bill of Lading—Power of Ship's Brokers to Exempt.]—The mere employment of ship's brokers at a foreign port to find a cargo for a ship and adjust the terms upon which it is carried does not give them implied power to relieve the master, when he signs bills of lading presented to him, from the duty of seeing that the dates of shipment are correctly stated in the bills. In breach of that duty the master is liable to his owners. *Stumore* v. *Breen*, 56 L. J., Q. B. 401; 12 App. Cas. 698—H. L. (E.)

Authority to hire and raise Seaman's Rating.]—See *Hicks* v. *Walker*, and *cases* supra, col. 82.

Payment of Past Services—Borrowing Money for.]—The master has, in the absence of the owner, or means of communicating with him, authority to pledge his credit for all things necessary for the purpose of conducting the navigation to a favourable termination, and for that purpose he may borrow money for services which require prompt payment; but he has no authority to borrow money generally in order to pay for services already rendered. *Beldon* v. *Campbell*, 6 Ex. 886; 20 L. J., Ex. 342.

Special Instructions—General Authority.]—A shipowner, in his written instructions to a captain, directed him, in case of emergency, to apply to certain firms abroad, "who would give him any assistance required":—Held, that this did not authorise the captain to do anything not included in his general power and authority as captain. *Lyall* v. *Hicks*, 27 Beav. 616.

Owner taking Benefit of Master's Contract.]—The master of a ship who had expended all the money furnished to him by his employers, entered into a contract abroad for the purpose of obtaining funds to enable him to lay in the cargo which constituted the main object of his voyage:—Held, upon its appearing that the owners had derived benefit from the contract in question, that they had no right to repudiate the claim of the party by whom the advance was made, upon the ground that the master had exceeded his authority in the transaction, or that he had obtained the advance by means of representations to the lender the truth of which the latter was not in a position to prove. *Ashmall* v. *Wood*, 3 Jur. (N.S.) 232; 5 W. R. 397.

Power to draw Bill on Owner—Necessaries.]—The master in a foreign port cannot bind the owners by drawing a bill on them. *Drain* v. *Scott*, 3 Ct. of Sess. Cas. (3rd ser.) 114.

The master cannot bind the owner for goods

supplied that are not necessary or proper for the ship. *Ib.*

Authority of Master to borrow Money in a Home Port.]—In an action against a shipowner for money advanced to the master in a home port:—Held, that the only question for the jury was whether, under the circumstances, the master was agent for the owner to get the advance; and that the state of accounts between the master and the owner had nothing to do with the case. *Williamson* v. *Page*, 1 Car. & K. 581.

Wreck of Passenger Ship—Carrying on Passengers—Agency of Master.]—Where a passenger ship is wrecked, and by the terms of the contract with the passengers the owners are under no liability to forward them to their destination, the master, who makes arrangements with another vessel to carry on the passengers, does so as the agent of the passengers, and not of the owners. *The Mariposa*, 65 L. J., Adm. 104; [1896] P. 273; 75 L. T. 54; 45 W. R. 191; 8 Asp. M. C. 159.

Power to Hypothecate.]—*See* tit. X. BOTTOMRY.

Bankruptcy of Shipowner—Money Payable under Charterparty.]—See *Wilkins* v. *Mure*, infra, col. 392.

Mate succeeding to Command—Death of Master.]—Power of mate to bind owners by altering rating of seamen. See *Hanson* v. *Roydon*, infra, col. 117.

Power to extend Lay Days—To give Discharge from Demurrage.]—See *Holman* v. *Peruvian Nitrate Co.*, infra, col. 479.

Coals—Charterer to Provide—Power of Master to bind Owner.]—See *The Castleyate*, infra, col. 250.

3. AUTHORITY TO SELL SHIP OR CARGO.

Cargo.]—*See* infra, col. 523.

Ship—Necessity alone justifies Sale—Insurance.]—The master of a vessel has no power to sell her so as to affect the insurers, except under circumstances of stringent necessity: such circumstances as, after sufficient examination of her condition, and after every exertion in his power, within the means at his disposal, to extricate her from peril or to raise funds for the repair, leave him no alternative but to sell her as she is. *Cobequid Marine Insurance Co.* v. *Barteaux*, L. R. 6 P. C. 319; 32 L. T. 510; 23 W. R. 892; 2 Asp. M. C. 536.

No Power to sell Ship.]—The master cannot sell the ship, even in case of necessity, without the owner's consent. *Anon.*, Sid. pt. i. 453.

—— **Wreck.**]—The master cannot sell the ship, even when wrecked, without the owner's consent. *Tremenhere* v. *Tresilian*, 3 Keb. 91.

Power to sell Ship in case of Necessity.]—In case of absolute necessity to save something from an adventure that cannot be completed the master may sell the ship—Per Lord Stowell. *The Fanny and Elmira*, Edw. 118.

Sale of Cargo not justified by Circumstances.]—On the 19th of April an Austrian ship, with a valuable cargo on board, ran upon a rock on the eastern side of Algoa bay, distant fifty miles by sea, and about eighty by land, from Port Elizabeth. The Austrian consul at Port Elizabeth came to the spot, and, there being no hope of getting the vessel off, he advised the master to sell her with the cargo. The master accordingly advertised the ship and cargo for sale, and they were sold in one lot by auction on the 30th of April for 9,500*l.* after a brisk competition. The purchaser got some part of the cargo out of the wreck, but on the 19th of June the ship went to pieces with the rest of the cargo on board. The owners of the cargo having abandoned it to the underwriters as a total loss, the underwriters filed their bill to have the goods which had been brought to land delivered to them as not having been effectually sold. The master had not gone to Port Elizabeth, nor endeavoured to procure funds to enable him to save the cargo; nor had he made any effort to induce any persons to undertake the salvage of the cargo. Several witnesses at Port Elizabeth deposed that in their opinion no person could have been induced to undertake the salvage; others gave their opinion that offers to save the cargo could have been obtained if a large percentage of the net proceeds had been offered There was a good deal of evidence to shew that, in the opinion of persons on the spot, the course which had been adopted of selling the wreck and cargo was the most advisable one in the interest of all parties concerned:—Held, that no such necessity was proved to have existed as would make the master the agent of the owners of the cargo to effect a sale; that the sale was void; and that the plaintiffs were entitled to the cargo saved, subject to a proper allowance for salvage and other expenses. *Atlantic Mutual Marine Insurance Co.* v. *Huth*, 16 Ch. D. 474; 44 L. T. 67; 29 W. R. 387; 4 Asp. M. C. 369.

—— **Onus is on Master to prove Necessity.**]—The authority of the master to sell the goods of an absent owner is derived from the necessity of the situation in which he is placed; and consequently, to justify his selling, he must establish a necessity for the sale; and an inability to communicate with the owner. *Australasian Steam Navigation Co.* v. *Morse*, 8 Moore, P. C. (N.S.) 482; L. R. 4 P. C. 222; 27 L. T. 357; 20 W. R. 728; 1 Asp. M. C. 407.

Duty to sell Cargo in case of Necessity.]—It is the master's duty in a port where he cannot communicate with the owner of the cargo to do what is necessary for its preservation; he may bottomry or even sell it—Per Lord Stowell. *The Gratitudine*, 3 Rob. 259.

Right of Cargo Owner to restrain Master from Selling—Terms.]—Where a vessel has become unable to proceed on her voyage without repairs, the owners of goods shipped on board the vessel may obtain the assistance of the court to restrain the captain from selling the cargo. But before the court will grant such assistance, the plaintiffs must shew their title to the goods, and must settle with the captain for what is due to him, and must exonerate the captain from his contract to deliver the goods at their place of destination, and from all liability on the bills of lading. *Rayne* v. *Benedict*, 10 L. J., Ch. 297; 5 Jur. 598.

Exception of Perils of Sea—Unnecessary Sale.]—Where the ship is unable to complete her voyage from accident, the exception of "dangers and accidents of the seas and navigation" does not justify the master in selling the cargo. *Cannan* v. *Meaburn*, 1 Bing. 243; 8 Moore, 127; 1 L. J. (O.S.) C. P. 84. See *Freeman* v. *East India Co.*, post, col. 525.

Ship sold by Master—Possession.]—Possession of a ship sold by her master without owner's consent decreed to her former owners, in default of appearance by the purchasers. *The Lagan*, otherwise *Mimax*, 3 Hag. Adm. 418.

4. Primage and Premiums.

Primage.]—Primage belongs of right to the master, and nothing but an express agreement can deprive him of his right to recover it from the freighter. An agreement by the master to receive from the owner a fixed sum, "in full of all cabin and other allowances," does not divest the master of his right. *Best* v. *Saunders*, M. & M. 208; 3 M. & R. 4; 7 L. J. (O.S.) K. B. 50. See *Caughey* v. *Gordon*, 3 C. P. D. 419; 27 W. R. 50.

By a bill of lading freight was to be paid "as per charterparty, with primage and average accustomed":—Held, that the reference to the charterparty applied to the freight only, and that in an action for primage the charterparty need not be produced. *Ib.*

Where there is a written agreement between the master and owners, not mentioning primage, and the owners have received payment in respect of primage from the freighters:—Held, that the master, by the usage of trade, is entitled to such payment. *Charleton* v. *Cotesworth*, Ry. & Mood. 175.

As to what amounts to an agreement as between shipowner and master to dispense with primage, see *Scott* v. *Miller*, 5 Scott, 11; 3 Bing. (N.C.) 811.

Premiums on Bills.]—If the master in a foreign port, from the state of the exchange, receives a premium for a bill drawn upon England on account of the ship, this belongs to his owner, although there may have been a usage for masters of ships to appropriate such premiums to their own use. *Diplock* v. *Blackburn*, 3 Camp. 43; 13 R. R. 744.

Master's Gratuity—Liability of Consignee.]—See *Hewitt* v. *Paul*, infra, col. 400.

5. Wages and Disbursements.

a. Generally.

Actions for.]—A master is entitled to sue the ship for wages as earned on board the ship within 24 & 25 Vict. c. 10, s. 10, if he performed the duties of master, although during his service he did not sleep on board the ship, and many of his duties were performed on shore. *The Chieftain*, Br. & Lush. 104; 32 L. J., Adm. 106; 9 Jur. (N.S.) 388; 8 L. T. 120; 11 W. R. 537.

He may also sue for disbursements made by him during such service on the ship's account, but not for mere liabilities incurred. *Ib.*

A master suing for wages and disbursements is bound to furnish accounts before bringing his suit, otherwise he will not be entitled to his costs. *The Fleur-de-Lis*, L. R. 1 A. & E. 49; 12 Jur. (N.S.) 379.

He is entitled, under 17 & 18 Vict. c. 104, ss. 187, 191, to double pay for the number of days (not exceeding ten), during which the payment of his wages is improperly withheld; but he is not so entitled, if he himself causes the delay, by improperly keeping back the accounts of the ship. *The Princess Helena*, Lush. 190; 30 L. J., Adm. 137; 4 L. T. 869. Overruled by *The Arina*, infra, col. 95.

The 17 & 18 Vict. c. 104, s. 189, read with s. 191, extends to masters of ships. *The Blakeney*, Swabey, 428; 5 Jur. (N.S.) 418.

Being compelled, by pressing necessity of ill health, to leave his ship abroad, he is entitled to sue immediately for his wages. *The Rajah of Cochin*, Swabey, 473.

—— **In Admiralty.**]—Formerly the master could not sue in admiralty for wages. *Clay* v. *Snelgrove*, 12 Mod. 405; Holt, 595; Carth. 518. S. P., *The Lord Hobart*, 2 Dod. 104.

Under 17 & 18 Vict. c. 104, s. 191, the master could not claim in admiralty for disbursements, unless the owners or mortgagees made a claim against him; in which case the court would examine the whole account. *The Caledonia*, Swabey, 17; 2 Jur. (N.S.) 48; 4 W. R. 183.

The master claimed wages from the mortgagees in possession; they claimed to deduct advances without going into the accounts to shew that they were entitled to do so:—Held, that they could not do so. *Ib.*

Under 7 & 8 Vict. c. 112, s. 16, the master could not sue for wages in admiralty, although the owner had compounded with his creditors, and had been released from his debts. *The Tecumseh*, 3 W. Rob. 109.

Arrest of the ship, under 7 & 8 Vict. c. 111, s. 22, for master's wages, the owner having filed a declaration of insolvency, but not having been made bankrupt: — Held, illegal. *The Great Northern*, 2 W. Rob. 509. S. P., *The Princess Royal*, 2 W. Rob. 373.

Where, in an action for master's wages, it appears that, at the institution of the suit, accounts are outstanding between the owners and the plaintiff, and that the same have not been taken or settled, and that within two days of the institution of the suit the wages are paid, the owners have not refused to pay "without sufficient cause" within the meaning of s. 187 of the Merchant Shipping Act, 1854, and therefore the plaintiff is not entitled to recover ten days' double pay. *The Turgot*, 11 P. D. 21; 54 L. T. 276; 34 W. R. 552; 5 Asp. M. C. 548.

Wages not Dependent on Freight.]—The rule of marine law, that wages depend on the earning of freight, does not apply to the wages of the master. *Hawkins* v. *Twizell*, 5 El. & Bl. 883; 25 L. J., Q. B. 160; 2 Jur. (N.S.) 302; 4 W. R. 242.

Therefore, where a ship is lost, the administratrix of the captain is entitled to maintain an action for the period of his service before the loss. *Ib.*

When freight has been earned, the master though also part owner, may sue in the admiralty court for his wages and disbursements. *The Feronia*, 37 L. J., Adm. 60; L. R. 2 A. & E. 65; 17 L. T. 619; 16 W. R. 585. But see *The Sara*, col. 99.

In an action by the master against his owners to recover wages which accrued during his detention in a foreign port, it is not incumbent on him to prove that freight was earned; it is sufficient for him to shew that he has performed his services; and the owners must adduce evidence to

prove that he is not entitled to remuneration. *Brown* v. *Millener*, 1 Moore, 65; 7 Taunt. 319; 18 R. R. 493. *See also* XXVI. ADMIRALTY LAW AND PRACTICE, infra, col. 952.

Part Owner—Mortgage of Part.]—F. and S., both residing at Halifax, Nova Scotia, were the owners each of a moiety of a ship and cargo. F. (as it was alleged) mortgaged his moiety to S. The ship sailed in November, 1868, from that port, F. being the master. After so sailing, S. assigned his own moiety and the other moiety, of which he was, as he alleged, mortgagee, to B., of Liverpool, who, on the arrival of the ship at Cork, ordered F. to take her round to Liverpool. F. declined to obey that order, on the ground that he, F., was the owner of a moiety of cargo and ship, and he denied in strong language in a letter to B. that he had mortgaged his moiety to S. The ship and cargo were arrested by order of the admiralty court and sold, at a price insufficient to cover the expenses:—Held, that F. was entitled to his wages as master earned on board the ship, even though he was part owner, and that the owner of the other moiety must pay him a moiety of such wages. *The Joseph Dexter*, 20 L. T. 820.

Claim to Equitable Share.]—In a suit for wages between an owner and the master, who is also a part owner, the court can take no cognisance of a claim by the master to an equitable share in the vessel. *The D. Jex*, 13 L. T. 22.

Contract—Independent Condition.]—The captain of a South Sea whaler covenanted with the defendant that he would proceed to the fishery and procure a cargo of sperm oil, or as great a proportion as might be, under all circumstances, within his power to obtain; would return to London, and at his own cost deliver the cargo; would obey instructions, be frugal of provisions, and not dispose of any of them without accounting for the same; and would not smuggle or trade, or permit anyone on board to do so. The defendant covenanted, on performance of the before-mentioned terms and conditions on the part of the captain, to pay him a certain proportion of the net proceeds of the cargo:—Held, that the captain's covenants were independent, and that the performance of them was not a condition precedent to an action on the defendant's covenant. *Stavers* v. *Curling*, 3 Bing. (N.C.) 355; 3 Scott, 740; 2 Hodges, 237; 6 L.J., C. P. 41.

—— **Executed.**]—A declaration stated, that the defendant was possessed of a ship, and the plaintiff was a master mariner, having interest in the island of N., in the West Indies, for loading a vessel; and it having been proposed by the plaintiff to the defendant that the defendant should give the plaintiff the command of the ship for a voyage to the West Indies and back, thereupon it was agreed, that, in consideration of the plaintiff having interest in N. for loading a vessel, the defendant would give the plaintiff the command of the ship, with the understanding that he would use all possible exertions for the benefit of the ship and the owners thereof, and that for such services the defendant would pay the plaintiff. Averment, that, in pursuance of the agreement, the defendant gave the plaintiff the command of the ship, and that he set out in command of the ship on the voyage, and safely delivered the outward cargo; that, finding that a homeward cargo was not likely to be obtained at N. without disadvantage to the ship and the owners, the plaintiff proceeded to the West Indies, and there procured a homeward cargo, and safely delivered the same, and then resigned the command of the ship into the hands of the defendant; and that, during all the time, the plaintiff used all possible exertions for the benefit of the ship and the owners. Breach, nonpayment by the defendant. Plea, that the plaintiff did not use all possible exertions for the benefit of the ship or of the owners:—Held, first, that a sufficient consideration appeared on the face of the declaration, the contract having been executed by the plaintiff. *Mills* v. *Blachall*, 11 Q. B. 358; 17 L. J., Q. B. 31; 12 Jur. 93.

Held, secondly, that the plea shewed only a partial failure of the consideration, and was, therefore, insufficient. *Ib.*

Counter-claim in Action for Wages.]—In an action of wages by master against shipowner, the defendant, by way of set-off and counter-claim, claimed damages for the loss of the ship by the negligence of the plaintiff:—Reply, that the ship was insured against a total loss, and that the underwriters had paid or agreed to pay to the owners the whole amount payable by them on a total loss:—Held, on demurrer, that the reply was bad, because the plaintiff had not pleaded that the money had been actually paid to the defendant, or that the counter-claim had been brought without the authority of the underwriters. *The Sir Charles Napier*, 5 P. D. 73; 43 L. T. 364; 28 W. R. 718; 4 Asp. M. C. 321—C. A.

Jurisdiction of County Court.]—A contract that a master mariner shall take a share of a fishing adventure and bear a share of certain disbursements is a contract of wages by the general maritime law, independently of the Merchant Shipping Amendment Act, 1873 (36 & 37 Vict. c. 85), s. 8; and jurisdiction over such a contract is conferred on county courts having admiralty jurisdiction by the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 3, sub-s. 2. *The Blessing*, 3 P. D. 35; 38 L. T. 259; 26 W. R. 404; 3 Asp. M. C. 561. See *The Dictator*, 38 L. T. 947; 4 Asp. M. C. 19, infra, col. 940.

See also XXVI. ADMIRALTY LAW AND PRACTICE.

Liability for Necessaries.]—The captain who gives directions for repairs, is liable to a tradesman in the first instance, if it does not appear that any credit was given to the owners. *Essery* v. *Cobb*, 5 Car. & P. 358.

Where goods were ordered for a ship by the owner, before the appointment of the captain, though some were not delivered till afterwards, yet as no personal credit was given to the captain, he was not answerable for any of them. *Farmer* v. *Davies*, 1 Term Rep. 108; 1 R. R. 159. See *Nicholson* v. *Mounsey*, 15 East, 384; 13 R. R. 501. And *The Marco Polo*, 24 L. T. 804; 1 Asp. M. C. 54.

Disbursements—From what Time.]—A master can only claim against his ship for disbursements from the date on which he is placed on the ship's register as master. *The Albion*, 27 L. T. 723; 1 Asp. M. C. 481.

—— **Counter-claim on Accounts when a Co-owner.**]—In a cause of wages and disbursements

instituted on behalf of a master, himself a co-owner, against other part owners, they may plead in answer that on a balance of account between the plaintiff as master and co-owner and the defendants nothing is due to the plaintiff, and set up a counter-claim for a balance due to them. *The City of Mobile*, 43 L. J., Adm. 41; L. R. 4 A. & E. 191; 29 L. T. 406; 22 W. R. 191; 2 Asp. M. C. 123.

—— **Defence on Criminal Charge—Forfeit.**]—A master, while at a foreign port with a homeward-bound vessel, incurred expenses in defending himself against a charge of murder, maliciously brought by two of the crew, whom he had censured for misconduct. The master was tried and acquitted, and bound over in 10*l.* to prosecute the men for perjury. He forfeited the 10*l.* in order to return with the vessel to England:—Held, first, that he was entitled to the expenses of his defence, on the ground that the charge originated directly from the performance by the master of his duty to his owners in chastising the men. *The James Seddon*, 35 L. J., Adm. 117; L. R. 1 A. & E. 62; 12 Jur. (N.S.) 609; 14 W. R. 973.

Held, secondly, that he was entitled to be allowed the 10*l.* forfeit, as it was for the interest of his owners that the master should not be delayed in returning with the vessel. *Ib.*

—— **Bills of Exchange.**]—Upon an appeal from the report of the registrar and merchants as to a master's claim for wages and disbursements, the following items were objected to: 1. Sums of money for which the master as well as the ship was liable, but which he had not paid. 2. Slops supplied to seamen, who afterwards deserted. 3. The amount of a dishonoured bill of exchange drawn for ship's purposes by the master upon the managing owner, but it was doubtful whether the master had received notice of the dishonour:—Held, as to the first item that the claim might be allowed upon proof to the satisfaction of the registrar that the sums were actually paid. *The Feronia*, 37 L. J., Adm. 60; L. R. 2 A. & E. 65; 17 L. T. 619; 16 W. R. 585. But see *The Sara*, post, col. 99.

Held, secondly, that the items for slops were properly allowed. *Ib.*

Held, thirdly, that as to the amount of the bill of exchange, even if notice of dishonour had not been waived, the master had not claimed the benefit of notice, and that therefore, as he was liable for the amount, the item was properly allowed. *Ib.*

There is no implied undertaking on the part of the owner, that a bill of exchange, drawn by the master on a third person, for money advanced for the ship's use, shall be duly honoured. *Harber* v. *Brotherstone*, 4 Camp. 254.

When the owners of a ship instruct the captain to make purchases in a foreign country, and to draw bills upon them in payment, the promise implied by law is not a promise to accept or pay the bills, but a promise to indemnify the captain against any loss or damage sustained by him from having drawn the bills. *Huntley* v. *Sanderson*, 1 Car. & M. 467.

In April and May, 1880, the master of a steamship obtained at a British colonial port coals for the ship, and paid for them by bills of exchange drawn on the charterers of the ship. The bills were dishonoured by the charterers, and in August, 1880, the master was served with a writ in an action brought to recover the amount of the bills. Judgment in this action was recovered against the master in July, 1881. In October, 1881, the steamship was sold, and the master in November, 1882, instituted an action of disbursements against her and her freight. The purchasers appeared and put in bail. At the hearing of the action the judgment recovered against the plaintiff in August, 1881, remained still in force and unsatisfied, and the plaintiff claimed to recover as a disbursement the amount for which he was liable under it:—Held, that the liability of the plaintiff to satisfy the judgment against him must be considered as a disbursement in respect of which a maritime lien existed under the 10th section of the Admiralty Court Act, 1861. *The Fairport*, 52 L. J., Adm. 21; 8 P. D. 48; 48 L. T. 536; 31 W. R. 616; 5 Asp. M. C. 62.

Held, also, that the right to enforce such lien had not been lost by any want of reasonable diligence on the part of the plaintiff, and that his claim must be pronounced for. *Ib.*

Recovery against Owner of Disbursements Paid to Shipwright.]—When shipwrights execute repairs to a ship at the order of the master given under circumstances by which the shipwrights acquire a right to claim against either the owners or the master, and they elect to claim against the master, the latter may, in an action for wages and disbursements, proceed against the ship and recover for the amount of such shipwright's claim as a disbursement made on ship's account. *The Limerick*, 34 L. T. 708; 3 Asp. M. C. 206—C. A.

Sum Paid under Bond given on Collision.]—When a ship through the default of her master has run into and damaged another ship, and the master of the former has in respect of such collision given a bond for the amount of the damage binding himself and his owners and the ship, he being himself a wrong-doer, cannot, in an action for wages and disbursements, claim the amount of such bond or to be indemnified against any claim to be made against him thereunder in respect of the collision. *Ib.* Reversing 45 L. J., Adm. 97; 1 P. D. 292.

Misconduct—Master taking Ship to Sea—Mortgagee—Wrongful Dismissal.]—A mortgagee took possession of a ship by putting a man on board and giving notice to the master. The latter, by order of the mortgagor, took the vessel to sea with the man in possession on board. In an action by the master for wages, and for compensation for wrongful dismissal, the registrar awarded him a sum as compensation, being the amount of wages payable for two months after the mortgagee took possession:—Held, on appeal, that the master had been guilty of misconduct in taking the vessel to sea, and could not as against the mortgagee be properly awarded any sum as compensation for wrongful dismissal. *The Fairport*, 54 L. J., Adm. 3; 10 P. D. 13; 52 L. T. 62; 33 W. R. 448; 5 Asp. M. C. 348.

Fraud of Managing Owner — Privity of Master.]—A master on his appointment agreed with the managing owner that he, the master, should find the provisions for the officers and crew at a certain rate per day. The master subsequently agreed with the managing owner, who was also a ship's store dealer, that the managing

owner should supply the provisions and should charge them against moneys of the master which he held in his hands. The managing owner, however, debited his co-owners with the costs of the provisions, and fraudulently applied the master's money to his own purposes:—Held, in an action in rem against the owners by the master to recover wages and disbursements, that the master was entitled to credit for such an amount in the settlement of his accounts with the owners, the fraudulent application of his money by the managing owner being a wrong done to the co-owners for which he was not responsible. *The Dora Tully*, 54 L. T. 467; 5 Asp. M. C. 550.

Right to Wages up to Final Settlement of Claim.]—A master is not entitled under the Merchant Seamen (Payment of Wages) Act, 1880, s. 4, to wages up to the final settlement of his claim. *The Arina*, 56 L. J., Adm. 57; 12 P. D. 118; 57 L. T. 121; 35 W. R. 654; 6 Asp. M. C. 141.

Right to Ten Days' Double Pay.]—A master is not entitled under ss. 187 and 191 of the Merchant Shipping Act, 1854, to the double pay for delay in the payment of wages recoverable by "seamen" under the former section. *The Princess Helena* (Lush. 190) overruled. *Ib.*

Under the provisions of s. 187 of the Merchant Shipping Act, 1854, and s. 4 of the Merchant Shipping Act, 1880, as to nonpayment of wages, the right to recover ten days' double pay and wages to the time of final settlement is not enforceable where there is a bonâ fide question as to liability. *The Rainbow*, 53 L. T. 91; 5 Asp. M. C. 479.

Taking Bill of Exchange.]—The master took a bill of exchange from the shipowner in payment of a balance due for wages and disbursements:—Held, that he could sue in admiralty for wages under 17 & 18 Vict. c. 112, s. 16. *The Simlah*, 15 Jur. 865.

Neglect to make Protest—Admiralty Jurisdiction.]—The omission of the master to make a correct protest as to damage to goods, whereby the cargo owner is prevented from recovering average and insurance moneys, is not a matter over which the admiralty court has jurisdiction under 24 Vict. c. 10, s. 6. *The Santa Anna*, 32 L. J., Adm. 198.

Misconduct — Habitual Drunkenness of Master.]—A shipmaster who has been habitually drunk during his employment cannot maintain an action for his wages. *The Macleod*, 50 L. J., Adm. 6; 5 P. D. 254; 29 W. R. 34. *And see* FORFEITURE, infra, col. 103.

Wrongful Discharge.]—A master wrongly discharged abroad is entitled to wages until he gets other employment, or (semble) until the end of the voyage. *The Camilla*, Swabey, 312; 6 W. R. 840. And see *The Fairport*, supra, col. 94.

Deductions for Misconduct.]—In a suit by the master for his wages the owners may deduct the amount of any loss he has occasioned them by his misconduct. *The Repulse*, 4 Not. of Cas. 169.

Disbursements—Liability on Bill.]—In an action for master's wages, a mortgagee intervening and declaring to set up a right of set-off or counter-claim, but not filing any such counter-claim in the registry, but only a statement that he objected to all the claims in the master's account except those relating to the payment of wages and the wages claimed, must submit to a settlement of all the accounts between the master and the ship, exclusive of any private account between the master and the owner in respect of extraneous matters. *The Glentanner*, Swabey, 415. Overruled, see *The Sara*, 14 App. Cas. 209, infra, col. 99.

In this settlement the amount of a bill drawn by the master on the owners for the ship and dishonoured by them, for which judgment has been recovered against the master, but execution not levied, is to be taken into account. *Ib.*

Disbursements and Liabilities.]—The master of a British ship drew a bill of exchange on her owners in favour of the vendors of necessaries supplied to her in a home port on her owners' request. The bill was accepted by the owners and afterwards dishonoured, and the master was sued upon it to judgment:—Held, that he had not made a disbursement or incurred a liability on account of the ship under s. 1 of the Merchant Shipping Act, 1889, so as to be entitled to a maritime lien upon the ship. *The Orienta*, *Elliott* v. *The Orienta* (*Owners*); 64 L. J., Adm. 32; [1895] P. 49; 11 R. 687; 71 L. T. 711; 7 Asp. M. C. 529—C. A.

—— **Payment of Seamen's Wages—Recovery in Admiralty by Master.**]—The master having paid the seamen their wages could not (formerly) sue the owners in admiralty. *Anon.*, Fortesc. 230.

—— **Coals—Charterer liable to supply—Bill by Master on Owner.**]—See *The Castlegate*, infra, col. 98.

—— **Lien for Disbursements—Enforcement—Winding-up.**]—The master of a ship belonging to a company drew a bill on the company for necessaries supplied to the ship, which was accepted, but was dishonoured at maturity. He paid the bill, and claimed repayment from mortgagees who had taken possession of the ship. On the following day an order was made for winding up the company. The master then applied in the winding-up for leave to take proceedings in the admiralty court, and obtained an order giving him leave. The liquidator applied to discharge this order, and an order was made for the liquidator to pay into court to a separate account to meet the claim 150*l.*, which exceeded the principal and interest, the master undertaking not to proceed in the admiralty court; the payment to be without prejudice to any application by him to increase the amount. The 150*l.* was paid in, and he applied to increase the amount so as to cover the costs of defending an action brought against him by the holder of the bill, and his costs of the application in the winding-up. The Vice-Chancellor ordered the principal and interest on the bill to be paid to the master out of the 150*l.*, and the residue to be paid to the liquidator:—Held, that though if there had not been mortgagees in possession of the ship the proper mode of enforcing the master's lien on the ship would have been by application in the winding-up, the order giving leave to proceed in the admiralty court was a proper order, the mortgagees not being parties to the winding-up;

and that the master was entitled to all his costs before the vice-chancellor as costs properly incurred by a mortgagee in enforcing his security. *Rio Grande Do Sul Steamship Co., In re*, 46 L. J., Ch. 277; 5 Ch. D. 282; 36 L. T. 603; 25 W. R. 328; 3 Asp. M. C. 424.

Detention Money as Witness.]—In calculating the amount due to a master for detention money and board whilst detained ashore as a witness, in a cause for the recovery of his wages, the fact that he through his wife carries on a business will not deprive him of his right to be allowed detention money; but if he lives at his place of business during his detention, the fact that he can live more cheaply at home than elsewhere is to be taken into consideration in fixing the amount to be allowed for subsistence money. *The Royal Family*, 31 L. T. 704; 2 Asp. M. C. 421.

Chancery Suit between Owners and Mortgagees—Master's Costs.]—The captain of a ship served a notice on the trustees of the docks, in which the cargo of the ship was being discharged, not to suffer its removal till the freight was paid, and wrote to the owners of the ship to inform them that he had stopped the cargo till the wages of himself and the seamen had been paid. In a suit between the owners and the mortgagee of one of them, the captain was made a party, and did not, by his answer, disclaim. The chief clerk found that certain sums were due to him in respect of wages, but that other sums claimed were not due:—Held, that the plaintiff was justified in making the captain a party, and that the latter was justified in not disclaiming, and was therefore entitled to his costs. *Alexander* v. *Simms*, 20 Beav. 123; 24 L. J., Ch. 618.

b. Lien.

Ship's Register.]—The master has no lien on the certificate of registry. *Gibson* v. *Ingo*, 6 Hare, 112.

The master, whether co-owner or not, has no lien upon a certificate of registry or ship's papers in case of wrongful dismissal. *The St. Olaf*, 2 P. D. 113; 35 L. T. 428; 3 Asp. M. C. 268.

For what.]—The master has at common law a possessory lien on the cargo, not only for freight, but also for general average. *Galam* (*Cargo ex*), 3 N. R. 254; Br. & Lush. 167; 2 Moore, P. C. (N.S.) 216; 33 L. J., Adm. 97; 10 Jur. (N.S.) 477; 9 L. T. 550; 12 W. R. 495.

A captain who has entered into engagements on account of the ship, thereby acquires a lien on the goods, and on the freight, to the extent of his engagements. *White* v. *Baring*, 4 Esp. 22; 6 R. R. 836. S. P., *The Panthea*, 25 L. T. 389; 1 Asp. M. C. 133.

But he has no lien on the ship for money expended, or debts incurred by him for repairs done to it on the voyage. *Hussey* v. *Christie*, 9 East, 426; 13 Ves. 599.

Nor on the freight for his wages, nor for his disbursements on account of the ship during the voyage, nor for the premiums paid by him abroad for the purpose of procuring the cargo. *Smith* v. *Plummer*, 1 B. & Ald. 575; 19 R. R. 391.

Nor for wages, stores or repairs done in England. *Wilkins* v. *Carmichael*, 1 Dougl. 101.

A master has no lien on the ship or freight for wages, nor for any expenditure which he may make in the ordinary discharge of his duties as master, however necessary for the performance of the voyage. But the case becomes one of ordinary principal and agent, where he makes a special contract, in itself ultra vires, in order to fulfil which he incurs special expenses; if the owner adopts the benefit of that contract, he must, in equity, also bear its burdens. *Bristow* v. *Whitmore*, 9 H. L. Cas. 391; 31 L. J., Ch. 467; 8 Jur. (N.S.) 291; 4 L. T. 622; 9 W. R. 621. Affirming 1 Johns. 96; 4 De G. & J. 325; 6 Jur. (N.S.) 29. Reversing 28 L. J., Ch. 801; 1 L. T. 173; 7 W. R. 150.

The master has no lien upon freight for his wages or other demands, unless it is a matter of express stipulation between himself and his owner. *Atkinson* v. *Cotesworth*, 5 D. & R. 552; 3 B. & C. 647; 1 Car. & P. 339; 3 L. J. (O.S.) K. B. 104; 27 R. R. 450.

Where Unsatisfied Judgment against Master for Necessaries.]—See *The Fairport*, 8 P. D. 48, supra, col. 94.

Lien not lost by taking Mortgage of Ship.]—A master is not deprived of his lien for wages and disbursements by the fact that he has taken a mortgage on the ship for the balance of his wages and disbursements, more especially if the shipowner has concealed from him the fact that there was a prior mortgage. *The Albion*, 27 L. T. 273; 1 Asp. M. C. 481.

Priority.]—See post, col. 101, and *The Queen*, 19 L. T. 706; *The Bangor Castle*, infra, col. 120.

Delay.]—See *The Chieftain*, infra, col. 101.

Under Tortious Hirer—Release.]—The release by the master of his personal claim against the shipowner for wages does not operate as a release of the ship from his lien for such wages. The fact that the master was hired by one who had fraudulently obtained possession of the ship, will not prevent the master having a lien upon the ship for his wages and disbursements, if he has discharged his duties in ignorance of the fraud. *The Edwin*, Br. & Lush. 211; 33 L. J., Adm. 197; 10 L. T. 658; 12 W. R. 992. But see *The Sara*, infra, col. 99.

Colonial Law.]—By 17 & 18 Vict. c. 104, s. 191, a master has a lien for his wages in the vice-admiralty court, whatever may be the municipal law of the colony. *The Rajah of Cochin*, Swabey, 473.

Disbursements — Maritime Lien — Master's Authority.]—A master of a ship acquires, under s. 1 of the Merchant Shipping Act, 1889, no lien upon the ship for disbursements for which he has no authority to bind the owner. *The Castlegate, Morgan* v. *Castlegate Steamship Co.*, 62 L. J., P. C. 17; [1893] A. C. 38; 1 R. 97; 68 L. T. 99; 41 W. R. 349; 7 Asp. M. C. 284—H. L. (Ir.)

Where no lien on the ship exists, there can be no lien on the freight. *Ib.*

Maritime Lien—Master's Lien for Disbursements.]—A liability incurred at the request of the vendors of necessaries and of the shipowners by the master of a British ship in respect of

necessaries supplied to her by the order of the owners at the port in England where they carry on business does not create a maritime lien which takes priority to a mortgage of the ship existing at the date of the necessaries being supplied. *The Orienta*, 64 L. J., Adm. 32; [1895] P. 49; 11 R. 687; 71 L. T. 711; 7 Asp. M. C. 529—C. A.

Master — Disbursements — Lien for — Necessaries.]—The Admiralty Court Act, 1861 (24 Vict. c. 10) does not give the master a maritime lien on the ship for disbursements. *The Glentanner* (Swabey, 415); *The Mary Ann* (L. R. 1 Adm. 8); *The Feronia* (L. R. 2 A. & E. 65); and *The Ringdove* (11 P. D. 120) overruled. *The Sara, Hamilton* v. *Baker*, 58 L. J., P. 57; 14 App. Cas. 209; 61 L. T. 26; 38 W. R. 129; 6 Asp. M. C. 413—H. L. (E.) [*See* 52 & 53 Vict. c. 46, s. 1.]

Maritime Lien — Right against Shipowners or Charterers — Authority.] — Where a ship is chartered under a charter providing that the master shall be appointed by the charterers, that the owners are to provide and pay for all provisions and wages of captain and crew, and for the necessary equipment and efficient working of the ship; that the captain is to be dismissed by the owners if he fails to give satisfaction, and that the charterers shall provide and pay for all coals, pilotages, port charges, &c., the master is the servant of the shipowners, and hence he has a right in rem for his wages and such disbursements as are necessary for the navigation of the ship, and which the charterers had not by the provisions of the charterparty undertaken to pay; and semble, per Lord Esher, M.R., if the charterers had refused to make these disbursements, and without them the ship could not be navigated, the master would be entitled to charge them against the shipowners. Semble, where the master is the servant of the charterers and not of the shipowners, he has no right against the owners in respect of wages and disbursements. *The Beeswing*, 53 L. T. 554; 5 Asp. M. C. 484—C. A.

By charterparty it was agreed that the owners of the ship should provide and pay for provisions and wages, and that the charterer should provide and pay for coals and other expenses. The master was to be appointed by and was to follow the instructions of the charterer. The master, with notice of the charterparty, ordered and made himself liable for provisions and coals for the vessel at a foreign port. These provisions and coals were necessary to enable the vessel to perform her voyage:—Held, in an action by the master against the vessel, that he was entitled to recover for the provisions but not for the coals, as by the terms of the charterparty he had no power to pledge the owner's credit in respect of them. *The Turgot*, 11 P. D. 21; 54 L. T. 276; 34 W. R. 552; 5 Asp. M. C. 548.

Agreement with Owners — Loss of Lien — Non-payment.]—A master, who after receiving a portion of his wages from the managing owners, elects to allow the balance to remain in their hands at interest, by so doing loses his lien, and cannot recover the balance in rem, but if he has had no opportunity of receiving his wages, or has been refused payment of them on demand, the mere fact of his allowing them to remain in the managing owner's hands after they become due will not deprive him of his remedy. *The Rainbow*, 53 L. T. 91; 5 Asp. M. C. 479.

Where shipowners, in answer to a claim for wages, plead an agreement between the managing owner and the plaintiff, that the plaintiff shall, instead of receiving his wages, allow it to remain in the hands of the managing owner, and has thereby foregone his right against the ship, the onus is upon the defendants to clearly prove that there was an express arrangement to that effect, before the court will deprive the plaintiff of his right. *Ib.*

Master under Liability for Necessaries may proceed in rem.]—A master who becomes personally liable for necessaries has the right to proceed in rem against the ship. *The Marco Polo*, 24 L. T. 804; 1 Asp. M. C. 54.

Wages Suit—Mortgagee intervening—Right to release of Ship—Bail.]—In an action against ship and freight for master's wages the mortgagee in possession is entitled to a release of the ship on giving bail, although the master has made himself liable on bills of exchange drawn upon the charterers for the ship's use. *The Ringdove*, Swabey, 310.

What Ship subject to Lien.]—The master's lien for wages under 7 & 8 Vict. c. 112, s. 16, affects only the ship in which the wages were earned. *The Julindup*, 1 Spinks, 71.

Master Joint Mortgagee—Sale by Mortgagees—Master's Claim for Wages.]—The master of a ship was a joint mortgagee of her. The owners became bankrupt, and the ship was sold by the mortgagees in possession, with the knowledge of the master, who did not interfere with the sale:—Held, that the master could sue the ship for wages under 7 & 8 Vict. c. 112, s. 16. *The Repulse*, 9 Jur. 738. *And see* 5 Not. of Cas. 348.

Suit entered in too small Sum—Release of Ship.]—A suit by a master for wages was entered for a sum which, by reason of the defendants' delay, proved insufficient to cover his claim and costs:—Held, that the ship should not be released until claim and costs paid in full. *The Helen*, 14 W. R. 502.

Lien in Admiralty—None in Chancery.]—A master sued in chancery the executor of a deceased part owner for 10*l.*, due to him on account of the ship. No remedy in equity against the ship, but semble aliter in admiralty. *Pierson* v. *Robinson*, 3 Swanst. 139.

Ship liable though Owners not liable—Master appointed by Persons allowed to remain in Possession of Vessel—Maritime Lien.]—The master of a ship, appointed by persons who are not the real owners, but who have been allowed by the real owners to remain in possession and to have the control of the vessel for the purpose of using her in the ordinary way, may have a maritime lien on the ship for his disbursements and liabilities properly incurred by him on account of the ship, although the owners may not be personally liable for the disbursements or the matters in respect of which the liabilities have been incurred. *The Castlegate* (62 L. J., P. C. 17; [1893] A. C. 38) and *The Orienta* (64 L. J. P. 32; [1895] P. 49; supra, col. 99,) distin-

guished. *The Ripon City*, 66 L. J., P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M. C. 304.

c. Priorities.

Extent of.]—The master has a maritime lien on the ship for his wages and disbursements, and his claim takes priority over all other claims, save claims for salvage and damage by collision. *The Panthea*, 25 L. T. 389; 1 Asp. M. C. 133.

Maritime liens, being in the nature of rewards for services rendered, rank against the fund out of which they are to be paid in the inverse order of their attachment on the res, and the last in time should be the earliest in payment. *The Hope*, 28 L. T. 287; 1 Asp. M. C. 563, infra.

Over Bottomry Bond.]—The claim of a master for his wages earned and disbursements made subsequently to a voyage, during which a bottomry bond has been given on his ship, takes priority over the claim of the bondholder. *Ib.*

A bottomry bondholder is entitled to priority over the claim of a master for wages earned on voyages previously to that during which the bond is given. *Ib.*

Against the balance of proceeds of sale of a vessel sold in a bottomry suit, the master has in respect of his claims, both for wages and disbursements, priority over the rights of the mortgagee. *The Mary Ann* or *Anne*, 35 L. J., Adm. 6; L. R. 1 A. & E. 8; 12 Jur. (N.S.) 31; 13 L. T. 384; 14 W. R. 136. But see *The Sara*, supra, col. 99.

A master, being sole owner, having given a bottomry bond, binding himself, ship and freight, cannot claim his wages to the prejudice of the bondholders. *The William*, Swabey, 346; 6 W. R. 871.

When a master, being also part owner of a vessel, had bound himself by a bottomry bond on ship, freight and cargo:—Held, that the owners of part of the cargo could not oppose his right to be paid his wages and disbursements in priority to the bondholder. *The Daring*, 37 L. J., Adm. 29; L. R. 2 A. & E. 260.

In such a suit by the master, the court will not, under the Merchant Shipping Act, 1855, s. 191, entertain a counter-claim by the owner of the cargo. *Ib.*

The master cannot compete with the bondholder for his wages against the ship's freight where he binds himself by the bond. Where, however, he has incurred no such personal obligation, he is not barred. *The Salacia*, 32 L. J., Adm. 41; 9 Jur. (N.S.) 27; 7 L. T. 440; 11 W. R. 189.

Over Seamen.]—The 17 & 18 Vict. c. 104, s. 191, does not alter the relation of the master to the seamen, and he cannot compete with them to their detriment for a share in a fund. *Ib.*

Over Mortgagees.]—A master does not lose his lien upon a ship for wages due by delaying to enforce such lien for ten months after his discharge, notwithstanding he has had an opportunity to do so; but he may enforce it even against persons who, as mortgagees, have in the interim become interested in the ship with notice of the lien. *The Chieftain*, Br. & Lush. 212. And see *The Bangor Castle*, post, col. 120.

A master's claim for wages and disbursements, whenever earned or made, takes priority over the claims of mortgagees. *The Hope*, 28 L. T. 287; 1 Asp. M. C. 563.

Where the master of an ordinary seeking ship entered into a charterparty, under seal, to carry troops from the Mauritius to England, and stipulated, on his own responsibility, in the charterparty, that he would make certain alterations in the ship, in order to enable him to carry the troops, and at the Cape of Good Hope entered into another charterparty, not under seal, to a similar effect, and made the specified alterations, and paid money, and drew bills to meet the expenses necessary to the making of these alterations, and the voyage was performed:—Held, that, apart from lien, in equity, the master was first entitled out of the freight earned under these charterparties to be repaid the sums advanced, and to be indemnified against the bills, and that the owner (or his mortgagee) was only entitled to the net freight after deducting these charges. *Bristow* v. *Whitmore*, 9 H. L. Cas. 391; 31 L. J., Ch. 467; 8 Jur. (N.S.) 291; 4 L. T. 622; 9 W. R. 621—H. L. (E.)

Enforcing Claim against Ship.]—The master of a ship belonging to a company drew a bill on the company for necessaries supplied to the ship, which was accepted, but was dishonoured at maturity. He paid the bill, and claimed repayment from mortgagees who had taken possession of the ship. On the following day an order was made for winding up the company. The master then applied in the winding-up for leave to take proceedings in the admiralty court, and obtained an order giving him leave. The liquidator applied to discharge this order, and an order was made for the liquidator to pay into court to a separate account to meet the claim 150*l.*, which exceeded the principal and interest, the master undertaking not to proceed in the admiralty court; the payment to be without prejudice to any application by him to increase the amount. The 150*l.* was paid in, and he applied to increase the amount, so as to cover the costs of defending an action brought against him by the holder of the bill, and his costs of the application in the winding-up. Bacon, V.-C., ordered the principal and interest on the bill to be paid to the master out of the 150*l.*, and the residue to be paid to the liquidator:—Held, that though if there had not been mortgagees in possession of the ship the proper mode of enforcing the master's lien on the ship would have been by application in the winding-up, the order giving leave to proceed in the admiralty court was a proper order, the mortgagees not being parties to the winding-up; and that the master was entitled to all his costs before the vice-chancellor as costs properly incurred by a mortgagee in enforcing his security. *Rio Grande Do Sul Steamship Co., In re*, 46 L. J., Ch. 277; 5 Ch. D. 282; 36 L. T. 603; 25 W. R. 328; 3 Asp. M. C. 424—C. A.

Priority of Claim of Material-Men.]—A master being part owner of a foreign ship ordered necessaries for the ship. The necessaries were supplied, and the master became liable for payment:—Held, that the material-men were entitled to be paid for the necessaries out of the proceeds of the ship and freight in priority to a claim of the master for wages and disbursements. *The Jenny Lind*, 41 L. J., Adm. 63; L. R. 3 Adm. 529; 26 L. T. 591; 20 W. R. 895; 1 Asp. M. C. 294.

A shipwright's lien is postponed to a master's claim for wages earned prior to the repairs. *The Gustaf*, Lush. 506; 31 L. J., Adm. 207; 6 L. T. 660. Cf. *The Queen*, 19 L. T. 706.

Interference of Court of Bankruptcy with Arrest under Warrant.]—A master mariner claiming a lien for wages and disbursements upon a vessel, the property of the arranging debtor, who had declared himself insolvent, caused the vessel to be arrested under the warrant of the court of admiralty. The court of bankruptcy, upon an application to restrain the further action of the court of admiralty in respect of the vessel, declined to do so, except upon the terms of lodging in court a sum sufficient to answer the claim and costs, and an undertaking to abide any further order in respect of any further sum which might be declared due for costs or otherwise. *T. C., In re*, Ir. R. 11 Eq. 151

Lien for Disbursements—Priority over Mortgage.]—Master's liability for necessaries has priority over mortgage debt. *The Limerick*, 1 P. D. 411; 34 L. T. 708; 3 Asp. M. C. 206.

Master's Lien—Mortgage—Sale of Ship.]—Master restrained by injunction from enforcing his alleged lien against proceeds of ship which had been mortgaged and afterwards sold on the voyage as unseaworthy. *Lister* v. *Payn*, 11 Sim. 348.

d. Forfeiture.

Drunkenness.]—Constant drunkenness, or non-performance of duty ascribed to it, on the part of the master, does, but occasional intoxication does not, work a forfeiture of wages. *The Atlantic*, 9 Jur. (N.S.) 183; 7 L. T. 647; 11 W. R. 188. S. P., *The Macleod*, 5 P. D. 254.

Occasional drunkenness in port on the part of the master of a vessel will not, if unaccompanied with neglect of duty, work a forfeiture of wages. *The Roebuck*, 31 L. T. 274; 2 Asp. M. C. 387, infra.

Semble, that constant drunkenness on the part of a master, whether there is proof of neglect of duty or not, will work a forfeiture of either the whole or part of his wages, according to circumstances. *Ib.*

Error in Judgment—Neglect.]—An error in judgment on the part of the master will not work a forfeiture of his wages. *The Atlantic*, supra.

As where he makes a mistake in the management of the ship's affairs in a foreign port. *The Thomas Worthington*, 3 W. Rob. 128.

Neither error of seamanship in a master, nor neglect to communicate to a Lloyds' agent, stranding of the vessel, nor neglect to sign a bottomry bond, works a forfeiture of wages. *The Camilla*, Swabey, 312; 6 W. R. 840.

—— Taking Bill instead of Cash for Freight.]—When a master receives instructions to take the balance of freight due at the end of a voyage in cash, or by bank bill upon London, and without sufficient inquiry, but without mala fides and rather through error of judgment, he takes a bill which he believes to be (but which is not) a bank bill, and which is afterwards dishonoured, causing loss to his owners, this negligence or disobedience, not being wilful, does not work a forfeiture of his wages, nor can the owners claim to deduct the amount of their loss from his wages. *The Dunmore*, 32 L. T. 340; 2 Asp. M. C. 599.

Insubordination.]—The owners of a vessel have a right to dismiss an officer who directly or indirectly promotes insubordination, and such officer has no right to wages otherwise due to him by agreement after such dismissal. *The Marina*, 50 L. J., Adm. 33; 29 W. R. 508.

F., part owner of a vessel, mortgaged (as it was alleged) his share to the other part owner S., who assigned his own share and the other mortgaged share to B. F. refused to obey B.'s orders, and denied in strong language to him that he had mortgaged to S.:—Held, that even if B. was owner of the entire ship and cargo, F.'s conduct and language were not such as to raise a forfeiture of his wages. *The Joseph Dexter*, 20 L. T. 820.

Employing Ship contrary to Orders.]—When a master receives express orders from his owners as to the voyages which he is to make and the ports to which he is to take the ship, and such orders are given under and with a view to a state of circumstances out of which danger might arise to the ship, and which are known to and discussed by the master and owner at the time when they are given, the master is not justified, out of an alleged apprehension of that danger, in taking the ship on other voyages and to other ports; and if he does so take the ship, he will not be entitled to recover his wages for the time during which she is engaged against the owners' orders, even if the voyages are for the owners' benefit. *The Roebuck*, 31 L. T. 274; 2 Asp. M. C. 387.

Desertion.]—A master's wages may be forfeited by desertion, but there can be no absolute desertion of his ship working a forfeiture of the whole of his wages if there is an animus revertendi upon the part of the master. *Ib.*

When a master quits his ship and remains away for such a time and under such circumstances as lead his owner reasonably to suppose that he has no intention of returning, the owner will be justified in removing the vessel from the place where it is left, and appointing another master; and the original master will not be entitled to recover his wages for any period after the time when he so quitted the ship. *Ib.*

e. Foreign Master.

Remedy for Wages.]—In a suit by a foreign master against the freight for his wages, the question whether the freight is liable is a question of remedy, and not of contract, and is, therefore, to be determined by the lex fori. *The Milford*, Swabey, 362; 4 Jur. (N.S.) 417; 6 W. R. 554.

The 17 & 18 Vict. c. 104, s. 191 (notwithstanding s. 107), extends to the masters of foreign ships, and gives them a remedy against ship and freight for wages. *Ib.*

A master of a foreign ship instituted a cause against the ship for his wages, and no notice of the institution of the cause was given by him to the consul of the foreign state. The owners appeared under protest; and the consul protested, as consul, against the cause being allowed to proceed. The cause was dismissed on the ground that the jurisdiction of the court of admiralty over causes of wages of foreign masters is discretionary only; that notice of the institution of any such cause ought to be given to the consul of the state to which the ship belongs; and that the protest of the consul was

a bar to the cause proceeding. *The Herzogin Marie*, Lush. 292 ; 5 L. T. 88.

Protest by Consul.]—The protest by a foreign consul against the continuance of a wages cause against a foreign vessel does not deprive the court of jurisdiction ; but the court will use its discretion whether or not to exercise the jurisdiction. *The Octavie*, Br. & Lush. 215 ; 33 L. J., P. 115 ; 9 L. T. 695. And see *The Leon XIII.*, 52 L. J., Adm. 58 ; 8 P. D. 121 ; 48 L. T. 770 ; 5 Asp. M. C. 73—C. A.

In a suit for wages by foreign seamen, if their consul intervenes and asks that payment of the wages due to them be made to him on their behalf, the court usually grants the application. *The Timor*, 9 L. T. 397 ; 12 W. R. 219.

Lien—Bottomry Bond.]—A master of a foreign ship having, in the terms of a bottomry bond, bound as well himself as the ship and freight, cannot enforce his lieu for wages against the claim of the bondholder. *The Jonathan Goodhue*, Swabey, 524.

6. Barratry.

Cotton stowed on Deck.]—Ninety bales of cotton, insured against barratry of the master and mariners, were stowed upon deck, and were jettisoned in a storm. Before the ship sailed one of her agents discovered that the captain was stowing cotton on deck, and opposed it, and desired him to send the cotton by another vessel. The captain, notwithstanding the remonstrance, continued to stow the cotton upon deck. This it was contended amounted to barratry, as "an act of wrong done by the master against the ship and goods" :—Held, that it did not amount to barratry. *Atkinson* v. *Great Western Insurance Co.*, 27 L. T. 103 ; 1 Asp. M. C. 382.

Kidnapping.] — When a master ships and carries Polynesian native labourers without a licence against the provisions of the Kidnapping Act, 1872 (35 & 36 Vict. c. 19), proof that the master, although he may never have seen the act itself or the proclamation thereof in the Australasian colonies, was informed before shipping the labourers that such an act existed, and that it was illegal to carry them, is sufficient evidence to justify a jury in finding that he shipped and carried the labourers wilfully and with knowledge of the prohibition, so as to make his act barratrous. *Australian Insurance Co.* v. *Jackson*, 33 L. T. 286 ; 3 Asp. M. C. 26.

Scuttling Ship.]—Scuttling a ship with the knowledge of the shipowner, but without the knowledge of the freighter, is barratry, in respect of which the freighter may recover against the underwriters. *Ionides* v. *Pender*, 43 L. J., Q. B. 227 ; L. R. 9 Q. B. 531 ; 30 L. T. 547 ; 22 W. R. 884 ; 2 Asp. M. C. 266. See also *Grill* v. *General Iron Screw Collier Co.*, post, col. 329.

Deviation for Master's Convenience.]—Deviation for master's convenience is barratry. *Vallejo* v. *Wheeler*, 1 Cowp. 143.

Barratry may be committed against a charterer who is pro hâc vice owner. *Ib.* As to this report see per Buller, J., 1 Term Rep. 329.

Deviation for the Owner's Benefit.]—Is not barratry. *Stamma* v. *Brown*, 2 Str. 1173.

Fraudulent Intent.]—On the part of the master is necessary ; neglect to pay port dues is not barratry. *Knight* v. *Cambridge*, 1 Str. 581 ; Cowp. 153 ; 2 Ld. Raym. 1540 ; 1 Mod. 230.

Extent of Owner's Liability for.]—A master of a ship, without the owner, entered into a charterparty with plaintiff to undertake a voyage on certain terms, and for due performance he bound the ship, tackle, &c., valued at 300*l.* The master deviated, and committed barratry, for which plaintiff obtained a sentence against him in Spain. The owner brought trover for the ship, and an action against plaintiff for the freight. Per cur., the master is liable for the deviation and barratry, but the owner is not liable beyond the sum at which the ship was valued in the charterparty. *Anon.*, 2 Ch. Cas. 2, 238.

See also B. Marine Insurance, infra.

7. Certificate.

Ship in Charge of Uncertificated Master.]—See *Heslop* v. *Cadenhead*, infra, IV., Owners ; 10, Offences by ; *Story, Ex parte*, ante, col. 82. *See also* tit. Wreck Inquiries, post, cols. 874 seq.

VI. Seamen (including Thames Watermen).

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Injury to.]—*See* IV., Owners.

1. Wages.

a. Generally.

Jurisdiction of Admiralty Court.]—The jurisdiction of the admiralty in wages suits is founded on the general maritime law, and has existed from the first establishment of the court. *The Courtney*, Edw. 239. *See also* post, XXVI. Admiralty Law and Practice — Prohibition.

Paid by Mate.]—The court of admiralty has no jurisdiction in a claim by a mate for wages

paid to seamen and disbursements. *The Victoria*, 37 L. J., Adm. 12.

Law of Flag or Forum.]—A subject of the United States was mate on board a vessel of that country during a voyage from California to Great Britain. By the death of the master, the mate assumed that position. He proceeded in the British court of admiralty against the freight for wages due to him. The owners appeared under protest, objecting that the law of the flag was applicable, and not the lex fori:—Held, that the lex fori must govern the case, and the protest be overruled, and that the mate had a lien on the freight, whatever might be the law of the United States, and notwithstanding the provisions of the 17 & 18 Vict. c. 104, ss. 109, 191. *The Milford*, Swabey, 362; 4 Jur. (N.S.) 417; 6 W. R. 554.

Freight the Mother of Wages.]—Freight is the mother of wages. If the ship is lost the mariners lose their wages. *Dunkley* v. *Bulwer*, 6 Esp. 68, infra.

Freight is the mother of wages. The shipowner gets no freight unless the ship unloads, and the seamen lose their wages. *Anon.*, Siderf. pt. 1, 236: *Anon.*, 2 Show. 283: *Anon.*, Siderf. pt. 1, 119. S. P., *The Lady Durham*, 3 Hag. Adm. 196: *Thomas* v. *Tobin*, 3 Hag. Adm. 197, n.

—— **Aliter, where special Agreement for Wages.**]—A special agreement for wages held good though no freight earned. *Campion* v. *Nicolas*, Str. 405.

Voyage abandoned—Ship unseaworthy.]—Where the ship went to sea in an unseaworthy condition and the voyage had to be abandoned, the seamen could not sue for wages, since no freight was earned. *Euken* v. *Thom*, 5 Esp. 6; 8 R. R. 824.

—— **Ship lost on Home Voyage.**]—A ship was hired by government to take out convicts to Van Diemen's Land. From that place it sailed to Batavia, and on several other trading voyages. It sailed on the homeward voyage to England, and arrived safe at St. Helena, but was lost before arrival at the port of discharge, and all on board perished:—Held, that proof of these facts, and of a seaman having gone on board the ship in England, and having been seen working on board at Van Diemen's Land, at Batavia, and afterwards at St. Helena, was sufficient to entitle the seaman to wages pro ratâ for the voyage out. *Harris* v. *Ivo*, 1 H. & W. 238.

Seamen entered into articles to serve for monthly wages on board a ship "bound for the ports of Madeira, any of the West India Islands, and Jamaica, and to return to London"; and it was agreed that they should not demand or be entitled to their wages, or any part, until the arrival of the ship at the port of discharge (meaning London):—Held, that though the ship earned freight upon the delivery of an outward-bound cargo at Madeira, and of another cargo taken in at Madeira, and delivered in the West Indies; yet, that, being lost in her passage home by a storm, the seamen could not recover wages pro ratâ upon the outward voyage by reason of the express terms of the stipulation respecting wages. *Appleby* v. *Dods*, 8 East, 300; 9 R. R. 450.

Wages to Port of Delivery—Prepaid Freight.]—If the ship is lost after her departure from a port of delivery, wages are due to the port of delivery; if freight is prepaid and the ship lost before arriving at a port of delivery, wages are due according to the amount of freight prepaid. *Anon.*, 2 Show. 283. And see *The Juliana*, 2 Dods. 504; *Cullen* v. *Mico*, 1 Keb. 831.

Ship captured.]—A seaman was taken out of a captured ship and carried to France; the ship was recaptured and taken to her destination:—Held, that no wages were due. *The Friends*, 4 C. Rob. 143.

The wages of a sailor are not payable if the ship is lost or taken before the end of the voyage (*Hernaman* v. *Bawden*, 3 Burr. 1844); although afterwards ransomed. *Wiggins* v. *Ingleton*, 2 Ld. Raym. 1211.

An officer or a sailor, who was engaged to serve on board a letter-of-marque for wages during the voyage, and a share of all prizes, is not entitled to any part of the wages if the ship is taken before she completes her voyage, although he shall have been sent from the ship before the capture, as prize-master on board a prize taken in the course of the voyage. *Abernethy* v. *Landale*, 2 Dougl. 539.

—— **Where Recaptured.**]—If a ship is captured in the course of her voyage, and is afterwards recaptured, and arrives at her port of destination, the sailors are entitled to their wages. *Bergstrom* v. *Mills*, 3 Esp. 36; 6 R. R. 810.

Detention by Foreign Power.]—A seaman may recover for wages during a hostile embargo in a foreign port, while he was imprisoned on shore, on proof that the crew was restored to the ship, and that she completed her voyage and earned freight, without producing the order by which the embargo was taken off. *Delamainer* v. *Winteringham*, 4 Camp. 186. S. P., *Pratt* v. *Cuff*, 4 East, 43, n.

The Russian government laid an embargo on British ships in Russian ports, until an alleged convention between the Russian and British government should be fulfilled by the latter. The crews were taken out of the ships, marched up the country, and there detained for six months, and treated as prisoners of war; and at the end of that time they were marched back to their ships, and the vessels with their cargoes restored:—Held, that this was an embargo, and not a hostile capture, and that the seamen were entitled to wages during the time of the detention. *Thompson* v. *Beale*, 1 Dow, 299; 14 R. R. 73; 4 East, 546; 1 Smith, 153; 3 Bos. & P. 405.

So it was held, where the plaintiff was a foreign seaman. *Johnson* v. *Broderick*, 4 East, 566; 1 Smith, 144; 7 R. R. 636.

When Seaman Impressed.]—A seaman impressed from a merchant ship was not entitled to wages up to his impressment (2 Geo. 2, c. 36) if his ship was lost and no freight earned. *Dunkley* v. *Bulwer*, 6 Esp. 86, supra. S. P., *Anon.*, 2 Camp. 320, n.

The mariner gets his wages up to the time of impressment if the ship earns freight. If the ship is captured the mariner gets no wages, even though she is afterwards recaptured. *Wiggins* v. *Ingleton*, 2 Ld. Raym. 1211.

Seaman entitled to wages up to impressment. *Chandler* v. *Meade*, cited, 2 Ld. Raym. 1211.

Discharge in foreign Port.]—A master is not generally at liberty to discharge his crew in a foreign port, but circumstances may justify him in doing so upon conditions. *The Elizabeth*, 2 Dods. 403.

Circumstances under which a master is justified in discharging a first engineer abroad considered. *The Marina*, 50 L. J., Adm. 33 ; 29 W. R. 508.

Damages for wrongful Discharge.]—Mariners' wages decreed with penalties for wrongful dismissal (5 & 6 Will. 4, c. 19, s. 11). A seaman was shipped for a voyage out and home. The ship was sold during the voyage at a foreign port, and the seaman was paid wages to the time of sale and paid his passage home :—Held, that the seaman was entitled to be put into as good a position pecuniarily as he would have been in if the voyage had been completed ; gain of time and re-employment being taken into consideration. *Mitchell* v. *Foe*, cited, *Maclachan on Ship.*, 4th ed. 234.

Hardships incurred.—In an action by a seaman for breach of the stipulations in his agreement for service, the court, in addition to the compensation provided by the Merchant Shipping Act, 1854, can award general damages for breach of the agreement, and for hardships incurred by the seaman through the vessel being employed for purposes other than those contemplated by the agreement. *The Justitia*, 56 L. J., Adm. 111 ; 12 P. D. 145 ; 57 L. T. 816 ; 6 Asp. M. C. 198.

Agreement for Voyage not exceeding Six Months—Compensation for Discharge within One Month.]—The respondent, a seaman, was engaged under an agreement in the prescribed form to serve on a ship on a voyage from Sunderland to Bilbao, and any other ports within certain degrees, and back to a port of discharge in the United Kingdom. The term of employment was not to exceed six months. The wages were stated to be at a monthly rate. The ship returned to Sunderland within twenty-three days, and, the voyage being thereupon terminated, the respondent was duly discharged. Upon a summons issued by the respondent against the appellant, the master, the judges held that he was entitled to compensation up to one month's wages for such discharge under the provisions of s. 167 of the Merchant Shipping Act, 1854, and notwithstanding any agreement : —Held, that, being properly discharged under his agreement, the respondent was not entitled to the benefit of s. 167, since discharge before the commencement of the voyage, or an improper discharge before one month's wages have been earned, is the condition precedent to the relief given by the act. *Tindle* v. *Davison*, 61 L. J., M. C. 107 ; 66 L. T. 372 ; 56 J. P. 390 ; 7 Asp. M. C. 169.

Expenses of Maintenance and Passage Home.] —Sect. 186 of the Merchant Shipping Act, 1894, which provides that where the service of any seaman belonging to any British ship terminates at any port out of her majesty's dominions ; the master, besides paying the wages to which the seaman is entitled, shall as one of several alternatives, "(*d*) deposit with the consular officer . . . such a sum of money as is by the officer . . . deemed sufficient to defray the expenses of his maintenance and passage home," imposes upon the consular officer the duty of determining the amount to be deposited ; and where the master has deposited the amount fixed by the officer, no further claim can be made against the shipowner under the section for any expenses incurred by the seaman. *Edwards* v. *Steel, Young & Co.*, 66 L. J., Q. B. 690 ; [1897] 2 Q. B. 327 ; 45 W. R. 689—C. A.

"Home" in the section means the port at which the seaman was originally shipped, or such other port in the United Kingdom as he agrees to go to. *Ib.*

Where seamen are wrongfully discharged abroad they are entitled to recover their necessary expenses (*The Frederick*, 1 Hag. Adm. 219) ; and the whole of the wages for the voyage. *The Elizabeth*, 6 Jur. 156.

Ship lost—Certificate of Master—7 & 8 Vict. c. 112.]—The enactment 7 & 8 Vict. c. 112, s. 17, as to seamen being entitled to wages in case of wreck on receiving the master's certificate, does not apply to a case where the seamen would have been entitled to wages before the act. Where, therefore, a vessel was lost in a seeking voyage after carrying and delivering cargoes in the course of it :—Held, that the seamen were entitled to wages without any certificate from the master. *Hicks* v. *Walker*, 4 W. R. 511.

Ship Insured—Owner Bankrupt—Seamen's Wages paid out of Insurance Money.]—Where an insured ship was lost, and the insurance money was recovered by the assignees of the owner, who had become bankrupt :—Held, that the seamen were entitled to be paid in full out of the insurance money. *Dawson, In re*, 1 Fonb. 229 ; 17 L. T. (o.s.) 100.

Owner and Master Bankrupt—Mate entitled to Six Months' Wages.]—Under a fiat against the master and owner of a ship, the mate is entitled to be paid six months' salary in full. *Hamborg, Ex parte, Hudson, In re*, 2 Mont. D. & D. 642 ; 11 L. J., Bk. 229 ; 4 Jur. 898.

When Left Behind by Own Negligence.]—A seaman shipped under articles, by which he agreed that he would serve on voyages to certain named places and home to the final port of discharge of the ship, in consideration of which services to be duly performed the master agreed to pay as wages a certain sum per calendar month. He was left behind at one of the places at which the ship stopped ; and the jury found that there was no desertion, but that he had been guilty of drunkenness and abusive language, to the subversion of discipline, and was left behind through his own negligence :—Held, that he was entitled to his wages up to the time of his being left behind. *Button* v. *Thompson*, 38 L. J., C. P. 225 ; L. R. 4 C. P. 330 ; 20 L. T. 568 ; 17 W. R. 1069.

Death before Termination of Voyage.] —A seaman entered into articles to serve on board the ship "R.," "bound from the port of L. to the S. S., to procure a cargo of sperm oil, and to return therewith to the port of L., where the voyage was to end" ; instead of wages he was to receive a share of the net proceeds of the cargo ; and it was stipulated that no one of the crew should "demand or be entitled to his share of the net proceeds of the cargo until the arrival of the ship at L., and her cargo should

be there sold and delivered, and the money for the same actually received by the owners." A cargo was procured, the ship was afterwards condemned in a foreign port, and the mariner accompanied part of the cargo on its homeward voyage (it having been transhipped into another vessel, the "A."), but died at sea:—Held, that "until" in the articles was a word of limitation of the mariner's right to wages, and not of postponement of payment of them merely; and, consequently, that as the ship did not return to L., the administrator of the mariner was not entitled to recover his share of the net proceeds of the "R.'s" cargo, but only to recover on a quantum meruit for his services on board the "A." *Jesse* v. *Roy*, 1 C. M. & R. 316; 4 Tyr. 626; 3 L. J., Ex. 268.

If a sailor hired for a voyage takes a promissory note from his employer for a certain sum, provided he proceeds, continues and does his duty on board for the voyage, and before the arrival of the ship he dies, no wages can be claimed, either on the contract or on a quantum meruit. *Cutter* v. *Powell*, 6 Term Rep. 320; 3 R. R. 185.

Where a seaman dies on the voyage his representatives are entitled to his wages up to his death or last time for payment, according as wages are payable. *Beale* v. *Thompson*, 4 East, 546.

Seaman Carried on after Service Expired—Damages.]—The plaintiff signed articles on February 11, 1896, to serve on board a steamship for a period not exceeding twelve months, and he was to be discharged either in the United Kingdom or on the continent between the Elbe and Brest. On February 11, 1897, the date when the contract expired, the steamship was at Aden, whence she was to sail to Batoum. The plaintiff applied for his discharge according to the terms of the articles, but being refused he was taken on board the steamer to Port Said, from which port he had to pay his passage home on another vessel:—Held, that he was entitled to recover the cost of his passage, his wages till arrival in the United Kingdom, and the cost of his board and lodging till he got a passage from Port Said. *Donkin* v. *Hastie*, 61 J. P. 568.

Assignment of Wages.]—A seaman assigns his wages as a security for money, and dies indebted to other persons. The assignment specifically binds the wages, and the money secured thereby shall be paid preferably to all other debts. *Crouch* v. *Martin*, 2 Vern. 595.

A seaman assigned his wages to J. as a security for a debt he owed to J., and died intestate; it was insisted that this was only an agreement in nature of a letter of attorney, and determined by the seaman's death, and that there were bond debts. Decreed J. shall be paid in due course of administration. *Mitchell* v. *Edes*, 2 Vern. 391; Pre. Ch. 125.

Expense of bringing sick Seaman Home—Deduction from Wages.]—A seaman who from bad food supplied on board ship fell sick has received an injury in the service of the ship within 17 & 18 Vict. c. 104, s. 228, sub-s. 1; and the board of trade are not entitled to deduct from wages received on his account the expenses of bringing him home. *Board of Trade (Secretary)* v. *Sundholm*, 41 L. T. 469; 4 Asp. M. C. 196.

Seaman unable to do Duty.]—A seaman is entitled to his whole wages though he has been unable to render his service, if his inability has proceeded either from a hurt received in the performance of his duty, or from natural sickness happening to him in the course of the voyage. *Chandler* v. *Grieves*, 2 H. Bl. 606, n.; 6 Term Rep. 325, n.; 3 R. R. 525.

Captain causing Men to refuse to work.]—If a seaman's claim for wages is resisted on the ground that he would not do his work, which by the ship's articles is to cause forfeiture of wages, it is a good answer to shew that the refusal to work was caused by the misconduct of the captain, which went to induce the men to incur such forfeitures. *Train* v. *Bennett*, 3 Car. & P. 3; M. & M. 82.

Insurance of Wages.]—The seaman could not (formerly) insure his wages. *The Lady Durham*, 3 Hag. Adm. 196.

Wages Payable out of Proceeds of Wreck.]—Where the mariners saved parts of their ship after she had been wrecked they are entitled to be paid their wages so far as the wreckage goes, though no freight earned. *The Neptune*, 1 Hag. Adm. 227. S. P., *The Lady Durham*, supra.

And similarly where the wreck is salved by others. *The Reliance*, 2 W. Rob. 119.

Illegal Voyage.]—Claim for wages as mate dismissed, the service being in contravention of the slave trade acts. *The Vanguard*, 6 C. Rob. 207.

Wages may be recovered from the master though the vessel be forfeited for illegal trading to which the mariners were not parties. *The Malta*, 2 Hag. Adm. 158, n.

Deviation from agreed Voyage.]—Deviation from the voyage agreed upon from accident or overruling necessity does not entitle the mariner to his discharge; but a deviation of importance, without necessity, does. *The Eliza*, 1 Hag. Adm. 182; *The Countess of Harcourt*, *Ib.* 248; *The Minerva*, *Ib.* 347; *The George Holme*, *Ib.* 370.

The voyage was described in the articles as from London to Madras and Calcutta and back to London. The ship deviated from Madras, going to Calcutta by way of Prince of Wales Island:—Held, that the seaman was entitled to his discharge at Madras, and that, although remaining on board to Calcutta, where he demanded his discharge and refused work and left the ship, he was entitled to wages up to leaving the ship. *The Cambridge*, 2 Hag. Adm. 243.

Ship Unseaworthy—Desertion of Crew.]—If the ship is not seaworthy by reason of some of the crew having deserted, the rest of the crew are not bound to go to sea in her, and their contract is at an end. *Hartley* v. *Ponsonby*, 7 El. & Bl. 872; 26 L. J., Q. B. 322; 3 Jur. (N.S.) 746; 5 W. R. 659.

Seaworthiness—Warranty.]—When a seaman signs articles at a foreign port there is an implied warranty of seaworthiness, and if the ship is unseaworthy there is consideration for a new contract for extra reward to induce him to sail in her. *Turner* v. *Owen*, 3 F. & F. 176.

Voyage abandoned—Ship Unseaworthy.]—See *Eaken* v. *Thom*, supra, col. 107.

Half Wages if Ship detained by Ice.]—A ship's articles contained a clause to the effect that if the ship should winter abroad on account of ice the officers and seamen should receive half wages during such detention. The ship went "seeking"; the ice prevented her getting a cargo, but not from sailing without one; she wintered abroad:—Held, that the crew were entitled to half wages only. *The Hoghton*, 3 Hag. Adm. 100.

Apprentice may sue for.]—An apprentice is entitled to sue the proceeds of the ship in which he has served for wages due, under a general apprenticeship to the owner, but not for the penalty contained in the indenture for breach of the agreement. *The Albert Crosby*, Lush. 44.

Wages of Apprentice harboured in another Ship.]—A. the master of an apprentice, who, being harboured by B. the master of another ship, serves as a seaman on board her, may waive the tort and sue B. for the services of the apprentice. *Foster* v. *Stewart*, 3 M. & S. 191; 15 R. R. 459.

Termination of Contract.]—On the wreck of a ship the seamen are bound to do their utmost to save ship and cargo; but the seamen's contract of service may be terminated either by final abandonment of the ship or by a discharge given by the master. *The Warrior*, Lush. 476; 6 L. T. 133.

Forfeiture of Wages by Misconduct.]—*See* infra, cols. 128 seq.

b. Contract.

i. *Stamp.*

Under 55 Geo. 3, c. 184.]—The plaintiff and the defendant being resident in England, and P. at Havana, and the defendant being a foreign agent, a written agreement was entered into by the plaintiff with the defendant on behalf of P. that the plaintiff would serve as stoker on board a steamer, about to leave London for Havana, in the service of P. During the outward voyage, rations were to be served out to the plaintiff on account of P., the contract to be in force for one year; and should the plaintiff be discharged before that time, three months' wages were to be paid in advance, besides finding him a homeward passage, P. being at liberty to continue the engagement or to discharge the plaintiff and to find him his passage back to England, the wages to be payable up to the day of the plaintiff's arrival in England, and unless he should be discharged for misconduct, one month's pay to be advanced for his outfit for the voyage:—Held, that the agreement did not require a stamp, being an agreement for the hire of a labourer. *Wilson* v. *Zulueta*, 14 Q. B. 405; 19 L. J., Q. B. 49; 14 Jur. 366.

An agreement by a master of a ship to take out a mariner to a foreign port, he working on board, is within the above exemption, as being an agreement for the hire of a labourer. *Cornforth* v. *Danube and Black Sea Ry.*, 2 F. & F. 197.

ii. *Form.*

Statutory.]—The 5 & 6 Will. 4, c. 19, s. 2, enacted that it shall not be lawful for any master of a ship to carry to sea any seamen, without first entering into an agreement, in writing, specifying the wages, &c. The defendant pleaded, to an action on a policy of insurance, that the master had not entered into any such agreement with the seamen, or any one of them, wherefore the voyage was illegal:—Held, that the non-compliance with the statute was no answer to an action on a policy of insurance effected on the ship, as it did not make the voyage itself illegal, or the vessel unseaworthy. *Redmond* v. *Smith*, 7 Man. & G. 457; 8 Scott (N.R.) 250; 13 L. J., C. P. 159; 8 Jur. 711.

Contract to Serve "in same Employ"—Transfer to another Ship.]—A seaman, in March, 1854, shipped on board a vessel called the "Custos," to serve as steward, and signed articles, as required by 13 & 14 Vict. c. 93, which professed to be an agreement between the master and the several persons whose names were thereto subscribed, at 3*l.* per month wages, for a voyage "from Liverpool to the west coast of Africa, to trade in any ports, bays, or rivers therein, and back to a final port of discharge in the United Kingdom, or for a term not to exceed three years." The articles contained the following provision: "The crew, if required, to be transferred to any other ship in the same employ." After the "Custos" remained some time on the African coast, the seaman, at the request of the captain, was transferred to another and larger vessel, engaged in the same trade, called the "Dauntless," entering into fresh articles with the master, under which he was to receive wages at the rate of 4*l.* per month. The "Dauntless" arrived in Liverpool on the return voyage in June, 1856, when he claimed wages at 4*l.* per month for the period during which he had served on board the "Dauntless." The defendant refused to pay him at the increased rate, insisting that he was bound by the original articles to serve on board any ship "in the same employ"; and he declined to accept the sum mentioned in the original articles:—Held, first, that the articles were not invalid for being, in the alternative "from Liverpool to the west coast of Africa and back, or for a term not to exceed three years." *Frazer* v. *Hatton*, 2 C. B. (N.S.) 512; 26 L. J., C. P. 226; 3 Jur. (N.S.) 694.

Held, secondly, that the provision for the transfer of the crew to another vessel in the same employ, was not in contravention of the 13 & 14 Vict. c. 93. *Ib.*

Held, thirdly, that the provision for transfer was not limited to a transfer of the whole crew collectively, but that the articles constituted an agreement between the owners and each of the crew for himself, and consequently, that he was bound to serve under the original articles, and there was therefore no consideration for the master's promise to pay the increased wages. *Ib.*

Execution before Consular Agent.]—Held, lastly, that the circumstances of the fresh articles not having been executed in the presence of a consular agent, was not an objection to their validity, provided they could have been set up. *Ib.*

No rate specified in Articles.]—Wages pronounced for; no rate being specified in the articles. *The Porcupine*, 1 Hag. Adm. 378; *The Prince George*, 3 Hag. Adm. 376.

Custom in Slave Trade.]—Ships' articles are conclusive as to amount of mariners' wages. Claim of a custom in the slave trade that the mate is allowed to carry a slave disallowed. *The Isabella*, 2 C. Rob. 241; and see *The Prince Frederick*, 2 Hag. Adm. 394.

See also *Turner* v. *Owen*, infra, col. 117; *Dafter* v. *Creswell*, infra, col. 117, as to contract for further remuneration.

Currency—Construction in Favour of Seaman.]—When, in a seaman's articles, it is covenanted to pay wages in dollars, sterling and not currency value is to be assumed as intended, and the wages are to be paid at the rate of 4*s.* 2*d.* per dollar. *The Annie Sherwood*, 12 L. T. 582; 13 W. R. 641, 965.

Where it was alleged that there was a specific covenant in seamen's articles, duly read over and explained to the crew, that the wages when due should be payable in United States currency or its equivalent:—Held, that the court would not enforce such a condition against the seamen, from the fact of its being contrary to equity and justice, and an imposition on them. *Ib.*

Where the amount of wages due to a seaman under his contract was greatly lessened by a depreciation of the currency at the date of his claim, and it did not appear at what rate such wages were to be calculated, the court construed the uncertain contract most strongly in favour of the seamen, and allowed him wages at the fullest rate. *The Nonpareil*, 33 L. J., Adm. 201.

iii. *Division of Profits.*

Consideration for.]—Where an agreement was entered into between the captain and the mariners, whereby, in consideration of their faithfully serving in a fishing voyage to the South Seas and back, they were each to receive a certain share of the net proceeds of the cargo brought home, and the owner was appointed agent to dispose of the cargo for the benefit of all concerned:—Held, that an action would not lie against him by one of the mariners to recover his share of the net proceeds, on proof that the defendant had sold the cargo, and that the price of it had come to his hands, unless an admission of faithful services could be proved. *Evans* v. *Bennett*, 1 Camp. 300.

Sailor not a Partner.]—If a sailor engages on a whaling voyage, and is to receive a certain proportion of the profits of the voyage in lieu of wages, when the cargo is sold he may maintain an action for his wages against the captain, and he will not be considered as a partner. *Wilkinson* v. *Frasier*, 4 Esp. 182.

iv. *Additional Wages.*

What is sufficient Consideration.]—No action will lie at the suit of a sailor on a promise of the captain to pay him extra wages in consideration of his doing more than his ordinary share of navigating the ship. *Harris* v. *Watson*, Peake, 102; 3 R. R. 654.

Where a seaman signed articles containing the following provision: "The crew, if required, to be transferred to any other ship in the same employ"; and after serving for a certain period on one vessel was shipped by the captain's desire on another vessel engaged in the same trade, under which he was to receive further remuneration:—Held, on the refusal of the defendant to pay him at the higher rate, that there was no consideration for the master's promise to pay increased wages, and that there was no neglect or refusal on the part of the defendant, so as to render him liable to the penalty imposed by 17 & 18 Vict. c. 104, s. 187. *Frazer* v. *Hatton*, 2 C. B. (N.S.) 512; 26 L. J., C. P. 226; 3 Jur. (N.S.) 694; 5 W. R. 632.

Where Ship Undermanned.]—A ship being on a voyage from L. to P. and back, when in port at P. became so short-handed that it was dangerous to life to proceed with only the reduced crew; the captain, being unable to procure additional hands, voluntarily promised the remaining seamen, who were under articles for the whole voyage, an additional sum if they would assist in taking the ship to her next port:—Held, that the seamen were not bound to proceed on the voyage, as it involved risk of life, and that the promise was therefore binding on the captain. *Hartley* v. *Ponsonby*, 7 El. & Bl. 872; 26 L. J., Q. B. 322; 3 Jur. (N.S.) 746; 5 W. R. 659.

The plaintiff and other seamen had entered into articles of agreement to serve for a voyage from Liverpool to Melbourne and home. At Melbourne several of the crew deserted, and one of the crew was discharged by the captain. Whilst the desertion was going on, the captain entered into a fresh agreement with the plaintiff and the other remaining seamen, to raise their wages for the remainder of the voyage:—Held, that he never was, under the circumstances, released from the obligation of the original articles, and could not, therefore, maintain an action to recover the increased rate of wages for the voyage home. *Harris* v. *Carter*, 3 El. & Bl. 559; 2 C. L. R. 1582; 23 L. J., Q. B. 295; 18 Jur. 1014; 2 W. R. 409.

—— **Ship Unseaworthy.**] — See *Turner* v. *Owen*, supra, col. 112.

Promise to pay Seamen higher Wages—Want of Consideration.]—In the course of a voyage some of the seamen deserted, and the captain not being able to find others to fill their places promised to divide the wages which would have become due to them amongst the remainder of the crew:—Held, that the promise was void for want of consideration. *Stilk* v. *Myrick*, 2 Camp. 317; 11 R. R. 717.

Semble, a promise by the master to pay seamen extra wages for extra work in the ship is void as against public policy. *Harris* v. *Watson*, Peake, Cas. 102; 3 R. R. 654.

The plaintiff, at the request of a captain in the royal navy, agreed to enter on board his ship as captain's cook, he undertaking to pay the plaintiff over and above the government pay to which his rating would entitle him. The plaintiff having performed the service:—Held, that there was a sufficient consideration to enable the plaintiff to maintain an action for such wages. *Clutterbuck* v. *Coffin*, 4 Scott (N.R.) 509; 1 D. (N.S.) 479; Car. & M. 273; 3 Man. & G. 842; 11 L. J., C. P. 65; 6 Jur. 131.

A mariner, who has signed articles for a voyage at a certain pay per month, cannot claim any further wages or gratuity by usage or custom. *Elsworth* v. *Woolmore*, 5 Esp. 84.

Where a sailor sued for wages due under the ship's articles, and also for the average price of a negro slave, for which there was only a parol agreement with the captain, and which was not mentioned in the articles:—Held, that the contract for the slave was void, as being in fact a promise to pay further wages. *White* v. *Wilson*, 2 Bos. & P. 116.

Master may bind Owners to pay.]—The master may bind the owners to pay a seaman employed to do other duties, as those of a steward, a higher rate of wages. *Hicks* v. *Walker*, 4 W. R. 511.

Death of Master—Mate succeeding to command—Power to alter Rating of Seamen.]—Where, in consequence of the death of the captain during the voyage, the chief mate becomes captain, the latter has authority to appoint a seaman to the post of second mate with the wages of such; and a contract to that effect is binding on the owners, notwithstanding no alteration is made in the articles under which the seaman shipped. *Hanson* v. *Royden*, 37 L. J., C. P. 66; L. R. 3 C. P. 47; 17 L. T. 214; 16 W. R. 205.

—— **Ship's Articles.**]—Semble, if the master dies on the voyage, and the chief mate succeeds him in the command, the crew is bound by the ship's articles, though such chief mate is a foreigner. *Renno* v. *Bennett*, 3 G. & D. 54; 3 Q. B. 768; 12 L. J., Q. B. 17.

Articles conclusive as to Rating.]—A seaman entered on the articles as such held to be precluded from claiming additional pay for services given in another capacity. *Dafter* v. *Cresswell*, 7 D. & R. 11; 2 Car. & P. 161; 29 R. R. 469.

v. *Allowance for Short Provisions.*

When Granted.]—Owing to the unexpected length of a voyage, the crew of a vessel had been put upon short allowance. They were allowed compensation under 17 & 18 Vict. c. 104, s. 223. *The Josephine*, Swabey, 152; 2 Jur. (N.S.) 148.

vi. *Advance Note.*

Liability — Condition.]—A captain gave one of the seamen an advance note in the following form: "Ten days after the ship 'Athlone' sails from the port of Liverpool, the undersigned does promise and agree to pay to any person who shall advance to Reuben Hill on this agreement, the sum of 6*l.*, provided Reuben Hill shall sail in the ship from the port of Liverpool." An outfitter gave the seaman in exchange for the note 3*l.* 5*s.* in cash, and 2*l.* 15*s.* worth of wearing apparel; but he stated, that if he had advanced the whole in cash, he would have charged a discount of 7½ per cent. The seaman having sailed with the vessel:—Held, that the condition upon which the holder was entitled to sue the maker was fulfilled by giving the seaman the amount in money and money's worth. *McKune* v. *Joynson*, 5 C. B. (N.S.) 218; 28 L. J., C. P. 133; 4 Jur. (N.S.) 760; 6 W. R. 658.

Assignment.]—See *Bellamy* v. *Lunn*, post, col. 126.

vii. *Jurisdiction to Set Aside Unreasonable Contracts.*

Ships' articles are conclusive as to the amount of wages and the voyage; on collateral points the court of admiralty may consider how far they are reasonable and just. Therefore, a clause providing that if contraband goods were found in the forecastle, the seamen living therein should forfeit their wages and 10*l.*, is not conclusive to work a forfeiture of wages against those not proved to be guilty of the offence. The penalty cannot be enforced in admiralty. *The Prince Frederick*, 2 Hag. Adm. 394.

Contract that if a ship miscarries party shall lose his wages is unreasonable. *East India Co.* v. *Atkyns*, 1 Comyn, 348.

The captain of a ship on an outward-bound voyage, takes bonds from his seamen to himself in 200*l.* penalty, conditioned, that they shall not demand any wages until the ship arrives in the port of London. The ship is lost, and the seamen sue the captain for their wages:—Held, that those bonds were unjust and void in law. *Buck* v. *Rawlinson*, 1 Bro. P. C. 138.

East India Company takes bond from the mariners and officers of the ships, &c., not to demand their wages unless the ship returned to the port of London. The ship arrives at a delivery port, and is afterwards taken by the French. The seamen and officers shall have their wages to the time of the arrival of the ship at the delivery port. *Edwards* v. *Child*, 2 Vern. 727.

A covenant that no wages to be payable unless the ship arrives at the last port of discharge, was not upheld in admiralty. *The Juliana*, 2 Dods. 501.

viii. *Dissolution.*

Contract determined by War—Foreign Warship—Declaration of War — Wages.]—Shipbuilders in this country contracted with a foreign government to build a warship and deliver it abroad to the foreign purchasers. In pursuance of this contract the shipbuilders contracted in writing with the defendant that he should as captain take out the ship to the purchasers at a fixed rate of pay. The defendant engaged the plaintiff to serve as one of his crew for a lump sum for the voyage. During the voyage the foreign purchasers declared war upon a foreign power. After the declaration of war, and during the voyage, the plaintiff left the ship and sued the defendant for the whole of the sum agreed to be paid him for the voyage:—Held, that he was entitled to recover the whole sum, upon the ground that the defendant had held himself out as the agent of the foreign purchasers, who by their declaration of war had altered the risks of the voyage. *O'Neil* v. *Armstrong, Mitchell & Co.*, 65 L. J., Q. B. 7; [1895] 2 Q. B. 418; 14 R. 709; 73 L. T. 178—C. A. Affirming 43 W. R. 554.

Seaman sent home as Witness.]—The plaintiff was hired as a mariner on board a ship for a specific voyage. In the course of the voyage he was obliged to leave the ship, and was sent to England by authority of a British consul, under 7 & 8 Vict. c. 112, ss. 59, 60, and 13 & 14 Vict. c. 93, as a witness on a trial of a person for an offence committed on the high seas:—Held, that this operated as a dissolution of the contract, and that he could not recover any wages subsequently

to the period when he was sent to England. *Melville* v. *De Wolfe*, 4 El. & Bl. 844; 24 L. J., Q. B. 200; 3 C. L. R. 960; 1 Jur. (N.S.) 758; 3 W. R. 401.

c. Lien; Priorities.

Wages are Lien on Ship and Freight.]—Seamen's wages are a lien upon the ship and freight; and are generally entitled to priority. *The Louisa Bertha*, 14 Jur. 1006: *The Lady Durham*, 3 Hag. Adm. 196: *The Linda Flor*, Swabey, 309; 4 Jur. (N.S.) 172; 6 W. R. 197, infra.

Lien not lost by Sale of Ship.]—It is not destroyed by sale to a purchaser without notice. *The Batavia*, 2 Dods. 500.

Lien Enforced.]—A decree for wages and costs against freight and master enforced against the ship, upon her coming to this country. *The Margaret*, 3 Hag. Adm. 238.

Voyage not proceeded upon.]—Seamen engaged by the owners or their agent for a voyage upon a foreign-going ship, which does not proceed upon the voyage, are entitled to a lien for their wages upon the ship, and the proceeds of sale thereof, although the engagement of the seamen has not been in writing. *Great Eastern Steamship Co., In re, Williams' Claim*, 53 L. T. 594; 5 Asp. M. C. 511.

Lien on Freight — Sub-Charter.] — Seamen have a maritime lien on freight due from sub-charterers to the charterers of a ship, and can arrest the cargo for the purpose of enforcing such lien. *The Andalina*, infra, col. 120.

No Lien on Cargo.]—The seamen's lien is only on ship and freight, not on cargo; although insurances may have been effected upon ship and cargo. *The Lady Durham*, 3 Hag. Adm. 196; *Thomas* v. *Tobin*, 3 Hag. Adm. 197, n.

Wages prior to Mortgage Debt.]—Wages are payable before the mortgage debt. *The Prince George*, 3 Hag. Adm. 376.

Wages and Subsistence Money prior to Bottomry.]—Mariners' wages, with subsistence money where necessary, take precedence of a bottomry bond. *The Sydney Cove*, 2 Dods. 13; *The Madonna D'Idra*, 1 Dods. 37.

A wages claim is preferred to a bottomry bond previously pronounced for, the bond having been given before the wages were earned. *The William F. Safford*, Lush. 69; 29 L. J., Adm. 109; 2 L. T. 301.

A claim by a person having paid wages to a ship's crew, at the request of the master, on account of a ship is in the nature of a wages claim, and entitled to the same priority. *Ib.*

There is no distinction in their right of precedence to a bottomry bond between seamen's wages earned antecedently, and those earned subsequently to the execution of the bond. *The Union*, Lush. 128; 30 L. J., Adm. 17; 3 L. T. 280.

Foreign Ship—Viaticum.]—The master and crew of a foreign ship arrested in this country are entitled to priority over a bottomry bond-holder in respect of their expenses home. *The Constancia*, 15 W. R. 183.

When a foreign ship is under arrest, and no appearance is entered for her, the court will allow the payment of wages and viaticum out of freight in the hands of a plaintiff in a bottomry suit, and order the discharge of the crew, although there is no suit instituted for their wages. *The Bridgwater*, 37 L. T. 366; 3 Asp. M. C. 506.

Wages postponed to damage Lien.]—A vessel had been pronounced liable for damage resulting from a collision; wages were due to the crew of the damaged ship. The proceeds of the sale of the ship doing the damage were not sufficient to satisfy both claims:—Held, that the wages were not entitled to priority. *The Linda Flor*, Swabey, 309; 4 Jur. (N.S.) 172; 6 W. R. 197. S. P., *The Chimæra*, 4 Jur. (N.S.) 172.

Suit for seamen's wages against the proceeds of the ship condemned and sold in a collision suit, and which were insufficient to satisfy the damage claimant, dismissed upon the ground that they could be recovered elsewhere. *The Duna*, 5 L. T. 217.

Mortgage Debt.]—The owners of a vessel who have recovered judgment against another ship in an action for damage by collision have a prior right against the proceeds of such ship to seamen who have recovered judgment against the same ship for wages earned before and after the collision. *The Elin*, 52 L. J., Adm. 55; 8 P. D. 129; 49 L. T. 87; 31 W. R. 736; 5 Asp. M. C. 120—C. A.

Master's Guarantee.]—While a master's lien for wages against his ship takes precedence of an ordinary claim by mortgagees, it does not take priority of any part of the mortgage debt, the payment of which the master has personally guaranteed to the mortgagees. *The Bangor Castle*, 74 L. T. 768; 8 Asp. M. C. 156.

Seamen's Wages prior to Master's Wages and Disbursements.]—Seamen are entitled to their wages in priority to the master's claim, either for his own wages or for advances made by him in payment of the seamen's wages. *The Salacia*, 32 L. J., Adm. 41; 9 Jur. (N.S.) 27; 7 L. T. 440; 11 W. R. 189.

Wages prior to Possessory Lien.]—Mariners have priority for wages over persons with a possessory common law lien up to the time of the beginning of such lien, and they are entitled to subsistence money from the time they leave the ship to the time they return home; this and the expenses of the journey home, and the costs of the action, rank with their prior wages. *The Immacolata Concezione*, 53 L. J., Adm. 19; 9 P. D. 37; 50 L. T. 539; 32 W. R. 705; 5 Asp. M. C. 208.

The master and seamen next after the salvor take precedence of the shipwright for wages earned before their ship comes into the shipwright's hands. If foreigners, they are also entitled, in addition to such wages, to a sufficient sum to take them back to their own country. *The Gustaf*, Lush. 506; 31 L. J., Adm. 207; 6 L. T. 660.

Wages prior to Towage Lien.]—The lien of seamen for wages ranks before a claim in respect of payments for the towage of the ship from sea to an inland port, and the light dues and dock dues. *The Andalina*, 12 P. D. 1; 56 L. T. 171;

35 W. R. 336 ; 6 Asp. M. C. 62. But see as to towage, infra, XIX. TOWAGE.

Wages prior to Necessaries Lien.]—*The Queen*, 19 L. T. 705.

Expenses of Sending Home—Solicitor's Lien—Priority.] — Solicitors for defendants in a salvage action against a foreign ship, who are entitled to a charge upon the ship, or the proceeds thereof, for their costs and expenses incurred in the preservation of the property, do not take priority of the claim of the foreign government, who, on the abandonment of the ship by her owners, are entitled, by the provisions of their code, to a lien upon the ship, or the proceeds, for the expenses of sending back the ship's crew to their own country. An Italian ship was brought into a British port by salvors. A salvage action having been instituted, the ship was sold by order of the court, and a sum was awarded out of the proceeds to the salvors. After payment of that sum, and the costs of the plaintiffs, a balance of 60*l.* 10*s.* 3*d.* remained in court. The defendants' solicitors had incurred expenses in pumping the ship, paying the marshal's possession fees, &c., and claimed a charging order upon the sum in court for such expenses, and sought payment out of such balance to them. The Italian government, through their consul in this country, had sent home the crew of the ship, and had incurred expenses by so doing. By Italian law such last-mentioned expenses are a lien upon the ship. The Italian consul opposed payment out to the defendants' solicitors, and claimed priority for the lien of the Italian government :—Held, that the Italian government was entitled to such priority. *The Livietta*, 52 L. J., Adm. 81 ; 8 P. D. 209 ; 49 L. T. 411 ; 5 Asp. M. C. 451.

d. Recovery of Wages.

i. *Who Liable.*

Charterer or Owner—Allotment Note of Seamen.]—By the Merchant Shipping Act, 1854, (17 & 18 Vict. c. 104), s. 169, the wife of any seaman in whose favour an allotment note of part of his wages is made, may recover by summary procedure the sum allotted, with costs, from the owner or any agent who has authorised the drawing of the note. The registered owner of a ship entered into a charterparty, by which he demised the ship to the charterer for a stipulated period, and parted with all control over it. He took possession of the ship, and appointed a master, who engaged W. as one of the crew, and gave his wife an allotment note, allotting and requiring the charterer to pay her 6*l.* monthly out of her husband's wages. The charterer having become insolvent :—Held, that the section did not, under the circumstances, make the registered owner liable to pay the arrears due under the note. *Meiklereid* v. *West*, 45 L. J., M. C. 91 ; 1 Q. B. D. 428 ; 34 L. T. 353 ; 24 W. R. 703 ; 3 Asp. M. C. 129.

On Change of Ownership.]—Where a change of ownership in a British vessel takes place by sale in this country whilst she is in a foreign port, the contract under which the crew shipped is (quoad the new owner) at an end ; but if one of the crew continues to serve on board the vessel at the request of an agent of the new owner without entering into any fresh articles, and afterwards, and before the termination of the contemplated voyage, quits with the consent of the captain appointed by the new owner, he may recover wages pro ratâ against such new owner. *Robins* v. *Power*, 4 C. B. (N.S.) 778 ; 27 L. J., C. P. 257 ; 4 Jur. (N.S.) 810.

Against Master.]—The seamen may recover their wages against the master. *The Saluda*, 32 L. J., Adm. 41 ; 9 Jur. (N.S.) 27 ; 7 L. T. 440 ; 11 W. R. 189.

During a voyage the ship was wrecked, and the captain gave the mariners an order upon the owners for the amount of their wages to the date of the wreck, acknowledging, at the same time, that he had hired them by the month :—Held, that, under these circumstances, no action for wages could be maintained by the mariners against the captain, at least without proving that they had first made a demand upon the owners. *Forsboom* v. *Krugor*, 3 Camp. 197.

The owners of a ship let it out to freight, and by the charterparty it was agreed, that no freight should be paid to the owners until six days after the ship should return to the port of London, and make a full delivery of her lading, but the master might detain the imprest money ; and if the ship should be lost in her voyage, the master and owners should not expect any other satisfaction than the imprest money for the freight and demurrage of the ship. The ship was lost ; and upon a question who was liable to pay the seamen's wages :—Held, that the master was liable in the first instance, as having hired them, but that he had his remedy against the owners. *Buck* v. *Rawlinson*, 1 Bro. P. C. 138.

King's Ship—Purser.]—A purser's steward on board a king's ship cannot recover wages from the purser upon an implied contract for his services as such steward on board the ship. *Carter* v. *Hall*, 2 Stark. 361.

Owner on Register not Owner in Fact.]—Owner on register not liable for wages, if not owner in fact. *Ratchford* v. *Meadows*, 3 Esp. 69.

Mortgagee not in Possession.]—Mortgagee not in possession is not liable for wages. *Annett* v. *Carstairs*, 3 Camp. 354.

Part Owners.]—Some of the mariners may sue some of the part owners for wages ; but semble in admiralty the part owners are liable only pro ratâ. *Alleson* v. *Marsh*, 2 Vent. 181.

Action when brought—Before Proper Time.]—Where a seaman is restricted by the ship's articles from demanding his wages until the expiration of twenty days after the ship's arrival at her destined port and the delivery of her cargo :—Held, that although the seaman had commenced his action before the expiration of the twenty days, he might still recover a sum which the captain had admitted to be due to him for wages, and which he had offered to pay him. *White* v. *Mattison*, 2 Stark. 325.

Action brought after accounting to Greenwich Hospital.]—Where the captain had, under 37 Geo. 3, c. 73, accounted upon oath to the collector for the wages of a deceased seaman, and paid the same to Greenwich Hospital, the representatives of such seaman may still sue the master for

any wages beyond the sum so paid. *Armstrong* v. *Smith*, 1 Bos. & P. (N.R.) 299.

Against Ship and Freight or Owner.]—The admiralty court has no power to restrain seamen from proceedingagainst the ship and freight for their wages, or to compel them to sue the owner; although the result may be to prejudice a holder of a bottomry bond on ship and freight. *The Arab*, 4 Jur. (N.S.) 417.

Wages Earned after Action brought.]—A seaman who brings a suit in rem for the recovery of his wages cannot have a decree for wages or subsistence money after the date of the commencement of his suit, although he is retained in the service of the ship by the master; but he will be entitled to an allowance in the way of costs for detention and subsistence money from the date of the institution of the suit to the date of the decree. *The Carolina*, 34 L. T. 399; 3 Asp. M. C. 141. See *The Constancia*, supra, col. 119; *The Bridgwater*, supra, col. 120.

ii. *Right to Sue Barred.*

Made Abroad.]—If foreign sailors stipulate, in their own country, before the commencement of a voyage, that they will not sue the captain for any money abroad, but be satisfied with what he may advance them in deduction of their wages till they return home, they cannot maintain an action against him for wages in the courts of this country. *Johnson* v. *Machielsne*, 3 Camp. 44; 13 R. R. 745.

Even though the ship and cargo are confiscated in an English port, and the voyage thereby ended. *Gienar* v. *Meyer*, 2 H. Bl. 603; 3 R. R. 520.

Made with Part Owner.]—Where a seaman, about to proceed on a trading voyage, entered into and signed articles, whereby he agreed not to sue for wages any of the owners, except one, who was the captain, and who alone was a party to the articles:—Held, that he could not sue the other owners, although they sold and received the proceeds of the cargo, and one of them, the managing owner, adjusted the wages, and settled with the seamen. *M'Auliff* v. *Bicknell*, 2 C. M. & R. 263; 1 Gale, 232; 5 Tyr. 1035; 4 L. J., Ex. 225.

Contract not to Sue before Voyage Ended.]—A seaman cannot maintain assumpsit for recovery of wages pro ratâ, where he has contracted to serve on a voyage to A. and back, and that no wages should be payable until the end of the voyage, although he was wrongfully dismissed at A. by the master. *Hulle* v. *Heightman*, 2 East, 145; 4 Esp. 75. And see *White* v. *Mattison*, supra, col. 122: *Buck* v. *Rawlinson, and Cases* supra, col. 118.

Right to Sue on Wrongful Dismissal.]—Where seamen were not to be entitled to their wages until the voyage was ended, and that voyage was to a foreign port, and the master, for no good or legal cause, dismissed a seaman before the ship's arrival at such port:—Held, that such seaman might immediately maintain an action for his wages. *Sigard* v. *Roberts*, 3 Esp. 72.

Statute of Limitations.]—Semble, a suit for seamen's wages is not within 21 Jac. 1, c. 16. *Hyde* v. *Partridge*, 2 Ld. Raym. 1204.

iii. *Foreign Seamen or Ship.*

Foreign Ship.]—The court of admiralty has jurisdiction to entertain a suit for wages against a foreign ship, the words of the 24 & 25 Vict. c. 10, s. 10, being "any" ship; but the court ought not to exercise jurisdiction without first giving notice to the consul of the nation to which such ship belongs. *The Nina*, 37 L. J., Adm. 17; L. R. 2 P. C. 38; 17 L. T. 585; 5 Moore, P. C. (N.S.) 60.

The protest of a foreign consul does not ipso facto operate as a bar to the prosecution of the suit: but the court ought to determine according to its discretion, judicially exercised, whether, having regard to the reasons advanced by the consul, and the answers offered on behalf of a claimant, it is fit and proper that the suit should proceed or be stayed. *Ib.*

A British subject having shipped on board a Portuguese ship as mate, and having signed an agreement to be bound by the law of Portugal, which required him to submit all differences between the master and seamen to the Portuguese consul, arrested the ship, and instituted a suit against the owners in the court of admiralty in England for wages, whereupon the Portuguese consul entered a protest against the proceedings:—Held, that the suit ought to be dismissed and the ship released, but without costs. *Ib.*

Quære, whether 17 & 18 Vict. c. 104, s. 189 applies to a claim for wages earned on board an American ship. *Burns* v. *Chapman*, 5 C. B. (N.S.) 481; 28 L. J., C. P. 6; 5 Jur. (N.S.) 19; 7 W. R. 89.

In an action for wages and wrongful dismissal brought by persons domiciled in England against a foreign ship, in which they had served under articles signed in a port of the country to which the ship belonged, in which action imprisonment, hardship, and ill-treatment were alleged, the court refused to interfere with the discretion of the judge below in declining to exercise jurisdiction against the protest of the consul, which alleged that, by the law of the country to which the ship belonged, all disputes relating to the ship, or claims against the owner or master, were to be referred to and decided by the tribunals or consuls of that country. *The Leon XIII.*, *Wardrop* v. *Leon XIII. (Owners)*, 52 L. J., Adm. 58: 8 P. D. 121; 48 L. T. 770; 31 W. R. 882; 5 Asp. M. C. 73—C. A.

When a ship has been sold in a cause in which no appearance has been entered, and the proceeds remain in the registry, all preliminary proceedings in a cause of wages may be waived, and the money due paid out of court. *The Juliana*, 35 L. T. 410; 3 Asp. M. C. 264.

The court will not pay the money to a foreign consul at his request, but will require the solicitor of the parties to satisfy any claims the consul may have before receiving the money. *Ib.*

A Prussian seaman sued the master and owner of the Prussian ship for wages in an admiralty action in the court of session. The ship had been arrested:—Held, that the action being for less than 20*l.* did not lie. *Brahn* v. *Grunwaldt*, 2 Ct. of Sess. Cas. (3rd ser.) 335.

—— **Discretion of Court.**]—The discretion of the admiralty court as to entertaining an action by foreign seamen against a foreign ship against which the foreign consul has entered a protest may be exercised on the motion of the defendant

notwithstanding his absolute appearance. *The Oberburgomeister von Winter*, 18 W. R. 443.

What Law applicable.]—The claim of a foreign seaman on board a foreign ship to wages to be decided by the law of the ship's flag. *The Johann Frederich*, 1 W. Rob. 37.

Foreign Consul.]—The admiralty will entertain a suit against a foreign ship for the wages of her crew being foreigners, provided the representative of the foreign state consents; but municipal laws of the foreign state will not be enforced. *The Courtney*, Edw. 239.

The court of admiralty has jurisdiction to entertain a suit for wages promoted by foreign seamen against a foreign ship. The consent of the foreign minister or consul is not necessary to found the jurisdiction in such cases; but notice of the proceedings should be given to the representative of the foreign government. *The Golubchick*, 1 W. Rob. 143; see also *The Vrow Mina*, infra; *The William Frederick*, 1 Hag. Adm. 138.

—— **Payment to.**]—In a suit for wages by foreign seamen, if the foreign consul intervenes and asks that payment of the wages be made to him upon the seamen's behalf, the court usually grants the application. *The Timor*, 9 L. T. 397; 12 W. R. 219; and see *The Juliana*, supra.

Wages earned by foreign seamen on board a foreign ship abandoned at Cowes to creditors pronounced for. *The William Frederick*, 1 Hag. Adm. 138.

Passage Money — Consul's Certificate.]—Foreign seamen, discharged in Great Britain, and who recover wages in a suit against a foreign ship in which they served, are not entitled as of course to their passage money home, but will obtain it when their consul certifies that they have gone or are about to go home. *The Raffaelluccia*, 37 L. T. 365; 3 Asp. M. C. 505.

Security for Costs.]—When a cause of wages was instituted against a foreign ship by her master and crew, who were also foreigners, and although they were at the time in this country, their only place of residence was on board the ship, and the master had stated that he had no means and intended to leave England, the court ordered them to give a security for costs in 130*l.* *The Zufall*, 44 L. J., Adm. 16; 32 L. T. 571; 23 W. R. 328. *See also* ADMIRALTY, LAW AND PRACTICE, infra.

Alien Enemies Suing.]—Alien enemies are entitled to sue in this country for wages earned by them as mariners on a voyage to this country under a licence. *The Maria Theresa*, 1 Dods. 303.

American seamen serving on board a British ship disguised as American, there being war between England and America:—Held, entitled to sue for their wages. *The Frederick*, 1 Dods. 266.

The court entertains a suit for wages earned on board a foreign ship belonging to an alien enemy coming to this country under a licence. *The Vrow Mina*, 1 Dods. 234.

iv. *Advance Note.*

The plaintiff took a seaman's advance note for 6*l.*, conditional upon his sailing in the ship, in exchange for 3*l.* 5*s.* in cash and 2*l.* 15*s.* in wearing apparel:—Held, that the holder had advanced the seaman 6*l.* within the meaning of the note and could recover against the maker. *McKune* v. *Joynson*, 5 C. B. (N.S.) 218; 28 L. J., C. P. 133; 4 Jur. (N.S.) 760; 6 W. R. 658.

Assignment—Condition—Liability of Owner.]—An advance note was given to A., a seaman, for a half month's wages. The note was in this form: "Five days after the ship 'W.' leaves P. pay to the order of A. (provided he sails in the said ship and is duly earning his wages, according to his agreement)," &c. It was directed to B. & Co. the shipowner's agents at P., and there was a note upon it that it should at once be presented to B. & Co. for acceptance. A. transferred the note to C., who presented it to B. & Co., by whom it was duly accepted. Four days after the "W." left P., A. was discharged. The master of the "W." informed B. & Co. that A. had been discharged within five days of sailing, and directed them not to pay the note. B. & Co. paid the note. On action by B. & Co. against the shipowners for the amount of the note:—Held, that, as A. was not earning his wages at the end of five days after the "W." left P., the condition of the note was not fulfilled, and that neither the shipowners nor B. & Co. as acceptors were liable upon it. *Bellamy* v. *Lunn*, 77 L. T. 396.

e. Practice.

Before Justices.]—The 7 & 8 Vict. c. 112, s. 15 (similar to s. 188 of 17 & 18 Vict. c. 104, Part III., s. 188), did not give any jurisdiction to a justice of the peace to adjudicate upon a claim for wages, by the administrator of a deceased seaman, and such administrator was not deprived of his right of action. *Hollingsworth* v. *Palmer*, 4 Ex. 267; 18 L. J., Ex. 409.

The admiralty court should not, under 5 & 6 Will. 4, c. 19, ss. 15, 16, entertain a wages suit under 20*l.*, except where the magistrates could not do justice. *The King William*, 2 W. Rob. 231.

In Superior Court—Place of Business.]—A place of occasional business is not a residence within the meaning of the latter part of s. 189 of 17 & 18 Vict. c. 102. *The Blakeney*, Swabey, 428; 5 Jur. (N.S.) 418.

—— **Pleading.**]—To an action by a seaman for wages a defence that 17 & 18 Vict. c. 104, s. 189, prohibits any suit in a superior court for the recovery of wages under 50*l.* is not open under the plea of never indebted, but must be pleaded specially. *Johnston* v. *Hilberry*, 3 H. & C. 328.

A seaman having brought an action for wages to an amount less than 50*l.*, together with a claim for damages for an assault, the court allowed the defendant (upon terms) to plead a plea founded upon the 188th and 189th sections of the 17 & 18 Vict. c. 104. *Rossi* v. *Grant*, 5 C. B. (N.S.) 699; 5 Jur. (N.S.) 895; 7 W. R. 203.

Jurisdiction—Admiralty Court.]—The 17 & 18 Vict. c. 104, s. 189, bars a seaman from recovering wages less than 50*l.* in the court of admiralty, except in the contingencies therein specified. *The Harriet*, Lush. 285; 5 L. T. 210.

The court of admiralty has no authority to restrain seamen from proceeding against the ship

for their wages, however well satisfied it may be that the owner is solvent. *The Arab*, 5 Jur. (N.S.) 417.

The court has jurisdiction to entertain a claim by seamen for wrongful dismissal and the consequential damages. *The Great Eastern*, 36 L. J., Adm. 15; L. R. 1 A. & E. 384; 17 L. T. 228.

The object of the 24 & 25 Vict. c. 10, s. 10, is to extend the jurisdiction which the court of admiralty had in the ordinary case of wages to the case of wages under a special contract, and of disbursements on account of the ship. *The Nina*, 37 L. J., Adm. 17; L. R. 2 P. C. 38; 17 L. T. 585; 5 Moore, P. C. (N.S.) 60.

—— **County Court.**]—See *The Michigan*, *Reg.* v. *City of London Court* (*Judge*), post, col. 940.

—— **Vice-Admiralty Court.**]—See *The Ferret*, post, col. 946.

"Dispute as to Liability"—Counterclaim.]—A counterclaim in respect of a separate cause of action is not "a reasonable dispute as to liability" within the meaning of s. 4, sub-s. 4, of the Merchant Seamen (Payment of Wages) Act, 1880. *Delaroque* v. *Ovenholme Steamship Co.*, 1 Cab. & E. 122.

Payment—Lien for Costs.] — Payment to seamen by shipowners before a shipping master is no satisfaction of wages pronounced for in a suit in the court of admiralty so as to deprive the proctor of his lien for costs. *The Araminta*, Swabey, 81; 2 Jur. (N.S.) 310; 4 W. R. 396.

Ship lost—Monition against Owner.]—Monition to shew cause granted against the owner of a ship totally lost at the instance of a seaman for unpaid wages, 7 & 8 Vict. c. 112, s. 17. Application for arrest of owner refused. *The Stephen Wright*, 12 Jur. 732.

Defence — Forfeiture for Misconduct — Logging.]—In a defence to a wages suit it was not necessary to plead the entries in the log of the acts of disobedience relied on as working a forfeiture of wages. *The John Knox*, 16 Jur. 1161.

Seaman Dead—Decree renewed to Administrator.] — Semble, a decree for wages to a mariner, with costs, may be renewed to the administrator of the seaman, when deceased. *The Prince George*, 3 Hag. Adm. 376. *See also* post, tit. ADMIRALTY, LAW AND PRACTICE.

Evidence.]—If, in an action for sailors' wages on articles under seal, the words are, "to which the parties have set their hands," without saying "seals," the plaintiffs will not be nonsuited, if it appears that they did not mean to contract by deed. *Clement* v. *Gunhouse*, 5 Esp. 83.

In an action for seamen's wages, the plaintiffs might, under 2 Geo. 2, c. 36, give evidence of the contents of the ship's articles, without having served a notice to produce them. *Bowman* v. *Manzelman*, 2 Camp. 315; 11 R. R. 716.

The 2 Geo. 2, c. 36, requiring articles to be entered into between the masters of ships and the mariners, and providing that the mariners shall not fail on any suit for wages from not producing the articles, did not apply in the case of a British seaman entering on board a foreign ship in a British port. *Dickman* v. *Benson*, 3 Camp. 290.

2. DESERTION, MISCONDUCT AND FORFEITURE.

Desertion—Left Ashore by Ship's Fault.]—If seamen go on shore on the ship's duty, and when the boat is about to return request to be permitted to remain on shore to get some victuals, which is refused, and the boat goes without them, if they afterwards go and offer to return to their duty on board the ship it is not a desertion. *Sigard* v. *Roberts*, 3 Esp. 71.

—— **By own Fault.**]—A sailor, under articles providing for a forfeiture of wages in case of breach of any of his engagements, among which is that of serving faithfully during the voyage, can recover nothing if he is left ashore in the course of it owing to his own fault in being absent, though he had no intention of deserting. *Sherman* v. *Bennet*, M. & M. 489.

—— **Master Refusing to give Leave.**]—If there is a clause in the ship's articles, that the seamen may leave at the end of three months if the ship is in port or in perfect safety, of which the captain is to be the sole judge, and the ship is in port in safety after three months, the seamen may leave the ship without the permission of the captain. *Neave* v. *Pratt*, 2 Bos. & Pul. (N.R.) 408.

Cargo not Discharged.]—A seaman leaving the ship after arrival and mooring at her port of delivery, but before cargo discharged, does not incur forfeiture of wages under 5 & 6 Will. 4, c. 19, s. 9, but loses one month's pay under s. 7. *McDonald* v. *Jopling*, 4 M. & W. 285; 7 L. J., Ex. 220.

—— **Old Law as to—5 & 6 Will. 4, c. 19.**]—The ancient law as to desertion not altered except by the express enactments of 5 & 6 Will. 4, c. 19. *The Two Sisters*, 2 W. Rob. 125.

—— **Works Forfeiture of Wages.**]—By the maritime law desertion works a forfeiture of wages. *The Baltic Merchant*, Edw. 86; *The Jupiter*, 2 Hag. Adm. 221; *Anon.*, 1 Ld. Raym. 639, 739.

Mooring Ship — Discharging Cargo.]—The crew are not discharged by the ship's arrival; they are bound to moor the ship and discharge the cargo. *The Baltic Merchant*, Edw. 86; *The Cambridge*, 2 Hag. Adm. 243.

Seaman Refusing to Return on Board.]—Wages forfeited by refusing to return on board when ordered after absence on shore by leave. *The Bulmer*, 1 Hag. Adm. 163.

—— **Leaving before Ship Docked.**]—Leaving the ship when she is detained by a crowd of ships from entering the harbour is desertion. *The Pearl*, 5 C. Rob. 224.

—— **Provision in Articles as to.**]—A clause in ship's articles to the effect that mere absence for less than twenty-four hours shall not be deemed desertion relates to occasional absence, and not to wilful denial of authority. *The Amphitrite*, 2 Hag. Adm. 403.

Alteration of Voyage — Leaving Ship not Desertion.]—Ship's articles and voyage were altered after sailing:—Held, that a seaman did not forfeit his wages by leaving the ship; half

wages awarded up to the seaman's reaching the port of discharge named in the articles. *The Eliza*, 1 Hag. Adm. 182.

—— **Deviation by Stress of Weather.**]—It is no justification for a mariner who deserts his ship, that she has been driven out of her course by stress of weather. *The Cambridge*, 2 Hag. Adm. 243. *See also Cases*, supra, col. 112.

Desertion must be clear, to forfeit Wages.]—*The Frederick*, 1 Hag. Adm. 211; *The George*, infra.

—— **No Contract proved.**]—Where the shipowner proved no contract to serve for any specified term:—Held, that no desertion such as would forfeit wages was proved. *The George*, 1 Hag. Adm. 168, n.

—— **Mate sent Home to give Evidence.**]—It is not desertion for a mate, in obedience to orders from the consul at a foreign port, to leave the ship and come to England to give evidence in a charge of stabbing against the master, which charge afterwards proved to be groundless. *Cross* v. *Hicks*, 16 W. R. 967.

—— **Seaman apprehended Ashore.**]—A seaman, having taken some of his clothes ashore, was apprehended ashore for assault. The ship sailed without him:—Held, that, desertion not being proved, his wages were not forfeited. *Seward* v. *Ratter*, 12 Ct. of Sess. Cas. (4th ser.) 222.

—— **Going Ashore to get Advice.**]—Going ashore to get advice as to their duty under the ship's articles held not to be a desertion. *The Westmoreland*, 1 W. Rob. 216.

—— **Ship not Moored—2 Geo. 2, c. 36.**]—A seaman who quits his ship after arrival in port but before she is moored does not forfeit his wages under 2 Geo. 2, c. 36, s. 3. To entitle the master to deduct a month's wages under that statute he must shew that the seaman left the ship without leave in writing; and he cannot set off the amount in an action for wages unless the provisions of the statute are complied with. *Frontine* v. *Frost*, 3 Bos. & P. 302.

—— **Owing to Misconduct of Officers.**]—If a master by inhuman treatment compels a sailor to quit a ship, it is not such a desertion as will amount to a forfeiture of his wages for the voyage performed. *Limland* v. *Stephens*, 3 Esp. 269.

To a declaration by a seaman for wages, the defendant pleaded that the plaintiff had been engaged as a seaman on board the "Candace," a British registered ship, for a voyage from Liverpool to San Francisco and back, and had during the voyage, and while he belonged to the ship at San Francisco, deserted from the ship, within the meaning of the 7 & 8 Vict. c. 112, s. 9; and that the plaintiff afterwards, and while he was such deserter, engaged himself as a seaman for the voyage back to England from San Francisco with the defendant as the master of another ship, for wages for which this action was brought. Replication, that while the plaintiff was serving as seaman on board, the captain and officers flogged and punished him with great and unreasonable cruelty and severity, and that such flogging and punishment were not rendered necessary by mutinous or improper conduct, but were unnecessary and unreasonable; that the plaintiff requested the captain and officers to desist, which they refused to do, whereupon the plaintiff, having reasonable grounds to believe that they would continue to flog and punish him with great and unreasonable cruelty and severity, in order to escape therefrom deserted from the ship:—Held, a good answer to the plea. *Edward* v. *Trevellick*, 4 El. & Bl. 59; 2 C. L. R. 1605; 24 L. J., Q. B. 9; 1 Jur. (N.S.) 110; 2 W. R. 586.

The plaintiff also replied that he was a negro, and that negroes are bought and sold as slaves in divers states of the United States; that he was serving on board the "Candace," and before he deserted, the captain of the ship threatened to sell him, the plaintiff, as a slave to citizens of the United States; that San Francisco is situated in one of the United States, to wit, in California, and that the plaintiff had just and reasonable grounds for believing and did believe that, on the arrival of the ship at San Francisco, the captain was about and meant to carry his threat into execution; and that, in order to prevent the captain from selling him as a slave, the plaintiff deserted:—Held, no answer to the plea. *Ib.*

Inciting to Desert—Storekeeper.]—A storekeeper, who had been verbally engaged to serve in port and for the next voyage, held to be a seaman within 17 & 18 Vict. c. 104, ss. 2, 257. *Thomson* v. *Hart*, 18 Ct. of Sess. Cas. (4th ser.), Just. Cas. 3.

Misconduct generally.]—Misconduct of seamen in port not regarded so seriously as when at sea. *The Blake*, 1 W. Rob. 73.

Wages not forfeited by mere misconduct, but only where the seaman's conduct would have made his discharge necessary for ship's safety. *Ib.*

Wages are forfeited by acts of mutinous tendency not apologised for. *The Susan*, 2 Hag. Adm. 229, n.

Misconduct on the part of a mariner such as will forfeit wages must be of a serious character. *The Malta*, 2 Hag. Adm. 158; *The Ealing Grove*, infra, col. 131. Ordinary drunkenness not sufficient. *The Lady Campbell*, 2 Hag. Adm. 5.

Negligence of Mate leading to Thieving.]—A mate may incur forfeiture of wages for general neglect of duty or a neglect of duty leading to robbery of the cargo—Per Dr. Lushington. *The Duchess of Kent*, 1 W. Rob. 283.

Thieving.]—Wages decreed, though seaman had thieved, and had been put on shore abroad (in violation of 39 Geo. 3, c. 80, s. 29). *The Beaver*, 3 C. Rob. 292.

If a sailor executed the articles prescribed by 37 Geo. 3, c. 73, and served accordingly, and during the voyage part of the cargo was plundered, but by whom could not be ascertained, he did not, in consequence of such plunderage, forfeit his wages. *Thompson* v. *Collins*, 1 Bos. & P. (N.R.) 347.

Detention of Property of.]—Where the second mate was ordered, with three other seamen, to take the ship's boat and convey the captain, who had gone on shore at the Mauritius, on board, and, on their getting on shore, they refused to return with him, but remained there all night, and he was obliged to get back to his ship in another boat, and redeem his own on the following morning, when the mate was taken before a magistrate at the Mauritius, and committed to prison for a month:—Held, that this was such an

act of disobedience as to warrant the captain in detaining his property on the vessel by way of forfeiture; and, consequently, that trover could not be maintained against the captain for such detention. *Weatherpen* v. *Laidler*, 8 Moore, 37.

Endangering Safety of Ship.]—To sustain an indictment for a misdemeanour under 17 & 18 Vict. c. 104, s. 239, it is not necessary that the act done or omitted should be followed by actual loss, destruction, or damage of such ship. *Reg.* v. *Gardner*, 1 F. & F. 669.

Drunkenness.]—Getting drunk on shore at Dominica and not returning on board at expiration of leave, held not to work forfeiture of wages. *The Ealing Grove*, 2 Hag. Adm. 15. *See* col. 129.

A seaman may get moderately drunk without forfeiting his wages. *The Lady Campbell*, 2 Hag. Adm. 5; *The New Phœnix*, 1 Hag. Adm. 199.

Deductions from Wages.]—Semble, the master may reimburse himself out of seamen's wages for loss by their fault. *Anon.*, 1 Ld. Raym. 650.

Loss by the gross negligence of a mariner may be set off against a claim for wages. *The New Phœnix*, 2 Hag. Adm. 420.

Neglect of Duty—Damages—Retention of Wages—17 & 18 Vict. c. 104, ss. 243, 244—25 & 26 Vict. c. 63, s. 11.]—In an action by an engineer for wages, the shipowner claimed a right to retain wages for damage to boilers by the plaintiff's neglect:—Held, that the above statutes did not exclude, by implication, a claim by the shipowner for damages at common law, and that the provisions excluding proof of misconduct not entered in the log book applied only to criminal proceedings under s. 243. *Great Northern Steamship Fishing Co.* v. *Edgehill* (11 Q. B. D. 225), infra, col. 133, observed upon. *Sharp* v. *Rettie*, 11 Ct. of Sess. Ca. (4th ser.) 745.

Disrating.]—The plaintiff, having shipped on board the "H. C." as refrigerating engineer, with wages at the rate of 10*l.* per month, was, during the voyage, disrated by the master for alleged drunkenness and unfitness for his duties. He was placed in the main engine-room, and his wages were reduced from 10*l.* to 7*l.* per month:—Held, that this disrating and reduction of wages was not a "deduction" from the wages within the meaning of s. 171 of the Merchant Shipping Act, 1854, and that it was not therefore, necessary that the amount by which the wages had been reduced should be shewn under the head of deductions in the account of wages delivered to the plaintiff by the master. *The Highland Chief*, 61 L. J., Adm. 51; [1892] P. 76; 66 L. T. 468; 40 W. R. 416; 7 Asp. M. C. 176.

No Duty to attempt Rescue after Capture.]—Mariners are not under any duty to attempt a rescue if their ship is captured. *The Two Friends*, 1 C. Rob. 271.

Charge of Misconduct not Sustained.]—*The Test* (2), 3 Hag. Adm. 307; *The Exeter*, 2 C. Rob. 261.

Admiralty Court—Whole Wages or None.]—The court had no power to pronounce for part of the seaman's wages in a case of misconduct; it must pronounce for the whole or none. *The Blake*, 1 W. Rob. 73.

Compensation.]—By a clause in the ship's articles of a South Sea whaler, the seamen serving on board were to lose their wages if they did not return with the ship to the port of London. After serving twenty-seven months, some of the seamen were, with the consent of the captain, exchanged into another ship for others belonging to that ship:—Held, that, if these seamen had lost their wages under the articles, they could at any rate receive a reasonable compensation for their services. *Hillyard* v. *Mount*, 3 Car. & P. 93.

Waiver.]—If seamen have incurred a forfeiture of their wages, and in a time of distress, when the ship is aground, the captain calls on those seamen to assist in getting her off, this is no waiver of the forfeiture; but if the captain continues them in their work after the peril is over it is otherwise. *Train* v. *Bennett*, 3 Car. & P. 3; M. & M. 82.

Where it is provided by a ship's articles that any of the crew who shall absent themselves from the ship without leave shall forfeit their wages; if, after one of the crew has so absented himself, the master receives him back again, and allows him to work like the others, the forfeiture is waived and the wages are recoverable. *Miller* v. *Brant*, 2 Camp. 590; 11 R. R. 806.

3. Proceedings against Seamen.

Time for Proceeding.]—The Merchant Shipping Act, 1854, s. 257, makes it an offence to persuade or attempt to persuade any seaman to neglect or refuse to join, or to desert from his ship; by s. 525 no conviction for any offence shall be made in any summary proceeding, unless such proceeding is commenced within six months after the commission of the offence; or if both or either of the parties to such proceeding happen during such time to be out of the United Kingdom, unless the same is commenced within two months after they both first happen to arrive or to be at one time within the same:—Held, that "parties to the proceeding" meant the seaman and the person persuading or attempting to persuade; and that if either of them leaves the kingdom during the six months after the commission of the offence, an information may be laid within two months of his return. *Austin* v. *Olsen*, 9 B. & S. 46; 37 L. J., M. C. 34; L. R. 3 Q. B. 208; 17 L. T. 537; 16 W. R. 426.

Informal Engagement.]—Held, also, that the offence might be committed, although the formalities required by s. 150 in the engagement of the seaman had not been complied with. *Ib.*

A seaman engaged by the master, and taken to sea without any such written agreement having been entered into between them as was rendered necessary by 7 & 8 Vict. c. 112, s. 2, was not a seaman or a mariner within 11 & 12 Will. 3, c. 7, s. 9, and therefore was not liable under that section for making a revolt by deserting his vessel in port, and inducing the rest of the crew to do the same. *Reg.* v. *Smith*, 3 Cox, C. C. 443.

Mutiny—Confinement of Captain—Justification.]—Upon an indictment under 11 & 12 Will. 3, c. 7, s. 9, for mutiny, it is no justification that the conduct and orders of the captain were unreasonable, unjust or vexatious; but if they were such that, unless the crew had confined the captain, they would have been in danger of their

lives, or of bodily harm, there is justification. *Reg.* v. *Rose*, 2 Cox, C. C. 329.

Summary Proceeding excludes Civil Remedy.]—The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 243—which enables a seaman who neglects without reasonable cause to join his ship to be punished upon proceedings before a court of summary jurisdiction with imprisonment and forfeiture of part of his wages—by implication takes away any other remedy against the seaman for the breach of contract, and the shipowner cannot, where the amount which he claims does not exceed 10*l.*, take proceedings for the recovery of damages under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4. *Great Northern Steamship Fishing Co.* v. *Edgehill*, 11 Q. B. D. 225. See *Sharp* v. *Rettie*, supra, col. 131.

Evidence of Desertion.]—A seaman having remained ashore all night at a foreign port, the master went to the consul without any notice to the seaman, and obtained his certificate that the seaman had deserted. In a summary proceeding before justices in this country by the seaman to recover his wages, the consul's certificate is not conclusive evidence of the fact of desertion. *Lewis* v. *Jewhurst*, 15 L. T. 275.

Ship must be Registered.]—The sections coming under the head of "Discipline," in 17 & 18 Vict. c. 104, have reference to British ships alone; and s. 257 renders liable to a penalty every person who wilfully harbours or secretes any seaman or apprentice who has deserted from his ship, and in order to convict an offender under this section, it must be shewn that the ship deserted from is a British ship; and inasmuch as by s. 19 every British ship must be registered, and no ship thereby required to be registered shall, unless registered, be recognised as a British ship, proof that the ship is registered must also be given, either by the production of the original register, or by an examined or certified copy of it, as required by s. 107. *Leary* v. *Lloyd*, 3 El. & El. 178; 29 L. J., M. C. 194; 6 Jur. (N.S.) 1246.

Proceedings before Justices — "Seagoing Ship."]—A ship registered as a British ship, that is engaged in carrying cargo upon rivers and their estuaries, although it may be capable of going to sea, is not a "seagoing ship" within the meaning of s. 109 of the Merchant Shipping Act, 1854. Therefore the provisions of s. 243 of that act for the punishment of offences by seamen do not apply to a man who is employed upon such a ship, and he may be dealt with under the Employers and Workmen Act, 1875. *Salt Union* v. *Wood*, 62 L. J., M. C. 75; [1893] 1 Q. B. 370; 5 R. 176; 68 L. T. 92; 41 W. R. 301; 7 Asp. M. C. 281; 57 J. P. 201.

Wrongful Arrest, Desertion — Liability of Owners.]—*O'Neil* v. *Rankin*, IV. OWNERS, 5. LIABILITY IN TORT, ante, col. 72.

4. DUTY AND LIABILITY OF MASTER OR SHIPOWNER.

Who may engage—Persons contracting to purchase one Share of Ship.]—By s. 147, sub-s. 1, of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), if any person not licensed by the board of trade other than "the owner or master or mate of a ship, or some person who is bonâ fide the servant and in the constant employ of the owner, or a shipping master duly appointed as aforesaid, engages or supplies any seamen or apprentice to be entered on board any ship in the United Kingdom," he incurs a penalty. The respondent having bonâ fide contracted to purchase one sixty-fourth share in a British ship from P., who, though not registered as the owner, had the full possession and control of the ship under a contract to purchase the sixty-four shares, supplied an apprentice to P., who engaged the apprentice for the ship:—Held, that the respondent was an "owner" within the meaning of the exemption, since though not a registered owner he had a contract enforceable in equity for the purchase of a share in the ship. *Hughes Sutherland*, 50 L. J., Q. B. 567; 7 Q. B. D. 160; 45 L. T. 287; 29 W. R. 867; 4 Asp. M. C. 459; 46 J. P. 6.

Implied Warranty.]—There is no implied warranty of seaworthiness in a contract between an owner of a ship and a seaman to serve on board it for a particular voyage. Therefore an action by a seaman against an owner of a ship for so negligently fitting out the ship, that by reason thereof it was unseaworthy, and the seaman was unable to sleep in his hammock, and obliged to undergo excessive labour, and was thereby injured in his health, not alleging any knowledge of the unseaworthiness, or any personal blame on the part of the owner, cannot be supported. *Couch* v. *Steel*, 3 El. & Bl. 402; 2 C. L. R. 940; 23 L. J., Q. B. 121; 18 Jur. 515; 2 W. R. 170.

To supply Medicines.]—A count alleged that the defendant neglected to supply and keep on board the vessel a proper supply of medicines, whereby the plaintiff's health suffered:—Held, that 7 & 8 Vict. c. 112, s. 18 (similar in enactment to s. 224 of 17 & 18 Vict. c. 104), made it the duty of the shipowner to have on board such medicines, and that though the act imposed a penalty recoverable as the specific punishment for the breach of that duty as to the public, sailors sustaining a private injury from a breach of that statutable duty were entitled to maintain an action to recover damages; and that the count was good. *Ib.*

Increase of Risk.]—The plaintiff agreed with the defendant to serve as one of the crew of a ship, whereof the defendant was master, for twelve months, from London to Rio, or any other of the ports specified in the agreement, amongst which were ports in the Pacific Ocean, and back to a final port of discharge, and to obey during that period all the defendant's lawful commands. He subsequently sailed for Rio with the ship. She was destined, as it appeared from her charterparty, for the service of the Peruvian government, and had on board a cargo of coal and ammunition. In the course of her voyage to Rio she joined company with two Peruvian war steamers, to which from time to time she supplied coal and ammunition. At Rio it became known to the plaintiff and the defendant that hostilities had commenced between Spain and Peru, two powers at peace with England. The defendant, notwithstanding this circumstance, announced to the plaintiff that he intended to go on to Callao, in the Pacific, another Peruvian port. He was at that time acting under the

direction of a Peruvian agent on board the ship, who received his instructions from the commanders of the two war steamers. The plaintiff objected to serve any further on the voyage on the ground that it had become illegal, and involved greater danger than he had anticipated when he entered into his agreement with the defendant. He accordingly left the ship. In an action for breach of contract brought by him against the defendant:—Held, that he must be taken to have engaged the plaintiff for an ordinary voyage, and that the plaintiff was entitled to treat as a breach of contract the defendant's employment of him on a voyage which would expose him to greater danger than he originally had reason to anticipate. *Burton* v. *Pinkerton*, 36 L. J., Ex. 137; L. R. 2 Ex. 340; 16 L. T. 419; 15 W. R. 1139.

Damages for Breach of Contract.]—The plaintiff, after leaving the ship, was imprisoned at Rio for some days as a Peruvian deserter. When he came out of prison the ship had gone, carrying some of his clothes on board of her. The jury awarded damages both for the imprisonment and the loss of clothes:—Held, that these damages were too remote to be recoverable. *Ib.*

Leaving Seamen Abroad.]—In an indictment against a master of a merchant ship, under 5 & 6 Will. 4, c. 19, for wilfully and wrongfully leaving a seaman behind before the termination of the voyage for which he was shipped, the allegation of ownership is material; and the only defence which the master can set up is, the production of a certificate of the consul or other party mentioned in the statute, or proof that it was impossible to obtain such certificate. *Reg.* v. *Dunnett*, 1 Car. & K. 425.

—— **Liability for Expenses.**]—Where seamen are injured by an accident, and put on shore while the ship proceeds on her voyage, the captain has no implied authority to make the shipowner liable for expenses incurred for their maintenance and care. *Organ* v. *Brodie*, 10 Ex. 449; 3 C. L. R. 51; 24 L. J., Ex. 70; 3 W. R. 13.

Passage Money.]—Foreign seamen engaged for a voyage out and home are entitled, upon being discharged in this country against their own consent, to receive, out of the proceeds of the ship, passage money for their return home; but not so seamen engaged during the course of a voyage. *The San Jose Primeiro*, 3 L. T. 513.

Seamen forced to provide themselves, the ship's provisions being exhausted, are entitled to board wages out of the proceeds of the ship. *Ib.*

Seamen of a disabled foreign vessel are entitled to an allowance for a return to their own country. *The Gustaf*, Lush. 506; 31 L. J., Adm. 207; 6 L. T. 660. See also *The Rafaelluccia*, col. 125.

Captain and Seaman—Common Employment.]—The owner of a ship is not responsible for the injury to, or death of, one of the crew resulting from the negligence of the captain of the ship, the captain and the crew being fellow-servants engaged in a common employment. *Hedley* v. *Pinkney & Sons Steamship Co.*, 61 L. J., Q. B. 179; [1892] 1 Q. B. 58; 66 L. T. 71; 40 W. R. 113; 7 Asp. M. C. 135; 56 J. P. 308—C. A.

"Seaworthy" Ship — What is — Duty of Owner to provide.]—By s. 5 of the Merchant Shipping Act, 1876, in any contract of service between the owner of a ship and the master or any seaman thereof, there is to be implied an obligation on the owner of a ship that he and the master shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same:—Held, that the expression "seaworthy" in that section meant that the ship should be in a fit state, as to repairs, equipment and crew, and in all other respects, to encounter the ordinary perils of the voyage at the time of sailing upon it; and that if a ship was properly equipped to encounter such perils, the negligence of the captain, in not using with proper care the means of safety provided, did not make the ship unseaworthy within the meaning of the section. *Ib.*

Misconduct—Entry in Log — Slander.]—A master entered in the log that the mate wilfully and intentionally disobeyed his orders in not allowing a seaman to steer. The mate sued the master for slander:—Held, that he must prove malice and want of probable cause. *Hill* v. *Thompson*, 19 Ct. of Sess. Cas. (4th ser.) 377.

Liability for Injuries to Seamen.]—*See* ante, IV. OWNERS, col. 73.

5. AUTHORITY OF MASTER TO PUNISH.

In what Cases.]—The captain of a merchant ship, lying in a foreign port, sent a seaman, who had committed mutiny on shore, into the custody of the local authorities, and procured him to be flogged and imprisoned:—Held, that the captain was answerable, having taken an active part in the proceedings, and not merely lodged his complaint. *Aitkin* v. *Bedwell*, M. & M. 68; 31 R. R. 712.

Where C., a mariner on board an East Indiaman at anchor in the bay of Canton, within two miles of Macao, and within hail of several other vessels, having been guilty of disorderly conduct in the absence of the captain, was, upon the captain's return to the ship four days afterwards, ordered to be flogged, upon which L., a mariner on board the same ship, resisted the execution of the captain's orders, and was guilty of riotous and mutinous conduct, for which, by command of the captain, he was flogged:—Held, that the captain was justified in flogging L.; and that the authority of the captain to inflict moderate punishment is not confined to a case where the vessel is at sea beyond the reach of assistance; and that such punishment need not be inflicted immediately upon the act being done for which the punishment is inflicted. *Lamb* v. *Burnett*, 1 C. & J. 291; 1 Tyr. 265. See also *Broughton* v. *Jackson*, 18 Q. B. 378; 21 L. J., Q. B. 265; 16 Jur. 886.

It is the duty of the captain of a merchant vessel, in case of misconduct of one of the crew, previously to the infliction of punishment, to institute inquiry, with the assistance of others, and to have the result entered in the log. *Murray* v. *Moutrie*, 6 Car. & P. 471.

A seaman employed in cutting blubber on board a whaler, in consequence of a quarrel with the captain followed by a blow from the mate, threw down his knife and refused to do any more work in the ship:—Held, that such conduct was an act justifying moderate punishment;

and that, although the punishment was excessive, yet, if the seaman, by some concession, might have put an end to it, and refused, he could not recover damages for the continuation of the punishment after such refusal. *Ib.*

Apprentice—Right to Chastise.]—A master has a right to chastise an apprentice, and the court will not inquire whether the chastisement was deserved, provided there was no cruelty. *Wights* v. *Burns*, 11 Ct. of Sess. Cas. (4th ser.) 217.

Evidence in Action against Captain.]—In an action against the captain of an East Indiaman, for flogging the plaintiff (a gunner's mate) on board the ship, the latter cannot give evidence as to his being of a respectable family and connexions, unless these circumstances could be proved to have been known to the captain at the time. *Rhodes* v. *Leach*, 2 Stark. 516.

Excessive Punishment.]—500*l.* damages recovered for excessive punishment by master of his seaman. *Watson* v. *Christie*, 2 Bos. & P. 224; 5 R. R. 579.

Threatened Mutiny—Force.]—The master is justified in using force to prevent a threatened mutiny. *Bingham* v. *Garnault*, Bull. N. P. 17.

6. Certificate of Character.

A master having made and signed a report of a seaman's character, upon his discharge, in the form sanctioned by the board of trade, the shipping master gave the seaman a copy of such report. A. knowingly and fraudulently made a fac-simile of this report, but instead of writing the letter M., which stood in the original to indicate that the seaman's character for ability and conduct was middling, wrote "G.," indicating that it was good:—Held, that A. was guilty of an offence within 17 & 18 Vict. c. 104, s. 176. *Reg.* v. *Wilson*, Dears. & B. 558; 27 L. J., M. C. 230; 4 Jur. (N.S.) 670; 6 W. R. 503; 8 Cox, C. C. 25.

Refusal to give Certificate of Discharge—Penalty.]—An action will not lie for the refusal to give to a seaman the certificate of discharge directed to be given by the 172nd section of the Merchant Shipping Act, 1854, the only remedy for such refusal being the penalty provided by that section. *Vallance* v. *Falle*, 53 L. J., Q. B. 459; 13 Q. B. D. 109; 51 L. T. 158; 32 W. R. 769; 5 Asp. M. C. 280; 48 J. P. 519.

7. Protection from Imposition.

Persons going on Board before final Arrival of Ship.]—A. was charged under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 237, with boarding, without the permission of the master, a ship "about to arrive at her place of destination before her actual arrival in dock or at the place of her discharge." The ship, at the time he boarded her, had just entered the Cumberland Basin, in the port of Bristol, at 7 p.m. The basin is divided from the river Avon by dock gates, and is a complete dock, forming part of, but divided by other dock gates from, the rest of the docks. There are quays in the basin, but the ship was not intended to discharge in the basin; she remained in the basin all night, and the next morning she was moored further in the floating harbour, and discharged her cargo at the quay there. The justices dismissed the complaint:—Held, that the ship had not arrived "at her place of destination" by merely arriving in the port of Bristol, and that she had not "actually arrived at her place of discharge," which was the quay where she ultimately did discharge; but that she had actually arrived in dock, within the meaning of the section, although the dock was not the dock in which she ultimately discharged; and that the justices' decision was therefore right. *Attwood* v. *Case*, 45 L. J., M. C. 20; 1 Q. B. D. 134; 33 L. T. 507; 24 W. R. 94.

Disposition of Court to Protect.]—Mariners are, from their ignorance and helpless state, placed in a peculiar manner under the tender protection of the court—per Sir W. Scott. *The Exeter*, 2 C. Rob. 261.

Assignment of Prize Money.]—Assignment by seaman of his prize money to the surgeon set aside. *Taylour* v. *Rochfort*, 2 Ves. Sen. 281. *Baldwin* v. *Rochfort*, 1 Wils. 229.

Contract to give up Salvage.]—*See* post, XXVI. Salvage.

Unreasonable Contracts for Service.]—*See Buck* v. *Rawlinson, and Cases* ante, col. 118.

8. Wills of Seamen.

Probate—Mariner's Will.]—1 Vict. c. 26, s. 11.

A mariner on board ship at Port Adelaide wrote a letter relating to the disposition of his property in case of his death:—Held, that this letter was entitled to probate, under 1 & 2 Vict. c. 26, s. 11, as a codicil to a will which he had previously executed. *Parker, In the goods of*, 2 Sw. & Tr. 375; 28 L. J., P. 91; 5 Jur. (N.S.) 553.

Will of a seaman on board the "Excellent" training ship, permanently stationed in Portsmouth harbour, held to be the will of a mariner or seaman being at sea within 1 Vict. c. 26, s. 11. *McMurdo, In the goods of*, L. R. 1 P. & M. 540.

A surgeon in the navy, returning from service, whilst at sea wrote a letter stating how he wished his property to be disposed of at his death:—Held, that he was a mariner or seaman within 29 Car. 2, c. 3, s. 23, and 1 Vict. c. 26, s. 11, and probate granted. *Saunders, In the goods of*, L. R. 1 P. & M. 16.

A staff-surgeon in the navy wrote a letter, some sentences of which were testamentary, on board H.M.S. "Serpent" at Devonport. The ship was lost at sea a few days after:—Held, that the will was entitled to probate. *Rae, In the goods of*, 27 L. R., Ir. 116.

9. Impressment.

A man is not excused from impressment as being headborough of the place in which he resides. Semble, there are no exemptions, except by statute, and perhaps ferrymen. *Fox, Ex parte*, 5 Term Rep. 276; 2 R. R. 596.

Habeas corpus not granted at prayer of the master to bring up his apprentice who had been impressed. *Landsdown, Ex parte*, 5 East, 38.

When an application by the master for a

habeas corpus warrant, granted by Mansfield, C.J., to bring before him apprentices wrongly impressed. *The Apprentices' Case*, 1 Leach. C. C. 203.

Impressment of seamen is legal. *Case of Pressing Mariners*, 18 St. Tr. 1326.

A seaman is not exempt from impressment because he is a freeholder. *Rex* v. *Douglas*, 5 East, 477. See *Goods' Case*, W. Bl. 251; or ship's carpenter *Boggin, Ex parte*, 13 East, 549.

A lord mayor's waterman is not exempt from impressment. *Rex* v. *Tubbs*, Cowp. 517.

A bond given by an impressed person to pay a sum in consideration of his release is void. *Pole* v. *Harrobin*, 9 East, 416, n.; 3 Dougl. 61.

A bargeman protected from impressment whilst carrying timber to the royal yards held not subject to impressment. *Goldswain's Case*, 2 W. Bl. 1207.

To convict for harbouring deserters under 17 & 18 Vict. c. 104, s. 257, it must be shewn that the ship was British and registered. *Leary* v. *Lloyd*, 3 El. & El. 178; 29 L. J., M. C. 194.

Wages of Seamen Impressed.]—*See Cases* supra, col. 108.

10. Supplying without Licence.

Onus of Proof of Licence on Defendant.]—A defendant having been charged under the 147th section of the Merchant Shipping Act, 1854, with supplying a seaman to a merchant ship, in the United Kingdom, he not being a person holding a licence from the board of trade for that purpose:—Held, on a case stated, that proof having been given of the supply of the seaman by the defendant, the onus of proving that he held a licence from the board of trade rested with him. *Reg.* v. *Johnston*, 55 L. T. 265; 16 Cox, C. C. 221; 6 Asp. M. C. 14; 51 J. P. 22.

11. Thames Watermen.

Thames By-laws — Navigating Steamboat — Towing more than Six Barges.]—A by-law made in pursuance of the Watermen and Lightermen Amendment Act, 1859, provides that any person, who, when in charge of or navigating any steamboat on the river between Vauxhall Bridge and the entrance to the Victoria Docks, shall at the same time tow more than six barges exceeding ten tons each attached thereto, shall incur a penalty. A person in charge of a steamboat towed thirty-one barges of more than ten tons each from the upper dolphin, situate about 100 yards above the entrance of the Victoria Docks, into the docks:—Held, that he was not, while so doing, navigating a steamboat upon the river within the meaning of the by-law, and could not be convicted of a breach thereof. *Rolles* v. *Newell*, 59 L. J., Q. B. 423; 25 Q. B. D. 335; 63 L. T. 384; 39 W. R. 96; 6 Asp. M. C. 563; 55 J. P. 70.

—— **Barge—Number of Men.**]—By-law 16 of the Thames conservators provides that all barges, boats, lighters and other craft navigating the river Thames, shall, when under way, have at least one competent man constantly on board for the navigation and management thereof, and all such craft of above fifty tons burden shall when under way have one man in addition on board to assist in the navigation of the same:—Held, that, "one man in addition" in this by-law means one competent and skilful man in addition, and that where the craft is above fifty tons burden, the by-law requires two competent men on board, and is not satisfied by having on board one competent man being a licensed lighterman, and a boy about sixteen years of age. *Goldsmith* v. *Slattery*, 63 L. T. 273; 6 Asp. M. C. 561. And see *Perkins* v. *Gingell*, col. 835.

Watermen's Act — Apprentice — Temporary Employment.]—When a person qualified to take apprentices under the Watermen and Lightermen's Act, 1859, has no employment for the time being for his apprentices, he may find temporary employment for them with another person so qualified. *Smith* v. *Francis*, 55 J. P. 407.

—— **Apprentice—Second Hand on Barge.**]—An apprentice bound as prescribed in the Watermen's Act, 1859, is qualified to act as a lighterman under s. 54, although he does not hold, and is not qualified to hold, a licence under the act; and he may be a competent person to act as second hand on board a barge or other craft of over fifty tons burden, within the meaning of by-law 16, made under the Thames conservancy acts. *Gosling* v. *Newton*, 64 L. J., M. C. 160; [1895] 1 Q. B. 793; 15 R. 395; 72 L. T. 500; 43 W. R. 559; 18 Cox, C. C. 135; 7 Asp. M. C. 587; 59 J. P. 406.

—— **Working Craft for Hire—Labourer employed at Weekly Wages.**]—The appellant, who was not a freeman of the Company of Watermen and Lightermen of the river Thames, was convicted of an offence under s. 54 of the Watermen and Lightermen Amendment Act, 1859 (22 & 23 Vict. c. cxxxiii). That section provides that, "if any person not being a freeman licensed in pursuance of this act, or an apprentice qualified according to this act, . . . shall at any time act as a waterman or lighterman, or ply or work any wherry, passenger-boat, lighter, vessel, or other craft upon the said river from or to any place or places or ship or vessel within the limits of this act for hire or gain," every such person shall be liable to a penalty. The appellant, who was engaged as a labourer at a wharf at weekly wages, by the orders of his employers, rowed a number of labourers in one of his employers' boats to a ship lying in the river within the limits defined by the act. He received no separate reward or payment for so doing:—Held, that the conviction was wrong. *Skittrell* v. *Showell*, 59 L. J., M. C. 26; 61 L. T. 874; 54 J. P. 325.

—— **Construction — Master on Paddle-box.**]—By the 99th by-law under the Watermen's and Lightermen's Amendment Act, 1859, which provides that if the master of any steam vessel shall not (when practicable) remain on one of the paddle-boxes or on the bridge of such vessel, or shall not cause and procure a proper look-out to be kept "from the bow" of such vessel, he shall incur a penalty, is not inconsistent with or impliedly repealed by the 36th by-law made under the Thames Conservancy Act, 1864, which provides that the master of every steam vessel shall be and remain on one of the paddle-boxes or bridge, and shall cause a proper look out to be kept from the said vessel. *Green* v. *Gosling*, 62

L. J., M. C. 45; [1893] 1 Q. B. 109; 5 R. 91; 67 L. T. 853; 41 W. R. 141; 7 Asp. M. C. 248; 57 J. P. 87.

—— **Barge in Tow—Waterman on Board.**]—A barge on the Thames in tow of a tug must have a licensed waterman on board and in charge. *Elmore* v. *Hunter*, 47 L. J., M. C. 8; 3 C. P. D. 116; 38 L. T. 179; 3 Asp. M. C. 555.

—— **Navigating without Licence.**]—A person, other than those mentioned in 22 & 23 Vict. c. cxxxiii, s. 54, who navigates a barge for hire within the limits of the act, is liable to the penalty of the act, although the barge has sailed from a place outside the limits of the act, and might, under 7 & 8 Geo. IV. c. lxxv, have been navigated by such person. *Doick* v. *Phelps*, 30 L. J., M. C. 2; 6 Jur. (N.S.) 1371; 3 L. T. 296; 9 W. R. 70.

The above section does not apply to a person, other than a freeman, who conveys for his own purposes his servants or workmen, without charge. *Tadhunter* v. *Buckley*, 7 L. T. 273.

A steam tug of eighty-seven tons, under 7 & 8 Geo. 4, c. lxxv, s. 37, may be navigated by a person who is not a freeman without incurring a penalty. *Reed* v. *Ingham*, 3 El. & Bl. 889; 23 L. J., M. C. 156; 2 C. L. R. 1495; 1 Jur. (N.S.) 61.

A barge, formerly a western barge, but at the date of the offence employed in carrying goods for the Great Western Railway from a basin of the Grand Junction Canal, outside the limits of 7 & 8 Geo. 4, c. lxxv, to a wharf in the Thames within the limits of the act, is not a western barge within s. 101 of the act. *Tibble* v. *Beadon*, 24 L. J., M. C. 104. *S. C.*, nom. *Reg.* v. *Tibble*, 4 El. & Bl. 888.

—— **Validity of By-law—Penalty.**]—A by-law imposing a penalty on any freeman who employed a non-freeman to navigate craft on the Thames is good. *Edmonds* v. *Waterman's Co.*, 24 L. J., M. C. 124; 3 C. L. R. 902; 1 Jur (N.S.) 727.

Licence Granted—Administrative, not Judicial Act—Certiorari.]—The making of an order for the issue of a licence or certificate by the court of the Company of Watermen and Lightermen of the river Thames authorising a person who has actually served for two years under a contract with a lighterman qualified to take apprentices, to act as a lighterman, is not a judicial, but an administrative act, and consequently such an order cannot be removed into the high court by certiorari. *Reg.* v. *Lucey*, *Gosling*, *Ex parte*, 66 L. J., Q. B. 308; [1897] 1 Q. B. 659; 61 J. P. 388.

VII. PILOT.

1. *Recovery of Fees and Penalties*, 141.
2. *Duties, Rights, and Liabilities*, 144.
3. *Licences*, 145.
4. *Duty to Employ*, 147.

And see XX., COLLISION, 10. COMPULSORY PILOTAGE.

1. RECOVERY OF FEES AND PENALTIES.

Production of Licence.]—The master of a ship was not liable to the penalty imposed by 6 Geo. 4, c. 125, s. 58, for refusing to employ a pilot, unless the pilot produced his licence as required by s. 66, although it was demanded. *Hammond* v. *Blake*, 10 B. & C. 424; 5 M. & Ry. 361; 8 L. J. (O.S.) K. B. 140.

A pilot nonsuited in action for pilotage because he did not shew his license. 52 Geo. 3, c. 39, s. 34. *Usher* v. *Lyon*, 2 Price, 118.

Offer by Pilot to take charge.]—A conviction under 6 Geo. 4, c. 125, s. 70, for continuing in charge of a ship after a duly licensed pilot had offered to take charge of it, was bad, if it did not shew that the offer was made to or in the presence of the party in charge of the vessel, or that it otherwise came to his knowledge. *Chaney* v. *Payne*, 1 G. & D. 348; 1 Q. B. 712.

In an action against a master of a vessel for penalties under 52 Geo. 3, c. 39, s. 34, the declaration must have alleged that a licensed pilot offered to the master to take charge of the vessel, or made such offer in his presence or hearing; and it was not sufficient merely to follow the general words of the act. *Peake* v. *Carrington*, 5 Moore, 176; 2 Br. & B. 399.

Transporting in Thames.]—The 5 Geo. 2, c. 20, which inflicted a penalty on persons piloting ships down the Thames, only extended to vessels sailing on foreign voyages, and not to those which, having performed their voyages, were moved from one wharf to another on the river, for the purpose of unloading their cargoes. *Rex* v. *Lambe*, 5 Term Rep. 76. S. P., *Rex* v. *Neale*, 8 Term Rep. 241.

Extra Fee for Docking.]—A ship arriving at the entrance of the West India Docks too late for docking that tide, held not liable under 6 Geo. 4, c. 125, to an extra pilotage charge for "docking" next tide. *The Adah*, 2 Hag. Adm. 326.

In Charge of Vessel—6 Geo. 4, c. 125, s. 70.]—Where a person selects the course of a ship, and takes the management of her for the purpose of directing her in that course, he is in the charge or conduct of the vessel within 6 Geo. 4, c. 125, s. 70. The master was not, however, precluded by that section from employing any moving power, as, for instance, steam or other power, bonâ fide used as a moving power, if upon the party applying such power necessarily devolved the selection of the ship's course, and the charge or conduct of her in that course. *Beilby* v. *Scott*, 7 M. & W. 93; 10 L. J., Ex. 149.

The master of a vessel navigating it himself as pilot, after a duly licensed pilot offered himself, was not liable to the penalty imposed by 6 Geo. 4, c. 125, s. 70, although he was liable to double the amount of the pilotage of the vessel, within s. 58. *Beilby* v. *Shepherd*, 3 Ex. 40; 18 L. J., Ex. 73.

Change of Pilots.]—Where a master of a vessel discharged a cinque port pilot in Standgate-creek, and dropped a mile down the port of Rochester, with a signal flying for a trinity house pilot, who came on board at Sheerness:—Held, that he was liable to a penalty under 52 Geo. 3, c. 39. *Thornton* v. *Boland*, 9 Moore, 403; 2 Bing. 219.

Charges—Thames.]—A pilot who brings a ship from Gravesend to the entrance of the Tilbury Docks, and thence into the docks, is not entitled under the order in council of May 17, 1882, to the special charge "for removing a vessel from moorings into a dry or wet dock," or to charge

any sum other than the rate from Gravesend to Northfleet. *The Clan Grant*, 56 L. J., Adm. 62; 12 P. D. 139; 57 L. T. 124; 35 W. R. 670; 6 Asp. M. C. 144.

Liability of Shipbrokers—Pilot carried to Sea.]—The ten shillings and sixpence per day to which a licensed pilot, taken, without his consent, to sea, or beyond the limits of his pilotage district, in any ship, is entitled by 17 & 18 Vict. c. 104 (The Merchant Shipping Act, 1854), s. 357, are not "pilotage dues" for which the shipbrokers are liable under s. 363. *Morteo* v. *Julian*, 48 L. J., M. C. 126; 4 C. P. D. 216; 41 L. T. 71.

Penalties—Suing for.]—The penalty imposed by 6 Geo. 4, c. 125, s. 70, might be sued for by a common informer. *Beilby* v. *Scott*, 7 M. & W. 93; 10 L. J., Ex. 149.

—— **Calculation of.**]—The penalties imposed by 52 Geo. 3, c. 39, s. 11, on ships neglecting to take in a pilot on arriving off Dungeness, were to be calculated on ships bound for the river, not on the pilotage due from Dungeness to the Downs, but on that which would be due on the ship's arrival at her ultimate place of destination in the river. *Mackie* v. *Landon*, 1 Marsh. 585; 6 Taunt. 256.

—— **Acting as Pilot.**]—T. was third mate of a ship, and after P., a duly licensed pilot, had offered to take charge, continued to act as pilot. T. was charged under s. 361 of the Merchant Shipping Act, 1854:—Held, that the justices rightly convicted T. without regard to his being or not being mate of the ship. *Turner* v. *Peat*, 53 J. P. 230.

—— **Local Act—Pilotage Fees.**]—Where a public local act, in force before the passing of the Merchant Shipping Act, 1854, and regulating a port, imposes a penalty on unauthorised persons acting as pilots, pilotage is compulsory. Pilotage rates, fixed by by-laws made by trustees under a local act, and under the Merchant Shipping Act, 1854, and duly sanctioned by her majesty in council, may be sued for by a pilot who has rendered services as such. The Merchant Shipping Act Amendment Act, 1889 (52 & 53 Vict. c. 68), is retrospective, as it declares what the meaning of the principal act of 1854 always has been, and by it the word "ship" in the act of 1854 includes "foreign ship." *Jones* v. *Bennett*, 63 L. T. 705; 6 Asp. M. C. 596.

—— **Master Piloting his own Ship.**]—A master or part owner not being a pilot may not, under 3 Geo. 1, c. 13, pilot his own ship up the Thames. *Kemler* v. *Blanchard*, W. Bl. 690.

—— **Refusal to take Pilot.**]—For a commitment under 6 Geo. 4, c. 125, s. 70, to be good it must appear that the offer by the pilot to take charge of the ship was made to the accused, or in his presence. *Reg.* v. *Chaney*, 6 Dowl. P. C. 281.

Sued for in Admiralty—Non-qualified Pilots' Charges.]—Pilotage sued for in admiralty; how far statutory rates applicable to non-qualified pilots. *The Nelson*, 6 C. Rob. 217.

A pilot may sue in admiralty for his services at sea. *The Bee*, 2 Dods. 498.

Proceedings in the admiralty of the cinque ports for the penalty for piloting a ship in the Thames contrary to 3 Geo. 1, c. 13. Declaration for attachment in prohibition. *Pierce* v. *Hopper*, 1 Str. 249.

2. Duties, Rights, and Liabilities.

Liability of Pilot of King's Ship.]—Liability of pilot of king's ship. See *Storr* v. *Clements*, post, XX. Collision, 3. Liability.

Action against Pilot for Collision—Venue.]—An action against a pilot for negligently damaging another ship by collision need not, under 6 Geo. 4, c. 125, s. 84, be brought in the county where the cause of action arises. *Lawson* v. *Dumlin*, 9 C. B. 54.

Pilot Getting Under Way in Improper Weather.]—A pilot who took a heavy steamship out of dock and down the Clyde in weather such that she ought not to have left the dock, held liable in damages for a collision that followed. *Burrell* v. *McBrayne, Islay (Owner of)* v. *Patience*, 22 Ct. of Sess. Cas. (4th ser.) 224.

Held, that taking the ship to sea in such weather was "wilful or culpable neglect or mismanagement," within the above act. *Ibid.* And see *The Strathspey* and *The Islay*, XX. Collision; 9, Compulsory Pilotage.

Jurisdiction against—Court of Passage.]—A ship, by compulsion of law, in charge of a duly licensed pilot in the river Mersey, came into collision with and occasioned damage to another vessel. The owners of the damaged vessel instituted an admiralty suit in the court of passage against the pilot:—Held, that the court of passage had not jurisdiction to entertain the suit, as an admiralty suit. *The Alexandria*, 41 L. J., Adm. 94; L. R. 3 A. & E. 574; 27 L. T. 565; 1 Asp. M. C. 464.

—— **Of Court of Admiralty.**]—Semble, that the court of admiralty has not jurisdiction to entertain such a suit. *Ib.*

There is no admiralty jurisdiction to entertain a suit against a pilot who, in navigating a ship, has caused a collision between that ship and another. *Ib.*

—— **Of County Court.**]—An action against a pilot for collision and damage caused to a barque by a vessel under his charge, is not an "admiralty cause," within 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, which confer admiralty jurisdiction upon county courts. *Flower* v. *Bradley*, 44 L. J., Ex. 1; 31 L. T. 702; 23 W. R. 74; 2 Asp. M. C. 489.

—— **Joinder of Pilot as Defendant—Collision.**]—See *The Germanic*, post, XX. Collision, 13. Practice.

—— **Collision with Dock Wall—Liability of Pilot in Admiralty.**]—See *The Zeta, Mersey Docks and Harbour Trustees* v. *Turner*, post, XX. Collision.

Liability of Harbour or Pilotage Authority for Collision caused by Pilot.]—*See* post, tit. Collision—Liability.

Duties of Pilot in charge of a Ship.]—*See* post, XX. Collision, 9. Compulsory Pilotage.

Injury to Pilot—Not Fellow-servant of Crew—Liability of Owners.]—There is no implied contract between the owners of a ship and a pilot whom they are compelled to employ, that the pilot shall take upon himself the risk of injury from the negligence of the shipowners' servants; and an action will lie by the pilot against the shipowners for injuries caused to him whilst acting as pilot on board their vessel, by the negligence of their servants. *Smith* v. *Steele*, 44 L. J., Q. B. 60; L. R. 10 Q. B. 125; 32 L. T. 195; 23 W. R. 388.

And where a pilot went on board a vessel in the course of his duty, in a district in which pilotage is compulsory, and while he was on board, a boat, which had been negligently slung by servants of the shipowners, fell on and killed him:—Held, that his widow could recover in an action against the shipowners brought by her, as executrix, under Lord Campbell's Act. *Ib.*

Additional Remuneration—Salvage.]—Where a pilot is called upon to perform extraordinary service, he may recover additional pilotage remuneration. *The General Palmer*, 2 Hag. Adm. 176; *The Enterprise*, 2 Hag. Adm. 178, n. *And see* post, XVIII. SALVAGE.

3. LICENCES.

Licences—Renewal.]—By 17 & 18 Vict. c. 104, s. 374, no licence granted by the Trinity house shall continue in force beyond the 31st January next ensuing the date of such licence, but the same may, upon the application of the pilot holding such licence, be renewed on such 31st January in every year, or any subsequent day; and a pilot's licence renewed on the 20th January is within the intention of this provision, so as to be in operation and effect in the May following. *The Beta*, 3 Moore, P. C. (N.S.) 23; Br. & Lush. 328; 34 L. J., Adm. 76; 12 L. T. 1.

—— **Refusal to Deliver up.**]—Under 17 & 18 Vict. c. 104, s. 352, a qualified pilot refusing to deliver up his licence when required to do so by the pilotage authority, is liable to a penalty, and cannot defend himself on the ground that the pilotage authority has acted capriciously in requiring the delivery. *Henry* v. *Newcastle Trinity House Board*, 8 El. & Bl. 723; 27 L. J., M. C. 57; 4 Jur. (N.S.) 685; 6 W. R. 232.

—— **Leith Trinity House—Limits.**]—The Trinity house of Leith has not power to grant licences to pilots within the jurisdiction of the Trinity house of London, and therefore a pilot to whom a licence has been granted by the Trinity house of Leith to navigate a ship along the east coast of England to Orfordness, thence to the Nore, and vice versâ, is subject to a penalty, under 5 Geo. 2, c. 20, s. 1. *Hossack* v. *Gray*, 6 B. & S. 598; 34 L. J., M. C. 209; 11 Jur. (N.S.) 996; 12 L. T. 701; 13 W. R. 859.

—— **Hull Trinity House—Authority to Licence.**]—By a charter of Elizabeth the Trinity house of Hull was authorised to take duties "in the port of the town of Kingston-upon-Hull, and in all places within the limits and liberties thereof, that is to say, in all havens, creeks, and other places where our customer of Hull by virtue of his office hath any authority to take any custom;" and they were empowered to exercise jurisdiction over disputes arising within the same limits; and to forbid any mariner of Hull to take charge as pilot of any ship to cross the seas, except such as should be first examined and licensed by them; and to punish any person who should act as pilot to cross the seas without their licence. The limits in question extended many miles up the Humber and river Ouse. Goole, a place within those limits, where the customer of Hull had formerly exercised jurisdiction, was constituted a port in 1828. Till after that time the Trinity house had never licensed pilots to take charge of vessels upon the Ouse, or the Humber, above Hull roads:—Held that the power given by the charter to license in all places where the customer of Hull had authority to take custom, extended over all the limits within which the customer might so act at the time when the charter was granted; consequently, that Goole, though now an independent port as to customs, was still subject to the charter, in respect of the licensing of pilots. *Beilby* v. *Raper*, 3 B. & Ad. 284.

Held, also, that it was not requisite, by the terms of the charter, that every licence should be for crossing the seas; but that the corporation might grant a more limited licence, as from Goole to Hull roads. *Ib.*

Pilotage Certificates—Grant of.]—The master of a vessel applied for a certificate, purporting to enable him to pilot his vessel within certain waters, and submitted to the required examination. The certificate was signed and sealed by the pilotage authority, and was lying in the office to be called for by the master, but he had not applied for it, and was ignorant that it was ready and would be given him on application:—Held, that the certificate was not granted to the master, nor possessed by him, within 17 & 18 Vict. c. 104, ss. 340, 353, so as to enable him to pilot his vessel in the specified waters. *The Killarney*, Lush. 202; 30 L. J., Adm. 41; 5 L. T. 21.

Evidence by a clerk from the Trinity house that the Trinity house has, from a period prior to the Merchant Shipping Act, 1854, been in the habit of licensing pilots for the district in question, is primâ facie proof of their authority. *The Juno*, 45 L. J., Adm. 105; 1 P. D. 135; 34 L. T. 741; 24 W. R. 902; 3 Asp. M. C. 217.

Under 17 & 18 Vict. c. 104, s. 355, the board of trade can issue certificates to masters or mates of ships described in s. 354, and of such ships only. *The Earl of Auckland*, Lush. 387; 15 Moore, P. C. 304; 5 L. T. 558; 10 W. R. 124—P. C.

A pilotage certificate issued to a master describing a ship as the property of a person, who was not the owner either at the time of the granting of the certificate, or at the time of a collision subsequently occurring, is invalid at the time of that collision. *Ib.*

—— **Refusal of Pilotage Authority to Renew.**]—A pilotage authority has an absolute discretion under the Merchant Shipping Act, 1854, s. 341, to refuse to renew a pilotage certificate granted to the master or mate of a ship under s. 340. *Reg.* v. *Trinity House*, 35 W. R. 835.

Cinque Port Pilot—Revocation of Licence—Powers of Trinity House.]—The Trinity house, since 16 & 17 Vict. c. 129, have power to revoke the licence of a cinque port pilot granted by the lord warden, under 6 Geo. 4, c. 125, for a proper

cause. Nature of the inquiry and hearing to be had in such case discussed. *Reg.* v. *Trinity House*, 4 W. R. 124.

Duty to produce.]—See *Hammond* v. *Blake*, supra, col. 142.

4. Duty to Employ.

Compulsory Pilotage.]—*See* post, XX. Collision, 9. Compulsory Pilotage.

Duty of Master to employ Pilot.]—It is the duty of a master arriving off a strange port to do his best to procure a pilot: but if he cannot obtain one, the insurance is not therefore void. *Phillips* v. *Headlam*, 2 B. & Ad. 380; 9 L. J. (O.S.) K. B. 238. See *Law* v. *Hollingsworth*, 7 Term Rep. 160.

A captor neglecting to take a pilot into Guernsey, whereby the prize was lost:—Held, liable in damages. *The William*, 6 C. Rob. 316.

A captor who properly places his prize in charge of a pilot is not liable for her loss. *The Portsmouth*, 6 C. Rob. 317, n.

VIII. SALE AND TRANSFER.

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1. Contract for Sale.

Written Agreement for—Necessity of Registration.]—An agreement in writing to transfer a ship does not require to be registered under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 55, nor need the special description of the ship sold required by that section to be inserted in a bill of sale transferring the ship be contained in such agreement. The plaintiff agreed in writing with the defendant to sell, and the defendant agreed to purchase, a yacht belonging to the plaintiff for the sum of 2,600*l.*, whereof the plaintiff was the registered owner, on condition that the defendant should be at liberty to rescind the said agreement should the yacht prove unsound. The defendant refused to carry out his part of the agreement, and the plaintiff brought an action against the defendant for specific performance, or, in the alternative, 2,600*l.*, and for damages for breach of contract. The defendant pleaded that the agreement, if any was made, was not a bill of sale, nor was it registered, nor did it contain a sufficient description of the yacht, as required by the Merchant Shipping Act, 1854. The plaintiff demurred:—Held, that s. 55 of the Merchant Shipping Act, 1854, applies to the actual instrument by which the ship is to be transferred, and not to an agreement to transfer. *Batthyany* v. *Bouch*, 50 L. J., Q. B. 421; 44 L. T. 177; 29 W. R. 665; 4 Asp. M. C. 380.

An unregistered contract for the sale of shares in a British vessel could not be enforced in equity before the passing of the 25 & 26 Vict. c. 63, s. 3. *Hughes* v. *Morris*, 2 De G. M. & G. 349; 21 L. J., Ch. 761; 16 Jur. 603, infra. S. P., *M'Calmont* v. *Rankin*, 2 De G. M. & G. 403; 22 L. J., Ch. 554; *Liverpool Borough Bank* v. *Turner*, 2 De G. F. & J. 502; 30 L. J., Ch. 379; 7 Jur. (N.S.) 150; 3 L. T. 494; 9 W. R. 292: *Boyson* v. *Gibson*, 4 C. B. 121; 16 L. J., C. P. 147. *And see* III. Registration, supra.

Executory Contract—Recital of Registry.]—An action would not lie for the breach of an executory contract for the sale or transfer of a ship, unless the contract contained a recital of the certificate of registry pursuant to the previous statute, 8 & 9 Vict. c. 89, s. 34. *Duncan* v. *Tindall*, 13 C. B. 258; 22 L. J., C. P. 137; 17 Jur. 347.

Payment of Earnest.]—Trover was held to lie for a ship, where, upon a bargain of exchange, the contract and delivery were fully completed by the payment of earnest. *James* v. *Price*, Lofft, 219.

Illegal Stipulation in.]—A stipulation, in a contract for the purchase of a ship made with a shipbuilder, that a certificate shall be delivered to the purchaser by the builder, for the purpose of enabling the former to obtain a register as owner, under 3 & 4 Will. 4, c. 55, ss. 15, 25, before the masts were on board, and before the ship was in a sufficiently forward state for the measurement required to be made by that act, did not render such contract illegal. *Goss* v. *Quinton*, 3 Man. & G. 825; 4 Scott (N.R.) 471; 12 L. J., C. P. 173; 7 Jur. 901.

Irregular—Effect of, against Wrongdoer.]—The plaintiff bought and paid for a ship stranded on the English coast, but the transfer was not regular; he tried to save her, but she went to pieces; the defendant possessed himself of parts of the wreck which drifted on his farm:—Held, that the plaintiff's possession enabled him to recover them in trover. *Sutton* v. *Buck*, 2 Taunt. 302; 11 R. R. 585.

Parol Evidence to shew Alteration.]—E., as agent to H., agreed to sell a ship to S., and a written contract was signed by S. The contract was forwarded to H., who made an alteration therein, and returned it to E., who thereupon produced the written contract, as altered by H., to S., who assented, without resigning the contract:—Held, that parol evidence was admissible to shew that S. assented, without re-signing, to the alteration made by H. in the contract after S. had affixed his signature. *Stewart* v. *Eddowes*, and *Hudson* v. *Stewart*, 43 L. J., C. P. 204; L. R. 9 C. P. 311; 30 L. T. 333; 22 W. R. 534.

Varying by Evidence of prior Contract.]—An agreement for the sale of a ship and kintlage will not be varied or controlled by a prior contract for the purchase of the latter only. *Lano* v. *Neale*, 2 Stark. 105.

Warranty by subsequent Bill of Sale.]—A contract by parol, or by letter, having been

entered into for the sale of a ship, with a warranty, a subsequent bill of sale, not containing any contract of warranty, does not necessarily destroy the previous warranty, supposing there is no evidence that the parties did not intend that it should continue. *Stuckey* v. *Bailey*, 3 F. & F. 1.

Existence of Subject-Matter—Implied Warranty.]—By a deed-poll, A. sold to B. a ship, with its masts, tackle and appurtenances, and covenanted that he had good right, full power, and lawful authority to grant, bargain, sell, assign and set over the premises:—Held, that this was a covenant that the subject-matter of the transfer existed in the character of a ship, at the date of the deed; and if it was physically destroyed, or had ceased to answer the designation of a ship, the covenant was broken. *Barr* v. *Gibson*, 3 M. & W. 390; 7 L. J., Ex. 124.

Condition precedent—"Ship now at Rangoon."]—In an action by the vendors against their vendees for refusal to accept, evidence was given to shew the circumstances under which the contract was made, and that it was of vital importance that the vessel should be in the port named at the time of making the contract. The jury found that the condition, "ship now at Rangoon," had not been fulfilled, and that it was a condition absolutely vital:—Held, that it was rightly left to the jury to say under what circumstances the contract was made, and that the words "ship now at Rangoon" amounted to a warranty justifying the defendants in saying that there had been a failure of performance of a condition precedent, and in refusing to carry out the contract. *Oppenheim* v. *Fraser*, 34 L. T. 524; 3 Asp. M. C. 146.

Held, also, that the finding of the jury was rightly taken as an element in enabling the court to say that the words amounted to a condition precedent. *Ib.*

Removing Ship after Contract for Sale.]—A shipowner of Hamburg made, at Hamburg, an agreement with a domiciled Englishman for the sale to the Englishman of a Hamburg ship whenever she might return from the voyage on which she then was. The ship returned, and was by the owner ordered to proceed to Sunderland. The master of the ship, who was authorised by the shipowner to act as his agent in the sale, refused to deliver the ship except on certain terms. The purchaser filed a bill against the owner and the master for specific performances. He obtained leave to substitute service on the master for the owner, and moved for an injunction to restrain the defendants from removing the ship out of the jurisdiction:—Held, that the court had jurisdiction to restrain the defendants from removing the ship, and injunction granted. *Hart* v. *Herwig*, 42 L. J., Ch. 457; L. R. 8 Ch. 860; 29 L. T. 47; 21 W. R. 663; 2 Asp. M. C. 63.

Sale with all Faults—Misrepresentation.]—Contract for sale of ship "with all faults." The vendors before signing the contract had shewn the purchaser an inventory or advertisement circulated at her previous sale to them, which was misleading as to her condition and value:—Held, that the parties were bound by the signed contract, and that no action for deceit would lie upon the representation. *Pickering* v. *Dowson*, 4 Taunt. 779.

Action on Bond for Quiet Possession.]—Action upon bond by vendor for quiet enjoyment of a ship sold; breach alleged, that the purchaser was sued for ballast supplied to the ship before the sale:—Held, that the plaintiff not having shewn that the ballast was in the ship at her sale, he could not recover. *Kynter's Case*, Leon. part 1, 46.

Sale when War imminent.]—The sale of a ship absolutely and bonâ fide by an enemy to a neutral when war is imminent, is not illegal. *The Ariel, Sorensen* v. *The Queen*, 11 Moore, P. C. 119.

Transfer after Capture.]—A transfer by the captor of a ship before condemnation is valid if the ship be afterwards condemned. *Morrough* v. *Comyers*, 1 Wils. 211.

Sale of Ship and all belonging to her—Chronometer on Shore.]—A ship ready to sail was sold with all belonging to her on board and on shore:—Held, that a chronometer on shore with an optician for regulation by him, and previously used in the ship, was included in the sale. *Armstrong* v. *M'Gregor*, 2 Ct. of Sess. Ca. (4th ser.) 339.

Specific Performance.]—On a sale by auction of shares in a ship, part of a bankrupt's estate, one of the conditions was, that the purchase-money should be paid to the solicitor of the assignees on or before a certain day, when the purchase was to be completed, and the purchaser to have possession, and a bill of sale; the purchaser paid part of the purchase-money to the solicitor before the day appointed for the completion of the purchase, and had possession, but not a bill of sale:—Held, that the payment, and the execution of the bill of sale, ought, in pursuance of the condition, to have been contemporaneous; that the assignees, not having received the money from the solicitor, or executed the bill of sale, would not be restrained from taking proceedings to recover possession of the ship; and that the purchaser was not entitled to a decree for specific performance of the contract, by the execution of the bill of sale by the assignees, upon payment to them of the balance of the purchase money. *Hughes* v. *Morris*, 2 De G. M. & G. 349; 21 L. J., Ch. 761; 16 Jur. 603—L.JJ. Affirming 9 Hare, 636.

Bankruptcy Jurisdiction.]—No jurisdiction in bankruptcy to compel bankrupt to perfect bill of sale of a ship. *Stewart, Ex parte*, 1 Glyn. & J. 344.

Breach of Contract to Sell.]—B. contracted to purchase a barge of H., the purchase-money to be paid by instalments. Part of the money so to be paid was paid, and H. gave notice to B. that he had sold the barge to another person, and he must give it up, and gave a formal notice to that effect. On petition under the Merchant Shipping Act, 1854, s. 65, to restrain the dealing with the barge until a day specified, order made on the terms of bringing the arrears of instalments into court, and giving security for the completion of the contract. *Baker, Ex parte*, 18 L. T. 313.

Failure of Consideration.]—The owner of a ship proposes to his agent, to whom he was indebted on account, to transfer the ship to him, provided the agent would answer the owner's

draft for repairs, in respect of which the owner was indebted to a third party not named. The ship was, in pursuance of this proposal, transferred to the agent, and the vendor afterwards became bankrupt, without having drawn on the purchaser, and without any communication of the terms of the purchase having been made to the creditor to whom the vendor was indebted for the repairs. There is no consideration between the purchaser and the vendor's creditor to entitle the latter to recover from the purchaser the amount of the repairs. *Rattenbury* v. *Fenton*, 3 Myl. & K. 505; 3 L. J., Ch. 203.

Order and Disposition.]—Ship at sea, policy, and cargo assigned to S. as security for an advance. On the ship's arrival, S. failed to take possession or do anything to show that the property had been transferred to him:—Held, that the ship and cargo passed to the assignees in bankruptcy of the transferor, as being in his order and disposition. *Mair* v. *Glennie*, 4 M. & S. 240; 16 R. R. 445.

The owner of the major part of a vessel in port mortgaged his share and transferred the bill of sale to the mortgagees. The mortgagees did not take possession, but suffered the mortgagor and the other part owners to manage her. The mortgagor having become bankrupt:—Held, that his share passed to the assignees under 21 Jac. 1, c. 19. *Hall* v. *Gurney*, 3 Dougl. 356.

Assignment of a ship at sea for a valuable consideration may be good against assignees of bankrupts, though no possession is taken thereof: aliter, as to a Thames passenger boat. *Bourne* v. *Dodson*, 1 Atk. 154. *See also* col. 158.

Misstatement in Class Certificate issued by Lloyd's Committee—Action by Purchaser of Ship.]—Lloyd's committee had furnished the owner of a sailing yacht with a certificate which classed the yacht as A 1 for eleven years. After the owner had sold the yacht to the plaintiff it was discovered that she was not entitled to this classification. The plaintiff brought an action for damages against the committee upon the ground that owing to the representation in the certificate he had given more for the yacht than she was worth:—Held, that the plaintiff had no cause of action. *Thiodon* v. *Tindall*, 60 L. J., Q.B. 526; 65 L. T. 343; 40 W. R. 141; 7 Asp. M. C. 6.

Public Policy—Sale Void.]—A sale by part owners of some of their shares upon the terms that the purchaser shall be master of the ship and the vendors, who retained four-sixteenths of the ship, managing owners, held void, on grounds of public policy. *Card* v. *Hope*, 2 B. & C. 661; 4 D. & R. 164; 2 L. J. (O.S.) K. B. 96; 26 R. R. 503.

Liability on Bills for Price of Ship.]—R. contracted with a company for the sale to the company of two ships to be sent by him to the Danube, and to be equipped by him for the voyage. The plaintiffs, on behalf of the company, agreed to give their bills for part of the purchase-money, R. undertaking that they should not be called upon to pay more than a specified part of the amount of the bills, and that not before a time named. The rest of the purchase-money was to be secured by mortgage of the ships to R. No transfer to the company and no mortgage to R. was executed. R. then sent the ships upon a voyage not to the Danube with a contraband cargo, rendering them liable to seizure and confiscation. He also mortgaged the ships, and indorsed over bills of exchange given for the mortgage money, all without the knowledge of the company:—Held, that the plaintiffs were entitled to be relieved from their liability upon the bills given to R. in respect of the purchase-money, the agreement for sale by R. to the company being no longer enforceable by R. *Burke* v. *Rogerson*, 12 Jur. (N.S.) 635; 14 L. T. 780—L.JJ.

Non-payment of Purchase-money.]—When the vendor of a share in a ship has executed the bill of sale, and a receipt for the purchase-money, without its being in fact paid, a court of equity will give relief as well as discovery. *Ryle* v. *Haggie*, 1 Jac. & Walk. 334.

An agreement was entered into for the sale of a ship to A. and B. (one-third to A. and two-thirds to B.), at the price of 750*l.*; and, if default should be made by the purchasers, for the resale of the ship, the deficiency, if any, upon the resale to be made good by the defaulting purchasers. Possession of the ship was delivered to the purchasers by the vendors, who received 250*l.* from A., and two bills of exchange, drawn by them, and accepted by A. for the remaining 500*l.* In the bills of sale, by which the agreement was carried into effect, the purchase-money for the one-third and two-thirds of the ship was expressed to have been paid by A. and B. respectively. The acceptances of A. were dishonoured and he became bankrupt. On a bill filed by the vendors, who had become entitled to the whole interest in the purchase-money, against B., who had become the sole owner of the ship by purchase from A.'s assignee, praying specific performance of the agreement by B., or that the ship might be sold, and the proceeds applied in payment, the court held that it had jurisdiction, and decreed an account and payment of the unpaid purchase-money by B., or a resale of the ship, in default of payment in a limited time. *Lynn* v. *Chaters*, 2 Keen, 521.

No Lien for Purchase-money.]—There is no lien on the ship for purchase-money unpaid, or for other interest in her. *Walton* v. *Butler*, 29 Beav. 428.

Breach of Contract to Sell—Damages.]—The vendor of a ship covenanted with the purchaser that he had power to sell her. She had been bottomried, and was arrested and sold by the admiralty court at the suit of the lender on bottomry:—Held, that the vendor was liable in damages. Discussion of the policy and law of hypothecation. *Meretone* v. *Gibbons*, 3 Term Rep. 267.

Contract by Purchasing Company to allot Shares to Builder—Payment in Cash.]—Shipbuilders contracted with a company to build for the company a vessel, to be paid for as to one-tenth in shares of the company at par on delivery of the ship, and as to the rest in cash by instalments. The shipbuilders afterwards objected to take any part of the price in shares, and no shares were allotted to them until three years after the ship was delivered, when the company was about to be wound up:—Held, that the shipbuilders having insisted upon payment in cash

from the time of delivery of the ship, the company was not bound to allot them shares at that time, and were not liable to the shipbuilders in an action for breach of the contract to allot the shares. *M'Millan* v. *Liverpool and Texas Steamship Co.*, 38 L. T. 288; 3 Asp. M. C. 579.

Nonpayment of Purchase-money — Mortgage for securing—Liability of Purchasers of Mortgaged Property — Sale of Ship rescinded.]—An agreement recited that A. was desirous of purchasing, and B. of selling to A., the half of a schooner for 200*l.*, and that B. had agreed to lend A. 370*l.*, on having the repayment and the interest secured by a mortgage of a rent-charge to which A. was entitled, and of the dividends of certain stock, and by a policy of insurance and two houses; and B. agreed to dispose of the schooner to A., and to execute the necessary deed for that purpose, the 200*l.* purchase-money of the schooner to be part of the 370*l.*, for which the mortgage was to be given by A., and that A. should execute a mortgage of the schooner to B. as a further security for the 370*l.*, which A. was to pay back by annual instalments of 50*l.*, until the principal and interest should be paid; and if A. neglected to pay off all or any of the instalments, with interest, B. should have power and authority to call in the 370*l.*, or so much as should be then due. The schooner proved unseaworthy, and was by mutual consent returned to B. A. afterwards assigned the other property comprised in the agreement to C., who had notice of the agreement:—Held, that a suit could be maintained against C. for an account of the sum due on foot of the 170*l.* actually advanced, and for a sale, although the agreement quoad the schooner had been rescinded. *Murphy* v. *Moorehead*, 16 Ir. Ch. R. 454.

Held, secondly, that the return of the schooner to B. was not to be considered as a payment of instalments. *Ib.*

Right to Freight earned after Sale.]—Where ship sailed in ballast from L. to J., and was sold on her voyage there, and afterwards sailed from J. to L. with cargo, on contract with owners of ship at time of sailing; the creditors of the former owners have no lien on freight due in respect of voyage from J. *Hill, Ex parte*, 1 Madd. 61.

Sale in Contemplation of War.]—A ship sold in contemplation of war by an enemy to his son, a neutral, and paid for only in part, condemned by prize court as enemy's property. *The Baltica*, 1 Spink's Prize Cases, 264.

Delivery—Ship sunk.]—After a ship was launched and the last instalment of her price paid and her certificate handed to the purchasers, whose captain was in charge of her, she was blown from her moorings and sunk:—Held, that delivery had been made, and that the ship was at the risk of the purchasers. *Brewer* v. *Duncan*, 20 Ct. of Sess. Cas. (4th ser.) 230.

Offer to buy Shares of Co-owners—Acceptance by One, Refusal by the Other.]—See *Anderson* v. *Sillars*, ante, col. 49.

Sale of Ship to be built and delivered Abroad—Ship lost—Recovery of Advances.]—*Henckell, Du Buisson & Co.* v. *Swan & Co.*, ante, col. 14.

Broker's Commission on Ship to be built—Recovery by Purchaser.]—*Neilson* v. *Skinner*, XXV. SHIPBROKERS AND AGENTS.

Ship's Stores — Appurtenances.]—A ship's husband, who was a part owner, bought his co-owner's share in the ship shortly after her return from a voyage. In an action by the seller against him for an account of the last voyage:—Held, that stores laid in for the voyage to be performed after the date of the sale were not appurtenances of the ship and must be paid for by the buyer. *Robertson* v. *Dennistoun*, 3 Ct. of Sess. Cas. (3rd ser.) 829.

2. TITLE.

a. By Bill of Sale.

Mode of Transfer by.]—Under the 17 & 18 Vict. c. 104, sales of ships can only be made in the manner prescribed by the statute. *Liverpool Borough Bank* v. *Turner*, 1 Johns. & H. 159; 29 L. J., Ch. 827; 6 Jur. (N.S.) 935; 8 W. R. 730. Affirmed, 2 De G. F. & J. 502; 30 L. J., Ch. 379; 7 Jur. (N.S.) 150; 3 L. T. 494; 9 W. R. 292.

A mere literal deviation from the form of conveyance of a ship prescribed will not render it void. *Taylor* v. *Kinloch*, 1 Stark. 175.

Notwithstanding the 26 Geo. 3, c. 60, s. 17, enacted that a bill of sale of a ship should be absolutely void, unless the certificate of the registry was truly and accurately inserted therein, a mere clerical mistake would not vitiate it. *Rolleston* v. *Smith*, 4 Term Rep. 161.

A bill of sale of a ship is not void, although it omits to set forth the true consideration, and is not stamped with an ad valorem stamp; but the parties thereto are liable to a penalty. *Robinson* v. *Macdonnell*, 5 M. & S. 228; 2 B. & Ald. 134, infra.

A bill of sale made to a trustee for the benefit of underwriters, whose names are not stated, is not primâ facie void, because contrary to the register acts. *Heath* v. *Hubbard*, 4 East, 110; 4 Esp. 205.

Where a bill of sale, though executed by the person named for that purpose by the plaintiff, the then owner of the ship, and purporting in all other respects to be made in conformity with the certificate of sale, was, in fact, made for less than the minimum price specified in the certificate, and the ship was registered in the name of the purchaser as sole owner:—Held, that the registry was void; and the ship having been sold by arrangement pending a suit that the plaintiff was entitled to the net proceeds of the sale. *Orr* v. *Dickinson*, infra.

When Necessary.]—A vessel which had been registered, was by the owners used for the space of four years as a mere coaling hulk and workshop, moored at one of their coaling stations; she was then transferred by them, under an agreement in writing, to a company to which the owners transferred their business. She was described in the agreement, and also in an invoice delivered, as a coal hulk:—Held, as a matter of fact, that under the circumstances of the case she was not a ship, at any rate as between the parties, so as to be by 17 & 18 Vict. c. 104, s. 53, transferable only by bill of sale, and therefore that the property in her passed to the company. *European and Australian Royal*

Mail Co. v. *P. & O. Steam Navigation Co.*, 12 Jur. (N.S.) 909; 14 L. T. 704; 14 W. R. 843.

Vesting of the Property.]—The property of a ship vests in the purchaser, instantly upon the execution of the bill of sale. *Hubbard* v. *Johnstone*, 3 Taunt. 177.

The non-registration of a ship, required by 8 & 9 Vict. c. 89, ss. 37, 38, by the first purchaser, did not affect the title of a subsequent bonâ fide purchaser. *The Australia*, 13 Moore, P. C. 132; Swabey, 480; 7 W. R. 718.

Under 17 & 18 Vict. c. 104, s. 79, the registry of a bill of sale, which, though purporting to be valid, so that the registrar has no alternative but to register it, is in fact invalid, gives no title, even at law, to the person thereby registered as sole owner of the ship. *Orr* v. *Dickinson*, Johnson, 1; 28 L. J., Ch. 516; 5 Jur. (N.S.) 672.

The property in a ship passes, as between the vendor and his assignees and the vendee, by a bill of sale, although the transfer is not registered pursuant to the Merchant Shipping Act, 1854. *Stapleton* v. *Haymen*, 2 H. & C. 918; 33 L. J., Ex. 170; 10 Jur. (N.S.) 497; 9 L. T. 655; 12 W. R. 317.

The duty to register a transfer of ownership rests with the vendee; the bill of sale entirely divests the title of the vendor; immediately on the execution of the bill of sale the vendor becomes entitled to all the benefits of ownership, and he takes with them all the concurrent liabilities. *The Spirit of the Ocean*, 34 L. J., Adm. 74; 12 L. T. 239.

Vesting of Property—Sequestration against Seller whilst registered as Owner.]—Under 17 & 18 Vict. c. 120, 17 & 18 Vict. c. 104, and 25 & 26 Vict. c. 6, s. 3, a bill of sale followed by possession vests the ship in the purchaser, and his property is not affected by subsequent sequestration of the seller whilst still registered as owner. *Watson* v. *Duncan*, 6 Ct. of Sess. Cas. (4th ser.) 1247.

What passes by.]—A bill of sale of a whaler absent on a fishing adventure, together with all masts, &c., boats, oars, and appurtenances, does not pass the cargo of oil, &c., acquired during the adventure. *Langton* v. *Horton*, 5 Beav. 9; 11 L. J., Ch. 233; 6 Jur. 357, 594.

Assignment of Future Earnings of Ship.]—An assignment of freight and earnings of a ship held not to include earnings not in existence, actual or potential. *Robinson* v. *Macdonnell*, 5 M. & S. 228; 2 B. & Ald. 134, supra, col. 154.

Future earnings of a ship held assignable in equity. *The Warre, In re*, 8 Price, 269. S. P., *Houghton, Ex parte*, 17 Ves. 251; 1 Rose, 177; 11 R. R. 73. *Speldt* v. *Lechmere*, 13 Ves. 588; *Mestarr* v. *Gillespie*, 11 Ves. 621; 8 R. R. 261 (though the ship not transferred in the registry).

Purchase by an Infant.]—A transfer of a vessel by a bill of sale, under 17 & 18 Vict. c. 104. s. 55, to a bonâ fide purchaser for value, vests the property in such vessel in the transferee from the moment of its execution, and gives him a good title against the assignees of his vendor for seizing and selling the vessel under the bankruptcy of the latter, although, until registration of the transfer, the transferee could not have transferred the vessel to a purchaser from himself. *Stapleton* v. *Haymen*, 2 H. & C. 918; 33 L. J., Ex. 170; 10 Jur. (N.S.) 497; 9 L. T. 655; 12 W. R. 317.

On a purchase of a vessel by a person under twenty-one, the vendor becomes a trustee in equity for the purchaser, until the latter, on coming of age, is enabled to make the declaration of ownership required by 17 & 18 Vict. c. 104, s. 38, previously to registering the vessel in his own name; and s. 3 of the 25 & 26 Vict. c. 63, expressly recognises and gives effect to such an equitable right, and enables it to be enforced. *Ib.*

Assignment—Dumb Barge—Bill of Sale.]—A dumb barge, propelled by oars, plying on the river Thames and carrying goods, wares and merchandise (without passengers) is a vessel within the exception of the Bills of Sale Acts, 1878 and 1882, which excepts from registration as a bill of sale transfers or assignments of a ship or vessel or any share thereof. *Gapp* v. *Bond*, 56 L. J., Q. B. 438; 18 Q. B. D. 200; 57 L. T. 437; 35 W. R. 683—C. A.

An assignment of a ship at sea is valid, though no possession is given; but of a passage craft in the Thames is void. *Bourne* v. *Dodson*, 1 Atk. 134. Cf. *Brown* v. *Heathcote*, 1 Atk. 160.

Whether Absolute or Conditional.]—A bill of sale of some shares in a ship was executed to T., and with it a declaration of ownership, as required for registration. T. did not register the instrument for more than four years, although he knew that this proceeding would be necessary to complete his title as part owner. He sought to have the vessel sold, and accounts taken between him and the defendant. The defendant alleged that the bill of sale had been given by him only as security for a loan which had since been fully paid. On several occasions T. accepted portions of the ship's earnings, without requiring to see vouchers or any regular accounts:—Held, that his conduct was that of a creditor, and not of a part owner, and that the setting up of the bill of sale as an absolute conveyance was an afterthought, and a course of conduct which would not be sanctioned by the court. *The Jane*, 23 L. T. 791.

When a bill of sale of a ship has been executed in the form prescribed by 17 & 18 Vict. c. 104, s. 55, the provisions of s. 66 do not prevent the owners from shewing that the transfer, though absolute in its terms, was intended as a security only. *Ward* v. *Beck*, 13 C. B. (N.S.) 668; 32 L. J., C. P. 113; 9 Jur. (N.S.) 912.

The 25 & 26 Vict. c. 63, s. 3, is a declaratory enactment that this is the true interpretation. *Ib.*

In July, 1853, A., being owner of a ship, sold it to D., of the firm of D., Y. & Co., for 4,725*l.*, and received in payment their draft on B., at twelve months' date. In September, 1853, the ship sailed from London on a voyage to San Francisco, and thence on a seeking voyage home. In June, 1854, the captain, who was sent out by D. to take charge of the vessel, chartered it to load a cargo of flour for Sydney. Some days after the bill of exchange became due, D., Y. & Co. requested A. to renew it, and he consented to do so on having the vessel transferred to him as a security. The vessel was accordingly transferred to him by deed of assignment, which was in the form of an absolute sale. In October, 1854, the captain, who had no knowledge of the assignment, received 1,000*l.* on account of freight and remitted it to D., Y. & Co. by a bill of

exchange. In November, 1854, D., Y. & Co., who had acted as ship's husband, became bankrupt:—Held, that though the assignment was in form absolute, yet the court might look to the real nature of the transaction, and see that it was by way of mortgage only. *Gardner* v. *Cazenove*, 1 H. & N. 423; 26 L. J., Ex. 17; 5 W. R. 195.

b. In other Cases.

Ship sold to Foreigner.]—A ship built in order to be sold to a foreigner, and to be delivered to him at a foreign port, was assigned by her builder to a bank for a valuable consideration, under an agreement which was not in the form of a bill of sale given by the Merchant Shipping Act, 1854. The assignment was not registered, either under that act or under the Bills of Sale Act, 1854. At the time of the assignment the vessel had been completely built and had been tried:—Held, that the ship was not a British ship within the meaning of the Merchant Shipping Act, 1854, and that an assignment of her need not be by bill of sale, nor registered under that statute. *Union Bank of London* v. *Lenanton*, 47 L. J., C. P. 409; 3 C. P. D. 243; 38 L. T. 698; 3 Asp. M. C. 600—C. A.

Held, also, that an assignment of her fell within the proviso in the Bills of Sale Act, 1854, s. 7, which exempts assignments of a ship from the operation of that statute. *Ib.*

A transfer of a ship, which has not been registered as a British ship under s. 19 of the Merchant Shipping Act, 1854, is good, although not made by bill of sale under s. 55. *Ib.*

Shares in Ship.]—An original owner of shares in a ship cannot enforce his title to those shares against a registered owner who has purchased them bonâ fide for value from a person whose name was on the register as owner, even though such person had been registered through fraud in the original owner. *The Horlock*, 47 L. J., Adm. 5; 2 P. D. 243; 36 L. T. 622; 3 Asp. M. C. 421.

A statement of defence alleging a fraudulent registration of the plaintiff's predecessor in title was demurred to, and the demurrer sustained, on the ground that a fraudulent registration on the part of an intermediate transferee is no defence to an action for possession by a bonâ fide purchaser for value, without notice of the fraud. *Ib.*

An injunction granted ex parte, on application of the plaintiff to prevent the defendant dealing, and to restrain the registrar of shipping from registering any dealings, in shares of a ship the subject of a co-ownership action pendente lite. *Ib.*

The sale of a share in a ship is good without actual delivery. *Addis* v. *Baker*, 1 Anst. 222.

—— **As against Registered Mortgagee.**]—A shipowner sold certain shares in a ship, and the purchaser, having neglected to register the sale, subsequently mortgaged the whole ship to a third person, who had no knowledge of the previous sale, to secure a balance exceeding the value of the ship. The purchaser subsequently registered his shares, and then finding the mortgage registered, instituted a suit against the ship, claiming as against his co-owner an account and the sale of the ship. The mortgagee intervened and claimed the release of the ship and damages and costs for its detention:—Held, that he was entitled to the release of the ship and to costs from the time the plaintiff became aware of his claim. *The Eastern Belle*, 33 L. T. 214; 3 Asp. M. C. 19.

Sale by Licitation.]—The transfer of a British ship is governed by the express provisions of the merchant shipping acts, which make a clear distinction between the legal estate and mere beneficial interests therein:—Held, that a sale by licitation of a British ship (or of a share therein) without a conveyance by bill of sale did not create such an interest in the purchasers as rendered it compulsory on the registrar, under the Merchant Shipping Act, 1854, to register them as owners, and that the registrar was right in refusing so to do, and to erase from his books the inscriptions contained in the register against the ship in the names of the mortgagees. *Chasteauneuf* v. *Capeyron*, 51 L. J., P. C. 37; 7 App. Cas. 127; 46 L. T. 65; 4 Asp. M. C. 489—P. C.

Purchase by Surveyor.]—A person surveying a ship, with a view to a sale by the master, may be justified in becoming the purchaser. *The Australia*, Swabey, 480; 13 Moore, P. C. 132; 7 W. R. 718.

Pirate Ship.]—A ship which had been engaged in acts of alleged piracy, and which, before any proceedings had been taken by the crown, had been sold by her owners at a public auction to a bonâ fide purchaser, was afterwards arrested by the crown:—Held, that although the ships and goods of pirates are upon conviction forfeited to the crown, yet the ship of a pirate which has not been piratically taken, and which before conviction has been transferred to an innocent purchaser, is not liable to seizure by the crown. *The Telegrafo* or *Restauracion*, *Reg.* v. *M'Cleverty*, 8 Moore, P. C. (N.S.) 43; 40 L. J., Adm. 18; L. R. 3 P. C. 673; 24 L. T. 748; 20 W. R. 242; 1 Asp. M. C. 63.

Registration—Bankruptcy—Order and Disposition.]—The defendant grantee under a bill of sale of a ship at sea, failed to register in accordance with 26 Geo. 3, c. 60, and 34 Geo. 3, c. 68, s. 16, before the bankruptcy of the grantor, but registered after his bankruptcy:—Held, that the property in the ship did not pass, and that the assignees of the bankrupt could recover in trover. *Moss* v. *Charnock*, 2 East, 399; Holt, 603.

Where a ship is sold at sea, in order to prevent her passing to the vendor's assignees upon his bankruptcy, as being in his order and disposition, the bill of sale should be delivered to the purchaser, who must take possession of the ship on her arrival. *Matthews, Ex parte*, 2 Ves. Sen. 272. Cf. *Brown* v. *Heathcote*, 1 Atk. 160.

See also III. REGISTRATION, supra, *and Cases*, col. 151.

Validity of Sale—By what Law.]—See *The Bomba* and *The Charlotte*, infra, col. 161.

3. WHO CAN SELL.

a. Managing Owners.

Authority of.]—D., the managing owner of a ship, through the plaintiffs, his agents at Constantinople, sold her to the Turkish government, and received a bill upon the Oriental Bank in London for the purchase-money, which bill was

duly paid. D. had no express authority at the time from the defendants (who were the owners of $\frac{23}{64}$ths of the ship) to sell her, but the latter knew that a sale was contemplated; and, after the sale, they executed a power of attorney, reciting that they had agreed to sell the vessel to the Turkish government, and had actually received the purchase-money, and empowering the plaintiffs to transfer their respective shares and to hand over the vessel to the purchasers. The defendants afterwards received from D. (or settled in account with him) the value of the then respective shares:—Held, that the jury was warranted in finding that the defendants had authorised the sale of the ship to D., or had by their subsequent ratification so adopted his act as to render them jointly liable to the plaintiffs for the commission due to the latter on the sale. *Keay* v. *Fenwick*, 1 C. P. D. 745—C. A.

Held, also, that the position of the defendants was not so altered by the fact of the plaintiffs having drawn upon D. a bill at three months' date for the amount of the commission, as to release the former from liability upon the dishonour of the bill. *Ib.*

b. Part Owners.

Rights of.]—A broker was employed to sell a ship belonging to three part owners, two of whom communicated with him on the subject; to them he paid their shares of the proceeds of the sale, but, after admitting the amount of the third part owner's share to be in his hands, refused to pay it to him without the consent of the other two; an action having been brought by the third part owner for the share:—Held, that he was not entitled to recover. *Halsall* v. *Griffith*, 2 C. & M. 679; 4 Tyr. 487; 3 L. J., Ex. 191.

A. and B. being in partnership and joint owners of a ship, A. requested C. and D. to accept two bills amounting together to 2,600*l.* on the security of the ship, which they agreed to do, and A. accordingly executed a bill of sale to them, and the ship was registered in their names, A. agreeing that they might sell the ship, and indemnify themselves out of the proceeds, if he neglected to provide for the bills when due. A. became bankrupt, and the bills were paid by C. and D., who thereupon assumed the ownership of the ship:—Held, that the ship, being the partnership property of A. and B., and registered in the name of the partnership firm, was within 3 & 4 Will. 4, c. 55, s. 32, and that A. had therefore a right to deal with her as with any other partnership property, and consequently could sell or mortgage her without a power of attorney from his partner B. *Howden, Ex parte*, 2 Mont. D. & D. 574; 11 L. J., Bk. 19.

A mandamus to the officers of customs to register a ship transferred by the survivor of two part owners, merchants, was refused on the ground that the executors of the deceased part owner ought to have joined in the transfer. *Rex* v. *Liverpool (Collector of Customs)*, 2 M. & S. 223.

c. Attorney.

Ordinarily a power of attorney authorising the sale of a vessel is revoked by the death of the owner. *Watson* v. *King*, 1 Stark. 121; 4 Camp. 272; 16 R. R. 790.

But a power of attorney to execute the indorsement of sale upon the register of a ship when she returns home is not revoked by the bankruptcy of the party giving the power. *Dixon* v. *Ewart*, Buck, 94; 3 Mer. 327.

A power of attorney to sell a ship may be substantially revoked by parol, and the attorney selling thereafter is guilty of a breach of trust. *The Margaret Mitchell*, Swabey, 382; 4 Jur. (N.S.) 1193.

If the grantee of a power of attorney to sell a ship sells fraudulently, or so as to commit a breach of trust, the fraud of the attorney vitiates the title of the purchaser, if the fraud was known to him, or could have been known by reasonable inquiry. *Ib.*

d. Guardian of Infant.

The guardian of an infant shipowner has no power under 17 & 18 Vict. c. 104, s. 99, to mortgage or sell a ship of which such infant is the owner. *Michael* v. *Fripp*, 38 L. J., Ch. 29; L. R. 7 Eq. 95; 19 L. T. 257; 17 W. R. 23.

e. Sheriff.

An execution debtor, being a registered proprietor of shares in a ship, a fi. fa. was delivered to the sheriff; and the solicitor for the creditor, by the direction of the sheriff, procured the certificate of registry from the ship, and delivered it to the sheriff, who retained it. The sheriff was registered at the custom house, under the Merchant Shipping Act, as the owner of the shares, which were afterwards sold by him and transferred to a purchaser by a bill of sale, which was also registered:—Held, that the seizure was effectual, although the sheriff did not go on board the ship, and that the property in the shares was regularly transferred by the bill of sale. *Harley* v. *Harley*, 11 Ir. Ch. Rep. 451.

f. Master.

Authority and Necessity.]—The master of a vessel has no power to sell her so as to affect the insurers, except under circumstances of stringent necessity; such circumstances as, after sufficient examination of her condition, after every exertion in his power, within the means at his disposal, to extricate her from peril or to raise funds for the repair, leave him no alternative but to sell her as she is. *Cobequid Marine Insurance Co.* v. *Barteaux*, L. R. 6 P. C. 319; 32 L. T. 510; 23 W. R. 892; 2 Asp. M. C. 536.

By the law of England, and the general maritime law, the master has no power to sell either cargo or ship, except in cases of absolute and utter necessity. *Cammell* v. *Sewell*, 5 H. & N. 728; 29 L. J., Ex. 350; 6 Jur. (N.S.) 918; 2 L. T. 799; 8 W. R. 639—Ex. Ch.

A ship reached Savannah in March, 1855, laded a cargo of timber, and in April, before she cleared the mouth of the river, drove ashore in a hurricane; she was got off, discharged her cargo, and was surveyed; extensive repairs were found necessary; neither the owner, who lived at Gloucester, in England, nor the master had any credit, the ship was uninsured, and money could not be raised on bottomry; under these circumstances the master sold her without any express authority from the owner; she was repaired by the purchasers, sailed to Liverpool, and was arrested there at the suit of the former owner:—Held, that the sale was valid, and the

ship was decreed to be restored with costs and demurrage; but in such cases the burden of proof lies upon the purchaser, unless the sale took place under the decree of a competent court. *The Glasgow*, Swabey, 145; 12 Moore, P. C. 355, n.; 2 Jur. (N.S.) 1147; 5 W. R. 10. S. P., *The Victor*, 13 L. T. 21.

If a ship, being in a foreign port, cannot be sent upon her voyage without repairs, and the repairs cannot be done except at so great and so certain a loss that no prudent man would venture to encounter it, this constitutes a case of necessity, justifying a sale of the ship by the master. *The Australia*, *Lapraik* v. *Burrows*, infra, col. 164.

The sale of a ship abroad, by the master, without the consent of the owner, can only be justified by proof of urgent necessity. *The Margaret Mitchell*, Swabey, 382; 4 Jur. (N.S.) 1193.

Where, in consequence of damage to a ship during the voyage, it becomes impossible to prosecute the adventure, the master has authority to sell her for the benefit of all parties interested, and a person employed by him to superintend the sale may lawfully pay over the proceeds to him or to his order. *Ireland* v. *Thomson*, 4 C. B. 149; 17 L. J., C. P. 241.

To constitute a valid sale at a port of distress, there must be the consent of the master (except under most peculiar circumstances), and impossibility of repairs except at a ruinous cost, or an equally ruinous delay and an inexpediency arising from imminent risk of awaiting communication with the owners. *The Uniao Vencedora*, otherwise *The Gipsy*, 33 L. J., Adm. 195; 11 L. T. 351.

Duty of Master.]—A master, before selling the ship, is bound, if practicable, to communicate with his owner. *The Bomba* and *The Charlotte*, infra.

It is the duty of the master of a British ship, before selling her in a foreign port, to consult the British consular officer there resident, the opinion of the consul being much considered by the court in determining the validity of the sale. *Ib.*

After Collision.]—Where an English-owned vessel came into collision in a foreign port, within telegraphic communication of England, at which port a British consul and agent of Lloyd's resided, and the master, believing the vessel would not again be fit for sea, sold her against the advice of the agent of Lloyd's and without first fully communicating with the owner and waiting for his reply, and it subsequently turned out that the vessel was but slightly injured, and was at a small expense fitted for sea, the court set aside the sale. *The Bonita*, 30 L. J., Adm. 145; 5 L. T. 141; Lush, 252.

Onus of Proof.]—The master of a British ship, except under urgent necessity, is not entitled to sell without the authority of the owner; and the proof of such necessity lies upon the purchaser. *The Bomba* and *The Charlotte*, Lush. 252; 30 L. J., Adm. 155, n.

The first purchaser of the master is bound to prove such necessity; but whether such onus probandi attaches to a second purchaser depends on all the circumstances of the case. *The Australia*, Swabey, 480; 13 Moore, P. C. 132; 7 W. R. 718, supra.

By Fraud and Forgery.]—A sole owner and at first master, after some intermediate appointments, made his son master, who, in Australia, without authority, sold the vessel, asserting himself to be the sole owner and master, the certificate of registry and indorsement bearing out, on the face of it, such assertion. The son received the purchase-money, but never transmitted it to the father:—Held, that the sale was effected by the fraud and forgery of the son; that the misleading description of him on the certificate of registry, which enabled him to practise such deceit, was not proved to arise from any culpable neglect in the instructions given by the father to the custom-house, and that the sale was null and void. *The Empress*, Swabey, 160; 3 Jur. (N.S.) 119; 5 W. R. 165.

According to Law of Foreign Country.]—The validity of the sale of a British ship in a foreign port is determined by the law usually enforced in the court of admiralty, unless the foreign law is specially pleaded. *The Bomba* and *The Charlotte*, Lush. 252; 30 L. J., Adm. 155, n.

A British ship was sent home under the command of a master in the navy, who was placed in charge by the naval officer commanding on the station. On her voyage she met with bad weather and put into a port at Fayal, where she was, after survey, sold at public auction to a Portuguese merchant by the master:—Held, that no necessity being shewn, and the proof of the validity of the sale by the law of the country not being made out, the sale was invalid by the general maritime law, and by the law of England. *The Eliza Cornish*, otherwise *The Segreda*, 1 Spinks, 36; 17 Jur. 738.

C., a British subject, owner of a ship, transferred her whilst on her voyage, by bill of sale, to H. The master had meanwhile drawn up a bill for necessaries at Melbourne, on C. in England, which C. refused to accept, and the bill was dishonoured. The ship having touched at Havre, the holder of the dishonoured bill indorsed it to T. & Co., French subjects residing at Havre, who thereupon commenced proceedings in the court of the civil tribunal there, against the master and against the ship. The master allowed judgment to go against him by consent, and was condemned to pay the amount of the bill, with interest, and the vessel was sold, H.'s claim as holder of the bill of sale of the ship being negatived:—Held, that the proceedings in the French court were proceedings in rem; and, consequently, the sale under its decree passed the property in the ship, and that H. was not entitled to recover. *Castrique* v. *Imrie*, 8 C. B. (N.S.) 405; 30 L. J., C. P. 177; 7 Jur. (N.S.) 1076; 4 L. T. 143; 9 W. R. 455 — Ex. Ch. Affirmed, 39 L. J., C. P. 350; L. R. 4 H. L. 414; 23 L. T. 48; 19 W. R. 1—H. L. (E.)

Master cannot Sell without Owner's consent.]—The master cannot sell the ship without the owner's consent even in case of wreck or imminent risk of loss. *Tremenhere* v. *Tresilian*, 3 Keb. 91; *Anon.*, Siderf. part. 1, 453.

Ship sold by master without consent of owners; possession decreed to former owners in default of appearance of purchasers. *The Lagan*, otherwise *Mimax*, 3 Hag. Adm. 418.

Fraudulent Sale by Master.]—The master fraudulently sold the plaintiff's ship to the East India Company, having no authority to sell her.

The plaintiff brought his bill in chancery against the company for an account and recovered the value of the ship and interest thereon. *Ekins* v. *East India Co.*, 2 Bro. P. C. 382; affirming 1 P. Wms. 395; 1 Eq. Ca. Abr. 722.

Improper Sale by Master.]—A ship belonging to the defendants registered in the port of London, sustained serious damage on her voyage to New Zealand, and on her arrival there was surveyed and pronounced not seaworthy. The master was unable, either by loan or bottomry, to raise money for her repair, and he at length sold the ship to the plaintiffs, and on receiving payment of the purchase-money by a bill of exchange in London, executed to them a bill of sale of the ship. The plaintiffs repaired the ship, and sent her to England with a cargo. The defendants refused to ratify the sale or consent to the registry of the ship in the plaintiffs' names, and on the arrival of the ship in the port of London the defendants put several men on board to take possession of the ship and cargo for them. The plaintiffs thereupon applied for an injunction to restrain the defendants from interfering with the ship, or removing her out of the jurisdiction, and for a manager and receiver of the ship and cargo:—Held, that the plaintiffs had no equitable, as distinct from a legal, title to the ship, and inasmuch as their title (if they had acquired any) was a purely legal one, and the case of interference, if wrongful, was therefore a mere trespass the court could not interfere in favour of the plaintiffs by injunction. That the plaintiffs, according to the case made on the motion, if they failed at the hearing to establish their right to the ship, would be entitled to equitable relief in respect of the bill of exchange given for the purchase-money, and that they were entitled to have the trial of the legal right put in a course for determination, and to have the property protected in the meantime. Semble, in such case, independently of the relief in respect of the bill of exchange, if engagements had been contracted of which the conduct of the defendants would prevent the fulfilment, and if there could be no adequate compensation to the plaintiffs in damages, or if the defendants were about to carry away or destroy the property, the court might interfere by injunction. *Ridgway* v. *Roberts*, 4 Hare, 106.

See further as to sale by master, *Cases* sub tit. B. MARINE INSURANCE, infra.

g. Ratification by Owner.

What is.]—Semble, that the master has authority, when, in consequence of injury to the ship during the voyage, there is no prospect of bringing her to the termination of the voyage, to sell her for the benefit of all parties interested. At all events, where the proceeds of such sale have been received by the owner, that is a sufficient ratification by him of the act of the master in selling her, so as to prevent him from afterwards recovering back the ship from the purchaser or one claiming under him. *Hunter* v. *Parker*, 7 M. & W. 322; 10 L. J., Ex. 281.

So, it is equally a ratification of a sale by an auctioneer acting under a parol authority for the master. *Ib.*

If there has been acquiescence by the owner, however unauthorised the sale may have been at the commencement, it amounts to a ratification by the owner. *The Australia*, *Lapraik* v. *Burrows*, 13 Moore, P. C. 132; Swabey, 480; 7 W. R. 718.

Confirmation of a sale by an owner will not be inferred from vague expressions of approval, if the owner at the time was not aware of the true state of the facts relating to the sale. *The Bomba* and *The Charlotte*, Lush. 252; 30 L. J., Adm. 141.

Acceptance of purchase-money generally operates as a ratification of the sale; but not so if the money was received without the intention of appropriating it; or if received in ignorance of the facts relating to the sale. *Ib.*

Receipt of the purchase-money by a vendor and absent principal, acts only as a ratification of a sale when received by him with an intention to appropriate it to his own use, and with full knowledge of the facts of the case. *The Bonita*, 30 L. J., Adm. 145; 5 L. T. 141. See also *Keay* v. *Fenwick*, ante, col. 159.

4. SALE BY ADMIRALTY COURT.

Sale by Court when Person absolutely Entitled.]—Under the Merchant Shipping Act, 1854, ss. 62—64, the court will order a particular sale to be carried out, instead of making an order for sale generally, if that course is shewn to be preferable. *Santon, In re*, 26 W. R. 810.

Where a petitioner under those sections claims as sole executor and general legatee of the registered owner, and makes the application within a year, though more than four weeks after the occurrence of the event on which the transmission took place, it is not necessary to serve the crown or any other person. *Ib.*

Where jurisdiction was given in respect of a particular kind of proceeding, by an act passed before the passing of the judicature acts, to the court of chancery alone, but, by a later act, still before the passing of the judicature acts, the jurisdiction was extended to the court of admiralty, the chancery division now has jurisdiction under the judicature acts. *Ib.*

In Co-ownership Action.] — The admiralty division of the high court of justice has power, under the Admiralty Court Act, 1861, s. 8, in a co-ownership action, to order the sale of a ship on the application of a minority of owners, but such power will always be exercised with great caution. *The Nelly Schneider*, 3 P. D. 152; 39 L. T. 360; 27 W. R. 308; 4 Asp. M. C. 54.

Part owners of a vessel, in a suit for sale brought against them by their co-owners, set up in their answer a claim for damages alleged to have been occasioned by the negligence or other wrongful act of such co-owners. The plaintiffs in their reply denied the jurisdiction of the court:—Held, that the court had jurisdiction to entertain such a claim. *The Ceylon*, 18 L. T. 417.

Sale by Court—Good against the World.]—A sale by order of the admiralty court in a salvage suit is good against a claim of the crown under a prior forfeiture for breach of revenue laws. *Att.-Gen.* v. *Norstedt*, 3 Price, 97; 17 R. R. 554.

The title conferred by the court under a sale of a ship by its order is good against the

world; and in the case of a foreign ship without transfer of the ship's register. *The Tremont*, 1 W. Rob. 163.

Sentence of Foreign Court—Prize.]—The sentence of a French court of admiralty condemning a ship for prize is binding in the courts of this country. *Hughs* v. *Cornelius*, Sir T. Raym. 473.

Sale under sentence of a foreign admiralty court not to be called in question. *The Martin of Norfolk*, 4 C. Rob. 293.

Foreign Judgment in rem.]—A ship was, whilst in a port of an English colony, repaired and furnished with necessaries for the voyage. The captain drew on his owner for the amount due. The bill was never accepted. The ship sailed on its prescribed voyage, and before reaching England entered a French port. The bill was indorsed to a French subject, who sued the captain on it, and obtained in the tribunal de commerce a judgment against him, but the judgment freed him from personal arrest, and declared the debt "privileged on the ship" (having priority over others). The ship was taken possession of by the French authorities under this judgment. While the ship was on its voyage, and before its arrival in the French port, the owner had executed a mortgage of the ship to a creditor. Neither the original owner nor the mortgagee was in any way personally cited in the action. The ship could not be actually sold till the civil tribunal of the district had confirmed the original judgment. It was confirmed, after the original owner and his assignee (for he had in the meantime become bankrupt) had been cited before the civil tribunal, and that court disregarded the opinion of an English lawyer as to what would be the relative rights of the holder of a bill of exchange and the holder of a bill of sale of the ship. The assignee of the mortgage afterwards instituted before the civil tribunal a process in the nature of a replevy of the ship, but failed in the process, and the ship was sold:—Held, that there had been a judgment in rem in the French court, and that the title of the vendee of the ship (an Englishman) could not afterwards be disturbed in this country. *Castrique* v. *Imrie*, 39 L. J., C. P. 350; L. R. 4 H. L. 414; 23 L. T. 48; 19 W. R. 1—H. L. (E.)

See also infra, XXVI. Admiralty Law and Practice, 18. Co-ownership.

5. Liabilities of Purchaser.

Goods supplied.]—The ship having been sold, but the transfer not having been registered, the vendor held not liable for goods supplied to the ship on the master's order. *Young* v. *Brander*, 8 East, 10. Cf. *McIver* v. *Humble*, 16 East, 169.

The entry in the custom-house books of the transfer of a vessel to a person named, without proof of authority to make the entry from the person named, is no evidence in an action for the price of goods supplied to the ship. *Fraser* v. *Hopkins*, 2 Taunt. 5.

Bottomry—Salvage—Wages.]—The purchaser of a ship takes her with the liabilities attached by law—seamen's wages, bottomry bond, demand for salvage; and his remedy must be against the vendor. *The Nymph*, Swabey, 86; *The Catherine* formerly *The Croxdale*, 15 Jur. 231.

A shipowner assigned fifteen-sixteenths of a ship to his creditor, in trust to sell and retain his debts, and afterwards became bankrupt. The ship was afterwards sold:—Held, that the creditor must bear his proportion of the seamen's wages and other expenses on account of the ship. *Douglas* v. *Russell*, 4 Sim. 533.

Where a ship was transferred while at sea to a vendee resident in the port in which she was registered, and money was paid by the vendee's agents under the sentence of a foreign court for salvage and wages of the captain and crew, provisions, and sundry ship disbursements:—Held, that the salvage and mariners' wages were a lien on the ship, but not the sums paid for the captain's wages, nor the disbursements. *Richardson* v. *Campbell*, 5 B. & Ald. 203, n.

Ship's Expenses.]—The lien on a ship for necessaries supplied continues, notwithstanding the sale of the ship, if there have been no laches in enforcing the lien. *The West Friesland*, Swabey, 454; 5 Jur. (N.S.) 658. Cf. *Douglas* v. *Russell*, supra.

Where A., who had contracted to buy a share of a ship in July (but did not execute a bill of sale till the September), by a memorandum of agreement dated September 30th, transferred his share with all his liabilities as owner to B., and afterwards sued B. for expenses incurred by himself with respect of the ship, after the contract for the purchase of the ship in July, but before the execution of the bill of sale in September:—Held, that, as the memorandum shewed nothing to make B. liable for expenses not incurred by the owner, the action therefore would not lie. *Chapman* v. *Callis*, 9 C. B. (N.S.) 769; 30 L. J., C. P. 241; 7 Jur. (N.S.) 995; 3 L. T. 890; 9 W. R. 375.

Repairs.]—B., managing owner of a ship, ordered necessary repairs. R. was at that time a registered part owner, but, before the order was given, had entered into a contract, to which B. was privy, for the sale of her share, and had received a bill of exchange in payment, though the contract was not completed until after the repairs had been made. R. never interfered in the concerns of the ship. The bill for repairs sent in was headed, "the captain and owners of the ship 'F.'":—Held, that R. was not liable for the repairs. *Curling* v. *Robertson*, 8 Scott (N.R.) 12; 7 Man. & G. 336; 13 L. J., C. P. 137.

Although legal ownership is primâ facie evidence of liability, yet it may be rebutted by proof of the beneficial interest having been parted with, and of the legal owners having ceased to interfere with the management of the vessel; and the true question for the jury in cases of this description is, "on whose credit the repairs were done." *Jennings* v. *Griffiths*, R. & M. 42; 27 R. R. 730.

Repairs before Registration.]—The sole registered owner of a ship gave orders for materials to be furnished and work to be done for the repairs of it; but before all the articles were delivered on board, he conveyed the vessel, with all its furniture, to another, by a bill of sale, which was duly registered:—Held, that the vendee was not liable for any of the goods furnished before the legal title was conveyed to him, and registered in the manner prescribed by the registry acts, whatever equitable agreement might have existed before between him and the

vendor, for the conveyance of the whole or a share of the ship, which was unknown to the tradesmen; nor was the vendee even liable for any of the goods delivered on board after the sale to him, by virtue of the previous orders of the vendor, to whom the credit was personally given; but the vendee was held liable for articles which were ordered by the captain for the use of the vessel after the legal title was transferred to him. *Trewhella* v. *Rowe*, 11 East, 435.

Sale—Preliminary Charter.]—A., being sole owner of a vessel, contracted to sell one-half share in her to M. and T., and agreed with them that they should have exclusive direction, management, and control of the vessel, to be dealt with and managed by them as managing owners and ship's husbands as they might think best, without let or hindrance from A. There was at the end of the contract a clause that M. and T. were to pay A. 900*l*. as a charter for his half share of the vessel for the first six months from the date of the vessel being ready to receive her cargo. During those six months repairs became necessary to the vessel, and were ordered to be done by T.:—Held, that A. was liable as part owner to pay for such repairs. *Preston* v. *Tamplin*, 2 H. & N. 684; 27 L. J., Ex. 192; 3 Jur. (N.S.) 1247; 6 W. R. 82—Ex. Ch.

Sale by Auction—Agreement to pay Liens—Trover.]—The purchaser of a ship at an auction after the sale agreed to pay the purchase-money to the auctioneer who was to distribute it amongst creditors of the vendors who had a lien on the ship. He subsequently paid the purchase-money to the vendor, and the shipwright in whose yard the vessel lay refused to let her leave the yard:—Held, that the purchaser, who had obtained a bill of sale of the ship, could not maintain trover. *Norris* v. *Williams*, 1 Car. &. M. 842; 2 L. J., Ex. 527.

Purchaser's Liability for Repairs and Supplies before Sale.]—The purchaser of shares in a ship fully provisioned and fitted for sea is not liable for repairs executed before the sale or for provisions supplied for the voyage; though if freight is earned the cost of provisions is a proper deduction from gross freight. *Carswell* v. *Finlay*, 14 Ct. of Sess. Cas. (4th ser.) 903.

Damage to Ship before Purchase—Right of Purchaser to Sue.]—*Symington* v. *Campbell*, XX. COLLISION, 4. Persons entitled to recover.

6. COMMISSION.

Sale of Ship—Principal and Agent—Profit made by Agent.]—The plaintiff in 1868 consigned a ship to G. & Co., in China, for sale, fixing a minimum price, and requiring cash payment. G. & Co. employed the defendant in Japan to sell the ship, with the same instructions. This was done with the knowledge and consent of the plaintiff. The defendant having vainly attempted to sell the ship on the terms mentioned, took her himself at 90,000 dollars, and about the same time resold her to a Japanese prince for 160,000 dollars, payable as to 75,000 dollars in cash, and the rest on credit. The plaintiff was not informed that the defendant had purchased the vessel himself or that he had resold it till June, 1869, after the transaction was completed. The defendant paid 90,000 dollars to G. & Co., who remitted it to the plaintiff, and eventually obtained the whole purchase-money of 160,000 dollars. In 1873 the plaintiff filed a bill in chancery to compel the defendant to account for the profit made by him in the resale of the ship:—Held, that the defendant was liable to account to the plaintiff for the profit made by him, the relationship of principal and agent existing between the parties. *De Bussche* v. *Alt*, 47 L. J., Ch. 381; 8 Ch. D. 286; 38 L. T. 370; 3 Asp. M. C. 384—C. A.

A. told W. that if he were the means of introducing a purchaser of A.'s ship, he should have a commission. W. had an offer through B., A. agreed that if the ship were sold W. and B. should share the commission. The offer fell through, also a second offer from C. to B. After some time C. wrote to A., introducing another person, who eventually bought the ship. The jury found that W. was authorised to find a purchaser, and that the purchaser was found through B.:—Held, that C., as agent of the purchaser, having acted on information received from B., W. was entitled to his commission. *Wilkinson* v. *Alston*, 48 L. J., Q. B. 733; 41 L. T. 394; 44 J. P. 35; 4 Asp. M. C. 191—C. A. *And see* XXV. SHIPBROKERS AND AGENTS.

Commission on Building Ship.]—Shipbuilders agreed with a shipbroker to build a ship for 56,000*l*., the builders to take half the shares in the ship. The builders agreed in a separate letter to pay the broker 1½ per cent. commission on the contract price; the usual commission on sale was 2½ per cent. The shares were taken up, and the price collected by the broker, and paid to the builders. The broker superintended the building. The commission was paid to the broker, and vouchers were sent to the owner's accountant shewing the payment. Four of the owners who had bought their shares from the owners, sued the broker for their shares of the commission:—Held, that they could not recover it. *Neilsen* v. *Skinner*, 17 Ct. of Sess. Cas. (4th ser.) 1243.

Introduction of Purchaser.]—Purchaser introduced by broker, but sale not thereby effected: no commission. *Wills* v. *Burrell*, 21 Ct. of Sess. Cas. (4th ser.) 623.

IX. MORTGAGE.

1. *Legal*, 168.
2. *Equitable*, 173.
3. *Mortgagor in Possession*, 175.
4. *Rights of Mortgagee*, 177.
5. *Recovery of Money advanced*, 188.
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Insurance by Mortgagee.]—*See* B. MARINE INSURANCE, V. INTEREST OF ASSURED, 9. BOTTOMRY, RESPONDENTIA AND MORTGAGE.

1. LEGAL.

Effect of Registration—Bankruptcy.]—On the 10th of June, 1830, R. mortgaged, by bill of sale to W. & Co., the ships "Lady East," "Pyramus," and "Sprightly," then being at sea. The bill of sale contained an assignment of the freight and policies. On the 12th of June the bill of sale was entered in the book of registry. On the 18th of October the "Sprightly" returned to port, and

sailed again on the 16th November. On the 7th January, 1831, R. mortgaged the same ships, freights and policies to the petitioners by bill of sale, containing a recital of and subject to the first mortgage; on the 11th May, 1831, the second bill of sale was entered in the book of registry; on the 14th June R. became bankrupt; on the same day the "Pyramus" arrived from sea; and on the 15th of July the "Lady East" arrived from sea; on the 21st June both mortgages were indorsed on the certificate of the "Pyramus"; and on the 16th of July both mortgages were indorsed on the certificate of the "Lady East." The "Pyramus" was lost at sea:—Held, that the second mortgage was valid as to the interest in the ships, freights, and policies. *Jones, Ex parte, Richardson, In re*, 2 C. & J. 513; 2 Tyr. 671; 1 L. J., Ex. 218.

—— **Priorities.**]—A. mortgaged a ship for 1,200*l.* to B., who transferred the mortgage to C. A. afterwards executed a second mortgage for 400*l.* B. afterwards paid off C., and C. signed a statutory receipt, instead of a retransfer. This receipt was produced to the registrar, who made an entry in the register-book, under the Merchant Shipping Act, 1854, s. 68, to the effect that the mortgage had been discharged. C. afterwards executed a deed purporting to be a retransfer of the 1,200*l.* mortgage to B., which was registered, and at the same time a note was made by the registrar against the entry of the receipt, stating that the receipt was signed in error, and the mortgage was afterwards again transferred to C., to secure a balance on account current, and this deed remained in C.'s hands, after satisfaction of all that was due on the account. B. then took a fresh mortgage from A. for 2,500*l.*, which included the 1,200*l.* and 400*l.*, and had since been transferred to the plaintiff. After the new mortgage, B. agreed with C. that the mortgage for 1,200*l.* should be a security for advances on a current account. The transfer of the mortgage to the plaintiff was not registered until after this agreement. Upon a question of priority between C. and the plaintiff:—Held, that the receipt with the entry on the register operated as a discharge of the first mortgage, and the same could not afterwards be revived by the note made by the registrar. *Bell* v. *Blyth*, 38 L. J., Ch. 178; L. R. 4 Ch. 136; 19 L. T. 662; 17 W. R. 194.

Indorsement on Register — Postponement of Power of Sale.]—A claimant, upon an interpleader in a county court as to his title to a ship seized in execution upon a judgment against the registered owner, proved a previous mortgage of the ship to him by such owner for a loan, with a proviso in the mortgage postponing until a date subsequent to the seizure of the ship the power of sale vested in the mortgagee by 17 & 18 Vict. c. 104, s. 71, and that such mortgage was recorded in the register-book of the port of the ship's registration in the form prescribed by s. 66, but there was no indorsement on the certificate of registry, according to 4 Geo. 4, c. 41, ss. 35, 43, and 3 & 4 Will. 4, c. 55, ss. 34, 42:—Held, that the mortgage was not invalid, either as a fraud against creditors, or as not being according to 17 & 18 Vict. c. 104, on the ground of the postponement of the power of sale. *Dickinson* v. *Kitchen*, 8 El. & Bl. 789.

Held, also, that, even if the registration of the mortgage was imperfect, by reason of the want of the indorsement on the certificate, yet a judgment given by the county court upon the interpleader summons against the claimant in favour of the execution creditor was erroneous; for the claimant became and was the owner of the ship, by reason of the mortgage, and such common-law incident to a mortgage is not abrogated by 17 & 18 Vict. c. 104, s. 70, which was intended to protect a mortgagee, taking possession of a mortgaged ship in order to make it available as a security, from liabilities that might otherwise attach upon him as owner of a ship in possession. *Ib.*

Where Fraudulent Concealment.]—The legal title of a mortgagee of a ship who, for the purpose of facilitating a sale by the mortgagor, conceals his mortgage, cannot prevail in equity against a purchaser for valuable consideration without notice. *Hooper* v. *Gumm*, 36 L. J., Ch. 605; L. R. 2 Ch. 282; 16 L. T. 107; 15 W. R. 464.

Of unfinished Ship.]—A., being owner of a ship which was unfinished, on the 5th of July mortgaged it to B. A., on the 5th of August, registered the ship as owner, pursuant to 17 & 18 Vict. c. 104, s. 42. On the following day, B. caused the mortgage to himself to be inserted on the register. A. having become bankrupt:—Held, that A.'s consignees could not maintain trover against B. for the ship. *Bell* v. *Bank of London*, 3 H. & N. 730; 28 L. J., Ex. 116.

Erasing Entries of.]—There is no provision in the merchant shipping acts which authorises the registrar to erase entries of mortgages. In case of their having been duly discharged, an entry to that effect may be made under s. 68 of the act of 1854. *Chasteauneuf* v. *Capeyron*, 51 L. J., P. C. 37; 7 App. Cas. 127; 46 L. T. 65; 4 Asp. M. C. 489—P. C.

Registration.]—A mortgage (1813) that failed to comply with the Register Act was absolutely void. *Wilson* v. *Heather*, 5 Taunt. 695.

See also *Campbell* v. *Thompson*, supra, col. 36; *Cato* v. *Irving, Bulteel, Ex parte; Payn* v. *Smith; Coombes* v. *Mansfield; Lindsay* v. *Gibbs*, supra, III. REGISTRATION.

Registered first mortgagees of a ship, with power of sale, took from the mortgagor, by an unregistered document, a declaration that the mortgage should be a security, not only for the mortgage debt, but for such sums as might, for the time being, be due from the mortgagor, either alone or with any partner to the mortgagees or their firm, however composed. Subsequently another incumbrancer took a registered mortgage, expressed to be subject to the first mortgage, but not referring to the unregistered charge, of which, however, the last mortgagee did not deny having had notice when he took his security:—Held, that the unregistered document was not merely a further charge but a new security, and that the Shipping Act, 8 & 9 Vict. c. 89, s. 34, excluded it from priority over the last mortgage. *Parr* v. *Applebee*, 7 De G. M. & G. 585; 24 L. J., Ch. 767; 3 W. R. 645.

—— **Bill of Sale, held to be Mortgage.**]—Bill of sale of a ship, though absolute in its terms, may, notwithstanding the Ship Registry Act, be in equity held a mortgage, if such appears to have been the real intention of the parties. *Langton* v. *Horton*, 5 Beav. 9; 11 L. J., Ch. 233; 6 Jur. 357, 594.

The owner of eight sixty-fourths of a vessel, in consideration of 100*l.*, assigned them by bill of sale; contemporaneously with its execution, a memorandum was indorsed thereon, signed by an agent of the assignee, stipulating that, on the assignor repaying to the assignee the 100*l.* and interest, the bill of sale should be void. Subsequently, the assignee received interest, and gave a receipt for it, as for interest on 100*l.* advanced on security of the bill of sale. The registry at the custom-house was of an absolute sale. The assignee sold the eight sixty-fourths, and the bill of sale to the purchaser was duly executed; but, before its registry, a bill to redeem by the original owner was filed, and the court restrained the registry of the bill of sale, and made a decree for redemption on payment of the 100*l.* and interest, with costs so far as they were increased by the dispute of the plaintiff's right to redemption. *Whitfield* v. *Parfitt*, 4 De G. & Sm. 240; 15 Jur. 852.

Registered Mortgagee — Unregistered Prior Purchaser.]—Registered mortgagee preferred to unregistered prior purchaser. *The Eastern Belle*, 33 L. T. 214; 3 Asp. M. C. 19.

Debenture charging Ships — Notice.] — Section 3 of the Merchant Shipping Amendment Act, 1862, did not repeal any part, but only explained the meaning of s. 69 of the Merchant Shipping Act, 1854. Therefore, though equitable interests in ships are recognised, a legal mortgage of a ship in statutory form and registered has priority over an equitable charge previously given, even where the legal mortgagee takes with notice of the charge. *Black* v. *Williams*, 64 L. J., Ch. 137; [1895] 1 Ch. 408; 13 R. 224; 43 W. R. 346; 2 Manson, 86.

Mortgage and Subsequent Sale.]—The owner of eight-sixteenths of a ship mortgaged them and afterwards sold them to another who took possession of them and of the great bill of sale. Held, that the mortgagee was to be preferred to the purchaser. *Gillespie* v. *Coutts*, Ambl. 652.

Payment off—Duty of Registrar.] — Upon production of a mortgage with a receipt for the mortgage money indorsed, the registrar's duty is to enter the discharge of the mortgage on the register. *Holderness* v. *Lamport*, 29 Beav. 129; 30 L. J., Ch. 489; 7 Jur. (N.S.) 564; 9 W. R. 327.

Mortgage of Ship at Sea—Bankruptcy—Order and Disposition.]—A transfer of a ship and cargo at sea conveyed by M. and S. as security for money advanced by executing and delivering to S. a bill of sale of the ship, a policy upon ship and cargo, indorsing the bills of lading, was held not to pass the property to S., where S. neglected upon the ship's return and notice thereof to take possession, or to do any act to notify the transfer of the property to him; but that the property passed to the assignees of M., a bankrupt, as being in his order and disposition; also that an agreement that the captain should have a share of the profits or loss on the voyage did not prevent S. from taking possession. *Mair* v. *Glennie*, 4 M. & S. 240; 16 R. R. 445.

R. W. and his partner gave a bond to H. for 1,200*l.*, and the same day assigned to H. or order the goods in two ships at sea, also the bills of lading and policies upon the same goods as collateral security; the policies indorsed to H., the bills of lading not:—Held, upon H.'s bankruptcy, that the ships and cargoes were not in his order and disposition. *Brown* v. *Heathcote*, 1 Atk. 160.

Mortgage of a ship at sea is good as against creditors in bankruptcy if the mortgagee takes the bill of sale and gets possession promptly; otherwise not. *Matthews, Ex parte*, 2 Ves. 272. S. P., *Thompson* v. *Smith*, 1 Madd. 395.

Mortgage of a ship in the port of Dublin, and delivery of muniments; the mortgagee insured her there, and made a second mortgage; the second mortgagee took possession as soon as he was informed she was in an English port; this is a sufficient possession to take it out of the stat. 21 Jac. 1, c. 19. *Batson, Ex parte*, 3 Bro. C. C. 362.

A. being indebted to B., assigns a ship to C. as trustee for B. by way of mortgage. The ship is registered de novo in the name of C., and a certificate of registry is put on board; but she is left under the control of A., who becomes bankrupt. Quære if she passes to his assignees under 21 Jac. 1, c. 19. *Hay* v. *Monkhouse*, Holt, 603.

Sole owner of a ship secretly mortgages three fourth shares in her as security for a debt, and is allowed by the creditor to retain possession of her until he becomes bankrupt; the requirements of the registry acts having been complied with:—Held, that the vessel passed to the assignees under 21 Jac. 1, c. 19, s. 11. *Kirkley* v. *Hodgson*, 2 . & R. 848; 1 B. & C. 588; 1 L. J. (O.S.) K. B. 185.

—— **Trover.**]—Where a ship was mortgaged at sea with a proviso that the mortgagor should continue in possession till failure of payment of the mortgage money on demand, the grand bill of sale was delivered and the mortgagor became bankrupt before the arrival of the ship, and the mortgagee took possession on her arrival:—Held, that he could maintain trover against the assignees, although he had made no demand on the bankrupt or his assignees. *Atkinson* v. *Maling*, 2 Term Rep. 462; 1 R. R. 524.

Bill of Sale left in Mortgagor's Hands—Indorsement of Subsequent Charges.]—Mortgagee of a ship by deed intrusts the mortgagor with the original bill of sale, and the mortgagor indorses thereon subsequent mortgages, or bills of sale, of several parts of the ship, and mortgagee acquiesces; this is evidence of an assent in such mortgagee, and shall therefore postpone him. *Mocatta* v. *Murgatroyd*, 1 P. Wms. 394.

Commission on Loan—Agreement to give Legal Mortgage of Ship—First Mortgage.]—Action to recover commission upon a loan obtained by the plaintiff for the defendant upon security of his ship. The defendant agreed to accept the loan and to give a "legal mortgage" of his ship. The lender, upon investigating the borrower's title, found that there was a first mortgage upon the ship, and refused to make the advance:—Held, that the agreement between the plaintiff and defendant was that the defendant should give a first mortgage as security; and that the verdict for the plaintiff for his commission should stand; new trial refused. *Thompson* v. *Clerk*, 7 L. T. 269; 11 W. R. 23; *S. C.*, nisi prius, 3 F. & F. 183.

What Gear included—Fishing Boats—Nets.]—In a case where certain fishing boats had been

mortgaged by the bankrupts, and the mortgagees laid claim to the nets and the fishing gear which had been used on board the said vessels (but of which no particular nets were appropriated to or specially belonging to any particular vessel) on the ground that such nets and fishing gear came within the word "ship" in s. 72 of the Merchant Shipping Act, 1854, and the word "appurtenances" in the form of mortgage of a ship now in use and substituted for Form I. given in the Merchant Shipping Act, 1854:—Held, that in order to make a thing an appurtenance it must be specified; that in the present case there was no evidence to show that any specific nets were appropriated to any particular ship, but that they were used indiscriminately, and that they could not in consequence be considered "appurtenances" within the meaning of the act. *Gould, Ex parte, Salmon, In re*, 2 Morrell, 137.

—— **Articles on Board at or after Mortgage.**]—A mortgage of a ship includes everything on board at the date of the mortgage which was necessary for the prosecution of the voyage, or anything which has been brought on board subsequently in substitution for what was there for the same object at the time when the mortgage was entered into. *Coltman* v. *Chamberlain*, 59 L. J., Q. B. 563; 25 Q. B. D. 328; 39 W. R. 12.

Mortgage of Whaler and Catch of Oil—Mortgage without Notice of Prior Mortgage—Priorities.]—See *Feltham* v. *Clark*, post, XV. CARGO, 15. SALE, ASSIGNMENT AND MORTGAGE.

Trawl Warp—Mortgage of Trawler—Factors Act, 1889.]—See *Hull Rope Works Co.* v. *Adams*, infra, col. 188.

By Guardian of Infant.]—The guardian of an infant shipowner has no power under the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 99, to mortgage or sell a ship of which such infant is the owner. *Michael* v. *Fripp*, 38 L. J., Ch. 29; 19 L. T. 257; 17 W. R. 23.

2. EQUITABLE.

Notice—Effect of.]—A mortgagee of a ship, with notice of a prior unregistered equitable mortgage, registers; the prior equitable mortgagee is postponed to him. *Coombes* v. *Mansfield*, 3 Drew. 193; 3 Eq. R. 566; 24 L. J., Ch. 513; 1 Jur. (N.S.) 270; 3 W. R. 345. See also *Hooper* v. *Gumm*, supra.

Validity of.]—In August, 1874, a shipbuilder, having overdrawn his account with his bankers, offered to give them a security over a ship which he was then building. This offer was declined in the first instance, with the intimation, however, that circumstances might arise which might render it desirable for the bank to have the security offered, whereupon he promised that whenever he was required to give it he would do so. Two months later, his account being still largely overdrawn, the bankers requested him to give them the promised security. Accordingly he deposited with them the builder's certificate of the ship, which was still unfinished, and the following day they put a man in possession. At the same time he, in consideration of 770*l.* then advanced to him, assigned to the bankers a trade debt of 2,384*l.* 2*s.* 8*d.*, as a further security for the general balance of his account. Two days afterwards he filed a petition for liquidation:—Held, that the transaction between him and his bankers was neither a fraudulent preference nor an act of bankruptcy. *Winter, Ex parte, Softley, In re*, 44 L. J., Bk. 107; L. R. 20 Eq. 746; 33 L. T. 62; 24 W. R. 68.

—— **By Deposit of Builder's Certificate.**]—Held, also, that the deposit of the builder's certificate was a good equitable mortgage of all his property and interest in the ship, and that, although unfinished, it did not require registration under the Bills of Sale Act, 1854. *Ib.*

—— **Of Unfinished Ship—Incapable of Registration.**]—Whether a ship not yet finished, and therefore incapable of registration under the merchant shipping acts, is properly called a ship or not, it is a thing capable of assignment by certificate in the usual way. *Ib.*

Equitable agreement by articles for security upon a share of a ship then building, with a covenant for a future bill of sale, and if the ship should be sold in the interval, for payment out of the purchase-money; postponed to a subsequent bill of sale, with possession taken as far as it could be subject to the builder's possession and lien. *Daniel* v. *Russell*, 14 Ves. 393.

—— **Under 17 & 18 Vict. c. 104.**]—Although the 17 & 18 Vict. c. 104, contains no provision negativing the validity of a mortgage made otherwise than according to the terms of the act, the whole scope of the act is to that effect, and an equitable mortgage is invalid. *Liverpool Borough Bank* v. *Turner*, 2 De G. F. & J. 502; 30 L. J., Ch. 379; 7 Jur. (N.S.) 150; 3 L. T. 494; 9 W. R. 292. *But see* 25 & 26 Vict. c. 63, s. 3.

—— **In Bankruptcy.**]—A registered mortgagee of a ship having deposited with a creditor the instrument of mortgage thereof, and subsequently become bankrupt:—Held, that such deposit took the ship out of the order and disposition of the bankrupt, and constituted the creditor equitable mortgagee of the ship. *Lacon* v. *Liffen*, 32 L. J., Ch. 315; 9 Jur. (N.S.) 477; 7 L. T. 774; 11 W. R. 474—L. C.

By Parol as a Lien.]—An owner of a ship may verbally authorise a creditor to take possession of it as a lien, and the creditor so taking possession may enforce such lien without any alteration in the registry. *Cazenove* v. *Clayton*, 2 M. & Rob. 552. See *Parr* v. *Applebee*, ante, col. 170.

Right to Proceeds of Sale of Ship.]—Moneys were advanced by the plaintiffs to M. M., upon the agreement that they should be reimbursed by the proceeds of a ship then being built in New Brunswick, and of her cargo, which were to be consigned by M. M. to the plaintiffs for sale; and a bill of lading of the cargo, and a power of attorney from the registered owner, enabling the plaintiffs to sell the ship, were transmitted by M. M. to the plaintiffs. M. M. afterwards transferred the ship and cargo to C. and G. The ship was thereupon registered in the names of C. and G. who sold the ship and cargo to R. and P., and the ship was then registered in the name of P. A new master was appointed, and a new bill of lading signed, and the ship and cargo were consigned by R. and P. (with a power of attorney from P. to sell the ship) to R. and G., in which firm all the members of the firm of R. and P. were partners, except P. The plaintiffs filed their bill against C. and G.,

R. and P., and R. and G., and the assignees of M. M., to establish a lien on the proceeds of the ship, and on the cargo, under their agreement with M. M. The defendant R., one of the partners in the firms of R. and P. and R. and G., was alone within the jurisdiction and served with the subpœna :—Held, that in the absence of P., who appeared to be the registered owner of the ship, the court could not make any decree establishing the plaintiffs' lien on the proceeds of the sale of the ship ; that, although it appeared that the ship had been sold by R. and G., pending the suit, under the power of attorney from P., and that the proceeds had been accounted for by R. and G. to R. and P., no fraud being proved in the transactions under which those firms had acquired the ship and the proceeds, the plaintiffs were not entitled to any relief in respect of the proceeds of the sale in the suit in which R. only appeared ; that the claim of the plaintiffs in equity to the proceeds of the ship would not be assisted by proof of notice by P. of the transactions between the plaintiffs and M. M. *M'Calmont* v. *Rankin*, 8 Hare, 1 ; 19 L. J., Ch. 215 ; 14 Jur. 475. *S. C.*, on further consideration, 2 De G. M. & G. 403 ; 22 L. J., Ch. 554.

Judgment Creditor of Equitable Mortgagee.]—A creditor getting judgment against a ship that is subject to an equitable mortgage is entitled to the interest of his debtor in the ship, and no more. *De Wolf* v. *Pitcairn*, 17 W. R. 914.

Assignment by Bill of Sale, in Form Absolute, held to be Mortgage.]—See *Whitfield* v. *Parfitt*, and *cases* supra, col. 171.

Agreement to give Mortgage.]—Means a first mortgage. *Thompson* v. *Clark*, supra, col. 172.

3. Mortgagor in Possession.

Effect of Charterparty.]—Where a beneficial charterparty has been entered into by a mortgagor in possession of a ship the mortgagee cannot object to the charterparty being carried out simply upon the ground that the effect of carrying out the charterparty will be to remove the ship out of the jurisdiction of the court, and to render it difficult for him to enforce his mortgage security. *The Fanchon*, 50 L. J., Adm. 4 ; 5 P. D. 173 ; 42 L. T. 483 ; 29 W. R. 339 ; 4 Asp. M. C. 272.

When shares in a ship are mortgaged, possession being retained by the mortgagors, and the managing owner, duly appointed by all the co-owners, including the mortgagors, charters the ship for a foreign voyage, and she loads and is about to proceed on the voyage, the mortgagee, even though he takes possession of his shares before the sailing of the ship but after the making of the charterparty, cannot arrest the ship or demand bail in an action brought by him to compel payment of his mortgage debt, provided the performance of the charterparty is not prejudicial to the security ; and the court will, upon the application of the co-owners, release a ship so arrested, and will condemn the mortgagee arresting in costs. *The Maxima*, 39 L. T. 112 ; 4 Asp. M. C. 21.

Where a mortgagor of a ship does some act which prejudices or injures the security of the mortgagee, the declaration in 17 & 18 Vict. c. 104, ss. 70, 71, that the mortgagor is to be deemed the owner, ceases to have any binding effect against the mortgagee, and he may exercise the powers given to him by the mortgage, subject to this qualification—every contract entered into by the mortgagor in possession is a contract which derives validity from the declaration contained in the statute of his continuing to be the owner. Such contract would, however, enure for the benefit of the mortgagee, on his giving notice to the party who is to pay the mortgagor under that contract. *Collins* v. *Lamport*, 34 L. J., Ch. 196 ; 11 Jur. (N.S.) 1 ; 11 L. T. 497 ; 13 W. R. 283.

Therefore where, pending a mortgage, the mortgagor had contracted for the sale of the ship, and before the contract was completed the purchaser had entered into a charterparty with the plaintiff, the mortgagees, on the bankruptcy of the mortgagor, were restrained from selling or otherwise dealing with the ship in any manner inconsistent with the terms of the charterparty. *Ib.*

Where a mortgagee took, with notice of a charterparty entered into by the mortgagor, an interlocutory injunction was granted restraining the mortgagee from exercising his power of sale in such a manner as to interfere with the rights of the charterer. *De Mattos* v. *Gibson*, 4 De G. & J. 276 ; 28 L. J., Ch. 165, 498 ; 5 Jur. (N.S.) 347, 555 ; 7 W. R. 100, 152, 403, 514.

Right to Possession under.]—A., being the owner of a steamship, mortgaged it to B., and subsequently, under circumstances held to shew acquiescence by B., entered into an agreement in contemplation of a partnership with C., by the terms of which C. was to work the ship for A. till further notice, paying all the expenses and receiving all the profits, A. agreeing to indemnify him against loss, if any, upon a periodical statement of accounts. Subsequently to this agreement B. gave notice to C. of the mortgage, and required possession of the ship. The ship was being employed in voyages at a distance from England, between S. and T., and was at that time at S., under engagements which had been entered into by C. with third parties, with respect to its next voyage to T. The ship was given up to B.'s agent at T. at the termination of its next voyage thither. At the time of such delivery C. owed to the crew of the ship a large sum for wages, which entitled them to proceed against the ship in the admiralty court ; and shortly after the delivery of the ship the crew took such proceedings, and the ship was seized by the officers of the court. B., after suffering much delay and loss, paid the wages and obtained possession of the ship. In an action of trover for the ship, brought by B. against C. :—Held, that C. was entitled to retain possession of the ship till its arrival at T., in order to fulfil the engagements incurred before notice. *Johnston* v. *Royal Mail Steam Packet Co.*, 37 L. J., C. P. 33 ; L. R. 3 C. P. 38 ; 17 L. T. 445.

Held, also, that as there had been a delivery of the ship at T., notwithstanding it was subject to a maritime lien for wages, A. was not entitled to recover on a count for trover. *Ib.*

Constructive Possession.]—A mortgagee may recover upon a ship mortgage, though never in possession of the ship, if the mortgagor has given all the possession he can give. *Belchier* v. *Parsons*, 1 Kenyon, 38, 48.

Mortgagor of three hoys suffered by mortgagee to remain in possession, and to work them. Upon his bankruptcy the hoys were held to pass to his assignees as being in his order and disposi-

tion. *Stephens* v. *Sole*, 1 Ves. 352. *S. C.*, cited 1 Atk. 157.

Right to Proceeds of Ship Sold in Wages Suit.]—Surplus proceeds of ship sold in wages suit not paid out to mortgagees, who had never been in possession; ordered to remain in the registry. *The Portsea*, 2 Hag. Adm. 84.

A mortgagee in possession of a ship sold under a decree of the court of admiralty for the payment of seamen's wages, is entitled to the remainder of the proceeds after payment of seamen's wages and costs. *The Neptune, Hodges* v. *Sims*, 3 Knapp, 94.

Right to Charter Mortgaged Ship.]—R., owner of a ship, having mortgaged it to the defendants, contracted with L. for the sale of the ship to him, and before R. became finally bound by the contract L. entered into a charterparty with the plaintiffs. Before the vessel started on her voyage R. stopped payment, whereupon the mortgagees took steps towards selling the ship. It appearing that the terms of the charterparty would not damage the security, an injunction to restrain any dealings with the ship inconsistent with the terms of the charterparty was granted at the suit of the plaintiffs. *Collins* v. *Lamport*, 34 L. J., Ch. 196; 11 Jur. (N.S.) 1; 11 L. T. 497; 13 W. R. 283.

Mortgagor no Claim for Use of Ship.]—A mortgagee out of possession of a whaler is not entitled as against the mortgagor or his assignee of the cargo to an allowance for the use of the ship. *Langton* v. *Horton*, 5 Beav. 9; 11 L. J., Ch. 233; 6 Jur. 357; 594.

Order and Disposition.]—*See cases* supra, cols. 151, 158.

Mortgagees Prejudiced.]—A mortgagor may not so deal with his ship as to materially prejudice his mortgagees' security. *Laming & Co.* v. *Seater*, 16 Ct. of Sess. Cas. (4th ser.) 828.

Arrest of Ship—Freight.]—First mortgagees to whom the ship's freight had been assigned after notice of a second mortgage, although they arrested the ship, did not take possession of her before the freight was paid:—Held, that they were not liable to account for the freight as mortgagees in possession. Having received it as assignees of freight they were entitled to it as against the second mortgagees, although the assignment was made after notice of the second mortgage. *The Benwell Tower*, 72 L. T. 664; 8 Asp. M. C. 15.

Liability of Mortgagee for Wages and Supplies.]—See *Baker* v. *Buckle, and cases*, cols. 191, seq.

Mortgagor taking to Sea Mortgagees' Man in Possession.]—See *The Fairport*, supra, col. 94.

4. Rights of Mortgagee.

To Sell and Use.]—Where a ship has been mortgaged for a debt, a creditor who has got judgment against a registered owner of the ship cannot take and sell the ship in execution, for to do so would be to defeat the rights of the mortgagee to make the ship available as a security for his debt, given him by 17 & 18 Vict. c. 104, s. 70. *Kitchen* v. *Irvine*, 8 El. & Bl. 789; 28 L. J., Q. B. 46; 5 Jur. (N.S.) 118.

Semble, that a mortgagee of a ship has power, under 17 & 18 Vict. c. 104, s. 70, to use as well as to sell the ship. *European and Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.*, 4 Kay & J. 676; 5 Jur. (N.S.) 310.

—— **Under what Conditions.**]—Where a mortgagee of a steamship took possession of her, and used her for the purposes of a speculation which resulted in a loss, and subsequently sold her disadvantageously:—Held, that he must himself bear such loss, and be charged with the value of the vessel at the time he took possession of her. *Marriott* v. *Anchor Reversionary Co.*, 3 De G. F. & J. 177; 30 L. J., Ch. 571; 7 Jur. (N.S.) 713; 4 L. T. 590; 9 W. R. 726.

A vessel was mortgaged for a nominal sum, to secure an unascertained balance due to the mortgagee, with power to sell by public auction, and, in case a vessel could not be sold, the mortgagee was to hold, enjoy and possess the free use, control and possession thereof as sole owner, until the full amount of his claims should be satisfied. Default was made in payment of the sum named before the real balance was ascertained, and pending an investigation thereof before arbitrators, the mortgagee caused the vessel to be sold by private contract:—Held, that such sale was wrongful, and not warranted by the conditions of the mortgage. *Brouard* v. *Dumaresque*, 3 Moore, P. C. 457.

Right to Arrest—Restraint Action.] — A mortgagee cannot arrest a ship for the purpose of getting security for her safe return. *The Highlander*, 2 W. Rob. 109.

As to Sale of Vessel at the Suit of a Mortgagee of Part.]—See *The Fairlie*, post, col. 194.

To defend Actions against Ship.]—The mortgagee may come in and defend his interest in the ship sued, but can only rely on defences open to the owner of the ship. *The Chieftain*, Br. & Lush. 104; 32 L. J., Adm. 106; 9 Jur. (N.S.) 388; 8 L. T. 120; 11 W. R. 537.

To receive Freight—Extent of Right.]—A mortgagee of a ship does not, ordinarily speaking, obtain, by the mortgage alone, a transfer, by way of contract or assignment, of the right to freight; the mortgagor remains the dominus of the ship, with regard to everything relating to its employment, or nonemployment, or to any rate of freight to be earned by its employment, until the mortgagee takes possession. The mortgagee on taking possession becomes the owner, and it is by virtue of that ownership, and not by virtue of any antecedent contract or right, that he is entitled to receive the freight, which, by contract or otherwise, is lawfully payable. *Keith* v. *Burrows*, 46 L. J., C. P. 801; 2 App. Cas. 636; 37 L. T. 291; 25 W. R. 831; 3 Asp. M. C. 481—H. L. (E.)

M. mortgaged his ship, then in California, to K. & Co., but the mortgage was not registered. A cargo was afterwards put on board in California on account of the ship, and bills of lading were drawn for a nominal freight of 1*s.* per ton. Before the ship arrived in England, B. & Co., without notice of the mortgage, advanced money to M. on the security of the cargo, and then sold the cargo to J. by a contract containing the following clause: "As cargo is coming on ship's account, freight is to be computed at 55*s.* per

ton, and invoice to be rendered accordingly." M. paid for the cargo and received the bills of lading, and handed them to B. & Co., with an assignment indorsed of his interest in "the within freight" expressed to be "at the rate of 55*s.* per ton, and not the nominal amount of 1*s.* per ton." K. & Co. registered their mortgage, and on the arrival of the ship took possession, and claimed freight at the rate of 55*s.* per ton: —Held, that the sum of 55*s.* per ton was not really freight, but was part of the price of the cargo kept back till the arrival of the ship, and that the mortgagees were not entitled to more than 1*s.* per ton, the freight specified in the bills of lading. *Ib.*

The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout not only what is due on his first mortgage, but also the amount of any subsequent charge which he may have acquired on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight. *Liverpool Marine Credit Co.* v. *Wilson*, 41 L. J., Ch. 798; L. R. 7 Ch. 507; 26 L. T. 717; 20 W. R. 665.

The mortgage of a ship carries with it a right to receive the freight earned by the ship; and although the mortgagee cannot recover back from the mortgagor freight which he has allowed the mortgagor to receive, yet he may at any time intercept the freight by giving notice to the mortgagor, consignee, or charterer that he intends to exercise his right of property, and to require the freight to be paid to him. *Wilson* v. *Wilson*, 41 L. J., Ch. 423; L. R. 14 Eq. 32; 26 L. T. 346; 20 W. R. 436.

The owner of a ship assigned the freight not yet earned, and three days afterwards, with the knowledge of the assignee, mortgaged the ship to persons, and the mortgagees registered their mortgage. The assignee neglected to give notice of his claim upon the freight to the mortgagees: —Held, that the assignee was not entitled to set up any right to such freight in opposition to the rights of the mortgagees. *Ib.*

When an entire ship is in mortgage, in order to defeat the right of the mortgagor to receive the freight, the mortgagee must take possession of her before the completion of her voyage; but where the mortgagor of certain shares is ship's husband, if the mortgagees join with the owners of the other shares in the ship in the appointment of a new ship's husband before the completion of the voyage, the mortgagor loses all right as ship's husband to receive the freight. *Beynon* v. *Godden*, 48 L. J., Ex. 80; 3 Ex. D. 263; 39 L. T. 82; 26 W. R. 672—C. A.

In August, 1876, R. was mortgagor of certain shares in a vessel, and also was acting as ship's husband, and the defendant was charterer of the vessel for the voyage upon which she was then employed. R. obtained from the plaintiff a loan of 200*l.*, and by a letter dated the 30th of August requested the defendant to pay to the plaintiff the freight due on the charter. On the 20th of September the mortgagees of R.'s shares and the owners of the other shares appointed E. ship's husband in place of R. Upon the 11th of October the vessel completed her voyage, and upon the 14th began to discharge her cargo; upon the 16th the defendant sent to the plaintiff a cheque for 200*l.*, which he afterwards dishonoured, E. having claimed the amount of the freight:—Held, that the plaintiff could not maintain an action to recover the amount of the cheque. *Ib.*

A mortgagee may entitle himself to freight by taking possession of the ship. *Gibson* v. *Ingo*, 6 Hare, 112.

First mortgagees to whom the ship's freight had been assigned after notice of a second mortgage, although they arrested the ship, did not take possession of her before the freight was paid:—Held, that they were not liable to account for the freight as mortgagees in possession. Having received it as assignees of freight, they were entitled to it as against the second mortgagees, although the assignment was made after notice of the second mortgage. *The Benwell Tower*, 72 L. T. 644; 8 Asp. M. C. 15.

Before the mortgagee obtained possession of the ship, the charterers and consignees of cargo sold to the shipowner part of the cargo by way of discharge of the freight:—Held, that the mortgagee was not entitled to the freight. *Belfast Harbour Commissioners* v. *Lawther*, 17 Ir., Ch. R. 54.

A., a shipowner, mortgaged a ship, then on her road home, to B., and afterwards gave a written authority to C., to whom he was indebted, to receive the ship's freight. A., becoming bankrupt, his assignees, under an order in bankruptcy, sold the equity of redemption in the ship, and, after deducting the amount due to them, paid the balance into court under the Trustee Relief Act:—Held, that C.'s claim for freight could not be sustained, no notice of the assignment by A. having been given to the charterers or their agents. *Pride of Wales and Annie Lisle (Owners of), In re*, 15 L. T. 606; 15 W. R. 381.

Held, also, that it was not necessary that the mortgagors should admit the accuracy of the mortgagee's account, in order to entitle them to payment of the fund in court. *Ib.*

The plaintiff, a shipowner, in July sold the ship to D., of the firm of D. Y. & Co., and received in payment of the price the draft of D. Y. & Co. on B. at twelve months. In September the ship sailed from London to San Francisco, and thence on a seeking voyage home. In June following the captain sent out by D. chartered her to load flour for Sydney. Some days before the bill of exchange became due, D. Y. & Co. requested the plaintiff to renew it, which he agreed to do upon having the ship transferred to him as security. The ship was accordingly transferred to him by an assignment in form absolute. In October the captain, who had no knowledge of the assignment, received 1,000*l.* on account of freight, and remitted it to D. Y. & Co. In November D. Y. & Co. became bankrupt:—Held, that the court could treat the assignment according to its real nature as a mortgage; and that the mortgagee, not having taken possession, was not entitled to the freight. *Gardner* v. *Cazenove*, 1 H. & N. 423; 26 L. J., Ex. 17; 5 W. R. 195.

Under an assignment of a ship, and her present and future cargo, freight and earnings, by the owner, for securing to the assignees all moneys which they had advanced, or might become liable to pay on account of the vessel and her cargo, which they had furnished the means of purchasing:—Held, the assignees, who were also the ship's agents, were entitled to retain a bill which was given for the purchase of part of the homeward cargo, and was remitted, but not

indorsed, to them by the owner, notwithstanding he denied that it was remitted in payment, and stated that they had not paid; and, contrary to an express understanding, had left him personally liable to some of the debts incurred in fitting out the vessel; and an injunction which had been obtained by the assignees, restraining an action of trover for the bill, was continued until the hearing. *Curtis* v. *Auber*, 1 Jac. & Walk. 526.

A part owner of a ship, whose share was subject to a mortgage, agreed with the other part owner (whose share was not subject to any mortgage), but without the concurrence of the mortgagee, to purchase guano on the joint account of the two part owners, and bring it in the ship to England. On the completion of the voyage, and when the cargo was about to be discharged, the mortgagee took possession:—Held, that he had no claim against the owner of the mortgaged share for freight, and could, at the utmost, only claim to adopt the mortgagor's contract, and stood in his place as to the profits of the adventure after deducting all expenses. *Alexander* v. *Simms*, 5 De G. M. & G. 57; 2 Eq. Rep. 861; 23 L. J., Ch. 721; 2 W. R. 329.

By the mortgage of a ship, under the 17 & 18 Vict. c. 104, the legal right to the freight is transferred. *Dobbyn* v. *Comerford*, 10 Ir. Ch. R. 327.

In October, 1883, W. mortgaged to the plaintiff certain shares in a ship. Subsequently W., who was captain and ship's husband of the ship, incurred liabilities to the defendants for goods supplied to and disbursements made for the ship. In March, 1886, the ship was chartered for a voyage from Montreal to Liverpool, the freight being payable one-third at Quebec, and two-thirds on right delivery of the cargo in Liverpool. Immediately upon arrival of the ship in Liverpool the plaintiffs took possession, and gave notice to the owners of the cargo to pay the freight to them. The defendants afterwards obtained judgment against W., and obtained garnishee orders upon the receivers of the cargo, attaching the freight due from them:—Held, that the defendants had no right to the freight as against the plaintiffs. *Japp* v. *Campbell*, 57 L. J., Q. B. 79.

A vessel was chartered to proceed to A., there take in a cargo to be shipped by the charterers, and return direct to London. After the ship's arrival in the port of London, and whilst the cargo was in course of delivery, a mortgagee, under an ordinary statutory mortgage made prior to the date of the charterparty, took possession:—Held, that he thereby acquired a right to the freight in priority to an assignee of the freight by a deed executed subsequently to the charterparty, notice of which had been given to the charterers. *Brown* v. *Tanner*, 37 L. J., Ch. 923; L. R. 3 Ch. 597; 18 L. T. 624; 16 W. R. 882.

Registered assignee of freight preferred to unregistered transferee of part of ship. *Lindsay* v. *Gibbs*, supra, col. 29.

Charge by Managing Owner—Appointment of Receiver of Freight—Rights of Co-owners.]—In an action in personam by a plaintiff claiming to be equitable mortgagee of the foreign ship "F." and her freight, to secure a liability incurred by him in accepting bills of exchange which had been drawn by the managing owner, it appeared that the alleged mortgage was given to the plaintiff by the managing owner; that the plaintiff, when he accepted the bills, thought the managing owner was sole owner, and that it was subsequently sworn on affidavit that the managing owner was only a part owner, but it did not appear whether the amount of the bills was in fact expended on the purposes of the ship. The "F." was in an English port under charter to carry cargo to a foreign port, when, on application by the plaintiff, an order was made appointing a receiver, and authorising him to proceed with the ship to the foreign port, and there receive the ship and all the freight due upon the voyage. The defendants appealed:—Held, that, even assuming the managing owner to be only a part owner, yet that, as it did not appear that the amount of the bills was not expended solely for the purposes of the ship, the court had authority to appoint a receiver to receive the whole of the freight, and that, in the circumstances, it was expedient that the order should stand. *Burn* v. *Herlofson*, or *The Faust*, 56 L. T. 722; 6 Asp. M. C. 126—C. A.

See also tit. XIII. FREIGHT, as to right of mortgagee to freight.

Mortgagee intervening in Bottomry Suit to get Freight brought in.]—See *The Percy*, infra, col. 218.

Freight in hands of Foreigner Abroad—Service of Notice of Writ.]—The first mortgagee of a ship, with power to collect the freight, brought an action against the second mortgagee (whose mortgage contained an assignment of the freight) and others, claiming an account and payment out of the freight of the amount he had paid for wages of the crew, and the wages and disbursements of the master. The freight was in the hands of R. & Co., foreigners, resident abroad, to whom it had been paid as agents of the second mortgagee, and who claimed to retain it in satisfaction of a debt due to them from their principal. The plaintiff sought to make R. & Co. defendants to the action:—Held, that Ord. XI. r. 1, did not apply, and leave to serve notice of the writ out of the jurisdiction refused. *McStephens* v. *Carnegie*, 49 L. J., Ch. 397; 42 L. T. 309; 4 Asp. M. C. 215—C. A.

Mortgage without Notice of prior Agreement for use of Ship—Sale by Mortgagee—Right of Purchaser to Certificate of Registry.] — The owner of a ship entered into a contract with a company that the ship should sail as one of the company's line. He subsequently mortgaged her without notice of the contract, and the mortgagee, after the death of the owner, and while the contract was in force, sold the ship, the purchaser having notice of the contract:—Held, that such contract was not binding upon the purchaser, and that in any case he, being the duly registered owner, was entitled to have the certificate of registry of the ship delivered up to him by the company in whose possession it was. *The Celtic King*, 63 L. J., Adm. 37; [1894] P. 175; 6 R. 754; 70 L. T. 562; 7 Asp. M. C. 440.

Co-ownership Action—Mortgagee intervening—Release of Ship.]—When a part owner of a ship institutes a suit against the ship, claiming as against his co-owner an account and a sale of the ship, a registered mortgagee, holding a mortgage which would not be satisfied by a sale of the ship, is entitled, on intervening in the suit,

to a release of the ship, and to his costs from the time of his claiming the release. *The Eastern Belle*, 33 L. T. 214; 3 Asp. M. C. 19.

Ship's Expenses after taking Possession.]—Mortgagees in possession of a ship held not entitled to prove against the bankrupt mortgagor's estate for the ship's expenses after they had taken possession. *Howden, Ex parte, Litherland, In re*, 2 Mont. D. & D. 574; 11 L. J., Bk. 19.

Mortgagee not bound to Charter—Equitable Rights in Ship.]—A mortgagee of a ship has a power of sale by his security. The ship arrived at Glasgow, and the mortgagee advertised her for sale by public roup in Scotland. An interdict of the Scotch court was obtained to suspend the sale. In the meantime, the parties claiming other interest in the ship, proposed to the mortgagee to enter into a charterparty for a voyage of the ship, pending the disputes which had arisen. The mortgagee refused to enter into such charterparty. The ship afterwards arrived at Liverpool:—Held, that the mortgagee had a clear right to refuse, as being a speculation which could not be imposed upon him. *Samuel* v. *Jones*, 7 L. T. 760.

Held, also, that the interdict having thrown a cloud upon the mortgagee's title, he was entitled to a decree for a sale, and an account as against all parties claiming an interest in the ship. *Ib.*

By 25 & 26 Vict. c. 63, s. 3, the court has jurisdiction over all equitable rights and claims of owners and mortgagees of ships. *Ib.*

Arrest before Mortgage Debt due—Release of Ship.]—Where the registered mortgagees of a ship instituted an action in rem as mortgagees for possession, and the ship was arrested therein before the mortgage money became due, and without any default on the part of the mortgagor, the court, being of opinion upon the facts that the ship was not being dealt with so as to impair the mortgagee's security, ordered her release. *The Blanche*, 58 L. T. 592; 6 Asp. M. C. 272.

Arrest of Ship for Disbursements—Payment by Mortgagees—Liability of Owners to repay.]—The plaintiffs were the registered mortgagees of forty-eight sixty-fourth shares in a ship, the defendants being the owners of the residue of such shares. The captain, having incurred a debt for necessary disbursements made by him, instituted proceedings in rem against the ship and arrested her in the admiralty division. The plaintiffs, in order to obtain the release and get possession of the ship, paid the captain's claim, together with the costs of the proceedings:—Held, that as the plaintiffs were compelled under pressure of law to pay the sum in question in order to release the ship from arrest and get possession of her, there was an implied promise on the part of the defendants to repay them that sum, inasmuch as the mortgagor and the defendants (the co-owners) were liable to the captain for the disbursements made by him. *The Orchis*, 59 L. J., Adm. 31; 15 P. D. 38; 62 L. T. 407; 38 W. L. 472; 6 Asp. M. C. 501—C. A.

Fraudulent Preference.]—The court will, under the 17 & 18 Vict. c. 104, s. 65, restrain a mortgagee of a ship from dealing with the ship in such a manner as would enable him to obtain the benefit of a fraudulent preference, and will exercise such power of restraint for a definite period, without requiring the applicant to file a bill. *The Regatta*, 6 N. R. 248.

Mortgagee preferred to Material Men.]—A British colonial vessel was mortgaged by her owners. The mortgage was duly registered under the Merchant Shipping Act, 1854. In February, 1868, whilst lying in the port of London, the material men, on the order of the master, did work and furnished supplies to the ship necessary to put her in a seaworthy condition. In July, 1868, the mortgagee executed an instrument transferring the mortgage to B. This transfer was without any valuable consideration, and was not registered, being made to enable him to take charge of the ship for the mortgagee. In the same month B. took possession of the ship. The material men having instituted a suit against the ship to recover the amount due to them for the work and supplies, B. intervened. At the time of the institution of the suit, the ship was under the arrest of the court, at the instance of two of her crew who had instituted a cause of wages; the owners of the ship were domiciled in Nova Scotia. The ship having been sold, the proceeds were found insufficient to satisfy the claim of the material men and the mortgage debt:—Held, that the assignee of the mortgagee was entitled to have his mortgage debt satisfied before the material men were paid the amount of their claim. *Johnson* v. *Black, The Two Ellens*, 8 Moore, P. C. (N.S.) 398; 41 L. J., Adm. 33; L. R. 4 P. C. 161; 26 L. T. 1; 20 W. R. 592; 1 Asp. M. C. 208—P. C.

Mortgagee postponed to Maritime Liens.]—A mortgagee of a ship and freight is subject to bottomry, salvage, or wages liens accruing after the date of his mortgage. *The Dowthorpe*, 2 W. Rob. 73.

Masters' lien for Wages—Sale of Ship by Master subsequent to Mortgage by him.]—Where the captain of a ship mortgaged her whilst on her voyage, and the ship, having become unseaworthy by stress of weather, was sold, and a bill for the proceeds drawn upon the purchaser, and indorsed to the defendant, the captain; the court, being satisfied that the bill represented the ship, granted an injunction against the defendant, who was threatening to put in force the bill to satisfy his claim of lien. *Lister* v. *Payn*, 11 Sim. 348.

Rights of Creditor of Mortgagor as against Mortgagee.]—There is nothing in 17 & 18 Vict. c. 104, enabling a creditor of the mortgagor to seize and sell a mortgaged ship, and the exercise of such a right by him is inconsistent with the right of the mortgagee, even though the mortgagee has agreed on his mortgage not to exercise his statutory power of sale until a date subsequent to a seizure by an execution creditor of the mortgagor. *Dickinson* v. *Kitchen*, 8 El. & Bl. 789.

Bond by Mortgagee not in Possession to prevent Sale of Ship by Foreign Court—Chancery Jurisdiction.]—The owner of a British ship, having mortgaged it in England, employed a Liverpool firm to consign it to their agents at New Orleans. As the New Orleans firm happened to be creditors of the owner, the Liverpool firm, in consideration of their having the consignment, instructed their agents not to proceed

against the ship at New Orleans, but to remit the proceeds to the mortgagees. Afterwards, the Liverpool firm getting into difficulties, some of the mortgagees insisted on the consignments being changed, and the Liverpool firm withdrew their instructions. When the ship arrived, the New Orleans firm brought actions in their courts against the owner; and, as the courts of Louisiana do not recognise the rights of mortgagees without possession, writs of attachment were obtained, under which the ship was seized. The mortgagees then, to prevent the ship being sold, gave to the New Orleans firm bonds for the amounts to be recovered in the actions, upon which the ship was released. The mortgagees filed a bill to restrain the holders of the bonds from suing on them, and to have the bonds delivered up:—Held, that the court had no jurisdiction to stay proceedings on the bonds; first, because the court would not have restrained execution of the attachment at New Orleans, as it could not have placed all the creditors, foreign and domestic, on an equal footing; secondly, because if it could have done so, the mortgagees should have sought to restrain the attachment, and not have placed themselves in a worse position by giving the bonds; and, thirdly, because if the prayer was granted, the courts of New Orleans would never in future release an English ship on the bond of a mortgagee. *Liverpool Marine Credit Co.* v. *Hunter*, 37 L. J., Ch. 386; L. R. 3 Ch. 479; 18 L. T. 749; 16 W. R. 1090.

Mortgagee bidding at Sale.]—Mortgagee of a ship allowed to bid for her at a sale by the court. *The Wilsons*, 1 W. Rob. 172.

Improper Sale by Mortgagee.]—A ship was mortgaged to secure an unascertained balance due to the mortgagee, with power to sell by auction; and in case the ship could not be sold, to hold and enjoy the ship as owner until the debt should be satisfied. Before the sum due was ascertained by arbitrators the mortgagee sold by private contract:—Held, that such sale was wrongful, and that the mortgagee was liable for the value of the ship after deducting the amount of his mortgage debt. *Brouard* v. *Dumaresque*, 3 Moore, P. C. 457.

Mortgagee selling after tender of Sum due on the Mortgage.]—A mortgagee who sells the ship when the amount due on the mortgage has been tendered to him, is liable to pay the mortgagor the value of the ship beyond that sum. *M'Larty* v. *Middleton*, 9 W. R. 861; on app. 4 L. T. 852; 10 W. R. 219 (L.JJ. differing).

Sale by First Mortgagee with Assent of Second Mortgagee—Surplus Proceeds.]—A., the first mortgagee of a ship, with the sanction and authority of B., second mortgagee, sold her and received the proceeds, which exceeded the amount due to him:—Held, that A. was accountable to B. in the character of trustee for the surplus. *Tanner* v. *Heard*, 23 Beav. 555; 3 Jur. (N.S.) 427; 5 W. R. 420.

Surplus Proceeds.]—Right of mortgagors to have payment out of court without admitting accuracy of account. See *The Pride of Wales, The Annie Lisle (Owners)*, *In re*, supra, col. 180.

Sale—"Just Allowances."]—A ship was mortgaged to the defendant to secure a sum exceeding 1,400*l.*; the mortgage was duly registered, and the defendant took possession of the ship and advertised her for sale. Before the sale the plaintiff, who held a mortgage on the ship, made and registered after the date of the registration of the mortgage to the defendant, instituted a suit against the ship to enforce his mortgage, and caused the ship to be arrested. The defendant, to obtain the release of the ship, paid 500*l.* into court in lieu of bail. The ship was sold by the defendant, and the proceeds were insufficient to satisfy the defendant's mortgage. The plaintiff, when the cause was ripe for hearing, abandoned the suit. The court condemned the plaintiff in costs, and ordered him to pay to the defendant interest on the 500*l.* paid into court. *The Western Ocean*, L. R. 3 A. & E. 38.

The mortgagees of a ship having seized it and advertised it for sale, the mortgagors brought an action against them for redemption, and moved for an injunction to restrain the sale, when, upon the mortgagees undertaking not to proceed with the sale, a decree was taken by consent in the action, directing an account of what was due on the mortgage for "principal and interest," and redemption on payment by the mortgagors of the amount certified:—Held, that the mortgagees were justified in seizing the ship, and that, in taking the account directed, they were entitled to be allowed expenses incurred by them in taking and holding possession of the ship, advertising it for sale and effecting insurances, under the head of "just allowances." *Wilkes* v. *Saunion*, 47 L. J., Ch. 150; 7 Ch. D. 188.

Mortgage for Further Advances—Bankruptcy of Mortgagor—Right of Mortgagee.]—Where under a mortgage of a ship to secure further advances, an advance is made on the date of a receiving order against the mortgagor, who is subsequently adjudicated bankrupt in respect of acts of bankruptcy committed prior to the execution of the mortgage, the mortgagee is entitled under s. 49 of the Bankruptcy Act, 1883, as against the trustee in bankruptcy to recover such advance, where before the date of the receiving order there was a contract to make further advances, and a promise to make the particular advance. *The Thames*, 63 L. T. 353; 6 Asp. M. C. 536.

Arrestment of Ship—Recall of Arrestment.]—A mortgagee of a ship petitioned for recall of arrestment of the ship, and, pending an action against the registered owner, the court allowed the vessel to sail, on the petitioner consigning a sum to be subject to the same claims and rights of the mortgagee as the ship was, as against the arresting creditor. *Stewart* v. *Macbeth*, 10 Ct. of Sess. Cas. (4th ser.) 382.

Improper Mortgage by Executor of Mortgagee—Money borrowed to pay for Repairs—Right of Sub-Mortgagee.]—See *Collinson* v. *Lister*, supra, col. 18.

Payment of Wages by—Recovery from Mortgagor's Agent.]—The owner of a vessel mortgaged it and subsequently entered into an agreement in contemplation of a partnership with C., under which the latter was to work the vessel, the owner paying all expenses. The vessel was employed on several voyages and finally given up to the mortgagee. At the time of such delivery C. owed large sums for wages, in respect of which proceedings were taken in the admiralty court by the master and seamen. The vessel was

seized, and the mortgagee, after much delay and loss, paid the wages :—Held, that he was entitled to recover such payments from C., as money paid to his use. *Johnston* v. *Royal Mail Steam Packet Co.*, 37 L. J., C. P. 33 ; L. R. 3 C. P. 38 ; 17 L. T. 445.

Deduction of Advances by Charterers.]—By the terms of a charterparty it was provided that the charterers should advance necessary funds for the ship's disbursements, not exceeding a specified amount, at the port of lading. Previously to entering into the charterparty the owner had mortgaged the ship and freight. The charterers made advances for the ship's disbursements, considerably in excess of the amount specified in the charterparty. Before the freight became due the mortgagee took possession of the ship, and stopped the cargo for freight :—Held, that the charterers were not entitled to deduct from the amount due for freight the advances made by them in excess of the sum provided by the charterparty. *Tanner* v. *Phillips*, 42 L. J., Ch. 125 ; 27 L. T. 480, 717 ; 21 W. R. 68 ; 1 Asp. M. C. 448.

Wages Suit — Mortgagee Intervening.] — Where a mortgagee intervenes in a wages suit the account is taken in the same way as if the owner were present to protect his interest. *The Julindur*, 1 Spinks, 71.

Mortgagee entitled to Release of Ship on giving Bail in Suit by Master for Wages.]—See *The Ringdove*, ante, cols. 99, 100.

Master's Wages—Advances—Accounts.]—See *The Caledonia*, Swabey, 17 ; 2 Jur. (N.S.) 48 ; 4 W. R. 183 ; supra, col. 93.

Sale by Order of Foreign Court.]—A British ship was attached in Louisiana by creditors of the registered owner, a British subject, for the purpose of making her available for their demands. Proceedings were taken by these creditors, in which certain persons, British subjects, claiming under a bill of sale by way of mortgage, from the owner, duly registered in England, intervened for the purpose of asserting their title and protecting their rights. Their title was wholly disregarded by the court of Louisiana, the law of that state not allowing a mortgage of chattels ; and the ship was sold. The ship arrived at an English port, and the mortgagees filed a bill to establish their charge :—Held, first, that the judgment of the foreign court was not upon a proceeding in rem, but in personam. *Simpson* v. *Fogo*, 1 Johns. & H. 18 ; 29 L. J., Ch. 657 ; 6 Jur. (N.S.) 949 ; 2 L. T. 594 ; 8 W. R. 407.

Held, secondly, that the mortgagees had not originated the proceedings in the foreign court so as to estop themselves from asserting their rights in this country. *Ib.*

Held, thirdly, that the judgment of the foreign court as averred, proceeding, as it did, in total disregard of the lex loci contractûs, was not a decision which the court here would of necessity uphold, or such as from its mere averment would destroy the plain and clear title previously averred in the mortgagees. *Ib.*

The owners of a British ship mortgaged her in England, and she afterwards was taken by the mortgagors to New Orleans, where she was attached by creditors, who took proceedings in the courts there for the purpose of making her available for their demands. The English mortgagees intervened in these proceedings for the purpose of asserting their rights, but their claim was wholly disregarded, the law of New Orleans not recognising a mortgage of chattels ; and, under an order of the court, the ship was sold to a British subject. The ship having afterwards returned to England with a cargo, the mortgagees filed a bill to enforce their claim :—Held, that the judgment of a foreign court of competent jurisdiction is conclusive inter partes on the merits of the matter in dispute, but may be reviewed by the courts in England, if any error appears on the face of the record. *Simpson* v. *Fogo*, 1 Hem. & M. 195 ; 32 L. J., Ch. 249 ; 9 Jur. (N.S.) 403 ; 8 L. T. 61 ; 11 W. R. 418.

Sale Abroad—Right of Mortgagees.]—Consignees of a ship at New Orleans who had made advances to the shipowner, got her sold under an order of a district court in Louisiana before the expiration of the time which the judge had directed should elapse before sale :—Held, that, as against prior mortgagees, the sale was fraudulent. *Bland* v. *Lynam*, 5 L. J. (O.S.) C. P. 87.

Hire and Purchase Agreement—Factors Act, 1889—Attaching Goods to Ship—Ship's Gear—Disposition of Goods.]—A hire and purchase agreement, under which the hirer has no power to determine the agreement by returning the goods, is an "agreement to buy" within s. 9 of the Factors Act, 1889. And if the hirer in such case, being the mortgagee of a ship, attaches the goods to the ship in such a way as to make them part of the ship's equipment, then such act, at any rate if followed by the mortgagee taking possession, will constitute a delivery by the hirer under a disposition by the mortgagee within the same section. A. owned a smack which he mortgaged to B. & Co. After the mortgage A. entered into a hire and purchase agreement with C., under which he gave A. possession of a trawl warp for the smack. The agreement, though it contained provisions enabling C. to determine it in certain events, gave A. no power to do so by returning the warp to C. A. attached the warp to the smack. Subsequently B. & Co. took possession of the smack and warp under the mortgage. C. thereupon forcibly retook possession of the warp. B. & Co. sued C. in the county court for trespass :—Held, that the county court was right in holding that the warp had passed to B. & Co. under the Factors Act, 1889, s. 9, and in giving damages. *Hull Rope Works Co.* v. *Adams*, 65 L. J., Q. B. 114 ; 73 L. T. 446 ; 44 W. R. 108.

5. Recovery of Money Advanced.

Form of Action—Pleading.]—Where the plaintiff assigned his ship to the defendant as a security for the repayment of money ; but it appeared on the register to be an absolute assignment, and the defendant sold her, and told the plaintiff that he had received the purchase-money, and would account with him for the balance of the proceeds of the sale :—Held, that the plaintiff was entitled to recover this balance on the common money counts, the acknowledgment being sufficient to support the action. *Prouting* v. *Hammond*, 8 Taunt. 688 ; Gow, 41.

Though a bill of sale for transferring the property in a ship by way of mortgage might be void as such, for want of reciting the certificate of registry therein, as required by 26 Geo. 3, c. 60, s. 17, yet the mortgagor might be sued upon his

personal covenant contained in the same instrument for the repayment of the money lent. *Kerrison* v. *Cole*, 8 East, 231.

Ship Lost—Money to be paid out of Ship's Earnings.]—T. lent D. 600*l.*, D. assigned one-sixteenth in a ship, and by defeasance it was declared that T. out of the earnings should pay himself 600*l.* and should account to D. for the surplus, but there was no covenant for payment of the money. The ship was lost, and T. brought his bill against D.'s executrix for the debt; she denied assets, præter to satisfy specialty debts. Decreed, she should account for testator's estate, and T. to account for the earnings, and to be allowed for the outfit of the ship though cast away. *Tyrrel* v. *Thomas* (*Lady*), 1 Vin. Abr. 183, pl. 5.

Liability of Mortgagor.]—A ship was mortgaged and taken to sea and captured. There was no covenant for payment of the money:—Held, that the executors of the mortgagor were liable for payment of the mortgage money. *Anon.*, cited in *King* v. *King*, 3 P. Wms. 358, 360.

Mortgage of Three-fourths of Ship — Sale ordered.]—Order made for sale of a ship at the instance of a mortgagee of three-fourths of the shares. *The Fairlie*, 37 L. J., Adm. 66.

Interest.]—The contract of mortgage of a ship provided that interest should be paid half-yearly in advance. The mortgagee sold the ship shortly before a half-yearly day for payment of interest, and received the balance of purchase-money (covering his principal debt) three days after that half-yearly day:—Held, that he was only entitled to interest in respect of the three days for that half-year. *Banner* v. *Berridge*, 50 L. J., Ch. 630; 18 Ch. D. 254; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. C. 420.

6. Priorities.

See also supra, cols. 168, seq. 1. Legal Mortgage.

Priority over Material Men.]—Where a mortgagee brings an action to realise his security, and material men with a common-law possessory lien on the ship intervene, and the ship, by order of the court, is sold, and the proceeds are only sufficient to satisfy the claim of the material men, the mortgagee is still entitled to be paid his taxed costs, up to the date of the sale, out of the proceeds of the sale of the ship in priority to the material men. *The Sherbro*, 52 L. J., Adm. 28; 48 L. T. 767; 5 Asp. M. C. 88.

A British colonial vessel was mortgaged by her owners. The mortgage was duly registered under the Merchant Shipping Act, 1854. In February, 1868, whilst lying in the port of London, the material men, on the order of the master, did work and furnished supplies to the ship necessary to put her in a seaworthy condition. In July, 1868, the mortgagee executed an instrument transferring the mortgage to B. This transfer was without any valuable consideration, and was not registered, being made to enable him to take charge of the ship for the mortgagee. In the same month B. took possession of the ship. The material men having instituted a suit against the ship to recover the amount due to them for the work and supplies, B. intervened. At the time of the institution of the suit the ship was under the arrest of the court, at the instance of two of her crew who had instituted a cause of wages; the owners of the ship were domiciled in Nova Scotia. The ship having been sold, the proceeds were found insufficient to satisfy the claim of the material men and the mortgage debt:—Held, that the assignee of the mortgagee was entitled to have his mortgage debt satisfied before the material men were paid the amount of their claim. *The Two Ellens*, *Johnson* v. *Black*, 8 Moore, P. C. (N.S.) 398; 41 L. J., Adm. 33; L. R. 4 P. C. 161; 26 L. T. 1; 20 W. R. 592; 1 Asp. M. C. 208—P. C.

Necessaries were supplied in an English port to a ship belonging to a colonial port. The ship was under mortgage; the mortgagee had taken possession. No owner or part owner being domiciled in England or Wales, a suit in rem against the ship was instituted in the admiralty court by the person who had supplied the necessaries. The mortgagee intervened to defend, claiming priority:—Held, that the mortgagee had priority, the claimant for necessaries having no maritime lien, and no equity to precede the mortgagee. *Ib.*

In November, 1861, A. supplied necessaries to a British ship. On the 12th of December, 1861, B. became a registered mortgagee of the ship, and A. subsequently instituted a cause of necessaries against the ship:—Held, that the mortgage of B. had priority over the claim for necessaries. *The Pacific*, B. & Lush. 243; 33 L. J., Adm. 120; 10 Jur. (N.S.) 1110; 10 L. T. 541.

A. was quarter owner of a ship; B. was owner of three-fourths. B. mortgaged his share. The mortgagee did not take possession, and the ship was by arrangement between A. and B. left under the control of A. A. ordered repairs to the vessel, which was afterwards sold by order of the court of admiralty:—Held, that in the distribution of the proceeds of the sale the mortgagee of the three-fourths was entitled to his proportion of the proceeds, without contributing towards the payment of the material men. *The Harriet*, 18 L. T. 804.

Liability of Master.]—In his accounts against the mortgagee the master is entitled to security for the amount for which he is personally liable in respect of necessaries. *The Limerick*, 1 P. D. 292; 34 L. T. 708; 3 Asp. M. C. 206—C. A.

Mortgagee Postponed to Maritime Liens.]—An assignee of ship or freight as security for a debt takes subject to subsequently accruing liens, such as for bottomry, salvage, or wages. *The Dowthorpe*, 2 W. Rob. 365.

—— **Postponed to Bottomry.**]—See *The Royal Arch*, and *Case*, post, col. 218.

Foreign Judgment against Ship in rem — Effect of.]—Declaration that the captain of a British ship, whilst on a voyage, drew a bill of exchange upon the then owners for the necessary disbursements of the ship, and the bill was dishonoured at maturity; that the plaintiff had meanwhile become mortgagee of the ship; that by the French law the bonâ fide holder of such a bill, if a French subject, can attach and sell the ship in proceedings in rem in the French courts; that the defendants, being British subjects and holders of the bill, after it was

dishonoured conspired with T., a French subject, that they should indorse the bill to him without value, and that he should take proceedings against the ship in the French courts, falsely representing that he was a bonâ fide holder for value; that this was done and the ship sold by order of a French court, whereby the plaintiff was deprived of his rights as mortgagee:—Held, that the declaration was bad, as no action could be maintained whilst the foreign judgment was unreversed. *Castrique* v. *Behrens*, 30 L. J., Q. B. 163; 7 Jur. (N.S.) 1028; 4 L. T. 52.

Hypothecation of Freight — Priority — Debenture Holders.]—The directors of a shipping company held to have power under the articles of the company, as against debenture holders, to charge the freight of two ships in order to raise money to carry on the business of the company. The debenture holders having brought actions to enforce their securities, and the company having gone into liquidation:—Held, that the charge upon the freight was to be preferred to the debenture holders' securities. *Ward* v. *Royal Exchange Shipping Co.*, 58 L. T. 174; 6 Asp. M. C. 239.

Wages Lien—Priority to Mortgage Debt.]—See *The Bangor Castle*, supra, col. 120; *and see* supra, 4. RIGHTS OF MORTGAGEE.

First and Second Mortgagees.]—The general principle that a first mortgagee whose mortgage is taken to cover future advances cannot claim in priority over a second mortgagee the benefit of advances made after he had notice of the second mortgage applies to the registered mortgages of ships notwithstanding s. 69 of the Merchant Shipping Act, 1854. Where priorities depend, not upon the dates of the instruments, but upon a state of facts wholly independent of the dates of the instruments, that section does not apply. *The Benwell Tower*, 72 L. T. 664; 8 Asp. M. C. 13.

7. LIABILITY OF MORTGAGEE.

Possession.]—The mere fact of ownership, without a privity of contract, is not sufficient to render an owner liable for goods furnished on the ship's account; nor does it attach any obligation on a mortgagee merely as such, as he derives no profit until the ship comes into his actual possession. *Baker* v. *Buckle*, 7 Moore, 349; 24 R. R. 685.

A mere mortgagee of a ship, who does not take possession, is not liable for necessaries supplied for the use of the ship previously to a retransfer. *Twentyman* v. *Hart*, 1 Stark. 366.

Where a ship is mortgaged, and the mortgagor continues in possession, the master employed by him cannot maintain an action for wages and disbursements against the mortgagee. *Annett* v. *Carstairs*, 3 Camp. 354.

A reply in a cause of necessaries, leaving it doubtful whether the person in possession of the vessel at the time of the supply was the original mortgagee or the transferee of the mortgage, is bad. *The Troubadour*, L. R. 1 A. & E. 302; 16 L. T. 156.

A mortgagee in possession will not be liable for necessaries supplied, unless the master in ordering them acted as the agent of the mortgagee. *Ib.*

An allegation that a defendant was in possession of the vessel at the date of the supplies, and personally liable for them, will not be a good reply to an answer of a defendant claiming to be a mortgagee prior to the date of the supply. *Ib.*

A., the owner of a ship, executed an absolute bill of sale of it to B., and by another deed of the same date assigned other property to B., which deed of assignment (reciting that the bill of sale was for the better securing a sum of money lent by B. to A., and also reciting a bond and warrant of attorney given by A. to B. to secure the same sum) declared that these "several deeds and instruments were made to enable B., by sale of all the things comprised in them, to raise the sum lent without the concurrence of A., at any time before the money should be paid off"; but in the same deed there was a covenant that, upon payment of the money, "B. should reconvey to A., but so as not to prevent B. from selling, &c., at any time before the full payment," &c.:—Held, that under these conveyances B. was not absolute owner of the ship, but only mortgagee; and was not liable for necessaries provided for the ship before he took possession. *Jackson* v. *Vernon*, 1 H. Bl. 114.

Mortgagee and Broker.]—If a person, who is mortgagee as well as broker of a ship, gives directions for repairs to be done, the question for the jury will be, in an action by the tradesman against him, whether he gave the directions only in his character of broker, or as a person having an interest in the vessel. *Castle* v. *Duke*, 5 Car. & P. 359.

Repairs—Liability for—Lien.]—A mortgagor of a ship, who remains in the ostensible ownership, has an implied authority to confer a right of lien for repairs necessary to keep her seaworthy, notwithstanding s. 70 of the 17 & 18 Vict. c. 104, which enacts that a mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship, or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgaged debt. *Williams* v. *Allsup*, 10 C. B. (N.S.) 417; 30 L. J., C. P. 353; 8 Jur. (N.S.) 57; 4 L. T. 550.

Mortgagees are entitled to payment in priority to material men who at the time of supplying the materials were not in such actual possession of the ship as to give them a possessory lien over her. *The Scio*, L. R. 1 A. & E. 353; 16 L. T. 642.

Where a graving flat was attached to a vessel, and chisels and other implements were on board at the time of arrest, the property of the material men:—Held, that these facts were insufficient to prove possession. *Ib.*

—— **Repairs prior to Transfer of Mortgage.**]—A mortgagee by transfer is liable for repairs done prior to his transfer. *The Skipwith*, 10 Jur. (N.S.) 445; 10 L. T. 43.

Mortgagee in Possession—Liability for Goods Supplied.]—Mortgagees in possession are liable for goods supplied in a foreign port on the order of a manager acting under power of attorney, to the same extent as owners are liable, and it is not necessary for the person who supplied them

to prove that they were used for the ship. *Havilland* v. *Thompson*, 3 Ct. of Sess. Cas. (3rd ser.) 313.

8. Jurisdiction of Admiralty Court.

Extent of.]—The enabling power conferred upon the court of admiralty by 3 & 4 Vict. c. 65, s. 3, did not extend to all questions arising out of a deed of mortgage, but was confined to the ship itself being mortgaged. *The Fortitude*, 2 W. Rob. 217.

Therefore by 24 & 25 Vict. c. 10, s. 11, the jurisdiction was enlarged to claims in respect of mortgages duly registered, whether the ship or the proceeds thereof were under arrest or not. *Ib.*

In Action of Restraint.]—Under 17 & 18 Vict. c. 104, s. 66, and 25 & 26 Vict. c. 63, s. 3, the court will look behind the register to the real character of transactions between co-owners, and treat as a mortgage that which is on the face of it an absolute transfer, if it should appear that such was the intention of the parties. *The Innisfallen*, 35 L. J., Adm. 110; L. R. 1 A. & E. 72; 12 Jur. (N.S.) 653.

Under 17 & 18 Vict. c. 104, s. 70, a mortgagee not in possession of the vessel cannot maintain an action of restraint. *Ib.*

A vessel having been arrested in a cause of restraint between co-owners, the court, on a motion by the charterer, to whom the vessel had been let for a voyage, ordered her release, it appearing that the alleged co-owner was only a mortgagee. *Ib.*

To appoint Receiver on Application of Second Mortgagee.]—Although a second mortgagee has no rights as against a prior incumbrancer, yet as against all other persons he has a right to possession of the ship, and the court will, at his instance, appoint a receiver. *Liverpool Marine Credit Co.* v. *Wilson*, 41 L. J., Ch. 798; L. R. 7 Ch. 507; 26 L. T. 717; 20 W. R. 665; 1 Asp. M. C. 323.

To decide Equities.]—Where an action has been brought by the registered transferee of a mortgage, and the ship arrested, the court will, in conformity with 25 & 26 Vict. c. 63, s. 3, enforce equities between the owner and the mortgagee; and will, in estimating the right of the mortgagee, consider not only the registered documents, but all the transactions between the parties relative to the mortgaged loan. *The Cathcart*, L. R. 1 A. & E. 314; 16 L. T. 211.

To Declare Title.]—A British ship was mortgaged by an instrument that was in the form prescribed by the Merchant Shipping Act, 1854, and was duly registered. The mortgagor died intestate, and the mortgagees sold the ship under their power of sale, and executed a bill of sale to the purchaser. By mistake, a receipt for the payment of the mortgage-money was indorsed on the mortgage and signed by the mortgagee, and produced to the registrar of shipping, who recorded the same. Afterwards the bill of sale was produced to the registrar, who refused to register it, upon the ground that the property in the ship had vested in the representatives of the mortgagor. In order to complete the title of the purchaser a suit in rem was instituted on behalf of the mortgagee and purchaser:—Held, that the court had jurisdiction to grant a decree declaring that the purchaser was entitled to possession of the ship. *The Rose*, 42 L. J., Adm. 11; L. R. 4 A. & E. 6; 28 L. T. 291; 21 W. R. 511; 1 Asp. M. C. 567.

To Order Sale.]—Sale of vessel at the suit of a mortgagee of three-fourths of the shares, decreed. *The Fairlie*, 37 L. J., Adm. 66.

Mortgages of Foreign Vessels—Jurisdiction.]—The arrest necessary to found the jurisdiction of the admiralty division of the high court over claims by mortgagees of foreign ships under 3 & 4 Vict. c. 65, must be in a cause over which the court has jurisdiction; a mere de facto arrest is not sufficient. *The Evangelistria*, 46 L. J., Adm. 1; 35 L. T. 410; 25 W. R. 255.

The admiralty division of the high court has jurisdiction, independently of the judicature acts, to and will entertain, on the intervention of the representative of a foreign state, or by the consent of parties, a cause of possession or mortgage of a foreign ship belonging to such state, so far as to ascertain the true position of the claimants and the nature of their title, and will, where it is for the advantage of all parties, order a sale of the ship. *Ib.*

To restrain Removal of Ship out of Jurisdiction to Enforce Mortgage.]—The defendant, a Spaniard, executed at Santander, in Spain, a mortgage to A. B. of a Spanish vessel, of which he was the master, to secure the repayment by the defendant to A. B., or whoever in future might represent his right, a sum of money and interest; and the mortgage deed contained a proviso that A. B., or whoever might represent him, might exact payment of the loan and interest at any time and in any manner. The plaintiff was the transferee of the mortgage, and the defendant and the vessel being at the port of Q., within the jurisdiction, the plaintiff commenced an action against the defendant to enforce the mortgage, and for an injunction to restrain the defendant from removing the vessel out of the jurisdiction, and duly served the defendant with a copy of the writ. He now moved for an interlocutory injunction to restrain the defendant from removing the vessel out of the jurisdiction until the hearing:—Held, that the court had jurisdiction to grant such an injunction, and it was granted accordingly. *Clavering* v. *Aguire*, 5 L. R., Ir. 97.

No Original Jurisdiction in Admiralty.]—The admiralty court had no inherent jurisdiction in respect of mortgages of a ship. *The Portsea*, Hag. Adm. 84. *The Exmouth*, 2 Hag. Adm. 83, n.

See also XXVI. Admiralty Law and Practice.

9. Costs.

Taxation of.]—Mortgagees' costs will be taxed as between party and party, in accordance with the practice of the court of chancery, and not as between solicitors and clients, where a decree has been made by consent that the mortgagees are to receive their "costs, charges and expenses properly incurred." *The Kestrel*, L. R. 1 A. & E. 78; 12 Jur. (N.S.) 713.

Mortgagees are entitled to charges by their solicitors for attending to take particulars of other suits against the vessel to which they were

not parties; to costs of negotiation between rival incumbrancers which led to nothing, and to which the owners were not parties; and costs of conference with counsel at a stage of the suit when it is not usual for a conference to be held. *Ib.*

Vexatious Arrest—Order to Pay.]—Mortgagee of four sixty-fourth shares of a vessel condemned in the costs, but not damages, occasioned by a wrongful arrest of the vessel. *The Egerateia*, 38 L. J., Adm. 40; 20 L. T. 965.

Priority over Material-men.]—See *The Sherbro*, infra.

First and Second Mortgagee.]—A first mortgagee of a ship, with the concurrence of the second mortgagee, sold the ship and received the proceeds. The second mortgagee, being unable to obtain an account, filed a bill for an account, also charging that the defendant was liable for stores which he had improperly allowed the mortgagor to retain. The defendant alleged that the proceeds of the sale were not sufficient to pay off his mortgage. The chief clerk, by his certificate, found in favour of the defendant as to the stores, but that he had received more than was due to him upon his mortgage. A motion by the defendant to vary the certificate was refused. Upon the question of costs:—Held, that the defendant must pay the costs of the motion, but no costs of the suit on either side. *Tanner* v. *Heard*, 23 Beav. 555; 3 Jur. (N.S.) 427; 5 W. R. 420.

Ship in Possession of Material-men—Costs of Suit to realise Security.]—A mortgagee brought his action to recover his mortgage debt. The ship was in possession of material-men, and, being sold, produced a sum less than their claim:—Held, that the mortgagee was entitled to his costs up to the date of the sale in priority to the material-men. *The Sherbro*, 52 L. J., Adm. 28; 48 L. T. 767; 5 Asp. M. C. 88.

X. BOTTOMRY.

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1. Instruments Amounting to.

Maritime Risk essential Ingredient.]—A master, being in want of funds, and without credit, in a foreign port, executed an agreement with certain parties for advances to be made to him. This agreement contained the following conditions: that the master should draw a bill of exchange, to cover such advances, upon the consignees of the ship at the port to which he was proceeding; that within thirty-four days after his arrival at such port he should discharge and pay such bill of exchange, and all interest which might have become due upon it, together with the money paid by way of premium for effecting an insurance of the vessel during the intended voyage, and until the vessel had taken her departure from the port to which she was proceeding, on a further outward voyage, as also interest on all such money as last aforesaid, at the rate of 9*l.* per cent. per annum, from the time of payment up to the time of such repayment; and for securing the repayment of all such sums and interest, the master bound, pledged, mortgaged and hypothecated the ship, with her tackle, apparel and appurtenances:—Held, that such an agreement is not an instrument which can be enforced in the court of admiralty; it is not a bottomry bond, for there is no maritime risk, an ingredient essential to its vitality. *The Indomitable*, Swabey, 446; 5 Jur. (N.S.) 632; and see *Hill* v. *Snow*, infra, col. 206.

Personal Obligation—No Pledge on Cargo.]—In a respondentia bond, the condition, after reciting that the money was lent upon the goods laden and to be laden on board a ship on her voyage out and home, was that if the ship should proceed on her voyage, and return within thirty-six months (the dangers of the sea excepted), and if the borrower within thirty days after her arrival should pay to the lender the sum agreed on, or if in the voyage and within thirty-six months the ship should be lost by fire, enemies or other casualties, the borrower should within six months after such loss pay to the lender a proportionable average on all the goods carried out and acquired during the voyage which should be saved, then the obligation to be void:—Held, that this was no more than a personal obligation from the borrower to the lender, and did not give the latter any specific pledge or lien on the home cargo, or the proceeds thereof. *Busk* v. *Fearon*, 4 East, 319; 1 Smith, 103.

Payment not Dependent on Arrival of Ship.]—A vessel having put into a foreign port in a damaged state, the master borrowed money of a merchant there for necessary repairs and disbursements; to secure which he drew bills upon his owner, and also executed an instrument which purported to be an hypothecation of the ship, cargo and freight. By this instrument, the merchant who advanced the money forbore all interest beyond the amount necessary to insure the ship to cover the advances; and the master took upon himself and his owner the risk of the voyage, making the money payable at all events, and subjecting the ship to seizure and sale by virtue of process "out of the high court of admiralty of England, or any court of vice-admiralty possessing jurisdiction at the port at which the vessel might at any time happen to be lying or to be, according to the maritime law and custom of England," in the event of the bills being refused acceptance or dishonoured:—Held, that this not being such an hypothecation as could be enforced in the court of admiralty, the payment of the money borrowed not being made to depend upon the arrival of the vessel, the merchant had no insurable interest in the ship. *Stainbank* v. *Sheppard*, 13 C. B. 418; 1 C. L. R. 609; 22 L. J., Ex. 341; 17 Jur. 1032; 1 W. R. 505—Ex. Ch.

Bill of Sale cannot be Construed as Bottomry Bond.]—Where the master, in consequence of damage sustained on the voyage, and the ship

becoming unseaworthy, and no advances on loan or bottomry could be obtained to repair her, sold her to the plaintiffs, who repaired and sent her with a cargo to her registered port in England, but the owners refusing to ratify the sale, or consent to the registry of the ship in the plaintiffs' names, put men on board to take possession of her and the cargo:—Held, that the bill of sale of the ship could not be treated as in the nature of a bottomry bond, as it was not intended so to operate. *Ridgway* v. *Roberts*, 4 Hare, 106.

Loan for Necessaries—Agreement that Lender may insure at Borrower's Cost.]—A foreign vessel was in an English port, and the owner, being temporarily in England and in want of funds for the purchase of necessaries, made an agreement with the plaintiffs, by which, in consideration of their advancing him by cash or acceptance 600*l.* for necessaries supplied to and for the use of the vessel, he thereby undertook to return them the amount so advanced, with interest and all charges, on the return of the vessel from her voyage. And the plaintiffs were thereby authorised "to cover the amount advanced the owner by insurance on ship, &c., out and home, at owner's cost." In an action in rem for necessaries in respect of the amount so advanced:—Held (Brett, M.R., doubting), that the agreement was not equivalent to a bottomry bond. *The Heinrich Bjorn*, 54 L. J., Adm. 33; 10 P. D. 44; 52 L. T. 560; 33 W. R. 719; 5 Asp. M. C. 391—C. A. See *S. C.* in H. L.; 55 L. J., Adm. 80; 11 App. Cas. 270; 55 L. T. 66; 6 Asp. M. C. 1—H. L. (E.)

How Construed.]—Instruments intended to effect bottomry are construed liberally, so as to effect the intention. It is not necessary that sea risk should be expressly mentioned, if it is clear that the lender undertakes it. *Simonds* v. *Hodgson*, 3 B. & Ad. 50; 1 L. J., K. B. 51. S. P., *The Kennersley Castle*, 3 Hag. Adm. 1.

Maritime Interest not Necessary but Material Element.]—Though maritime interest is not a necessary element of bottomry, the rate of interest is material in considering the character of the instrument. *The Emancipation*, 1 W. Rob. 124.

Master may hypothecate Ship Abroad, but cannot bind Owners Personally.]—The master may hypothecate the ship abroad for necessaries; but he cannot bind the owners so as to make them personally liable in admiralty. *Johnson* v. *Shippin* (or *Shepwey* or *Shipway*), 1 Salk. 35. *S. C.*, Ld. Raym. 982; 11 Mod. Rep. 79; Holt, 48.

—— **Cannot make Owner Liable Personally.**]—The master may bottomry the ship, and also make the owner personally liable for the advance. *Samson* v. *Braggington*, 1 Ves. Sen. 442; *Ibid.*, Suppl. 87, 202; but see *Stainbank* v. *Sheppard*, infra, col. 207; and *The Dante*, infra, col. 222.

No Maritime Risk no Bottomry.]—Articles appended to a charterparty signed by the master acknowledged the receipt of money on account of freight, for which he had paid insurance, which with other moneys he agreed should be deducted from his freight "on his safe arrival in London"; and in case his freight should not be sufficient to pay the same, "the debit shall be retained as a bottomry bond."—Held, that there being no maritime risk and no proof that the money was for the ship's necessities, the amount could not be paid out of the proceeds of the ship, as upon bottomry. *The Grecia*, 7 Not. of Cas. 410.

A bottomry bond can only hypothecate something which is in danger of perishing by maritime risk during the time that the bond is running, and therefore cannot validly pledge freight to be earned on a voyage after that maritime risk is ended and the bond is forfeited. *The Staffordshire, Smith* v. *Bank of N. S. Wales*, infra, col. 200.

Part not exposed to Maritime Risk.]—A bond, covering in part property not exposed to maritime risk is bad as to that part, but may be valid as to the residue. *The Sultan*, Swabey, 504; 5 Jur. (N.S) 1069.

Where a part only of goods hypothecated by a respondentia bond reaches its destination, such part is only liable to pay a proportional part of the money secured by the bond, namely, according to the proportion that the value of the goods brought to their destination bears to the total value of the property on which the bond was given. *Ib.*

Lender on Bottomry has no Property in the Ship.]—The lender on bottomry acquires no property in the vessel; his interest is jus in rem, not jus in re, until so declared by the court—Per Sir William Scott. *The Tobago*, 5 C. Rob. 218, 222.

Nature of Bottomry Discussed.]—*Meretone* v. *Gibbons*, 3 Term Rep. 247.

Action for Money Lent—Bottomry Bond given after Bills.]—Action in assumpsit for money lent; verdict for the plaintiff, though subsequently to bills being given for the debt a bottomry bond was given; new trial refused. *Weston* v. *Foster*, 2 Bing. (N.C.) 693; 3 Scott, 155; 5 L. J., C. P. 242.

Foreign Law as to Lien Material.]—The fact that by the law of the country in which the bond is given, there is a lien upon the ship furnishes a presumption in favour of bottomry as against personal credit. *The Vibilia*, 1 W. Rob. 1.

Admiralty Court—Prohibition refused.]—Money borrowed by one on board ship at sea of another on board the same ship for the necessary use of the ship upon bottomry is payable by the shipowner; and if not paid, the ship is bound. Prohibition refused. *Scarreborrow* v. *Lyrius*, and *Cases*, infra, XXVI. ADMIRALTY LAW AND PRACTICE.

2. VALIDITY.

a. Matters affecting.

Agreement for Purchase of Ship.]—A bottomry bond originally valid is not affected by any agreement by the bondholder for the purchase of the ship. *The Heligoland*, Swabey, 491; 5 Jur. (N.S.) 1180.

Bondholder—Communication of Bond to Mortgagees.]—A bottomry bondholder is under no obligation to communicate the existence of the bond to the mortgagees of the ship, and is not affected by the owner concealing it from the mortgagees. *Ib.*

—— **Laches.**]—A mortgagee cannot set up, as a defence to a bond, the laches of the bondholder, unless his position has been thereby prejudiced. *Ib.*

Executed before Shipment of Cargo.]—A bottomry bond upon ship, freight, and cargo for necessary repairs to the ship, executed after the repairs done and the contract of affreightment, but before actual shipment of the cargo, is invalid as against cargo. *The Jonathan Goodhue*, Swabey, 355.

Voyage Illegal.]—Transactions between the owner and mortgagee of the vessel which might render the voyage illegal cannot invalidate a bottomry bond given by the master to a bonâ fide lender, who has only to look to the facts, that is, distress, absence of credit, and necessity. *The Mary Ann*, L. R. 1 A. & E. 13.

Consideration — Pledging Credit.]—A bond may be given, though money has not actually been advanced, to a person who has pledged his own credit for the expenses incurred. *The Royal Arch*, Swabey, 269; 6 W. R. 191.

Executed after Advance—Lien by Foreign Law.]—In a foreign port, where the law gave a lien for advances made for repairs, the master consigned the ship to a merchant to get the repairs done, without any agreement being made as to bottomry. Shortly before the ship sailed the master gave the merchant, at his request, a bottomry bond:—The bond was held valid. *The Laurel*, Br. & Lush. 317; 11 Jur. (N.S.) 46; 13 W. R. 352. *S. C.* on pleading; Br. & Lush. 191; 33 L. J., Adm. 17; 9 L. T. 457.

Advertising for Loan.]—It is proper to advertise before taking up money on bottomry; but the neglect of the master to do so does not affect the validity of the bond. *Ib.*

Maritime Interest.]—The absence of any provision for maritime interest does not make the bond invalid. *Ib.*

Given against Owners' Order.]—A bottomry bond given by the master trading abroad against the orders of his owners to the agents of the owners beyond the sum to which his credit was limited by the owners, and without necessity:—Held, invalid. *The Reliance*, 3 Hag. Adm. 66.

Lender not Bound to see to Expediency of Repairs.]—A foreign lender on bottomry is not bound to see that the repairs for which he lends the money are expedient. *The Vibilia*, 1 W. Rob. 1.

Agreement that Third Party should Repay the Loan.]—Bottomry bond pronounced for notwithstanding an alleged agreement with the owner that the charterer, a partner of the bondholder, should pay the bond. *The Huntcliff*, 2 Hag. Adm. 285.

Bills—Collateral Security.]—A ship being mortgaged to G., sailed on a voyage to Melbourne and back. On her arrival at Melbourne she required necessary repair, and the agents having refused to make further advances upon credit, the master entered into a bottomry bond, hypothecating the ship and her freight to Melbourne and back, and drew bills on G. for the amount secured by bottomry. Before the bills arrived in England G. died, and the holders of the bond and bills failing to obtain either acceptance or payment took proceedings on the bond:—Held, that they, having failed in obtaining acceptance or payment of the bills, were entitled to sue upon the bond, but that the bond could not validly hypothecate freight which had not been earned at the time the bond was payable. *The Staffordshire, Smith* v. *Bank of New South Wales*, 8 Moore, P. C. (N.S.) 443; 41 L. J., Adm. 49; L. R. 4 P. C. 194; 25 L. T. 137; 27 L. T. 46; 20 W. R. 557; 1 Asp. M. C. 365—P. C.

A bottomry bond may be given at the same time with, and as a collateral security for, bills drawn on the owners for money so borrowed. *Stainbank* v. *Sheppard*, ante, col. 196.

When a bottomry bond on ship, freight, and cargo has been given by the master of a ship as collateral security for a bill of exchange drawn by him upon the bondholders, on the understanding that if the bill is properly met by funds being placed in the hands of the latter, the bottomry bond will not be enforced, but the master or shipowners, having placed no funds in the bondholders' hands, give notice that they do not intend to meet it, the bond is not invalid as against the cargo, although the bondholders have conditionally accepted the bill, and have neither presented it to the master for payment nor protested it. *The Onward*, 42 L. J., Adm. 61; L. R. 4 A. & E. 38; 28 L. T. 204; 21 W. R. 601; 1 Asp. M. C. 40.

The lender on bottomry may take bills of exchange as collateral security. *The Ariadne*, 1 W. Rob. 411.

A bottomry bond is not invalid merely because it is given as security for bills of exchange given at the same time. *The Emancipation*, 1 W. Rob. 124.

Nothing Due on Bond—Held Invalid.]—On taking the accounts in a bottomry suit it was found that, after reducing the commission charged by the ship's agent, which was excessive, nothing was due upon the bond:—Bond held invalid. *The Roderick Dhu*, Swabey, 177; 5 W. R. 168.

Demurrage—Compromised Claim.]—A master of a chartered ship having sold a part of the cargo to pay expenses of demurrage, the ship was in course of a subsequent voyage arrested in a foreign port at the suit of the charterer. The charterer's claim was, with the sanction of the court, compromised for a sum of money, and a bond given to the charterer in payment of that sum:—Held, that the bond was invalid. *The Ida*, 41 L. J., Adm. 85; L. R. 3 A. & E. 542; 27 L. T. 457; 21 W. R. 39.

Freight Earned on Subsequent Voyage—Liability.]—Freight earned on a subsequent voyage held liable to satisfy a bottomry bond given on a previous voyage. *The Jacob*, 4 C. Rob. 245; commented on, L. R. 4 P. C. 194.

Bond given by a Master for Repairs in time of his Predecessor.]—Bottomry bonds given by successive masters for repairs done by order of their predecessors, who had died, sustained. *The Wakefield*, cited, 3 Hag. Adm. 8.

Excessive Premium.]—Excessive premium is not a reason for pronouncing the bond invalid.

The Lord Cochrane, 2 W. Rob. 312. S. P., *The Laurel*, supra, col. 199.

Bond given on Land—Admiralty Jurisdiction.]—Semble, a bottomry bond made on land cannot be sued on in admiralty. *Anon.*, 1 Keb. 520.

Bottomry Abroad—Prohibition to the Admiralty Refused.]—The master bottomried the ship at Rotterdam for repairs. Prohibition to the admiralty in a suit upon the bond refused. *Corset* v. *Huseley*, Comb. 135; Holt, 48.

The admiralty has jurisdiction in bottomry whether the bond is given on land or at sea. *Meretone* v. *Gibbons*, 3 Term Rep. 267.

And see post, XXVI. ADMIRALTY LAW AND PRACTICE.

Usury—Maritime Risk.]—The usury laws are not infringed where the money lent is at maritime risk. *Sharpeley* v. *Hurle*, or *Hurrell*, cited, 2 Rolle, 48; Cro. Jac. 208.

Bond given by Master held Invalid as against Cargo Owner.]—A bottomry bond in ship, freight and cargo was granted by the master at the port where the owner of the cargo resided. Advertisements for a loan on bottomry were published, and the cargo owner was aware of them and of the distress of the ship, and that the cargo had been unloaded and reloaded, but no application had been made to him for an advance, nor any express notice given of the application for a loan:—Held, that the bond was invalid as against the cargo owner. *The Nuova Loanese*, 17 Jur. 263.

Bond to Debtor to the Ship.]—A debtor to the ship cannot lend on bottomry. *The Hebe*, 2 W. Rob. 146; 7 Jur. 564. *But see next Case.*

The bond is not vitiated by the fact that the lender was indebted to the ship when the advance was made; it is bad pro tanto only. *The Hebe*, 2 W. Rob. 412.

Bottomry Bond to Ship's Agents—Held Valid.]—A bottomry bond in favour of agents abroad who undertook the superintendence and ordering of repairs, after communicating with the owners of ship and cargo, without intimating that they intended to take bottomry security until just before the ship sails, pronounced against. *The Wave*, 15 Jur. 518.

A bottomry bond is not invalid merely because the advance secured by the bond is made by agents of the ship, provided that they could not be expected to advance on the personal credit of the owners, and gave the master an opportunity of obtaining an advance on the owners' personal credit elsewhere by refusing such an advance. *The Staffordshire, Smith* v. *Bank of New South Wales*, 8 Moore, P. C. (N.S.) 443; 41 L. J., Adm. 49; L. R. 4 P. C. 194; 27 L. T. 46; 20 W. R. 557; 1 Asp. M. C. 365—P. C.

Bond given to stranger in foreign port acting as ship's agent, she being in great distress, held valid. *The Tartar*, 1 Hag. Adm. 1. S. P., *The Vibilia*, 1 W. Rob. 1.

Bond given abroad, partly for the benefit of the shipowners' agent, who threatened to arrest the ship, intended to cover simple contract debts for goods supplied to the ship on the agent's guarantee, held valid. *The Hersey*, 3 Hag. Adm. 404.

Objections to bottomry bond, that it was given to the ship's agents, that the money disbursed was to be repaid by bills on the owner, that the repairs to the ship were improvident, and that she ought to have been sold, overruled. *The Lord Cochrane*, 2 W. Rob. 312.

—— **Or Invalid, according to Circumstances.**]—A. & Co. agreed to purchase at Akyab cargoes of rice for F. & Co., A. & Co. to be secured by hypothecation of the bills of lading and a fixed freight of 5*s.* per ton. Whilst the ship was loading one of the cargoes, A. & Co. advanced about 540*l.* for ship's disbursements, but upon hearing that F. & Co. had stopped payment, induced the master to execute a bottomry bond both for the advances already made and also for a further sum of small amount:—Held, that the first advances were made partly upon personal security and partly upon the margin of freight, and could not therefore be secured by a subsequent bottomry. *The Empire of Peace*, 39 L. J., Adm. 12; 21 L. T. 763.

Held, also, that the further advances were too trivial to render the bond valid with respect to them. *Ib.*

The ship's agent took a bottomry bond, without inquiry as to its necessity or application, for money lent partly to pay for landing charges of a cargo shipped by himself, which had heated. The bond was held invalid. *The Royal Stuart*, 2 Spinks, 258.

An agent lending on bottomry is bound to see to the application of the money. *Ib.* And see *The Rhoderick Dhu*, infra.

Bond given for Master's Private Debt.]—The master cannot hypothecate the ship for a debt of his own. *King* v. *Perry*, 3 Salk. 23.

Recapture — Hypothecation by Mate for Salvage.]—In case of capture and recapture, the mate in the absence of the master can hypothecate the ship for payment of salvage. *Parmeter* v. *Todhunter*, 1 Camp. 591.

Bottomry by Executor of Deceased Part Owner in Good Credit.]—A bottomry bondholder had advanced money bonâ fide, with knowledge of a previous mortgage of the ship and of all other circumstances. The bond was executed by the executor of the deceased sole owner, who had himself already made the necessary advances for the ship, and who had ample credit, and also by the master, who had been appointed by the executor. The bond, opposed by the mortgagees, was pronounced against. *The Dunvegan Castle*, 3 Hag. Adm. 331.

Necessity alone justifies Bottomry.]—To authorise a captain to hypothecate a ship or freight for repairs, the necessity for such hypothecation must exist; if, therefore, an agent of the shipowner in a foreign port has sufficient funds in his hands for the repairs, the captain cannot hypothecate. *Lyall* v. *Hicks*, 27 Beav. 616.

The consent of a managing part owner to a bottomry bond binds his co-owners, and is strong evidence of the necessity of the bond. *The Royal Arch*, Swabey, 269; 6 W. R. 191.

And see Cases, col. 207, infra.

—— **Where no Personal Credit.**]—Bottomry can only be given where money cannot be obtained on personal credit. *The Sydney Cove*, 2 Dods. 1.

It is the vital principle of bottomry bonds that they shall have been taken where the shipowner is known to have no credit—Per Lord Stowell. *The Nelson*, 1 Hag. Adm. 169, 175.

Before resorting to bottomry the master must ascertain that the supplies cannot be procured upon the owner's personal credit. *The Eliza, Heathorn* v. *Darling*, 1 Moore, P. C. 5.

The only ground upon which the master of a ship is justified in resorting to bottomry bonds, and upon which the court has jurisdiction to enforce such bonds, is the inability of the master to obtain money upon personal credit for refitting the ship, or for payment for the repairs and dispatch of the vessel. On a sale of a bottomry bond by auction at a foreign port at the lowest rate offered, an agent of the charterers and sole owners of the cargo, who was at the same port, expressed his willingness to advance what was necessary upon the personal credit of the owners; though it was not proved that the bondholders had notice of the offer at the time the bond was given, the admiralty court pronounced against the bond, and the sentence was affirmed on appeal. *The Prince of Saxe-Coburg, Soares* v. *Rahn*, 3 Moore, P. C. 1.

See also infra, *b.* AUTHORITY OF MASTER.

Shipowner may Bottomry in Case of Necessity.]—The shipowner may bottomry his ship, if he cannot otherwise obtain money, for the ship's necessities; though the master does not join in the bond. Such a bond will rank before a prior mortgage of the ship. *The Duke of Bedford*, 2 Hag. Adm. 294.

Lender must ascertain Necessity.] — The lender on bottomry must ascertain that necessity for bottomry exists, and that without the money the ship cannot proceed. Whether he is bound to see to the application of the money advanced, quære. *The Orelia*, 3 Hag. Adm. 75.

Bond for Repairs before Voyage begun, and given after Voyage ended.]—A bottomry bond may be valid whatever the number of voyages the adventure includes, provided such voyages are intended or consented to by the owners. A bond given in payment of repairs rendered necessary by an accident which occurred before the commencement of a voyage, and dated after the termination of the voyage, held valid. *The Mary Anne*, 4 Not. of Cas. 376; 10 Jur. 253.

—— **Repairs Improvident.**]—See *The Lord Cochrane*, supra, col. 202.

—— **For Repairs, given to Consignees of Charterers—Bills of Exchange.**]—A bottomry bond given just before the ship sailed, for money due for repairs, to the consignees of the charterers, they having been directed by the charterers to "value upon the owner" for other than trivial expenses, sustained. Bills of exchange given at the same time do not affect the validity of the bond. *The St. Catherine*, 3 Hag. Adm. 253.

Cargo—Bottomry or Sale for Repairs.]—The whole cargo may be bottomried, or part of it sold, to pay for repairs to the ship, provided the cargo owner is thereby benefited. *The Gratitudine*, 3 C. Rob. 240, 261.

—— **Part of Cargo Saved.**]—Bottomry bond on ship, freight and cargo, to be paid twenty-one days after the ship's arrival in London, and not to be payable if the ship and cargo be lost or cast away. The ship was abandoned as a total loss before reaching London; part of the cargo was sold and the proceeds brought to London, and part carried to England in another ship. There was no proof that the ship could not have been repaired. The bond pronounced for. *The Elephanta*, 15 Jur. 1185.

—— **Bottomry of Cargo—When Valid.**]—The cargo cannot be bottomried unless where the ship and freight are insufficient. Where the bond was upon ship and cargo only, the freight was applied in discharge of the bond before the cargo was resorted to. *The Dowthorpe*, 2 W. Rob. 73. *And see Cases* infra, cols. 209, 210.

By Substituted Master.] — Bond given by substituted master to the merchant who appointed him, held valid. *The Rubicon*, 3 Hag. Adm. 9.

Abandonment by Shipowner—Bond by Substituted Master.]—The shipowner having abandoned, a substituted master gave a bottomry bond to a holder of a collateral security. Bond sustained. *The Kennersley Castle*, 3 Hag. Adm. 1.

By Master under Arrest.]—Bond executed by master while under arrrest, held valid. *The Heart of Oak*, 1 W. Rob. 204.

Excessive Premium—Refusal of Chancery to Assist in Case of.]—A part owner borrowed money from the plaintiff on bottomry, payable on the return of the ship from the voyage, and he was then going in the service of the East India Company. The East India Company broke her up in the Indies, and the owner sued them and recovered damages, but not to the full value of the ship. The bottomry bondholder brought his bill in chancery to have satisfaction out of the money so recovered, but his bill was dismissed; for a court of equity will not assist a bottomry bond which carries an unreasonable interest. *Dandy* v. *Turner*, 1 Eq. Ca. Abr. 372.

May be Good in Part and Bad in Part.]—A bottomry bond may be good in part and bad in part. *The Tartar*, 1 Hag. Adm. 1; *The Hebe*, 2 W. Rob. 412; *The Augusta*, 1 Dods. 283; *The Osmanli*, 3 W. Rob. 198; 7 Not. of Cas. 322; *The Heart of Oak*, 1 W. Rob. 204. And see *The Empire of Peace*, supra, col. 202.

The court of admiralty has power to reduce the premium on a bottomry bond, if excessive. *The Heart of Oak*, supra.

Bottomry bond pronounced for under suspicious circumstances; of 1,961*l.* 11*s.* 6*d.* claimed upon the reference, 475*l.* 11*s.* 6*d.* only allowed; no costs of suit given to either party; cost of the reference given to the shipowners. *The Gauntlet*, 13 Jur. 413.

A bottomry bond may be good in part, though void for the residue. Where, therefore, a bottomry bond was given by the master at New York, as well for advances to obtain his discharge from arrest, at the instance of the consignees, on account of damage done on the voyage to

part of the cargo, as for payment of the port duties and other disbursements necessary to enable the ship to prosecute her voyage, the judicial committee (reversing so much of the decision of the admiralty court as rejected the bond in toto) sustained the bond to the extent of the sums advanced for necessary supplies and payments of the port duties. *The Prince George*, *Smith* v. *Gould*, 4 Moore, P. C. 21.

Bond given in Port of Owner's Country.]—The master may hypothecate ship and cargo though lying in a port of the country in which the owners reside, provided he has no means of communicating with the owners. *La Ysabel*, 1 Dods. 273.

Bond given before Voyage commences—Quære.]—Whether a bottomry bond given in port prior to the commencement of a voyage is valid. *The Jenny*, 2 W. Rob. 5.

Bond by Master of British Ship in this Country.]—Botttomry bond granted by the master of a British vessel in a port of this country upheld. *The Trident*, 1 W. Rob. 29.

Money lent at Cowes for repairs and service of a British ship, whose owners resided at Newcastle, held not to be matter for bottomry. *The Lochiel*, 2 W. Rob. 34.

—— **In Jersey.**]—Bond given upon a British ship in Jersey: quære, whether it is valid. *The Barbara*, 4 C. Rob. 1.

—— **In Ireland.**]—A bond given in Ireland on a British ship held valid. *The Rhadamanthe*, 1 Dods. 704.

Bond given to free Ship from Arrest.]—A bottomry bond given to free the ship from arrest at Malta for a debt due from the owner to his agent there on a general account, held valid. *The Osmanli*, 3 W. Rob. 198; 7 Not. of Cas. 322.

The mere fact that by the law of the port in which the bond is given the ship may be detained does not make a bond, otherwise invalid, to be valid. *The Augusta*, 1 Dods. 283. And see *The Hersey*, supra, col. 201.

—— **Arrest for Salvage.**]—See *The Sultan*, infra, col. 206.

Bond to meet Consul's Charges.]—Bond given at British consul's instigation, in great part for payment of his commission, upheld. *The Zodiac*, 1 Hag. Adm. 320.

—— **To defray Debts incurred on previous Voyage.**]—Money lent for the payment of debts incurred in a previous voyage not matter for bottomry. *The Lochiel*, 2 W. Rob. 34.

—— **To pay off Previous Bond.**]—The amount of a previous bond given in the same voyage, having been paid off, may be included in a new bond given on the same but not on a subsequent voyage. *The Toivo*, Spinks, 185.

Semble, that payment of one bottomry bond is a good consideration for a new bottomry bond. *Dobson* v. *Lyall*, 2 Ph. 323, n.; 3 Myl. & Cr. 453, n.; 11 Jur. 179, n. See *S. C.*, 8 Jur. 969 (on exception to report).

For Insurance Premiums.]—The master putting into a foreign port of distress has no authority to insure the ship and freight for performing the residue of the voyage, and has no authority, therefore, to grant a bottomry bond on the ship to pay for the premiums of such insurance. *The Serafina*, Br. & Lush. 277.

To free from Arrest for Salvage.]—Where a vessel is lying stranded, and the master cannot communicate with the owner, the master, in order to tranship and send on, may on his own authority give a respondentia bond to release the cargo lying under arrest for salvage. *The Sultan*, Swabey, 504; 5 Jur. (N.S.) 1369.

Charges for Unloading Outward Cargo.]—Every disbursement at a foreign port necessary to enable a ship to prosecute her voyage, made in or about the ship herself or her crew, is a proper subject for bottomry. Charges upon the unloading of the outward cargo are such necessary disbursements. *The Edmond*, Lush. 211; 30 L. J., Adm. 128; 2 L. T. 394. *And see* Lush. 57; 29 L. J., Adm. 76; 2 L. T. 192.

Such disbursements must be for charges for which the owner or master of the ship is liable; those for which the consignee of the cargo is liable are not the subject of bottomry. *Ib.*

Average Contribution.]—A debt for general average contribution, arising in respect of an outward voyage, being a personal debt only, is not a sufficient foundation for a bottomry bond on the ship for the voyage homeward. *The North Star*, Lush. 45; 29 L. J., Adm. 73; 2 L. T. 264.

Consul's Expenses in Suppressing Mutiny.]—Expenses incurred by the British consul in a foreign port, the crew being in possession of the ship and the master in irons, in connection with a mutiny on board, and reinstating the master in his command, held a good foundation for bottomry bond, although at the outset of the matter nothing was said as to giving a bond. *The Gauntlet*, 3 W. Rob. 82.

Usury Laws—Bottomry no Infringement of.]—Bottomry is not invalid as contrary to the usury laws, because of the sea risk. *Sharpley* v. *Hurrell*, Cro. Jac. 208; *Soome* v. *Gleen*, Siderf., pt. 1, 27; *Mason* v. *Abdy*, Holt, 738; *Chesterfield* (*Earl of*) v. *Janson*, 2 Ves. Sen. 27, 124, 142; *Joy* v. *Kent*, Hard. 418; *Roberts* v. *Tremayn*, 2 Rolle, 47; Cro. Jac. 508; *Appleton* v. *Brian*, 1 Keb. 711.

Bottomry bond payable whether the ship return or not sail, bad for usury. *Hill* v. *Snow*, 1 Keb. 358.

Foreign Ships trading to East Indies—7 Geo. 1, st. 1, c. 21.]—Validity of bottomry bonds on foreign ships trading to East Indies. *Sumner* v. *Green*, 1 H. Bl. 302.

b. Authority of Master.

Agent for Cargo Owners.]—The character of agent for the owners of the cargo is imposed upon the master by the necessity of the case, and by that alone. The master is invested by presumption of law with authority to hypothecate the cargo, on the ground that the owners have no means of expressing their wishes; but when such means exist, when communication can be made to the owners, the character of agent is no longer

imposed on the master, because the necessity which creates it does not arise. *The Hamburgh*, infra.

Agent for Owner of Ship.]—If the master orders repairs for his ship, or borrows money on a bottomry bond in order to execute the repairs, he is the agent alone of the owner of the ship in ordering such repairs and borrowing money. *Benson* v. *Duncan*, 3 Ex. 644; 18 L. J., Ex. 169; 14 Jur. 218—Ex. Ch. See *S. C.*, infra.

Master cannot bind Owner beyond Value of Ship.]—The master cannot by bottomry bind the owners beyond the value of the ship. *Anon.*, Ca. in Ch., pt. 2, 238.

Necessity alone Justifies.]—The master may hypothecate the ship only in case of necessity. *Anon.*, Holt, 651; 3 Salk. 23. S. P., *Bridgeman's Case*, Hob. 11.

A bottomry bond executed by the master of a ship cannot be supported against the owners if the master, at the time of executing the bond, had other resources for obtaining the necessary supplies for the ship. *Dobson* v. *Lyall*, 2 Ph. 323, n.; 3 Myl. & C. 453, n.; 6 L. J., Ch. 115; 11 Jur. 179, n. S. P., *Lyall* v. *Hicks*, supra, col. 202; *The Royal Arch*, supra, col. 199.

The obligee in a bottomry bond also chartered the ship for the homeward voyage:—Held, that, from the time the charterparty was made, the sum that would become due for the freight was a resource of the captain, applicable to procuring such sums as were necessary to discharge expenses. *Dobson* v. *Lyall*, supra. *And see Cases* supra, col. 202.

Law of the Flag.]—The extent of the authority conferred on the master of a vessel to bind the owners either of the ship or of the cargo is derived from, and governed by, the law of the flag. *The Karnak*, 6 Moore, P. C. (N.S.) 136; 38 L. J., Adm. 57; L. R. 2 P. C. 505; 21 L. T. 159; 17 W. R. 1028.

No Power to Bottomry before Voyage begun.]—The master has no power to hypothecate the ship before the voyage is begun. *Lister* v. *Baxter*, Str. 695.

Pledging Owner's Credit.]—A master has no authority to hypothecate for money borrowed at a foreign port for necessary repairs and disbursements, and by the same instrument pledge the personal credit of his owner for such advances, whether maritime interest be stipulated for or not. *Stainbank* v. *Sheppard*, 13 C. B. 418; 1 C. L. R. 609; 22 L. J., Ex. 341; 17 Jur. 1032; 1 W. R. 505—Ex. Ch.

The master of a vessel requiring supplies for the further prosecution of her voyage is bound to ascertain whether such supplies can be procured on the personal credit of the owner before he resorts to a bottomry bond as security for their amount. *The Eliza*, *Heathorn* v. *Darling*, 1 Moore, P. C. 5.

Master's Personal Credit.]—A bottomry bond given by a master upon a threat of arrest for supplies previously furnished on his personal credit is void. *The Hessey*, *Gore* v. *Gardner*, 3 Moore, P. C. 79.

To justify resort by a master of a ship to a bottomry bond, it is requisite by maritime law that the advances should be merely to enable the ship to refit; or to pay for the repairs and dispatch of the vessel for the completion of her voyage; and that the master should be unable to obtain such advances upon personal credit. *The Prince of Saxe-Coburg*, *Soares* v. *Rahn*, 3 Moore, P. C. 1.

Though the debts which a master in need of repairs in a foreign port has incurred may be personal, he may borrow money upon bottomry of ship, freight and cargo to pay them from any one not his creditor. *The Karnak*, supra.

By Mate—Capture and Recapture.]—A mate, in the absence of the captain, has a right to hypothecate the ship for the purpose of paying the salvage to the recaptors. *Parmeter* v. *Todhunter*, 1 Camp. 541.

Duty to Communicate with Owners.]—Before resorting to bottomry for raising necessary supplies, it is absolutely necessary, where practicable, that notice should be given by the master to the owner of the vessel, and an allegation that such owner was insolvent is no excuse for not communicating with him, unless he has been judicially declared insolvent, and the ownership of the vessel vested in his assignees, to whom such notice must then be given. *The Panama*, *Barron* v. *Stewart*, 6 Moore, P. C. (N.S.) 484; 39 L. J., Adm. 37; L. R. 3 P. C. 199; 23 L. T. 12; 18 W. R. 1011.

A British ship, under a charter from London to Callao, put into Melbourne for repairs. The master, who was also a part owner, fearing that the shipwrights would, unless their claims were paid, detain the vessel, and that she might thus be unable to fulfil her charter, raised the necessary funds from the ship's assets at Melbourne upon a bottomry bond of the ship and freight:—Held, that the bond was not invalidated by the absence of a previous communication between the master and the co-owner. *The Staffordshire*, 8 Moore, P. C. (N.S.) 443; 41 L. J., Adm. 49; L. R. 4 P. C. 194; 27 L. T. 46; 20 W. R. 557; 1 Asp. M. C. 365—P. C. And see *S. C.*, 25 L. T. 137.

Held, also, that the mortgagee of a ship cannot, for the purposes of such previous communication as is necessary between the party hypothecating the ship and the owner, be deemed an owner: though it may be otherwise if the mortgagee is also the ship's agent and agent for the owner. *Ib.*

The authority of a master to pledge by bottomry for the purpose of raising money for the absolute necessaries of the ship, only arises when he cannot obtain the necessary advances upon the personal credit of the owner, and such power to raise money by bottomry is vested in the master, although the owner resides in the same country, provided there are no means of communication with the owners, and the exigency of the case requires it. *The Oriental*, *Wallace* v. *Fielden*, 7 Moore, P. C. 398.

A ship on a voyage from Galveston, United States, to Liverpool, put into Bermuda disabled. The master wrote to the owners of the ship and cargo, and meanwhile, to avoid delay and loss, commenced repairing the ship. The repairs were completed, and the master then, fearing detention of the ship, and having received no replies from the owners of the ship and cargo, raised money to pay for the repairs on bottomry of the ship, freight and cargo. The lenders were not the repairers of the ship:—Held, that the bond was valid, and bound the cargo. *The Karnak*, 6 Moore, P. C. (N.S.) 136; 38 L. J., Adm.

57; L. R. 4 P. C. 505; 21 L. T. 159; 17 W. R. 1028—P. C. See *S. C.* infra.

The possibility of communication with the owners of the ship or cargo must be construed by estimating the cost and risk incidental to the delay from the attempt to make such communication, and the probability of failure after every exertion made. *Ib.*

Bottomry bond granted at New York by master of a vessel whose owners lived at St. John's, New Brunswick, between which place and New York there was telegraphic communication. The lenders had previously acted as agents for the ship, and there had been no communication with the owners; bond held invalid. *The Oriental*, 7 Moore, P. C. 398—P. C. Reversing 3 W. Rob. 243.

Semble, a bottomry bond given by the captain of a ship at a foreign port is not necessarily void because there was time during the ship's stay at such port for the captain to have written home to his employers, and to have received an answer. *Glascott* v. *Lang*, 2 Ph. 310; 16 L. J., Ch. 429; 11 Jur. 642.

A plea, alleging that the bottomry bond was executed by the master without any express authority from the defendant; and that, at the time when the same was executed, the amount of the costs and expenses exceeded the amount of the value of the ship when repaired, and all the freight that could be earned by the voyage, should the vessel arrive at its destination; and that the defendant, so soon as he received notice, abandoned the ship, and all right and title to the same, and all freight in respect of the voyage, and did never ratify the act of the master:—Held, bad. *Benson* v. *Duncan*, 3 Ex. 344; 18 L. J., Ex. 169; 14 Jur. 218—Ex. Ch. See *S. C.* supra, col. 207.

See also supra, *a.* MATTERS AFFECTING VALIDITY, and infra, 3. ALLOWABLE ITEMS.

Power of Master to Bottomry for Repairs.]—See *Miller* v. *Potter*, ante, col. 17, *and Cases* supra, col. 203.

Cargo—Power to Hypothecate.]—A master has power to hypothecate the cargo as well as the ship for a reasonable purpose only, for the benefit of the ship and cargo. *Hussey* v. *Christie*, 13 Ves. 599; 9 East, 426; 9 R. R. 585.

Where it appeared that at a foreign port, at which the master had taken in necessary supplies, the owner of the vessel had a recognised agent within the possible and probable knowledge of the person making the advance:—Held, that the bottomry bond given for such advance was void. *The Faithful*, 31 L. J., Adm. 81.

The existence of the necessity which the maritime law requires to validate the hypothecation of the ship and cargo by bottomry, is to be ascertained by evidence in the usual manner, the meaning of the term "necessity" in respect of hypothecation by the master being analogous to its meaning in other parts of the law. *The Karnak*, 6 Moore, P. C. (N.S.) 136; 38 L. J., Adm. 57; L. R. 2 P. C. 505; 21 L. T. 159; 17 W. R. 1028—P. C. See *S. C.*, supra.

The necessity, which will validate the hypothecation of a cargo by bottomry, is a high degree of need, arising when choice is to be made of one of several alternatives, under the peril of severe loss, if a wrong choice should be made. And any combination of events which should prevent the completion of the voyage with profit, unless money should be obtained by bottomry, would raise the question whether there was need for bottomry in such high degree as to create a necessity. If, though the repairs are complete, yet the ship cannot leave the port until they are paid for, the completion of repairs is an immaterial fact in estimating the degree of need for bottomry. *Ib.*

A shipmaster has authority to bottomry cargo as well as ship at a foreign port to enable the ship to prosecute her voyage; and the shipowners are liable to indemnify cargo owners if the cargo is attached or sold by the bondholders, without regard to the question of the validity of the bond. *Anderston Foundry Co.* v. *Law*, 7 Ct. of Sess. Cas. (3rd ser.) 836.

A ship on her voyage from Newcastle to Lisbon came into collison and put into Leith for repairs. The master and mate were owners of the ship and incurred a debt of 580*l.* to the shipbroker, which included damages payable to the other ship, repairs, and other charges. Only a small part of this was chargeable against cargo, the bulk being chargeable against ship and freight. The master had no means, except 80*l.*, and bottomried ship, freight and cargo for 500*l.* The cargo owners refused to consent to bottomry the cargo. The ship and cargo were sold for 155*l.*:—Held, that, except as to freight, the bondholder had no right against the cargo, as the master had no power to bottomry it under the circumstances. *Dymond* v. *Scott*, 5 Ct. of Sess. Cas. (4th ser.) 196. *And see Cases* supra, cols. 203, 204.

Cargo Bottomried—Indemnity against Shipowner.]—A ship was damaged by perils of the sea, and the master hypothecated, by a bottomry bond, the ship, freight and cargo, amongst which were the goods of the plaintiff. The ship and freight not realising the amount borrowed, his goods were attached in the admiralty court until contribution was paid by him towards the difference due to the obligee of the bond, and he was obliged to pay his proportion of the costs of the suit instituted in the admiralty court:—Held, that he could maintain an action against the owner of the ship on an implied promise to indemnify. *Benson* v. *Duncan*, 3 Ex. 644; 18 L. J., Ex. 169; 14 Jur. 218—Ex. Ch.

Duty to communicate with Owner of Cargo.]—The master of a ship, being only the agent of the cargo in special cases of necessity, is bound, when circumstances permit, to communicate with the owner of the cargo before he does any act which seriously affects the value of the cargo. *The Onward*, 42 L. J., Adm. 61; L. R. 4 A. & E. 38; 28 L. T. 204; 21 W. R. 601; 1 Asp. M. C. 540.

A master, therefore, putting into Port Louis, Mauritius, for repairs to his ship, and intending to raise money for those repairs upon bottomry, not only on ship and freight, but also upon cargo of an imperishable nature and belonging to one firm residing in Great Britain, is bound to communicate with them before having recourse to bottomry; otherwise the bond is invalid. *Ib.*

Bottomry bond upon ship, freight, and cargo, taken up by the master of a small Swedish vessel at a port in Sweden. Part of the cargo was consigned to England:—Held, that, considering the distance between Sweden and England, and the means of communication, it was essential to the validity of the bond, so far as the cargo was concerned, that the master should communicate with the owners of the cargo before resorting to hypothecation of the cargo, as he could have

obtained an answer within a period not inconvenient with regard to the exigency of the circumstances of the case. *The Bonaparte, Wilkinson* v. *Wilson*, 8 Moore, P. C. 459.

The master during the voyage executed a bottomry bond hypothecating the ship, freight, and cargo. The cargo was not perishable, and the master could have communicated with the owners of the cargo before executing the bond:—Held, that the master should have communicated with the owners of the cargo, and that the bond was invalid in respect of the cargo. *The Hamburgh*, 2 Moore, P. C. (N.S.) 289; Br. & Lush. 253; 33 L. J., Adm. 116; 10 Jur. (N.S.) 600; 10 L. T. 206; 12 W. R. 628—P. C.

Whether a master of a vessel without funds or credit must communicate with the owners of the cargo before hypothecating the ship, freight, and cargo, in order to enable him to pay the expense of the necessary repairs of the vessel, is a question which can only be decided by the circumstances of each particular case. *Ib.*

The master before giving a bottomry bond on ship, freight, and cargo, is bound, as against owners of cargo, to communicate both with the owners of ship and the shippers or consignees of cargo, where such communication is under all the circumstances reasonably practicable; but not otherwise. *The Olivier*, Lush. 484; 31 L. J., Adm. 137; 6 L. T. 259.

The defence that a bottomry bond is void for want of communication with the shipowner or cargo owner must be specially pleaded. *Ib.*

The master, before he hypothecates the cargo, ought, if he has the means of doing so, to communicate with the owner; and this is not merely to give the owner an opportunity of advancing the requisite funds, but also to give him an opportunity of unlading the cargo; although he cannot do this without payment of the entire freight. *The Lizzie*, L. R. 2 A. & E. 254; 19 L. T. 71.

What Communication to Owner Sufficient.]—To justify a master in giving a bottomry bond on cargo where communication with the owners is necessary, a mere statement of injuries sustained by the ship and of the consequent necessity for repairs entailing considerable expense, unaccompanied by a statement that a bottomry bond is proposed, is not a sufficient communication; the law does not require the owners from such premises to draw the conclusion that the ship and cargo must be bottomried; although it may not be required that the words "bottomry of cargo" should be used in the communication, the fact itself should be stated, or at least the necessity for a bottomry bond should be an obvious and irresistible inference from the circumstances stated. *The Onward*, supra.

A communication detailing the disasters to the ship, and the probable expense of repair, but not expressing the intention to bottomry the cargo, and requesting the owners of cargo to wait for further information, is not, where any communication is necessary, sufficient; more especially where the information as to the bottomry has been given to the shipowners, but withheld from the owners of cargo; and under such circumstances the owners of cargo are not bound to conclude that the master will resort to bottomry, or to reply to the communication. *Ib.*

A master cannot bottomry a ship without communication with his owner, if communication is practicable, and, a fortiori, he cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner is practicable. Such communication must state not merely the necessity for expenditure, but also the necessity for hypothecation. *Kleinwort* v. *Cassa Marrittima of Genoa*, 2 App. Cas. 156; 36 L. T. 118; 25 W. R. 608; 3 Asp. M. C. 358—P. C.

A statement by the master of the injuries sustained by a ship and of the repairs necessary is not a sufficient communication with the owners to justify him in giving a bottomry bond upon the ship and cargo, if unaccompanied by a statement that such bond is necessary. *Ib.*

The mere receipt by the owners of the cargo of general information that the ship is damaged, and in need of repairs, does not impose upon them the duty of supplying money for such repairs without further information. *Ib.*

A Swedish vessel, bound from a port in Sweden to Hull, was driven, by stress of weather, to put back into another port in Sweden. This took place in November, 1848. Ten days afterwards the cargo was unladen, and the ship found to be greatly damaged. The repairs were completed, and the cargo reloaded. The master at once communicated with the owners of the ship resident in Sweden, who, being without funds, consented to the master taking up a bottomry bond for payment of the necessary repairs, and the British consul at the port where the vessel lay wrote on behalf of the master, and as his agent, to the consignees at Hull, informing them of the damage sustained by the vessel, but made no application for money, nor referred to the necessity of repairs. No answer was made to this letter, and the master, in March, 1849, hypothecated the ship, freight, and cargo, for the money borrowed for the repairs:—Held, that such letter to the consignees was a sufficient notice to authorise the master raising money by bottomry on the cargo. *The Bonaparte, Wilkinson* v. *Wilson*, 8 Moore, P. C. 459.

—— **Bond given to meet Expenses caused by Cargo Owners' Delay—Deduction from Freight.**]—Where the master was obliged to sell part of the cargo abroad to defray the ships' expenses and gave a bond on cargo for further advances, the owners of the cargo, if they caused the delay which occasioned the expenses, cannot refuse payment of any part of the freight or deduct it from the sum due on the bond. *The Angerona*, 1 Dods. 382.

—— **Bond given to Consignee of Cargo.**]—A bottomry bond given to consignee of cargo, there being a consignee of ship in the place, upheld; it not being shewn that the lender was aware that bottomry was not necessary. *The Nelson*, 1 Hag. Adm. 169.

Hypothecation of Cargo before Shipment.]—*The Jonathan Goodhue*, Swabey, 33, supra, col. 199.

Hypothecation of Freight—Advances Deducted.]—A. chartered a ship then on an outward voyage to load a cargo in Cuba for London, agreeing that his agent should make such advances in Cuba as he should think the ship required. The master bottomried the ship and freight before she reached Cuba. Certain sums were advanced by the agent in Cuba; and in the bondholder's suit against the ship and freight A. brought into the registry the freight less the

sums advanced in Cuba:—Held, that such deduction was properly made. *The Standard*, 6 W. R. 222.

Hypothecation of Ship, Freight and Cargo—Rights of Cargo Owner.]—The holder of a bottomry bond on ship, freight, and cargo, is upon conclusion of proceedings by default against ship and freight, entitled to the full freight in payment of his bond and costs; the owner of cargo who has paid the freight into court, is not entitled to a reference as to the amount due on the bond, although part of the cargo was sold by the master and the proceeds applied to ships' expenses before the bond was executed. *The Gem of the Nith*, Br. & Lush. 72.

Amount of Freight—Deduction of Insurance.]—The charterer may deduct from the freight payable to a bottomry bondholder the premium for insurance of part of the freight advanced according to stipulations in the charterparty before the bond was granted. *The Catherine*, Swabey, 263; 5 W. R. 829.

c. By what Law.

Where Ship is Foreign.]—The owner of cargo who ships it on board a foreign vessel, ships it to be dealt with by the master according to the law of the flag, that is, the law of the country to which the vessel belongs, unless that authority be limited by express stipulation at the time of the shipment. Therefore a bond made by the master of a foreign ship hypothecating cargo laden on board such ship, if valid according to the law of the flag of the ship, will be enforced by the English admiralty court, on the arrest of the ship and cargo at the port of London (the port of discharge within the meaning of the bond), although the conditions imposed by English law as essential to the validity of such bond have not been complied with. *The Gaetano and Maria*, 51 L. J., Adm. 67; 7 P. D. 137; 46 L. T. 835; 30 W. R. 766; 4 Asp. M. C. 470—C. A.

The validity of a bottomry bond taken up in a foreign port upon a foreign ship, freight, and cargo, the owners of the cargo being English, and the ship and cargo being proceeded against in England, is to be governed by the general maritime law, and not by the lex loci contractûs, or the law of the country to which the vessel belongs. *The Hamburgh*, 2 Moore, P. C. (N.S.) 289; Br. & Lush. 253; 33 L. J., Adm. 116; 10 Jur. (N.S.) 600; 10 L. T. 206; 12 W. R. 628—P. C.

A master of a French ship contracted to carry a cargo, the property of the plaintiff, from the West Indies to Liverpool. The ship being sea damaged put into a port of refuge for repairs, to meet the charges of which the master hypothecated the ship, freight, and cargo. The French law is not in force either at the place where the charterparty was executed, or where the cargo was shipped, or the port of refuge where the ship was repaired. Upon the arrival of the ship at Liverpool, proceedings were instituted in the admiralty court upon the bottomry bonds executed by the master, to which suit the owners (the defendants) being French subjects and domiciled in France did not appear, relying on the French law that the owner of a ship may in all cases free himself from the acts and engagements of the master, in all that concerns the ship and voyage, by the abandonment of the ship and freight. The value of the ship being insufficient to satisfy the bonds, the plaintiff, in order to save his cargo, paid the remaining sum due upon the bonds, costs, &c., and then sued the defendants as upon an implied indemnity:—Held, that he was not entitled to recover. *Lloyd* v. *Guibert*, 6 B. & S. 100; 35 L. J., Q. B. 74; L. R. 1 Q. B. 115; 13 L. T. 602—Ex. Ch. Affirming 10 Jur. (N.S.) 949; 12 W. R. 953.

East India Trade.]—The 7 Geo. 1, c. 21, s. 2, which prohibits loans of money on bottomry of vessels designed to trade in the East Indies, has, since the other restrictions upon the East India trade have been removed, been repealed by implication. *The India*, Br. & Lush. 221; 33 L. J., Adm. 193; 12 L. T. 316.

Power of Master to Bottomry—Law of Flag.]—Per Erle, C.J. See *The Karnak*, 6 Moore, P. C. (N.S.) 136; 38 L. J., Adm. 57; L. R. 2 P. C. 505; 17 W. R. 1028.

3. Allowable Items.

Premiums of Insurance—Advance Freight.]—A charterer may deduct from the freight payable to a bondholder the premium for insurance of part of the freight advanced, according to stipulations in the charterparty before the bond was granted. *The Catherine*, Swabey, 263; 5 W. R. 829.

Expenses of Ship at Port.]—All expenses incurred in the port where the bond is given relating to the ship or crew, being expenses for which the master or owner of the ship is liable, and being necessary to enable the ship to proceed on her voyage, may be allowed. *The Edmond*, Lush. 211; 30 L. J., P. 128; 2 L. T. 394.

Law Expenses.]—The agent of a ship abroad applied a balance of freight in discharge of law expenses relating to the ship's business, and took a bottomry bond for other payments, for which there was a lien on the ship:—Held, that the amount of such law expenses could not be deducted from the bond. *Ib.*

Commissions.]—Where a cargo is unshipped, stored and transhipped at a foreign port, and a respondentia bond is given to defray the charges, the court, though considering the custom of the port, will not allow as items in the bond any commissions beyond a reasonable amount, calculated upon a principle of quantum meruit. *The Glenmanna*, Lush. 115.

Commissions charged at St. Thomas's of two per cent. on the value of cargo for storage, and of two and a half per cent. for landing and reshipping, disallowed, and in lieu thereof reasonable sums allowed. *Ib.*

Commissions of five per cent. on cash advances reduced to two and a half per cent., according to the practice observed in the registry. *Ib.*

Commissions on freight in respect of the vessels chartered to tranship disallowed. *Ib.*

A usage to establish a right to deduct commissions for obtaining the charter from the freight as against the holder of a bottomry bond must be distinctly proved. *The Karnak*, infra.

A commission of two per cent. on the value of ship and cargo, in addition to ten per cent. maritime interest on the sum advanced, charged for

management of the ship's business in port of distress by the lenders on bottomry disallowed. *The Calypso*, 3 Hag. Adm. 162.

Commission for unshipping and care of cargo, and wages advanced to crew abroad, disallowed. *The Cognac*, 2 Hag. Adm. 377.

Advance to Master.]—Advance of money to master for alleged services in taking care of the cargo and for personal expenses was not allowed as charges on cargo. *The Glenmanna*, supra.

In a suit on a bottomry bond hypothecating "ship, cargo, and freight," it appeared that the master had before bottomry obtained advances on account of freight from the charterers:—Held, that the obligee had no claim to freight so advanced by the charterers prior to bottomry, provided the advances were made bonâ fide. *The Karnak*, 6 Moore, P. C. (N.S.) 136; 38 L. J., Adm. 57; L. R. 2 P. C. 505; 21 L. T. 159; 17 W. R. 1028.

Sums Advanced for Disbursements.]—Sums advanced for disbursements partly upon personal security and partly upon security of freight cannot be made the subject of bottomry. *The Empire of Peace*, 39 L. J., Adm. 12; 21 L. T. 763.

Cost of Insuring Bottomry Loan.]—Charge for insuring part of the money lent on bottomry at a bottomry premium disallowed. The lender must insure by a separate contract on his own account. *The Boddingtons*, 2 Hag. Adm. 422.

Simple Contract Debts—Wages.]—The inquiry before the master was, what sum of money on a particular day was due and payable upon a certain bottomry bond, and what was necessary for discharging such other demands against the ship as were necessary to be discharged, and of defraying such expenses as it was necessary to incur to enable the ship to proceed home:—Held, that a private debt of the captain was not within the meaning of the inquiry, although it might prevent his returning with the ship. *Dobson* v. *Lyall*, 2 Ph. 323, n.; 8 Jur. 969. See *S. C.*, 3 Myl. & Cr. 453, n.; 6 L. J., Ch. 115; 11 Jur. 179, n., supra, cols. 205, 207.

Held, secondly, that a sum of money which was required for the purchase of stores and payment of wages at a port into which the ship put on the homeward voyage was within the meaning of such inquiry, although, on the particular day named, such sum could not be definitely foreseen. *Ib.*

Thirdly, that a sum which became payable for seamen's wages, dues, and other expenses, immediately upon the completion of the homeward voyage, was also within the meaning of the inquiry. *Ib.*

Price of Goods supplied on Personal Credit.]—Goods supplied in the first instance on personal security alone cannot afterwards be made the subject of bottomry. *The Augusta*, 1 Dods. 283.

Advances made on Personal Credit.]—Small advances made without express reference to bottomry may be included in a subsequent bond. *The Vibilia*, 1 W. Rob. 1.

Simple Contract Debts bought up by Lender on Bottomry.]—Debts owing upon personal credit bought up from the ship's creditors by the lender cannot be the subject of bottomry. *The Ocean*, 2 W. Rob. 429, 466.

Advances to pay previous Debts.]—Advances made for the ship's service, to pay debts incurred before the advances, may be included in a bottomry bond. *The Hebe*, 2 W. Rob. 412; 4 Not. of Cas. 361; 10 Jur. 227.

See further as to Allowable Items, supra, cols. 198 seq.

4. Priorities.

Marshalling.]—*See* infra, col. 220.

Master's Wages.]—The claim of a master for his wages earned and disbursements made subsequently to a voyage, during which a bottomry bond had been given on his ship, takes priority over the claim of a bondholder. *The Hope*, 28 L. T. 287; 1 Asp. M. C. 563.

A bottomry bondholder is entitled to priority over the claim of a master for wages earned on previous voyages. *Ib.*

The master of a French lugger executed bottomry bonds on ship, freight, and cargo, and bound himself personally by the bonds. The ship arrived at her port of destination, and the bonds were indorsed to the owners of the cargo, who instituted a suit against ship, freight and cargo, to enforce payment of the bonds. The master afterwards instituted a suit against the ship and freight for wages. The proceeds of the ship were insufficient to pay the bonds: but the proceeds of the ship, together with the freight and the value of the cargo, were sufficient to pay the bonds as well as the wages of the master:—Held, that the master was entitled to have his wages paid out of the proceeds of the ship before any portion of that fund was appropriated to the payment of the amount due on the bonds. *The Eugénie*, L. R. 4 A. & E. 123; 29 L. T. 314; 21 W. R. 957; 2 Asp. M. C. 104.

Bottomry bond on ship, freight and cargo; proceeds of ship and freight insufficient:—Held, that though the master bound himself by the bond, and was also a part owner of the vessel, the owners of part of the cargo could not oppose his right to be paid his wages and disbursements in priority to the bondholder. *The Daring*, 37 L. J., Adm. 29; L. R. 2 A. & E. 260.

The general rule that a master who has bound himself as well as ship and freight for the payment of a bottomry bond is not entitled to payment of his own claims in priority, will not be acted upon where the bottomry bondholder will not be prejudiced by the master being paid before him. *The Edward Oliver*, 36 L. J., Adm. 13; L. R. 1 A. & E. 379; 16 L. T. 575.

The master of a foreign ship having by the bottomry bond bound himself as well as the ship and freight cannot enforce his lien for wages as against the bondholder. *The Jonathan Goodhue*, Swabey, 524.

By a bottomry bond, the master covenanted that he had authority to charge the vessel, and that the vessel and cargo, with the freight, should at all times after the voyage be liable for the payment of the amount due under the bond:—Held, that this covenant did not affect the master's right to be paid his wages in priority to the bondholder. *The Salacia*, 32 L. J., Adm. 41; 9 Jur. (N.S.) 27; 7 L. T. 440; 11 W. R. 189.

Seamen's Wages.]—Seamen's wages earned before the giving of a bond are to be preferred to the bond. *The Union*, Lush. 128; 30 L. J., Adm. 17; 3 L. T. 280.

Bond on ship, freight and cargo, ship and freight insufficient to pay the same, suit by seamen against ship and freight for wages, the owners of the cargo allowed to defend, because having an interest in the administration of the fund, but the claim of the seamen ultimately pronounced for, as superior to that of the bondholder, and therefore to that of the owners of the cargo deriving through him. *Ib.*

—— **Payment on Account of Wages.**]—Wages are preferred to a bottomry bond given before the wages are earned; and one who has paid the wages at the master's request. *The William F. Safford*, infra. And see *The Mary Ann*, 9 Jur. 94.

Wages Paid by Bottomry Bondholder.]—Bottomry bondholder paying wages of crew in order to save expense of their detention by order of court given priority in respect of such payment over all other claims. *The Kammerherre Rosenkrants*, 1 Hag. Adm. 62.

The court will not, unless upon application being made to it, sanction the repayment of wages to bondholders out of the proceeds of the sale of a ship. *The Cornelia Henrietta*, L. R. 1 A. & E. 51; 12 Jur. (N.S.) 396; 14 W. R. 502.

Disbursements and Wages Paid by Shipowner.]—A shipowner paid wages and other necessary disbursements in respect of a ship upon which a bottomry bond had been given. The ship was sold at the suit of the bondholder:—Held, that such payments being made without leave of the court the shipowner was not entitled to priority over the bottomry bond. *The Janet Wilson*, 6 W. R. 329.

Ship, Freight and Cargo Bound—Priorities.]—Bottomry bond against ship, freight and cargo. Judgment by default against ship and freight; as against the cargo the bond contested:—Held, that the bondholder is entitled to payment out of the freight, and that the cargo owner has no right to have it kept in court for payment of his costs, in the event of the bond being pronounced invalid against cargo. *The Lord Cochrane*, 1 W. Rob. 312.

Scotch Law—Arrestment—Freight—General Average.]—Consignees of cargo subject to a claim for general average on board a ship subject to bottomry sold it upon the terms that the price should include freight, "the average and bottomry bond to be for account of and settled by sellers." The bill of lading was indorsed to the purchasers, who retained part of the price to meet a balance of freight. A creditor of the owner and master of the ship subsequently used arrestments in the hands of the holder of the bill of lading:—Held, that the arrestees were accountable for so much of the freight as remained in their hands at the date of the arrestment without deducting the amount of the bottomry bond, to which they had not acquired title until after the arrestments; and that the arrestments attached the amount due to the ship for general average. *Ranking* v. *Tod*, 8 Ct. of Sess. Cas. (3rd ser.) 914.

Necessaries—Broker's Advances.]—A broker, procuring necessaries to be supplied to a ship, and paying for them, gives credit to the master and owners, and stands in a different position from a tradesman supplying; his claim, therefore, does not take precedence as a claim under a bottomry bond. *The Flor de Funchal*, 35 L. J., Adm. 119; 13 W. R. 1000.

A bottomry bond is preferred to a claim of necessaries previously pronounced for, the necessaries having been supplied before the bond. *The William F. Safford*, Lush. 69; 29 L. J., P. 109; 2 L. T. 301.

Merging Claims.]—A cause of necessaries was instituted in a county court, and subsequently transferred to the court of admiralty. The petition in the court of admiralty alleged that a bottomry bond was given as security for the amount due for necessaries:—Held, first, that the claim for necessaries merged in the bottomry. *The Elpis*, 42 L. J., Adm. 43; L. R. 4 A. & E. 1; 27 L. T. 664; 21 W. R. 576; 1 Asp. M. C. 472.

Held, secondly, that the suit having been transferred as one for necessaries could not be retained as a cause of bottomry. *Ib.*

Purchaser without Notice of Bond.]—A British ship, upon which a bottomry bond had been taken payable on her arrival in England, was sold by her master at Bahia as unseaworthy to a foreigner who repaired her and sent her to England. There was no evidence of notice of the bottomry having been given at the sale:—Held, that the ship was subject to the bond. *The Catherine*, formerly *The Croxdale*, 15 Jur. 231.

Viaticum of Master and Crew.]—The viaticum of master and seamen of a foreign ship arrested in this country by bottomry bondholder is paid before the bond. *The Constancia*, 15 W. R. 183.

Mortgages.]—A bottomry bond is entitled to priority of payment over a mortgage during the voyage for which the bond was executed; but when due, should be enforced within reasonable time, and a voluntary agreement on the part of the holder to postpone payment under it alters its character totally, and substitutes a contract over which the admiralty court, at least, has no jurisdiction. *The Royal Arch*, Swabey, 269; 6 W. R. 191.

The charterer of a ship in a foreign port, who had notice of a prior mortgage on the ship and its future earnings, agreed with the master, who was also owner, to advance on bottomry such a sum as should be necessary to equip the ship for the homeward voyage, and a bottomry bond was accordingly executed; but the necessary cost of the outfit exceeded the amount of the bond:—Held, that as against the mortgagee he was not entitled to set off the excess against the sum coming due under the charterparty. *Dobson* v. *Lyall*, 2 Ph. 323, n.; 3 Myl. & Cr. 453, n.; 6 L. J., Ch. 115; 11 Jur. 1794. *And see* tit. IX. MORTGAGE.

Mortgagee Intervening—Freight not brought in—Payment of Bond out of Proceeds of Ship.]—A ship was sold in a bottomry suit; the owners and a mortgagee of the ship intervened and the mortgagees resisted payment out to the bondholder until freight (also part of the bottomry security) should be brought in:—Held, that the mortgagee had no right to impede payment to the bondholder. *The Percy*, 3 Hag. Adm. 402.

Execution Creditor and Bondholder.]—See *Ladbroke* v. *Crickett*, post, col. 227.

Later Bond preferred to Earlier.]—Bottomry bonds of later date are preferred in payment to those of earlier date. *The Rhadamanthe*, 1 Dods. 201. S. P. *The Eliza*, 3 Hag. Adm. 87.

As between bonds of different dates the last executed must be first discharged. *The Sydney Cove*, 2 Dods. 1; *The Betsey*, 1 Dods. 289.

Bonds of Different Dates Granted on same Occasion.]—Bottomry bonds of different dates granted to lenders upon one advertisement for tenders paid pro rotâ. *The Exeter*, 1 C. Rob. 173, 176.

Payment of Prior Charges.]—The court granted leave to bondholders to pay prior charges, and to have a lien on the ship, cargo and freight, in respect of such payments, which were small in amount, on an affidavit specifying the charges to be paid. *The Fair Haven*, L. R. 1 A. & E. 67; 14 W. R. 821.

Advances under Charterparty.]—A bottomry bond cannot affect a previous contract in a charterparty, so as to take precedence of money advances made subsequently to the bond under the authority of the charterparty. *The Salacia*, Lush. 578; 32 L. J., Adm. 43; 8 L. T. 91. S. P., *The Standard*, supra, col. 212.

Dock Dues.]—A person who has advanced money for the purpose of discharging dock dues stands in the same position as the dock company, and his claim ranks with pilotage and towage claims, and has priority over the claim of a holder of a bottomry bond of a previous date. *The St. Lawrence*, 49 L. J., Adm. 82; 5 P. D. 250.

Lien for Freight Preferred.]—W. shipped at Hayti, on board the ship "Galam," a cargo for Europe. The ship during the voyage became unseaworthy, and put in at Angra, where she was condemned and the cargo discharged. The captain took up a sum of money on the security of the cargo, and granted a respondentia bond for the amount, payable with interest on the arrival of the ship at the port of Falmouth. W. chartered the ship "Mary Jane," of which C. was master and owner, to proceed to Angra and fetch home the cargo. The "Mary Jane" proceeded on her voyage, and on her return she was by bad weather driven ashore at Scilly, and it became necessary to unship the cargo, which was received by B. & Co., on behalf of C., and subject to a right of lien in respect of freight. The respondentia bond had been transferred to M'A. & Co. W., in order to defeat this bond, ordered C. to proceed to Hamburg instead of Falmouth; M'A. & Co. thereupon instituted a suit in the admiralty court on the bond, and the cargo was arrested by an order of that court:—Held, first, that as the cargo could not be carried to its destination by reason of the order of the admiralty court, C. had earned his freight, and had a lien on the cargo for freight, and that such lien was preferable to the claims under the respondentia bond. *Galam, Cargo ex*, 2 Moore, P. C. (N.S.) 216; Br. & Lush. 167; 33 L. J., Adm. 97; 10 Jur. (N.S.) 477; 9 L. T. 550; 12 W. R. 495; 3 N. R. 254.

Held, secondly, that the subsequent carrying of the cargo by C. was essential to making it available either for the holder of the bond or anyone else, and was in the nature of salvage service; and that in a competition of liens, the shipowner, who has rendered a service of this description, is entitled to priority over the holder of a respondentia bond, who has done nothing, and whose money has contributed nothing towards forwarding the cargo to its destination. *Ib.*

5. Marshalling.

In what Cases.]—Where there is a creditor on two funds, and another creditor on one only of those funds, the assets will be marshalled, if it can be done without violating a rule entitled to preferential observance. *The Priscilla*, Lush. 1; 5 Jur. (N.S.) 1421; 2 L. T. 272.

Where, therefore, there are two bottomry bonds, the first in date on ship and freight only, and the other or last bond on ship, freight and cargo, and ship and freight are insufficient to discharge both bonds, the last bond, which is entitled to priority, must be paid out of ship and freight. *Ib.*

A vessel being at Constantinople, in want of repairs, the master, with the knowledge and approbation of the owner, borrowed money on bottomry. The bond was dated the 12th October, 1858, and was secured on the ship and freight. A second bond on the ship, freight, and cargo, dated the 11th December, 1858, was granted at Odessa; and a third, also on the ship, freight, and cargo, dated the 13th January, 1859, at Syra. The balance of the proceeds arising from the sale of the ship and from the freight, was insufficient to discharge all the claims under these bonds:—Held, that, in order to leave a fund for the payment of the first bond, the court could not compel the owners of the cargo to contribute to the liquidation of the two last executed bonds, so long as the proceeds of the ship and freight were not exhausted. *Ib.*

The general rule that a master who has bound himself, as well as ship and freight, for the payment of a bottomry bond, is not entitled to payment of his own claims in priority, will not be acted upon, where the bottomry bondholder will not be prejudiced by the master being paid before him. Where the master gave bonds on ship, cargo, and freight:—Held, that his claim for wages and disbursements should have priority over those of the bondholders, and that the assets should be marshalled accordingly. *The Edward Oliver*, L. R. 1 A. & E. 41; 9 Jur. (N.S.) 27; 7 L. T. 440; 11 W. R. 189.

The court, acting upon equitable principles, will not direct assets to be marshalled except in cases where the two funds to which one of the creditors can resort belong to the same person. *The Edward Oliver*, supra, distinguished. *The Chioggia*, 66 L. J., Adm. 174; [1898] P. 1; 77 L. T. 472.

Where there are several bonds, some binding the ship and freight, others the ship, freight, and cargo, the court of admiralty will marshal the assets, directing one claim to be satisfied from the cargo, and another from the ship and freight. *The Trident*, 1 Wm. Rob. 29. S. P., *The Mary Ann*, 9 Jur. 94.

Ship and Freight Owners.]—Where a ship and freight are bottomried, the owners being different, the ordinary rule is that they pay ratably. *The Dowthorpe*, 2 W. Rob. 73.

Ship and Cargo Owners.]—Where there is a bottomry bond upon ship alone, and another upon cargo alone, claims for pilotage, towage, and wages satisfied out of proceeds of ship and freight pro rata, and not out of freight only. *La Constancia*, 2 W. Rob. 460; 4 Not. of Ca. 512; 10 Jur. 845.

Different Bonds on Ship and on Cargo.]—Three bonds of bottomry granted upon the same vessel; two of the bonds granted upon the ship alone, the third bond upon the cargo only. In marshalling the assets the court directed the two bonds upon the ship to be paid out of the proceeds of the ship exclusively; the bond upon the cargo to be paid out of the proceeds of the freight in the first instance, and the cargo only held liable if the proceeds of the freight should be insufficient. *La Constancia*, 2 W. Rob. 404; 4 Not. of Ca. 285; 10 Jur. 845.

Ship and Freight to be exhausted before Cargo.]—In bottomry, ship and freight must be first exhausted before resort can be had to cargo. *The Prince Regent*, cited in *The Dowthorpe*, 2 W. Rob. 73, 85.

6. Condition of Loss or Payment.

Abandonment of Voyage.]—A bond becomes payable upon the abandonment of the voyage agreed upon in the bond. *The Heligoland*, Swabey, 491; 5 Jur. (N.S.) 1180.

"Constructive Total Loss."]—The master, in order to raise money for necessary repairs, hypothecated the ship and freight. The bottomry bond contained a clause which provided that the obligation should be void if the obligors should pay in consequence of the loss of the ship such an average as by custom would have become due on the salvage, or if the ship should be utterly lost, cast away or destroyed, in consequence of the perils of the sea. The ship, on her homeward voyage, met with such bad weather as to be obliged to put into an intermediate port, in a damaged state, and after being surveyed was found unseaworthy, and sold, while existing in specie, for a sum less than the amount of the bond:—Held, first, that the doctrine of constructive total loss does not apply to a bottomry bond, as in the case of an insurance between insurers and insured, and the bondholder was entitled to the entire proceeds of the sale of the ship. *The Great Pacific*, 6 Moore, P. C. (N.S.) 151; 38 L. J., Adm. 45; L. R. 2 P. C. 516; 21 L. T. 38; 17 W. R. 933.

Held, secondly, that the clause in the bond did not apply when the ship remained in specie, though so much damaged that it would have cost more to repair her than she was worth. *Ib.*

Insurance on Constructive Total Loss.]—The condition of a bottomry bond provided for its defeasance on payment of the amount of the bond, "or, in case of the loss of the ship or vessel, such an average as by custom shall have become due on the salvage, or if on the voyage the ship or vessel should be utterly lost, cast away, or destroyed." The ship having become a constructive total loss, the bondholder, by a decree in the admiralty court, obtained payment to him of the proceeds of the ship, which had been paid into court, and which were insufficient; the court holding that a bottomry bond was only discharged by payment or by an absolute total loss, and that the condition providing for defeasance on payment of such average as by custom should have become due, did not refer to the case of a constructive total loss. In an action by the bondholder on a policy of insurance upon the bond:—Held, that the doctrine of constructive total loss was not applicable to a policy of insurance on bottomry, and that the condition of defeasance did not apply to the case of a constructive total loss. *Bloomfield* v. *Southern Insurance Co.*, 39 L. J., Ex. 186; L. R. 5 Ex. 192; 22 L. T. 371; 18 W. R. 810.

Voyage not completed through Act of Master, or impossible.]—When money has been advanced on bottomry, and the completion of the voyage is prevented by the act of the master, or by some impossibility which the bondholder cannot control, he may convert his security under the bond into a debt upon personal credit. Bond granted in London stipulating that the money should be paid within twenty-four hours of the ship's arrival in the United States. The ship sailed and put into Plymouth, where she was condemned as unseaworthy. The bond was pronounced for. *The Dante*, 2 W. Rob. 427.

A., intending to go a voyage, enters into a bottomry bond, but the ship not going the voyage, but lying all along safe in the port of London, the court decreed the defendant should lose the premium, and the bondholder accept of his principal with usual interest. *Dequilder* v. *Depeister*, 1 Vern. 263.

Ship arriving, but of no Value.]—A bottomried ship was captured, recaptured, repaired, salved, and then arrived at her destination. She was not worth the amount of the bond, repairs and salvage:—Held, that the holder could recover upon the bond. *Joyce* v. *Williamson*, 3 Dougl. 162.

Ship abandoned as Constructive Total Loss.]—The bond is payable although the vessel is driven to a port for repairs; and although she is abandoned as a constructive total loss. *The Armadillo*, 1 W. Rob. 251; 1 Not. of Cas. 75.

In this case the bottomry bondholder is not entitled to salvage. *Ib.*

Salvage—Total Loss.]—Where there is an actual loss, the lender in bottomry is not entitled to salvage. *The Aline*, 1 W. Rob. 111.

Money lent on Adventure—Ship lost by Fault of Owner.]—Debt on bond for 200*l.*; conditioned to be void on payment of 125*l.* within twenty days of the ship's arrival. Defence that the ship was disabled and did not arrive. Replication that she was disabled through the neglect of the defendant in allowing her to fall into disrepair:—Judgment for the plaintiff. *Dottin* v. *Dowrich*, Lutw. 268.

Deviation—Bond payable though Ship lost.]—Bill in chancery by obligor in a penal bottomry bond to pay 40*s.* per month for 50*l.* The ship was to go from Holland to the Spanish islands and so to England. She went to the Spanish islands, took in Moors in Africa, and so to Barbados, and perished afterwards. The plaintiff being sued on the bond, sought relief in chancery, pretending that the deviation was on necessity. The bill was dismissed save as to the penalty. *Anon.* Ca. in Ch., pt. 2, 130.

Money was lent upon an obligation to repay the same, with interest, upon return of the ship from the specified voyage, unless the borrower should prove her loss. She deviated from the voyage, and was afterwards lost:—Held, that the money was payable. *Western* v. *Wildy*, Skinner, 152.

—— **Pleading.**]—Action of debt on bottomry. Defendant pleads that the ship sailed from L. to B. without deviation, and was lost on her voyage home. Replication, that she deviated by sailing from B. to J. Rejoinder, that the alleged deviation was because of her being pressed into the king's service; absque hoc, that she deviated after being pressed. Demurrer; adjudged for the plaintiffs. *Williams* v. *Steadman*, Skinner, 345; Holt, 126.

Bill of Adventure—Pleading Loss by Perils of Sea.]—Action on bond to proceed on voyage and return, dangers of the sea excepted—"or if the ship be lost before the return or payment, to be void"; plea, the ship was lost; demurrer on the ground that loss by perils of sea was intended. Demurrer overruled, the plaintiff should have replied that the ship was lost by defendant's fault. *Boddington* v. *Wotton*, 2 Keb. 768.

Insurance by Lender on Bottomry.]—*See* post, *Goddart* v. *Garrett*, post, tit. B. MARINE INSURANCE; *Stainbank* v. *Sheppard*, ante, col. 196.

7. INTEREST OR PREMIUM.

Rate of.]—No particular rate of interest is essential, though when the ordinary or a low rate of interest is taken it raises a suspicion that sea risk was not intended, and sea risk is essential to the jurisdiction of the court. *The Royal Arch*, Swabey, 269; 6 W. R. 191.

The defendants having paid into the registry, by order of the court, a sum of money which proved larger than the amount finally pronounced to be due to the bondholder, the bondholder was nevertheless held entitled to the full ordinary interest upon the latter sum from the date of the bond becoming due. *The Edmond*, Lush. 211; 30 L. J., Adm. 128; 2 L. T. 394.

The rate of interest ordinarily payable upon a bottomry loan and the premium thereon after the safe arrival of the ship at the end of the risk is 4 per cent. per annum, and a provision in a bond entered into by the master of a ship, providing for the payment of 10 per cent. per annum interest is not binding on the owners of ship or cargo, provided the provision was entered into without their knowledge. *The D. H. Bills*, 38 L. T. 786; 4 Asp. M. C. 20.

Premiums besides Interest.]—A bottomry bond on ship, freight, and cargo provided for payment of a bottomry loan, together with interest at 8 per cent., at or before the expiration of five days after the arrival of the ship at her port of discharge. The bond further provided that an additional premium of 10 per cent. on the loan should become payable if default was made in payment. The ship having arrived at her port of discharge, default was made in payment of the bond, and a suit was instituted by the bondholder against ship, freight, and cargo, to recover the amount of the loan and interest, and the additional premium of 10 per cent.:—Held, that the additional premium of 10 per cent. could not be enforced against the cargo, but that the bondholder was entitled to interest at 4 per cent. from the date when the bond became payable until payment. *The Sophia Cook*, 4 P. D. 30.

Bottomry Bond not providing for Payment of Interest.]—The master of a Danish vessel being without funds or credit at Hamburg, in order to obtain necessaries to enable his vessel to proceed on a voyage to Africa and back to London, obtained a loan on the security of instruments by which he pledged his vessel and bound himself for the repayment of the sum advanced within six days after the arrival of the vessel in London. No stipulation was made for interest of any kind:—Held, in an action of bottomry instituted against the vessel, that the instruments were valid bottomry bonds, and that the holders were entitled to payment out of the proceeds of the vessel of the sum advanced, together with 4 per cent. interest from the time when the bonds became due. *The Cécilie*, 4 P. D. 210; 40 L. T. 200; 4 Asp. M. C. 78.

In a bottomry bond taken at Calcutta, blanks had been left where the rate of interest ought to have been expressed; the court pronounced for the bond, with such interest as the registrar should find to have been usual on such risks at the time and place the bond was taken. *The Change*, Swabey, 240; 5 W. R. 547.

Interest, from what Date.] — Where the bottomry bondholder is resident abroad, and has no agent in this country, interest will not be payable prior to the arrival of a power of attorney to receive the principal. *The New Brunswick*, 1 W. Rob. 28.

First decree in bottomry suit. Interest from decree to payment out of proceeds of ship refused. *The Exeter*, 1 C. Rob. 173.

Excessive Premium—Power of Court to reduce.]—The court of admiralty has power to reduce the premium on bottomry bonds, but exercises it with caution. Premium reduced from 20 to 12½ per cent. on a voyage from Rochelle to London. *The Cognac*, 2 Hag. Adm. 377. S. P., *The Zodiac* 1 Hag. Adm. 320.

The court, judging the premium to be excessive, will refer it to the registrar and merchants to be reduced. *The Huntley*, Lush. 24.

See also *The Pontida*, infra, col. 227, as to the power of the registrar to reduce excessive premium.

—— **Court of Equity.**]—The plaintiff lent money on bottomry of a ship chartered to the East India Company, who broke her up in India. The bondholder brought his bill to have satisfaction out of damages recovered against the company by the shipowner. Bill dismissed—"for a court of equity will never assist a bottomry bond which carries an unreasonable interest." *Dandy* v. *Turner*, Eq. Ca. Abr. 372.

—— **Does not Invalidate the Bond.**]—*The Lord Cochrane*, 2 W. Rob. 312. S. P., *The Laurel*, supra, cols. 199, 201.

—— **Usury Laws.**]—See *Sharpley* v. *Hurle*, supra, col. 201.

8. JURISDICTION.

A bottomry bond given by a master with the consent of the owner, upon a British ship, lying in a British port, for a new voyage, cannot be sued upon in the court of admiralty; but it is otherwise if the ship was lying in a foreign port. *The Royal Arch*, Swabey, 269; 6 W. R. 191.

The court has jurisdiction in the case of a bottomry bond given by a British subject on the occasion of his purchasing a British ship abroad, and raising money for her outfit to return home and a new voyage. *The Heligoland*, Swabey, 491: 5 Jur. (N.S.) 1179.

The court has jurisdiction over bonds of respondentia as over bottomry bonds. *The Sultan*, Swabey, 504; 5 Jur. (N.S.) 1069.

Prohibition in bottomry refused. *Lister* v. *Baxter*, 2 Str. 695.

The admiralty court has jurisdiction in case of a bottomry bond given in the course of a voyage, though executed on land and under seal. *Menetone* v. *Gibbons*, 3 Term Rep. 267.

The court of admiralty has jurisdiction in a case of bottomry where a bond has been given, or an agreement to execute a bond, though the ship has never put to sea. *The Aline*, 2 W. Rob. 111.

See also post, XXVI. ADMIRALTY LAW AND PRACTICE—PROHIBITIONS.

Jurisdiction of Admiralty Court not Exclusive—Chancery.]—A bill was filed to set aside a bottomry bond which had been given at Trieste without any communication from the captain to the owners in England, and as was alleged, by a fraudulent conspiracy between the captain and the obligee. The court supported the bond, but, at the request of the obligee, directed inquiries as to the amount due on the bond. *Glascott* v. *Lang*, 2 Ph. 310; 2 Ph. 323; 16 L. J., Ch. 429; 11 Jur. 642. And see *S. C.*, 3 Myl. & Cr. 451; 8 Sim. 358; 2 Jur. 909.

The court of chancery had jurisdiction in respect of bottomry bonds. *Dobson* v. *Lyall*, 2 Ph. 323, n; 6 L. J., Ch. 115; 11 Jur. 179, n.; 3 Myl. & Cr. 433, n. And see *S. C.*, 8 Jur. 969.

Injunction granted by the court of chancery to restrain proceedings in the admiralty court upon a bottomry bond and as to freight, upon the ground that there were equities that could be determined only in chancery. *Duncan* v. *McCalmont*, 3 Beav. 409; 10 L. J., Ch. 335; 5 Jur. 262.

—— Of Registrar and Merchants.]—See *The Pontida*, infra, col. 227.

9. PRACTICE.

Action on Bond.]—In an action of bottomry the original bond must be brought in before the validity of the bond is pronounced for. *The Rowena*, 37 L. T. 366; 26 W. R. 82; 3 Asp. M. C. 506. See *The Jeune Nanette*, infra, col. 227.

Owners of Cargo—Persona standi.]—Where the result of the suit mainly affected the owners of the cargo bottomried, the court allowed them to have a persona standi through the bondholder. *The Union*, Lush. 128; 30 L. J., Adm. 17; 3 L. T. 280.

Proceedings by Default—Reference—Cargo Owner.]—The owner of a bottomry bond on ship, freight and cargo, is, upon the conclusion of proceedings by default against ship and freight, entitled as of course to have the full freight due upon delivery of the cargo paid to him, in order to satisfy the sum secured by the bond with costs; and the owner of the cargo, who has paid the freight into court, is not entitled to a reference of the amount due on the bond, notwithstanding that, before the execution of the bond, part of his cargo was sold by the master, and the proceeds applied to the ship's expenses. *The Gem of the Nith*, Br. & Lush. 72.

Claim of Holder to Sum awarded for Loss of Freight.]—Semble, where in an action for limitation of liability a sum of money is awarded as compensation for loss of freight to the owners of a vessel run down by the plaintiff's ship, the holder of a bottomry bond on the freight of the vessel run down is entitled to claim, in respect of the loan on bottomry, a portion of the sum awarded for loss of freight. *The Empusa*, 48 L. J., Adm. 36; 5 P. D. 6; 41 L. T. 383; 28 W. R. 263; 4 Asp. M. C. 185.

Proof of Good Faith.]—In disputed cases of bottomry bonds the court expects that, where it is practicable, the master will, by his affidavit, shew affirmatively the good faith of his own transaction, and the circumstances relating to it. *The Faithful*, 31 L. J., Adm. 81.

Onus—Primâ facie Validity.]—Where the court has decreed the sale of a ship and cargo at the suit of a bottomry bondholder, whose right has not been questioned by the owner of the property, the bond must be taken to be primâ facie valid, and a bondholder has a right to require any other claimant to the proceeds in the registry to prove his interest before he can be called on to defend and maintain his own claim. *The India*, 32 L. J., Adm. 185; 9 Jur. (N.S.) 417; 9 L. T. 234; 11 W. R. 536.

Liability of Bail.]—When in a bottomry suit bail has been given generally to cover ship and freight, but the ship only is held to be pledged by the bond, the bail is only liable to the extent of the value of the ship at the time of release from arrest, and an inquiry will be directed to ascertain that value. *The Staffordshire, Smith* v. *Bank of New South Wales*, 8 Moore, P. C. (N.S.) 443; 41 L. J., Adm. 49; L. R. 4 P. C. 194; 27 L. T. 46; 20 W. R. 557; 1 Asp. M. C. 365.

Consent to Decree not Rescinded.]—Where a defendant in adequate possession of the facts has given his consent to a decree, pronouncing for the validity of a bottomry bond, the court will not rescind the decree, though the facts might possibly raise a valid defence, according to a decision pronounced subsequently to the decree. *The Glenburn*, Br. & Lush. 62; 11 W. R. 685.

Pleading.]—Action on bond to proceed to sea and to return, perils of the sea excepted; and to repay money advanced if the ship return, and if the ship be lost the bond to be void. Plea, that the ship was lost; demurrer, that loss by peril of the sea was intended. Demurrer overruled, because if loss by defendant's default was intended it should have been pleaded. *Boddington* v. *Wotton*, 2 Keb. 768.

War—Enforcement of Bond after Termination of.]—Bottomry bond put in suit by a French merchant in 1792—suspended during the war—not enforced during the following peace; then further prosecuted by a British subject, the indorsee, in 1804:—Held, that the bond could not be enforced in the original proceedings. *The Rebecca*, 5 C. Rob. 102.

Payment out of Court of Proceeds of Ship.]—Bottomry bond against ship, freight and cargo; judgment against ship and freight by default, the consignees of cargo contesting the bond. The proceeds of ship and freight paid out of court to the bondholders, notwithstanding the opposition of the cargo owners, on the ground that such proceeds might be liable to claims by him in respect of cargo sold by the master to pay for repairs or in respect of costs. *The Lord Cochrane*, 1 W. Rob. 312.

Jurisdiction of Registrar and Merchants—Reduction of Premium.] — The validity of a respondentia bond having been admitted, it was referred to the registrar and merchants to decide what amount was payable thereunder. The registrar and merchants reduced the full amount of the bond by lessening the charges in respect of certain metal and felt supplied to the ship, commissions payable to the agents, and the premium on the bond, on the ground that the amounts charged were unreasonable. The plaintiffs objected to the reduction, and filed pleadings in objection to the report:—Held, that it was within the jurisdiction of the registrar and merchants to reduce the amount payable under the bond, since the defendants were not bound to pay more than such sum as was required to pay for things actually necessary for the ship, and at a reasonable rate. *The Pontida*, 53 L. J., Adm. 78; 9 P. D. 177; 51 L. T. 849; 33 W. R. 38; 5 Asp. M. C. 330—C. A.

Held, also, that as the premium on the bond was excessive it had been rightly reduced, and that the report must be confirmed. *Ib.*

See also 7. INTEREST OR PREMIUM, supra.

Rights of Execution Creditor and Bondholder.]—The owner of a ship charged her for repairs done in England by instrument under seal stated to be by way of bottomry. She was arrested by admiralty process, and sold to satisfy the claim for repairs, and no appeal from the decree. Whilst the suit was pending a writ of execution issued against the shipowner at the suit of another creditor. The sheriff cannot seize the ship, nor maintain trover for her against the admiralty officer. *Ladbroke* v. *Crickett*, 2 Term Rep. 649; 1 R. R. 571.

Original Bond in Foreign Court.]—The court will not proceed upon an official or notarial copy of a bottomry bond, the original of which is preserved in a foreign court, without a certificate that no further copy has been or will be issued. *The Jeune Nanette*, 4 W. R. 92. See *The Rowena*, 26 W. R. 82, supra, col. 225.

Amount of Freight to be paid into Court to meet Bond—Advances by Charterer—Part Cargo sold.]—A ship was chartered to go to a port of loading, there to load and return, freight payable as per sale. On the voyage out the master hypothecated the cargo to be shipped, and the ship and freight. At the port of loading advances were made to the master by the charterers' agent, with notice of the bond. On the voyage home the master sold part of the cargo to pay ship's expenses:—Held, that the charterers might deduct the advances made abroad according to the charter, and by the charter declared to be deducted on settling freight, from the amount of chartered freight to be paid into court in respect of the bond; also that the freight which would have been payable upon the goods sold should be deducted; also that advances made to the master beyond the sum stipulated for in the charter should not be deducted, nor the value of the goods sold. *The Salacia*, Lush. 578.

Liability of Freight earned from Sub-shippers.]—Freight earned from sub-shippers of goods by permission of charterers of the whole ship is liable, as against the charterers, in payment of a bottomry bond given at the charterers' port for advances subsequent to the charterparty. *The Eliza*, 3 Hag. Adm. 87.

Action against Master—Arrest of Ship.]—A master, not a part owner, gave a bottomry bond. The holder being unable to arrest the ship, the bond being not yet payable, was about to sue the master. He applied for a warrant to arrest the ship, which was at Leith, to prevent her going to sea. Form of order made. *The Lucovitch*, 12 Ct. of Sess. Cas. (4th ser.), 1090.

Proceedings abandoned—Fresh Proceedings instituted.]—Parties who have abandoned proceedings upon an alleged bottomry bond will not be allowed, except upon strong grounds shewn, to institute fresh proceedings upon the same bond. *The Fortitudo*, 2 Dods. 58.

10. COSTS.

Validity admitted — Amounts disputed.] — Where the bond is admitted to be valid, and referred to the registrar and merchants to report the amount due, the plaintiff is usually entitled to the general costs of the reference, but will be condemned in costs clearly occasioned by improperly persisting in claims which cannot be sustained. *The Kepler*, Lush. 201.

Foreigners Ignorant of the Law.]—Where the holders of a bond (foreigners) had acted solely under a misapprehension of English law, the court pronounced against the bond, but without costs. *The North Star*, Lush. 45; 29 L. J., Adm. 73; 2 L. T. 264.

Arrest before Bond payable.]—Where the holders of a bottomry bond, on ship and freight, payable seven days after the arrival of the ship, being apprehensive that her cargo would be discharged forthwith, and their security diminished, instituted a bottomry suit, after the arrival of the ship and before the expiration of the seventh day, and arrested the ship, the court, on the application of the owners of the ship, who had paid the amount of the bonds and interest into court, condemned the plaintiffs in costs. *The Endora*, 48 L. J., Adm. 32; 4 P. D. 208; 40 L. T. 166; 4 Asp. M. C. 78.

Large Deductions made by Registrar.]—Where, the bond having been pronounced for, large deductions are made by the registrar and

merchants, the bondholder will be liable to the costs of the reference. *The Catherine*, 3 W. Rob. 1.

XI. CHARTERPARTY.

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See also XII. BILL OF LADING; XIII. FREIGHT; XIV. DEMURRAGE; XV. CARGO.

1. STAMPING.

See 54 & 55 Vict. c. 39.

Under previous Statutes.]—Brokers signed a properly-stamped charterparty as agents for their principals, and then, at the request of the owner of the ship, signed a guarantee as follows: "In consideration of our having signed the charterparty of —— as agents of ——, we hereby guarantee the due fulfilment of same":—Held, that this document was sufficiently stamped with a sixpenny stamp, as an agreement, and need not be stamped as a charterparty or an agreement for or relating to the freight or conveyance of money, goods and effects on board a ship, under 5 & 6 Vict. c. 79, s. 2. *Rein* v. *Lane*, 8 B. & S. 83; 36 L. J., Q. B. 81; L. R. 2 Q. B. 144; 15 L. T. 466; 15 W. R. 345.

A copy of the charter signed by or on behalf of the charterer, though that copy is signed by the shipowner, is a copy, and admissible unstamped, if there is any evidence that the original was stamped. *Smith* v. *Maguire*, 1 F. & F. 199. See *S. C.*, 3 H. & N. 554; 27 L. J., Ex. 465; 6 W. R. 726.

It is for the objector to a copy, even if a charterparty, on the ground that the original was not stamped, to make out that fact; at all events, very slight evidence to the contrary will be sufficient to rebut the objection, and a memorandum on the charter, "the brokers hold the original, stamped," is sufficient. *Ib.*

An unstamped charterparty was, within fourteen days allowed, by 5 & 6 Vict. c. 79, s. 21, for stamping such an instrument without payment of a penalty, delivered at the office of the subdistributor of stamps at Cardiff, for the purpose of being transmitted to London to be stamped, the proper amount of stamp duty and postage being left with it. The clerk in that office, to whom it was delivered, proved that he sent to London all documents left with him for that purpose, but he had no recollection of the document in question. The clerks in the office in London were unable to say whether or not the document reached their hands, but they said that, if it did, it would, in the usual course, be returned to the district office in the country. The clerk at Cardiff could not say whether the document was returned to him or not, but he stated that, on search being made for it, no trace of it could be discovered:—Held, that this sufficiently raised a presumption that the document was stamped, so as to let in secondary evidence of its contents. *Closmadeuc* v. *Carrel*, 18 C. B. 36; 25 L. J., C. P. 216; 2 Jur. (N.S.) 474; 4 W. R. 547.

Executed Abroad—Evidence.]—A charterparty executed entirely abroad, and stamped within two months after it had been received in this country, can be received in evidence, since it falls within the provisions of 33 & 34 Vict. c. 97, s. 15, and not of ss. 67 & 68 of that act. *The Belfort*, 53 L. J., Adm. 88; 9 P. D. 215; 51 L. T. 271; 33 W. R. 171; 5 Asp. M. C. 291.

2. THE CONTRACT.

a. Parties.

Mistake as to.]—Action by charterer on a charterparty. Defence, that the charterparty was made between the defendant and a company, and not the plaintiff. Reply, that the agreement was between the plaintiff and the defendant; that in drawing up the charterparty one of the company's printed forms was used, on which the name of the company appeared as charterers; that by the mistake of the plaintiff and the defendant the company's name was omitted to be struck out, and remained instead of the plaintiff's name; that the charterparty was signed by the plaintiff and the defendant, and it was intended and agreed that the plaintiff should be liable and entitled under it:—Held, that it was unnecessary that the charterparty should be rectified, and that the reply was good. *Breslauer* v. *Barwick*, 36 L. T. 52; 3 Asp. M. C. 353.

To an action on a charterparty for not loading, the defendants pleaded that they entered into the charterparty solely as agents for D., and that, before they signed, it was agreed that they were only to sign as agents, so as to bind D., and not to render themselves liable as principals for the performance of the charterparty, and that they signed it as follows, "For D. T. and H., agents"; they and the plaintiff bonâ fide believing at the time that they, having so signed, would not be personally liable, and that they had power to bind D., and that he was bound by it, and liable to be sued, and that the plaintiff was inequitably taking advantage of the mistake in drawing the charterparty so as to make the defendants personally liable as charterers, contrary to the

intention of the plaintiff and the defendants :—Held, that the plea was good on equitable grounds, and also a good plea at law. *Wake* v. *Harrop*, 1 H. & C. 202 ; 31 L. J., Ex. 451 ; 8 Jur. (N.S.) 845 ; 7 L. T. 96 ; 10 W. R. 626—Ex. Ch.

Charterparty under Seal — Execution by Agents.]—A charterparty under seal cannot be executed by an agent not authorised under seal. *Horsley* v. *Rush*, cited, 7 Term Rep. 209.

Master may Sue without joining Co-owners.]—The master, a part owner, may sue above upon a charterparty made between himself and the charterer, without joining the other part owners. *Seeger* v. *Duthie*, 8 C. B. (N.S.) 72 ; 30 L. J., C. P. 65 ; 7 Jur. (N.S.) 239 ; 3 L. T. 478 ; 9 W. R. 166—Ex. Ch.

Who entitled to Sue—Principal or Agent.]—In an action on a charterparty executed not by the plaintiff but by a third person, who in the contract described himself as "owner of the ship" :—Held, that evidence was not admissible to shew that such person contracted merely as the plaintiff's agent. *Humble* v. *Hunter*, 12 Q. B. 310 ; 17 L. J., Q. B. 350.

A declaration alleged a charterparty to be made "between A., therein described as the owner of the good ship called, &c., of the one part, and S., merchant and freighter, of the other part." The charterparty when produced was expressed to be made between A. of the one part and S., "as agent of the freighter," of the other part, and stipulated that, "being concluded on behalf of another party, it is agreed that all responsibility on the part of S. cease as soon as the cargo is shipped." No principal was named in the charterparty, and it appeared that S. was, in point of fact, himself the real freighter, and not merely an agent in the matter :—Held, that he was entitled to sue as principal for a breach of the charterparty, notwithstanding he had contracted as agent, and that the above stipulation applying only to his character of agent, had not the effect of limiting his responsibility as principal. *Schalmtz* or *Schmalz* v. *Avery*, 16 Q. B. 655 ; 20 L. J., Q. B. 228 ; 15 Jur. 291.

A contract for the conveyance of goods from Liverpool to Australia was entered into as follows : "It is this day mutually agreed between J. and R. W., owners of the ship 'Jessica,' of the first part, and S. J. C. of the other part," that the ship should be ready by a given day to take on board certain goods, and should proceed therewith to Geelong and there deliver the same ; "the rates of freight determined upon by the parties to this agreement are as under," &c., "one-third to be paid in London, on receipt of bills of lading, and the remainder by the Geelong and Melbourne Railway Company, at Geelong" ; "goods to be taken on board at Liverpool at ship's expense" ; and the agreement was signed "J. and R. W., S. J. C." :—Held, that S. J. C. was personally bound by this contract and entitled to sue for a breach of it. *Cooke* v. *Wilson*, 1 C. B. (N.S.) 153 ; 26 L. J., C. P. 15 ; 2 Jur. (N.S.) 1094 ; 5 W. R. 24.

Whilst a vessel was yet to arrive, the charterer's agents (the consignees of the cargo) appropriated the cargo and indorsed the bill of lading through other persons to the plaintiffs. The ship was delayed and the cargo damaged. The plaintiffs sustained no loss by deterioration, for under their contract they paid for the cargo after deductions settled by arbitration for the damage done to it :—Held, that they were entitled to sue in their own names or even as trustees for the consignees. *The Wilhelm Schmidt*, 25 L. T. 34 ; 1 Asp. M. C. 82.

Broker for Commission under.]—A charterparty made between captain and charterers contained a clause providing for payment of commission to the broker for negotiating the charter :—Held, that the broker could not sue in rem under the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2, sub-s. 1, as he was not a party to the charter. *The Nuova Raffaelina*, 41 L. J., Adm. 37 ; L. R. 3 A. & E. 483 ; 24 L. T. 321 ; 20 W. R. 216 ; 1 Asp. M. C. 16.

Liability to be Sued—Principal or Agent.]—The defendants, acting as agents for L., chartered a ship for the conveyance of a cargo of currants from the Ionian Islands. The charterparty was expressed to be made and was signed by the defendants as "agents to merchants," the name of the principal not being disclosed :—Held, that evidence was admissible in an action by the shipowners against the defendants upon the charterparty, of a trade usage, by which, if the name of the principal is not disclosed within a reasonable time, the agents themselves are personally liable. *Hutchinson* v. *Tatham*, 42 L. J., C. P. 260 ; L. R. 8 C. P. 482 ; 29 L. T. 103 ; 22 W. R. 18.

The plaintiffs and defendants entered into a charter of the ship R. to load a cargo of deals. In the body of the charter the defendants were described as follows : "It is this day mutually agreed between Messrs. J. H. & Co., of Newcastle, for owners of the good ship R." The defendants signed the charterparty at the foot, as follows : "For owners, J. H. & Co." A cargo was loaded on board the ship at Hudigsval, and the captain signed a bill of lading for it, stating that he had received it in good condition. The cargo was ultimately delivered to the plaintiffs at Gloucester, and was found on delivery to have been injured to the extent of 50*l*. In an action by the plaintiffs against the defendants for the damage, in a county court, three letters, which had passed between the plaintiffs and the defendants and their solicitors, were admitted, and as soon as the plaintiffs' evidence was closed, the defendants' solicitor objected that there was no evidence against the defendants as principals, and applied for a nonsuit, on the ground that it appeared upon the charterparty that the defendants were not principals but only agents of the owner. The judge overruled the objection, and decided that the defendants were liable as principals. On an appeal :—Held, that there was evidence to support the decision that the defendants were liable as principals. *Adams* v. *Hall*, 37 L. T. 70 ; 3 Asp. M. C. 1.

Action on a contract alleged to have been made by the defendant, to charter a ship for the plaintiff. Proof, that the defendant made a memorandum of charterparty in B.'s name, and purporting to be signed by the defendant as agent of B. ; that the defendant had no authority to contract for B., and knew that he had none, and that B. refused to adopt the contract :—Held, that the defendant was not liable as principal in an action on the contract itself, and a nonsuit was entered. *Jenkins* v. *Hutchinson*, 13 Q. B. 744 ; 18 L. J., Q. B. 274.

By charterparty it was agreed between the

plaintiff, owner of a ship, and the defendants, of London, merchants, that the ship should proceed to T., and there load from the factors of the merchants a full and complete cargo at the merchants' risk and expense, which the merchants bound themselves to ship; and being so loaded should proceed to Memel, and deliver the same on being paid freight, half to be paid on unloading, in cash, and the remainder in good bills on London; thirty running days to be allowed the merchants for loading at T. and discharging at Memel. "By authority of and as agents for S. of Memel, R. and F., J. M. L." (signatures of the defendants and the plaintiff): —Held, that the defendants were contracting parties, and therefore were personally liable for breach of the charterparty. *Lennard* v. *Robinson*, 5 El. & Bl. 125; 3 C. L. R. 1363; 24 L. J., Q. B. 275; 1 Jur. (N.S.) 853.

A memorandum of charterparty was expressed to be made between "P., of the good ship 'C.,' and W., agent for E. W. & Son," to whom the ship was to be addressed. It was signed by W., without any restriction:—Held, that he was personally liable as charterer. *Parker* v. *Winlow*, 7 El. & Bl. 942; 27 L. J., Q. B. 49; 4 Jur. (N.S.) 64.

A charterparty was made in the following terms: "It is this day mutually agreed between George Deslandes & Son, owners of the ship called 'The Deslandes,' now lying in the port of London, of the one part, and Messrs. Gregory Brothers, as agents to Samuel Ferguson, of Anamaboo, merchants and charterers, of the other part," and was signed, "For George Deslandes & Son, of Jersey, owners, H. Gammon, as agent; for Samuel Ferguson, Esq., of Anamaboo, Gregory Brothers, as agents":—Held, that Gregory Brothers were not personally liable. *Deslandes* v. *Gregory*, 2 El. & El. 602; 30 L. J., Q. B. 36; 6 Jur. (N.S.) 651; 2 L T. 634; 8 W. R. 585—Ex. Ch.

On the 24th of June the defendants, who were shipbrokers, wrote to the plaintiffs, offering them "room" in a ship called "F. K. Dumas," for certain cement and stone from London to Callao. On the 25th of June the defendants chartered the ship for the voyage, the charterparty providing, inter alia, that the whole ship should be at the disposal of the charterers, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be responsible to all whom it might concern, as if the ship were loaded at her berth by and for the owners, independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require, without prejudice to the charterparty; and that the charterers' responsibility, except for freight, should cease on the vessel being loaded. On the 26th of June an agreement was made between the defendants, acting for the owners of the "F. K. Dumas," and the plaintiffs, that the former should receive on board cement and stone, at certain freight, from London to Callao, and sail on a certain day: freight to be paid one-half on signing bills of lading, and the remainder on final discharge at Callao. The cement and stone were shipped, the half freight paid, and the master signed bills of lading, making the remainder payable at Callao. On her voyage, the ship, being damaged by bad weather, put into an intermediate port, where the vessel was condemned. The master, being unable to forward the plaintiffs' goods to their destination, sold them. In an action against the defendants for their value, the jury found that the sale was not justified:—Held, that, on the construction of the above documents, there was no contract between the plaintiffs and the defendants for the carriage of the goods from London to Callao. *Wagstaff* v. *Anderson*, 49 L. J., C. P. 485; 5 C. P. D. 171; 42 L. T. 720; 28 W. R. 856—C. A.

A charterparty, on its face, purported to be accepted by M. G. by procuration of T. G. To shew the authority of M. G., evidence was adduced that T. G., although resident in London, carried on business of a corn factor at Limerick, where the charterparty was executed, and that M. G. was his brother, and had the general management of his business and warehouses there, and was in the habit of sending great quantities of corn to London by vessels hired and the charterparties signed by him, by procuration of T. G.:—Held, that the jury was at liberty to find that M. G. had a general authority so as to bind the brother, although in fact no authority had been given by him to execute this charterparty, and it was one in which he had no interest. *Smith* v. *M'Guire*, 3 H. & N. 554; 27 L. J., Ex. 465; 6 W. R. 726. *S. C.*, at nisi prius, 1 F. & F. 199.

—— **Agent of Government.**]—A person entering into a charterparty in his own name, on behalf of government, is personally liable. *Cunningham* v. *Collier*, 4 Dougl. 233.

—— **Agent for the Charterer.**]—See *Hough* v. *Manzanos*, infra, col. 294.

—— **Partner.**]—To a declaration for freight due on a charterparty made between the plaintiff as owner, and W. & Co. as merchants and freighters, they pleaded that they entered into the charterparty solely as agents for M.: and that, before they signed the charterparty, it was agreed and understood they were only to sign it as such agents, and were not to make themselves liable as principals for the payment of the freight to become due under such charter; that they signed as follows, "For M., of C., W. & Co., agents," the defendants and the plaintiff bonâ fide believing at the time the charter was made that they having so signed would not be liable to be sued on the charter; that they had power to bind M., and that the plaintiff was inequitably taking advantage of their mistake in drawing the charter. At the trial the defendant, who signed the charterparty on behalf of the defendants' firm, deposed to a conversation between himself and the plaintiff at the time of signing the charter, which supported the plea; the plaintiff admitted that the defendant had correctly testified to what he, the defendant, had said, but affirmed that he, the plaintiff, had said nothing, or if he had made any remark he could not then, at the trial, remember what he had said. The judge directed the jury that if they believed the defendant had at the time of signing expressed his intention not to render his firm personally liable by so doing they were to find for the defendants, which they accordingly did:—Held, on a motion for a new trial on the ground of misdirection, inasmuch as the judge should have gone on to tell the jury that they must find that the plaintiff was an assenting party to the defendant's expression of his intention not to render his

firm liable by his signature to the charter, that the whole of the facts having been before the jury, the direction was sufficient to bring before the jury the issue they had to decide. *Cowie* v. *Witt*, 23 W. R. 76.

Adding Parties—Ord. XVI. rr. 11, 48—Non-joinder of Party residing out of the Jurisdiction.]—A defendant cannot claim as of right to have his joint contractor in a charterparty, who is resident out of the jurisdiction, added as a party under Ord. XVI. r. 11. *Wilson* v. *Killick*, 68 L. T. 312; 7 Asp. M. C. 275.

Recovery by One not a Party—Deed Poll.]—Charterparty by indenture sealed and delivered, but not being inter partes, whereby the defendant covenanted to pay for the hire of the ship a certain sum to B., master and part owner, and to C. 300*l.*:—Held, that the indenture being in the nature of a deed poll, C. could recover upon it. *Cooker* v. *Child*, 2 Lev. 74.

If a charterparty is expressed to be made between A., owner of the ship whereof B. is master, and C.; and contains covenants by C. with A. and B.: B. cannot sue thereon, although he seals and delivers the instrument. *Scudamore* v. *Vandenstone*, 2 Rol. Abr. 22; 2 Co. Inst. 673.

Authority of Master to bind Cargo Owner—Charterparty on Transhipment of Cargo.]—See *Matthews* v. *Gibbs*, infra, col. 434.

Charterparty, when binding on Dissenting Part Owners.]—*The Vindobala*, supra, col. 55.

b. Legality.

Cargo of Hay—Landing Forbidden.]—By a charterparty made by the charterer's agent in France, a ship was chartered, and it was stipulated that the ship should load a cargo of pressed hay at Trouville, in France, and proceed direct to London; and all cargo was to be brought and taken from ship alongside. The agent verbally told the master that the consignees would require the hay to be delivered at a particular wharf in the port of London, to which the master assented. On arriving in that port the master was unable to land the hay at the wharf, by reason of an order in council under the Contagious Diseases (Animals) Act, 1869, forbidding hay from a French port to be landed in the United Kingdom. The order had been made before the charterparty was entered into, but neither party knew of it. After some delay the charterer received the hay from alongside the ship into another vessel, and exported it. There was no legal obstacle to doing this, but eighteen days were allowed by the charterer to elapse beyond the lay days. The shipowner having brought an action for this detention of his ship, the charterer contended that the contract was for an illegal purpose, and therefore void:—Held, that although it was the intention of the parties, when the charterparty was entered into, to land the hay at London, yet as the contract was not made knowingly with the intention to violate the law, and as it could be carried out (as it ultimately was) without violating the law, it was not void; and the charterer was, therefore, liable for the demurrage. *Waugh* v. *Morris*, 42 L. J., Q. B. 57; L. R. 8 Q. B. 202; 28 L. T. 265; 21 W. R. 438. See also *Haines* v. *Bush*, post, col. 285.

Navigation Laws—Crown not bound by.]—The navigation laws are not binding on the crown so as to prevent the conveyance of public stores from one colony to another. *The Swift*, 5 C. Rob. 320.

c. Generally.

i. *Form and Construction.*

As to Freight.]—*See* post, XIII. FREIGHT.

As to Cargo.]—*See* post, XV. CARGO.

Early Charterparty.]—Declaration reciting charterparty, dated 1698. *Thornton* c. *Bethel*, Lutw. 704.

Intention.]—It is important not to give to a mercantile instrument such as a charterparty an unnecessarily strict construction, but such a construction as with reference to the context and the object of the contract would effectuate the obvious and expressed intention of the parties. *Dimech* v. *Corlett*, 12 Moore, P. C. 199.

Agreement not in Writing.]—An agreement between the owners and the merchants for the employment of a ship on a voyage, not in writing, but acted upon by the parties, is equivalent to a charterparty. *Lidgett* v. *Williams*, 4 Hare, 462; 14 L. J., Ch. 459.

Ratification by Master of.]—G., a shipbroker at G. G., chartered the Finnish vessels F. and M. prior to their arrival at G. G., and without communication with the owners. G. had on several previous occasions chartered the F. and M. under similar circumstances, and all of these charterparties had been carried into effect. After the arrival of the F. and M. at G. G. their masters were on several occasions at G.'s office, and were shewn their charterparties. A fortnight after the vessels' arrival at G. G., during which time freights had risen, the masters refused to take up the charterparties:—Held, that the masters, by their conduct, had not ratified the charterparties in such a way as to make the act a complete ratification. *The Funny, The Mathilda*, 48 L. T. 771; 5 Asp. M. C. 75—C. A.

Insurance—Reference to Charterparty—Bill of Lading—Sale at Price to include Cost, Insurance and Freight.]—A. & Co., merchants in France, agreed with B., a merchant at Glasgow, to buy a cargo of 1,000 tons of coal at a certain price per ton, to include cost, insurance and freight to Rochefort. B. chartered a steamer in his own name to carry the coal, and at the request of A. & Co. put on board thirty tons of iron bought by him for A. & Co. The charterparty exempted the shipowners from liability for loss from dangers of navigation caused by negligence of master or crew. B. took a bill of lading in his own name, exempting the shipowners from liability for loss by dangers of navigation (no mention of negligence), and bound the shipowners to deliver "on being paid freight, all other conditions as per charter." The bill of lading for the iron was in similar form, but made no reference to the charter. B. insured the coals and iron in his own name and in the name of all to whom the same might appertain, for sums exceeding the invoice price. On the ship sailing, B. sent A. & Co. the bills of lading indorsed to them, and the charterparty. The ship and cargo were lost

by negligence of master and crew. B. received the insurance moneys, and credited A. & Co. with the invoice prices of the iron and coals. A. & Co., in the interest of the insurers, sued B. for nondelivery according to bill of lading:—Held, as to the coals, that they became the property of A. & Co. on shipment, and that the pursuers were entitled to recover; the negligence clause not being imported into the bill of lading:—Held, also, as to the iron, that the pursuers, being subject to the conditions of the charterparty, were not entitled to recover. *Delaurier* v. *Wyllie*, 17 Ct. of Sess. Cas. (4th ser.) 167.

Bill of Lading differing from Charterparty.]—The plaintiff chartered the defendant's ship for carriage of a cargo of cotton-seed from Alexandria to the United Kingdom. The charterparty provided that the master was to sign bills of lading at any rate of freight and as customary at port of lading without prejudice to the stipulation of the charterparty. There was also a cesser of liability clause. A cargo was shipped under the charterparty at Alexandria by and on account of the charterers, and a bill of lading was given containing an exception, which was not in the charterparty, protecting the shipowners from liability for damage arising from any act, neglect or default of the pilot, master or mariners. The cargo was lost by the negligence of the master. In an action for nondelivery of the cargo, the jury found that there was no special custom at Alexandria with regard to the form of bill of lading in use there:—Held, that, whether such finding were right or wrong, the terms of the charterparty did not authorise the giving of a bill of lading containing the before-mentioned exception; and that, even if they did, in the absence of express provision to the contrary, as between the shipowners and the charterers only the charterparty could be regarded as constituting the contract, and the bill of lading must be looked on as a mere receipt for the goods; and consequently that the defendants were liable for nondelivery of the cargo. *Rodocanachi* v. *Milburn*, 56 L. J., Q. B. 202; 18 Q. B. D. 67; 56 L. T. 594; 35 W. R. 241; 6 Asp. M. C. 100—C. A.

Reading with Bill of Lading.]—The excepted perils mentioned in the charterparty were more numerous than those in the bill of lading:—Held, that, under the circumstances, both instruments together contained the contract. *The San Roman*, 41 L. J., Adm. 72; L. R. 3 A. & E. 583; 26 L. T. 948. Affirmed, 42 L. J., Adm. 46; L. R. 5 P. C. 301; 21 W. R. 393; 1 Asp. M. C. 603.

A vessel was chartered to carry a cargo of coals from Cardiff to Rouen. The charterparty provided that the liability of the charterers should cease "when the ship is loaded and advance of freight with demurrage at Cardiff paid. Ship to have a lien on cargo for freight, dead freight and demurrage." The bill of lading contained no restriction on the liability of the charterers. In an action for balance of freight:—Held, that the charterparty and bill of lading must be read together, and construed according to the plain meaning on the face of them, and that the charterer's liability ceased on performance of the conditions in the charterparty. *Barwick* v. *Burnyeat*, 36 L. T. 250; 25 W. R. 395; 3 Asp. M. C. 376. See also *Gullichsen* v. *Stewart*, post, col. 449.

—— **With Letters.**]—A charterparty was explained and construed by letters for the purpose of fixing the liability under it upon persons signing the charterparty "for owners." *Adams* v. *Hall*, 37 L. T. 70; 3 Asp. M. C. 1.

General Ship—Inquiry by Shipper as to Charterparty.] — When a vessel about to sail is advertised as a general ship, an intending shipper is not bound to inquire as to the existence of any charterparty. *Peek* v. *Larsen*, 40 L. J., Ch. 763; L. R. 12 Eq. 378; 25 L. T. 580; 19 W. R. 1045; 1 Asp. M. C. 163.

A Norwegian vessel was advertised as a general ship by C. & Co., an English firm, described in the advertisement as brokers. The plaintiffs entered into an agreement with C. & Co. for the carriage of certain goods at a stipulated rate of freight, and placed the goods on board before they had notice of any charterparty affecting the ship. It was afterwards proved that C. & Co. were charterers of the vessel under a charterparty, which provided that the owner should have a lien for freight, dead freight and demurrage. The captain refused to sign bills of lading, except subject to the charterparty, or to return the goods to the plaintiffs:—Held, that the owners of the ship were not entitled to retain the goods in satisfaction of their claims under the charterparty, and that the plaintiffs were entitled to have the goods delivered to them free from any claim by the shipowners. *Ib.*

Sub-Charter—Notice to Shipper.]—A shipper, who has loaded on the terms of a sub-charter, is not affected by notice of a stipulation in the original charterparty that the owner is to have "a lien on the cargo for arrears of hire." He has a right to have bills of lading signed on the terms of the sub-charter. *Tharsis Sulphur and Copper Mining Co.* v. *Culliford*, 22 W. R. 46.

Bill of Lading—Notice to Shipper.]—The goods of a shipper in a general ship are not affected by a clause in a charterparty of which he has no notice or knowledge, giving the shipowner a lien on all cargo and freight for arrears of hire due under the charterparty. *The Stornoway*, 51 L. J., Adm. 27; 46 L. T. 773; 4 Asp. M. C. 529.

Captain to be Agent of Charterers—Liability of Owners for Captain's Acts.]—Where a charterparty contains a provision that the captain shall be the agent and servant of the charterers for all purposes, and shall sign bills of lading only as their agent, the liability of the owners to third parties in respect of his acts depends upon whether he was in fact their servant or the charterers' only; and upon that question the charterparty is not conclusive:—Held, in such a case, that the captain was the servant of the owners, who were therefore liable upon bills of lading signed by him. *Scheibler* v. *Furness* ([1893] A. C. 8) and *Colvin* v. *Newberry* (8 B. & C. 166) distinguished. *Manchester Trust Co.* v. *Turner*, or *Furness*, 64 L. J., Q. B. 766; [1895] 2 Q. B. 539; 14 R. 739; 73 L. T. 110; 44 W. R. 178; 8 Asp. M. C. 57—C. A.

Incorporation of Colliery Guarantee—Demurrage, &c.]—See *Monsen* v. *Macfarlane*, XIV. DEMURRAGE, infra, col. 466.

Inconsistency between Charterparty and Bill of Lading.]—See *Houston* v. *Sansinena*, and other cases, col. 309, infra.

Incorporation in Bill of Lading—Provisions as to Lien on Cargo for Freight.]—See *Gardner* v. *Trenchman*, and cases, infra, col. 431.

Advances to Master at Port of Loading—Loss of Ship—Freight advanced—Deductions from Freight.]—See *The Red Sea*, [1896] P. 20; B. MARINE INSURANCE; IX. LOSSES (5).

Bill of Lading varying from Charterparty — Parol Proof.]—By charterparty a ship was to carry cement from London to Aberdeen and Cruden, a port north of Aberdeen, delivering 100 tons at Aberdeen and the rest at Cruden, the freight for the latter being higher than for the Aberdeen portion. In the bill of lading the order of the ports was reversed. In an action for freight:—Held, that parol evidence was admissible that the bill of lading was varied from the charterparty with consent of the consignees' agent, and that the master had complied with the contract by going to Cruden first and tendering delivery there. *Davidson* v. *Bisset*, 5 Ct. of Sess. Cas. (4th ser.) 706.

"Port Charges"—Light Dues—Deviation.]—Upon a voyage from South American ports to Leith the charterers of a ship exercised an option, reserved to them upon payment of port charges, of discharging part of their cargo at Deptford. In consequence of the ship entering the port of London the whole of the light dues up to and including Leith became payable. But for this deviation the light dues would have been payable at Leith by the shipowners. To avoid detention in the port of London the charterers paid all the light dues demanded, but claimed to set them off against balance of freight, upon the ground that they were not port charges:—Held, that the light dues were port charges, payable by the charterers in the terms of the charterparty. *Newman* v. *Lamport*, 65 L. J., Q. B. 102; [1896] 1 Q. B. 20; 73 L. T. 475; 8 Asp. M. C. 76.

Towage—Delay—Extent of Deviation Authorised.]—A general clause giving a steamer "liberty to tow and be towed and assist vessels in all situations," must be construed as limited to deviations which do not frustrate the object of the contract. *Potter* v. *Burrell*, infra, col. 264.

Joint Account—Partnership.]—A clause in a charterparty, that "any profit or loss on the charter shall be equally divided between owners and charterers," does not create a partnership between the owners and charterers so as to deprive the former of their right of action against the latter for demurrage. *Ib.*

Consignees to take Cargo "from alongside Ship"—Custom—Lighters.]—A custom in the wood trade in the port of London which imposes an obligation on a shipowner to discharge a cargo of long lengths of timber into lighters, is not inconsistent with a clause in a charterparty under which the cargo is to be taken from alongside the ship at merchant's risk and expense. *Aktieselkab Helios* v. *Ekman*, 66 L. J., Q. B. 538; [1897] 2 Q. B. 83; 76 L. T. 537—C. A.

ii. *Law Applicable.*

Lex loci contractûs.]—Primâ facie, the law of the place where a contract is made is that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and such law ought to prevail in the absence of circumstances indicating a different intention; but a contract of affreightment made between a charterer and owners of the ship, being persons of different nationalities, in a place where both of them were foreigners, to be performed partly there by the ship breaking ground in order to start for the port of lading, a place where both parties would also have been foreigners; partly at the latter port, by taking the cargo on board; and partly on board the ship at sea, subject there to the laws of the country of the ship; and partly by final delivery at the port of discharge—is to be construed by the law of the nation of the ship. *Lloyd* v. *Guibert*, 6 B. & S. 100; 35 L. J., Q. B. 74; L. R. 1 Q. B. 115; 13 L. T. 602.—Ex. Ch.

A British subject at a Danish West India island chartered a ship belonging to French subjects, for a voyage from St. Marc, in Haiti, to Havre, London or Liverpool, at the charterer's option, he knowing that the ship was French. The charterparty was entered into by the master, in pursuance of his general authority as such, and not by any special authority from the owners. The charterer shipped a cargo at St. Marc for Liverpool. On her voyage the ship sustained damage from a storm, which compelled her to put into a Portuguese port. There the master properly borrowed money upon bottomry of the ship, freight and cargo, and repaired her, and she proceeded with the cargo, and arrived safely at Liverpool. The bondholder proceeded in the court of admiralty against the ship, freight and cargo, which being insufficient to satisfy the bond, he sued the owners to indemnify him for the deficiency. They abandoned the ship and freight in such a manner as, by the French law, absolved them from liability:—Held, that the charterer was not entitled to recover, because the French law, as being that of the ship, governed the case. *Ib.*

The master of a German ship while at Constantinople, by a charterparty, partly in English and partly in German, and entered into with Germans, chartered his ship to take a cargo from Taganrog to England, Havre or Hamburg:—Held, that the contract must be construed according to German law. *The Express*, 41 L. J., Adm. 79; L. R. 3 A. & E. 597; 26 L. T. 956; 1 Asp. M. C. 355.

A German ship, while in a German port, was chartered by a charterparty in the English language by English charterers, and the ports of call for orders and of final delivery of cargo were English. On a question of delay in delivery of cargo:—Held, that the contract must be governed by English law. *The San Roman*, 42 L. J., Adm. 46; L. R. 5 P. C. 301; 21 W. R. 393; 1 Asp. M. C. 603—P. C.

Intention of Parties.]—The master of a North German ship lying at Constantinople entered into a charterparty with North German subjects there resident, to carry a cargo to a port in the United Kingdom or on the Continent, to be delivered to English consignees. The charterparty and the bill of lading given under it were in the English language, and it was stipulated

that the ship should call at one of three ports of the United Kingdom for orders. The ship duly called at Falmouth, and was ordered to proceed to an English port to discharge:—Held, that as the intention of the parties as to what law should govern was to be gathered from the circumstances of the case, and as the giving of the orders fixed the seat of the contract in England, the law of England applied. *The Wilhelm Schmidt*, 25 L. T. 34; 1 Asp. M. C. 82.

Law of the Flag.]—A claim was made by an American citizen in the winding-up of a British steamship company for damages for the loss of his cattle arising through the negligence of the master and crew. The ship in which the cattle were carried was a British ship trading between Boston and Liverpool. The charterparty contained express stipulations exempting the company from liability caused by the negligence of the master and crew. The cattle were shipped at Boston, and bills of lading were given there, in conformity with the contract. The ship stranded on the coast of North Wales, owing, as was admitted, to the negligence of the master and crew. According to the law of the state of Massachusetts, as at present ascertained, the stipulations exempting the owners from liability through negligent navigation were void; but according to English law such stipulations were good, and were usually inserted in English bills of lading. The question was whether the law of the flag (that is to say, the personal law of the shipowner) or the lex loci contractûs should govern the contract of affreightment:—Held, on the authority of *Lloyd* v. *Guibert* (1 L. R., Q. B. 155), that the stipulations were valid, first on the general ground that the contract was governed by the law of the flag; and, secondly, on the particular ground that from the special provisions of the contract itself it appeared that the parties were contracting with a view to the law of England. *Missouri Steamship Co., Monroe's Claim, In re*, 58 L. J., Ch. 721; 42 Ch. D. 321; 61 L. T. 316; 37 W. R. 696—C. A.

Freight—Sale of Part of Cargo at Port of Distress.]—By a charterparty, in usual English form, made in London between the agents of the German owner of a German vessel and the defendants, who carried on business in England, the vessel was chartered to the defendants to load a cargo of rice at Bassein and deliver the same as ordered, at a port in the United Kingdom or on the continent between Havre and Hamburg, the freight to be paid on right delivery of the cargo. On the voyage the vessel encountered bad weather and had to put into a port of distress. A quantity of the rice was found to be so much damaged by sea water that it could not be carried on, and was condemned and sold. In an action by the shipowner to recover freight in respect of the rice so sold, the plaintiff contended that the charterparty was governed by the law of the flag, and that, under German law, full freight was payable in respect of the rice justifiably sold at the port of distress:—Held, that under the circumstances, the contract was an English contract, to be construed according to English law; and that, therefore, no freight was payable in respect of the rice sold at the port of distress. *The Industrie*, 63 L. J., Adm. 84; [1864] P. 58; 6 R. 681; 70 L. T. 791; 42 W. R. 280; 7 Asp. M. C. 457—C. A.

Custom — Admissibility of Evidence.] — *See* infra, vii. EVIDENCE TO EXPLAIN—*e.* CONDITIONS AND WARRANTIES.

Sale of Cargo by Master—What Law applicable.]—See *The August*, post, col. 525.

iii. *Proceeding to a Port, or as near as the Ship can safely get.*

Insufficient Water in Dock—Right of Charterers to order Ship to wait for Spring Tide.]—A charterparty made between English shipowners and English charterers provided that the ship should proceed to a dock in an English port, or so near thereunto as she might safely get, and there load a cargo always afloat as and where ordered by charterers. The depth of water in the dock was such that the ship could only load a full cargo always afloat during spring tides. The ship arrived in the dock and was ordered by the charterers to a berth, to which she proceeded, but after loading part of the cargo left the dock, because, the spring tides being over, she would otherwise have taken the ground, and demanded the rest of the cargo at the nearest place at which she could safely load always afloat:—Held (A. L. Smith, L.J., dissentiente), that the charterers were not bound to order the ship to a berth where she could load immediately, but were entitled to give an order for a berth in which the ship could load always afloat within a reasonable time, and that, as the shipowners must be taken to have known the ordinary conditions of the depth of water in the dock, and as the order given was such that it might have been obeyed at the next spring tides, it was a reasonable order, which the charterers were entitled to give. *Carlton Steamship Co.* v. *Castle Mail Packets Co.*, 66 L. J., Q. B. 819; [1897] 2 Q. B. 485; 77 L. T. 332; 46 W. R. 68—C. A.

"And There load a full Cargo."]—A stipulation that a ship shall proceed to a certain place, or as near thereto as she can safely get, and there load a full cargo, means such a place to which she can safely get, and from which, when loaded, she can safely get away. *Shield* v. *Wilkins*, 5 Ex. 304; 19 L. J., Ex. 238.

Ship unable to lie Afloat without being lightened.]—Where a vessel is chartered to proceed with cargo to a "safe port . . . as ordered, or as near thereunto as she can safely get, and always lie and discharge afloat," the master is not bound to discharge at a port where she cannot, by reason of her draught of water, "always lie and discharge afloat" without being lightened, even if she can be lightened with reasonable dispatch and safety in the immediate vicinity of the port or in the port itself. A vessel was chartered to proceed with a cargo of grain from Baltimore to Falmouth for orders, "thence to a safe port in the United Kingdom as ordered, or as near thereunto as she could safely get, and always lie and discharge afloat." The vessel was ordered to Lowestoft. Her draught of water, when loaded, was such that she could not lie afloat in Lowestoft harbour without discharging a portion of her cargo, but the discharge of cargo might have been carried on with reasonable safety in Lowestoft roads. The consignee offered at his own expense to lighten the vessel in the roads, but the master refused to proceed to

Lowestoft to discharge, and went to Harwich as the nearest safe port, and there discharged the cargo:—Held, that the consignee could not recover damages against the shipowner for the refusal of the master to discharge at Lowestoft. *The Alhambra*, 50 L. J., Adm. 36; 6 P. D. 68; 43 L. T. 636; 29 W. R. 655; 4 Asp. M. C. 410; —C. A.

To sail to London, Surrey Commercial Docks.]—A charterparty for a ship to sail to "London, Surrey Commercial Docks" is not satisfied by the ship arriving at the gate of the docks, but not entering into the docks. *Dahl* v. *Donkin or Nelson*, 50 L. J., Ch. 411; 6 App. Cas. 38; 44 L. T. 381; 29 W. R. 543; 4 Asp. M. C. 392—H. L. (E.)

Charterer's Duties as to securing a Discharging Berth.]—There is no established custom in the port of London by which the charterer of a timber-loaded ship is bound to secure for the vessel, on its arrival in the river, and in close contiguity to the docks named, the authority to enter into the docks. The charterparty was to "London, Surrey Commercial Docks, or as near thereto as she may safely get, and lie always afloat." As the docks were full the ship could not be given a discharging berth, and the dock manager therefore refused it entrance into the docks. Both parties having named these docks in the charterparty, this refusal of the dock authorities was held not to be the fault of either party. The cause of the delay as to being admitted into the docks was immaterial; the length of the delay was material. The charterer would not name any other dock to which the ship might be taken. The ship's master therefore took it to the Deptford buoys (the nearest place to the Surrey Commercial Docks where it could lie in safety afloat), and there discharged the cargo by lighters, carrying the timber into the Surrey Commercial Docks, where it was afterwards sorted and put in order on the wharf:—Held, that, under the circumstances existing in this case, the delay in discharging the cargo was to be attributed to the charterer, who therefore became liable to demurrage, and to the charges for unloading. *Ib.*

"So near thereto as She may safely get at all Times of Tide and always Afloat."]—A ship was chartered to unload at S. or "as near thereto as she might safely get at all times of tide and always afloat," and for delay in unloading the charterers were to pay demurrage. The state of the tide prevented the ship from reaching S. for four days after she arrived at the nearest point where she was able to float:—Held, that, according to the terms of the charterparty, this was a sufficient arrival of the ship at S. to found a claim for demurrage. *Horsley* v. *Price*, 52 L. J., Q. B. 603; 11 Q. B. D. 244; 49 L. T. 101; 31 W. R. 786; 5 Asp. M. C. 106.

—— **"If sufficient Water."**]—A condition in a charterparty that the ship shall "discharge in a dock as ordered on arriving, if sufficient water, or so near thereunto as she may safely get, always afloat," means that she is to discharge in the dock ordered, if there is sufficient water at the time of giving the order. *Allen* v. *Coltart*, 52 L. J., Q. B. 686; 11 Q. B. D. 782; 48 L. T. 944; 31 W. R. 841; 5 Asp. M. C. 104.

Expenses of Lightering to Place of Discharge.]—By the terms of a charterparty the ship was to take in a full cargo at Bombay, and proceed therewith to a safe port on the continent between Havre and Hamburg as ordered, "or so near thereto as she might safely get." The cargo was to be brought to and taken from alongside at merchant's risk and expense. The ship was ordered by the charterers to Koogerpolder, in Holland. Koogerpolder is some distance up a canal, and the vessel with her full cargo on board drew too much water to proceed up the canal. No arrangements had been made by the charterers or consignees for taking delivery of any part of the cargo at the mouth of the canal. The portion of the cargo that required to be unloaded in order to enable the vessel to enter the canal was at least a third. The question arising under these circumstances between the shipowners and the charterers was which of them ought to bear the expenses of lightering the cargo from the mouth of the canal to Koogerpolder:—Held, that, under the circumstances, the voyage under the charterparty ended at the mouth of the canal, and that consequently the charterers ought to bear the above-mentioned expenses. Meaning of the words "as near thereto as she may get" discussed. *Capper* v. *Wallace*, 49 L. J., Q. B. 350; 5 Q. B. D. 163; 42 L. T. 130; 28 W. R. 424; 4 Asp. M. C. 223.

Danube Bar.]—The defendant agreed by a charterparty that the ship should proceed to Galatz, or as near thereto as she could safely get, and there load a cargo, the act of God, &c., and every other dangers and accidents of the seas, rivers and navigation during the voyage excepted. The ship arrived on the 5th November off the mouth of the Danube. At that time, and until the 7th January following, the water was unusually low on the bar and the ship was unable to cross. On the 11th December she was obliged by stress of weather to go to Odessa, as the nearest safe port, where she afterwards took in a cargo and sailed for England. On and after the 7th January there was sufficient water in the port for the ship to have crossed and to have gone up to Galatz, and there shipped a cargo:—Held, that there was a breach of the charterparty, and that the defendant was not justified in putting an end to the contract by any of the excepted causes. *Schilizzi* v. *Derry*, 4 El. & Bl. 873; 24 L. J., Q. B. 193; 1 Jur. (N.S.) 795; 3 W. R. 374.

Part Cargo unloaded to cross Bar—Expense of reloading—Duty of Ship to reload.]—A ship under charter to sail to a named port, or as near thereto as she could safely get, and to load as much cargo as she could reasonably and conveniently ship and stow, went over the bar of the port and took in a full cargo of hams and cattle, for which the master signed bills of lading. She sailed and grounded on the inner bar, and part of the cargo had to be lightened, the master offering to take that part of the cargo on board again after passing the outer bar, at the shipper's risk. The shipper's agent refused to put the cargo on board again on these terms, and the ship sailed with so much of the cargo as was left on board:—Held, that the shipowner was entitled neither to freight nor to damages for refusing to reship the cargo lightened, for that the master having signed bills of lading for the whole cargo, though not bound to go within the

bar, was bound to carry to its destination the whole cargo signed for. *General Steam Navigation Co.* v. *Slipper*, 11 C. B. (N.S.) 493; 31 L. J., C. P. 185; 8 Jur. (N.S.) 821; 5 L. T. 641; 10 W. R. 311.

Glasgow—Custom to lighten at the Tail of the Bank.]—See *Hillstrom* v. *Gibson*, infra, XIV. DEMURRAGE, col. 476.

Unloading and Discharging—Rules of Port.]—*See* XIV. DEMURRAGE; XV. CARGO.

Safe Port—What is.]—See *Reynolds* v. *Tomlinson*, infra, col. 253.

iv. *Frost Preventing Loading.*

Customary Manner of Loading.] — By the terms of the charterparty the ship was to proceed to the port of loading and there load a cargo of iron in the customary manner from the agents of the freighters. Cargo to be supplied as fast as steamer can receive. Time to commence from the vessel being ready to load, and ten days on demurrage over and above the said lay days at 40*l.* per day. ("Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading; in which case owners to have the option of employing the steamer in some short-voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship.") On the ship's arrival the loading was commenced, but shortly afterwards was wholly stopped for five days through frost:—Held, that the exception in the charterparty as to frost did not relieve the charterers from liability for demurrage, inasmuch as the detention of the cargo by ice occurred in the canals before the cargo reached the dock where the vessel was lying. *Grant* v. *Coverdale*, 53 L. J., Q. B. 462; 9 App. Cas. 470; 51 L. T. 472; 32 W. R. 831; 5 Asp. M. C. 353—H. L.

By the terms of the charterparty the ship was to proceed to Cardiff, East Bute Dock, and there load in the customary manner from the agents of the freighters a cargo of rail iron; the cargo to be loaded as fast as steamer could take on board and stow within the customary working hours of the port, commencing when steamer was in berth and ready to load; and if longer detained merchants to pay steamer 30*l.* per day demurrage. "Detention by frost, floods, &c., not to be reckoned as lay days." The shipowner, when the charterparty was made, did not know who were the freighters' agents at Cardiff. There were about six shippers of rail iron there, all of them (with the exception of the freighters' agents) having wharves in the West or East Bute Dock. The agents' wharf was at a distance from the docks upon a canal communicating with the West Bute Dock, and their rail iron was loaded on ships berthed in the East Bute Dock by means of lighters passing down this canal through the West Bute Dock, and from thence down a smaller canal connecting the two docks. The other shippers loaded in the East Bute Dock, either from the quay or by lighters coming alongside the ship from the wharves in the East Bute Dock, or by lighters from the West Bute Dock, passing down the connecting canal. The ship, on arrival, was berthed in the East Bute Dock, and the loading was commenced, but shortly afterwards was stopped for sixteen days by frost, which covered the canal from the agents' wharf to the West Bute Dock with ice and prevented the passage of the lighters, though the water in the docks was not frozen:—Held, that the exception in the charterparty with respect to detention by frost did not apply to relieve the freighters from liability to demurrage. *Kay* v. *Field*, 52 L. J., Q. B. 17; 10 Q. B. D. 241; 47 L. T. 423; 31 W. R. 332; 4 Asp. M. C. 588—C. A.

A. by charterparty engaged to load on board B.'s ships a cargo of coals "with due despatch." The goods had to be brought by A. along a canal to the dock, and frost prevented the completion of the loading:—Held, that A. was responsible for the delay consequent thereon. *Kearon* v. *Pearson*, 7 H. & N. 386; 31 L. J., Ex. 1; 10 W. R. 12.

The exception in a charterparty whereby a certain number of laying days is allowed to the charterer, detention by ice is not to be reckoned as such, applies where the ice not only renders access to the ship impracticable in the port itself, but blocks up a river by means of which alone the intended cargo can be conveyed to the port. *Hudson* v. *Ede*, 8 B. & S. 640; 37 L. J., Q. B. 166; L. R. 3 Q. B. 412; 18 L. T. 764; 16 W. R. 940—Ex. Ch. See *White* v. *Steamship Winchester Co.*, infra, col. 265.

"Accident" — Snowstorm.] — A charterer agreed to load a ship with coal in regular and customary turn, "except in case of riots, strikes, or any other accidents beyond his control," which might prevent or delay her loading. To an action for breach of the above covenant in the charterparty, he pleaded that he was prevented loading the vessel by a snowstorm, which rendered it impossible to bring the cargo to the agreed place of shipment:—Held, that the snowstorm was not such an accident. *Fenwick* v. *Schmalz*, 37 L. J., C. P. 78; L. R. 3 C. P. 313; 18 L. T. 27; 16 W. R. 481.

And see 6, LIABILITY OF CHARTERER OR AGENT, infra.

v. *Sailing.*

Final Sailing.]—The term "final sailing" of a vessel from the port of loading, stated in a charterparty as the period for payment of freight, or part of it, means the final departure from the port, and being at sea ready to proceed on her voyage, and not merely having the clearances on board, and being ready to sail. *Roelandts* v. *Harrison*, 9 Ex. 444; 2 C. L. R. 995; 23 L. J., Ex. 169.

In determining a point at which a vessel has "finally sailed," the circumstances of the particular port of loading must be considered; and where the vessel was wrecked after having her clearances on board, and had left the dock gates, and had reached a ship canal between high and low water, where she was subject to certain regulations under a local act, and where she was liable to be stopped by the harbour-master:—Held, that she had not finally sailed within the meaning of the charterparty. *Ib.*

Extent of Port.]—By the terms of a charterparty the owners were entitled to an advance of one-third of the freight within eight days "from final sailing of the vessel from her last port in United Kingdom." The vessel was loaded at Penarth Dock, and was towed by a steam-tug seven or eight miles, bringing her out about

three miles into the Bristol Channel. She there cast anchor, as the weather was threatening. Whilst she was lying at anchor a storm broke her cables, and she ultimately ran ashore on Penarth beach, and the cargo was spoiled. The vessel had never been beyond the limits of the port of Cardiff as defined for fiscal purposes, but she had left what, for commercial purposes, is considered the port, and had been out at sea. She went ashore within the limits of the port in its commercial sense. The owners sued for one-third of the freight, and the charterers resisted the claim on the ground that the vessel had never sailed from her last port in the United Kingdom :—Held, that the word "port" must be taken in its ordinary commercial sense, and that as the vessel had got out to sea without any intention of returning, she must be taken to have finally sailed from her last port, that her being driven back into it by the weather made no difference, and that the one-third of the freight was payable. *Price* v. *Livingstone*, 53 L. J., Q. B. 118 ; 9 Q. B. D. 679 ; 47 L. T. 629 ; 5 Asp. M. C. 13—C. A.

At the time a loss happened the ship had left the harbour, but her crew was not complete, the master and mate were not on board, her shrouds and cables were not in proper condition, and the bills of lading were not signed ; the intention was that she should remain at anchor in the roadstead until the preparations for her voyage were complete :—Held, that she had not sailed within the meaning of the charterparty. *Thompson* v. *Gillespy*, 5 El. & Bl. 209 ; 24 L. J., Q. B. 340 ; 1 Jur. (N.S.) 779 ; 3 W. R. 505.

A vessel being loaded and in a fit state for sailing, but the clearances not being completed, nor the bills of lading signed, left the harbour with the captain on board. She crossed the bar, and the captain returned to land in order to get the papers completed and sign the bills of lading. The vessel stood off and on waiting for the captain ; but it being found that she had been injured, she returned into harbour to repair and did not afterwards sail :—Held, that the vessel had not sailed. *Hudson* v. *Bilton*, 6 El. & Bl. 565 ; 26 L. J., Q. B. 27 ; 2 Jur. (N.S.) 784.

Hire of Tug—Commencement of Hiring.]—A tug was hired for salvage purposes "from the 8th of September, at which date the vessel is to be at the disposal of the charterer at Greenock." The tug, which might have left before, did not sail from Greenock until 2.30 p.m. on the 8th September, and the hirer lost the benefit of his salvage contract :—Held, that the tug owner was liable, as the tug should have sailed earlier. *Mackenzie* v. *Liddell*, 10 Ct. of Sess. Cas. (4th ser.) 705.

vi. *Other Provisions.*

Commission — Inwards and Outwards.]—By a charterparty, a ship was to proceed with a cargo from Glasgow to San Francisco, where she was to be "consigned to the charterers' agents, inwards and outwards, paying the usual commissions" :—Held, that the effect of the expression "outwards" was not to bind the master to take a cargo home from San Francisco ; the meaning only was that, if a cargo was shipped from San Francisco, the charterers should be employed as shipbrokers to do all the business of the ship in respect of such cargo. *Cross* v. *Pagliano*, 40 L. J., Ex. 18 ; L. R. 6 Ex. 9 ; 23 L. T. 420 ; 19 W. R. 159.

—— **Memorandum Part of Contract.**]—A memorandum in a printed form between two brokers, used by a charterer, "commission to be paid to charterer, to whom the vessel is to be addressed, on her return to London," the charter being only for an outward voyage, and making no mention of a homeward voyage ; and the ship not having returned direct from the port of discharge, but taken a cargo elsewhere, requires evidence that the memorandum was understood by the parties to be part of the contract, and that in mercantile usage it applied in such a case to the return cargo, and meant that the charterer should collect the freight and receive commission on it. *Hibbert* v. *Owen*, 2 F. & F. 502.

Void or Voidable in Event of War.]—The plaintiff chartered the ship "Edgar" to C. by charterparty in which it was agreed that the ship after completing intermediate employment (which she was to be at liberty to take) should proceed to Galatz for orders to load there, &c., and being so loaded procced to Malta for orders. Upon the margin of the charterparty were the words, "In the event of war, blockade, or prohibition of export preventing loading, this charterparty to be cancelled." The plaintiffs then effected a policy with the defendants for the insurance of the freight of the ship against the perils of the sea, restraint of princes, &c. The "Edgar" sailed for Genoa under the charterparty on the 1st of May, 1877, war having been declared by Russia against Turkey on the 24th of April. Before her arrival at Genoa, the plaintiffs ascertained that Russia had closed the ports of loading mentioned in the charterparty. The "Edgar," however, discharged her cargo and took in ballast at Genoa, and sailed for Constantinople, and upon her arrival there on the 28th of May, found that the loading ports were closed, and that there was no reasonable probability of their being open in time for her to load her chartered cargo. She therefore did not proceed farther towards Galatz, but obtained a homeward cargo at a freight less than that stipulated for by the charterparty. In an action upon the policy :—Held, by Cockburn, C.J., and Manisty, J. (Lush, J., dissenting), that the plaintiffs could not recover, for according to the true construction of the charterparty the act of closing the ports by the Russian government was a prohibition of export preventing loading, and that upon the happening of that event the charterparty came to an end—without any election by either party. By Lush, J., that the effect of the memorandum in the margin was to make the charterparty voidable only at the option of either party, that neither party having elected to avoid it the charterparty continued in force up to the time when the loading became impracticable, and that the plaintiffs had sustained such a loss of the chartered freight as to entitle them to recover. *Adamson* v. *Newcastle Steamship Freight Insurance Association*, 48 L. J., Q. B. 670 ; 4 Q. B. D. 462 ; 41 L. T. 160 ; 27 W. R. 818 ; 4 Asp. M. C. 150.

And see 5. PERFORMANCE, infra.

"Ship Damage."]—In a charterparty, between the East India Company and the owners of a ship taken into their service, was the following clause : "But nevertheless the part-owners shall not be charged with any sum of money in respect of goods damaged on board the ship,

either in her outward or homeward bound voyage, but such as shall, by the condition and appearance of the package thereof, or by some other reasonable proof, appear to be ship damage." Part of the homeward-bound cargo was damaged in a storm:—Held, that this was not ship damage within the meaning of the clause, which was imputable only to such damage as happens by the insufficiency of the ship, or the negligence of those who have the charge of her. *East India Co.* v. *Todd*, 1 Bro. P. C. 405.

Mistake as to.]—Although a clause, by way of condition or of warranty, contained in a charterparty, cannot be got rid of by reason of its being part of a printed form, not adverted to expressly by the parties, and intended by one of them to be omitted: yet, if the other party was aware at the time that it could not be complied with, and after shewing that it was broken, treated the charter as subsisting, it will afford him no defence to an action on the charter. *Dixon* v. *Heriot*, 2 F. & F. 760.

Provisions as to Lighterage—Writing and Print.]—Charterers agreed with a shipowner by charterparty that his ship should load at Barbadoes, St. Kitts, or Trinidad, a full cargo of West India produce, "to be brought to and taken from alongside at merchant's risk and expense." These words, with others, were in print. The charterparty also contained the words "cargo at Trinidad as customary." These words, with others, were in writing. The custom at Trinidad is, that the ship pays for the lighterage, and the shipowner allows the charterer the reasonable expense thereof. The ship loaded at Trinidad in the customary manner, but the captain refused to pay the lighterage, whereupon the charterers had to bear the expense of it:—Held, that the stipulation, "cargo at Trinidad as customary," worked an exception to the stipulation as to loading at merchant's risk, and that the charterers were entitled to recover the lighterage from the defendant. *Scrutton* v. *Childs*, 36 L. T. 212; 3 Asp. M. C. 373.

Disbursements—Coals—Liability of Shipowner or Charterer.]—By a charterparty between the defendants, the owners of a steamer and the charterers, it was agreed that the owners should maintain her in a thoroughly efficient state during the term of the charterparty, and that the charterers should provide and pay for coals and fuel, port charges, pilotages, agencies, commissions and all other charges whatsoever not appertaining to the working or efficiency of the steamer. It was also agreed that if in consequence of a breakdown of machinery the vessel put into a port other than that to which she was bound, "port charges, pilotages and other expenses" should be borne by the owners. The steamer put into Vigo, a port to which she was not bound; in consequence, as was alleged by the master, of the breakdown of the condenser. The master sued the defendants in an action for disbursements for the price of coals supplied to him at Vigo:—Held, that, even assuming that the putting into Vigo was a necessary consequence of the breakdown of the machinery of the steamer, the price of the coals supplied there was not part of the "port charges, pilotages, and other expenses at the port," within the meaning of the charterparty, and the defendants were not liable. *The Durham City*, 58 L. J., Adm. 46; 14 P. D. 85; 61 L. T. 339; 6 Asp. M. C. 411.

Court-martial—Condition precedent to Payment under Covenant.]—Covenant in a charterparty, whereby, if the ship should be lost, burnt, or taken, and it should appear to a court-martial that the master had made the best defence he could, the freighters covenanted to pay the value of the ship. The holding of the court-martial is a condition precedent. *Davison* v. *Mure*, 3 Dougl. 28.

Detention of Ship by Foreign Government—Expenses—Charterer or Shipowner.]—Expenses caused by unjust detention of a ship by a foreign government in respect of legal matters and repairs:—Held, not to be expenses incurred by the ship within the meaning of a clause throwing such expenses on the charterers. *Sully* v. *Duranty*, 3 H. & C. 270; 33 L. J., Ex. 319.

Disbursements on account of Ship—Master's Claim—Authority of Master.]—By a charterparty it was agreed that the owners should provide and pay for all the provisions and wages of the captain and crew, for the insurance of the vessel, and maintain her in a thoroughly efficient state. It was further agreed that the charterers should provide and pay for all the coals, port-charges, pilotages, commissions and all other charges whatsoever, except those before stated; and it was further agreed that the captain, although appointed by the owners, should be under the orders and directions of the charterers, as regards employment, agency, or other arrangements. The master ordered coals for the vessel at two different foreign ports, in order to enable the vessel to perform her voyage. These coals were ordered from the firm of W. & Co., with whom the charterers had a contract to supply their vessel with coal. The charterers were subsequently adjudicated bankrupts. In an action by the master against the vessel and her freight for disbursements on account of the ship:—Held, that he was not entitled to recover, as, by the terms of the charterparty, he had no power to pledge the owner's credit. *The Castlegate*, 62 L. J., P. C. 17; [1893] A. C. 38; 1 R. 97; 68 L. T. 99; 41 W. R. 349—H. L. (Ir.)

Despatch-money — "Sundays and Fête-days excepted."]—A charterparty contained the following provision: "The steamer to be discharged at the rate of 200 tons per day, weather permitting (Sundays and fête-days excepted), according to the custom of the port of discharge, and, if sooner discharged, to pay at the rate of 8*s.* 4*d.* for every hour saved":—Held, that in calculating despatch-money, the charterers were not entitled to include the hours of Sundays and fête-days. *The Glenderon*, 62 L. J., Adm. 123; [1893] P. 269; 1 R. 662; 70 L. T. 416; 7 Asp. M. C. 439.

Causes operating before Time of Shipment—Breakdown of Railway.]—The defendants chartered the plaintiffs' vessel for the carriage of a cargo of ore from Poti in the Black Sea, the charterparty containing amongst the excepted perils which might prevent or delay the loading of the vessel: "floods, stoppages of trains, miners or workmen, accidents to railways and to mines or piers from which the ore is to be shipped." In the ordinary course the ore was brought from the mines to the pier by lines of railway, and could

not be brought in any other way, and was not generally brought until it was wanted for shipment. The vessel arrived at Poti, but no cargo was or could be supplied to her in consequence of the breakdown of the railway communication between the mines and the pier, caused by storms and floods, and the vessel sailed away without cargo. In an action by the plaintiffs against the charterers for not supplying the cargo :—Held, that the exceptions in the charterparty applied not only to causes operating at the port of loading, but also to causes operating to prevent the ore being brought from the mines to the pier, and that the charterers were therefore protected by the exceptions. *Furness* v. *Forwood*, 77 L. T. 95.

Master's Signature to Bills of Lading—Penalty for Delay in Signing.] — A stipulation in a charterparty that the master shall sign bills of lading within twenty-four hours after the cargo is on board, or pay 4*d.* per registered ton per day for each day's delay, is a stipulation for a penalty. *Jones* v. *Hough* (5 Ex. D. 115) followed. *The Princess*, 6 R. 723 ; 70 L. T. 388 ; 7 Asp. M. C. 432.

If the master eventually signs the bill of lading, the stipulation does not cease to be a stipulation for a penalty. *Ib.*

Freight—Master to sign at any Rate of Freight "without prejudice to this charterparty"—Cesser Clause coupled with Lien — Duty of Master.]—Where a charterparty provides that the captain is to sign bills of lading at any rate of freight required "without prejudice to this charterparty," the latter words impose no duty upon the captain to refuse to sign any bills of lading not containing provisions that preserve to the shipowner his lien for the full charterparty freight. They mean only that the shipowner's right of action against the charterer for the charterparty freight is not to be prejudiced. *Hansen* v. *Harrold*, 63 L. J., Q. B. 744 ; [1894] 1 Q. B. 612 ; 9 R. 315 ; 70 L. T. 475 ; 7 Asp. M. C. 464—C. A.

Advances for Disbursements on Account of Freight — Obligation to make Demand.] — A charterparty provided for the payment of certain lump sum freights, and contained the following clauses : "Cash for steamer's ordinary disbursements at port or ports of loading, not exceeding 150*l.* in all, to be advanced at the exchange of 50*d.* to the dollar on account of freight, subject to 3 per cent. to cover costs of insurance, &c. (captain's receipts to be conclusive evidence of the amount of such advances, and of their having been properly made), and balance of freight on right and true delivery of the cargo in cash" :—Held, that the master of the ship was not obliged to put the clause in force, but he was at liberty to take advantage of it or not as he in fact found it necessary, and that, therefore, if the shipowners provided him with money for disbursements, or he chose to advance it himself, it was unnecessary for him to ask the charterers for an advance on account of freight, and the owners could not be held liable for breach of contract if he did not ask for an advance. *The Primula*, 63 L. J., Adm. 118 ; [1894] P. 128 ; 6 R. 749 ; 70 L. T. 253 ; 42 W. R. 527 ; 7 Asp. M. C. 429.

Cesser Clause—Liability of Charterer as Holder of Bill of Lading.]—A clause in a charterparty providing for the cesser of the charterer's liability on the goods being loaded, does not absolve the charterer, if he be also the indorsee and holder of a bill of lading, incorporating the conditions of the charterparty, from liability for damage incurred at an intermediate port. *Bryden* v. *Niebuhr*, 1 Cab. & E. 241.

East India Company's Charter—Ship used for War Purposes.]—The East India Company's charterparties provided that the company should be at liberty to use the ship for war purposes, and to put her under the command of the king's officers. The company altered the upper works of a ship chartered by them, put more guns on board than stipulated in the charterparty, and put her under command of a king's officer :—Held, that the charterparty authorised such use of her. *Dobree* v. *East India Co.*, 13 East, 290.

Ship Chartered for Trade or War—Loss on Voyage of Discovery.]—A ship chartered to the East India Company for trade or warfare was lost whilst upon a voyage of discovery ordered by the company :—Held, that her owners could recover damages for her loss against the company if they did not consent to the voyage ; but, it appearing that they had consented, nonsuit. *Lewin* v. *East India Co.*, Peake, 243 ; 3 R. R. 700.

Agreement to pay Pilotage, &c.—Cargo Short Delivered—Liability.]—Upon an agreement to pay certain pilotage and port charges for an entire voyage, though a part only of the cargo is delivered, there will be no apportionment of the pilotage and port charges, but the whole must be paid. *Christy* v. *Row*, 1 Taunt. 300; 9 R. R. 776.

Causes beyond Charterers' Control.] — The words "or other causes beyond their control" in the exception clause of a charterparty do not relieve charterers from their liability to demurrage, where delay in loading a vessel is due to the disorganisation of workmen at the factory of the sellers of the goods, the results of which disorganisation could have been avoided had the charterers in the first instance made a better bargain with the sellers. Such delay is not due to causes outside the charterers' power or beyond their control. *Richardsons and Samuels & Co., In re*, 66 L. J., Q. B. 579 ; 66 L. J., Q. B. 868 ; 77 L. T. 479. *S. C.* in C. A.

vii. *Evidence to Explain.*

Custom—Lay Days.]—By a charterparty, made at Riga, the ship was to proceed with a cargo of timber, to Liverpool, and to deliver at such dock there as ordered on arrival. On arrival at Liverpool the ship duly entered into dock, but in consequence of the crowded state of the dock, was unable for some days to obtain a berth alongside the quay from which she was allowed to discharge :—Held, that in an action for demurrage, evidence was admissible tending to shew that, by the custom of the port of arrival, timber ships were not considered to have arrived until they had obtained a discharging berth within the dock. *Steamship Co. Norden* v. *Dempsey*, 45 L. J., C. P. 764 ; 1 C. P. D. 654 ; 24 W. R. 984.

—— **"Always Lay and Discharge Afloat."**]—Where a vessel is chartered to proceed with

cargo to a "safe port . . . as ordered, or as near thereto as she can safely get, and always lay and discharge afloat," the master is not bound to discharge at a port where she cannot, by reason of her draught of water, always lie and discharge afloat, without being lightened. Evidence that it was the custom at the port of discharge for vessels to be lightened in the roads before proceeding into the harbour held to lie inadmissible. *The Alhambra*, 50 L. J., Adm. 36; 6 P. D. 68; 43 L. T. 636; 29 W. R. 655; 4 Asp. M. C. 410—C. A.

Cargo to be "taken from Alongside at Merchant's Expense," and "to be discharged according to Custom of the Port."]—A charterparty contained two clauses, "cargo to be taken from alongside at merchant's expense," and "to be discharged according to custom of the port":—Held, that these clauses were not contradictory, and therefore evidence of custom was inadmissible to charge the shipowner with the cost of unloading. *The Nifa*, 62 L. J., Adm. 12; [1892] P. 411; 1 R. 540; 69 L. T. 56; 7 Asp. M. C. 324.

Evidence of General Custom admissible.]—In construing a charterparty evidence of the existence of a general custom in the particular trade is admissible, but to affect the construction of the document the custom must be proved to exist. *Cunningham* v. *Fonblanque*, 6 Car. & P. 44.

—— **Not where it adds New Term to Charterparty.**]—Where the charterers attempted to set up against the shipowner a custom that, unless expressly excluded by the charterparty, and notwithstanding a provision in the charterparty that the cargo was to be consigned to the charterer's agents abroad free of commission on the charter, the agents were, on procuring an outward charter, to receive a commission on freight payable under it:—Held, that evidence of the alleged custom was not admissible, as it would not explain the charterparty, but would add a new term to it. *Phillips* v. *Briard*, 1 H. & M. 21.

—— **Or is inconsistent with Charterparty.**]—By a charterparty the vessel was to deliver at H., "or so near thereto as she could safely get"; to discharge as customary; the cargo to be brought to and taken from alongside the ship at merchant's risk and expense. The draught of water of the vessel with the cargo on board was too great to allow her to reach H. The nearest point to which she could safely get was S., where the merchant refused to accept delivery of any part of the cargo. In order to lighten the vessel, part of her cargo was discharged into lighters at S. and sent in them to H. Her owner having sued the charterer to recover the lighterage expenses:—Held, that a defence alleging that by the custom of the port of H. the defendant was not bound to take delivery elsewhere than at H. was bad on demurrer, inasmuch as it sought to set up a custom inconsistent with the written contract, and that the plaintiff was entitled to recover the lighterage expenses. *Hayton* v. *Irwin*, 5 C. P. D. 130; 41 L. T. 666; 28 W. R. 665; 4 Asp. M. C. 212—C. A.

—— **Local.**]—Semble. If the custom be local only, it must be known to both parties, or it will not control the charterparty. *Holman* v. *Peruvian Nitrate Co.*, 5 Ct. of Sess. Cas. (4th ser.) 657.

Evidence as to Meaning of "Cargo" and "Freight."]—A. engaged with B. to have a full cargo for the ship, the rates of freight for which would average 40*s.* per ton, and at least nine cabin passengers, passage-money to average 75*l.* The contract was fulfilled as to the passengers, but the average rate of freight for goods amounted to 30*s.* only per ton. A. shipped, however, steerage passengers, the net profits from whom made the average earnings of the ship over 40*s.*:—Held, that as this was an unusual contract, evidence was not admissible to shew that the terms "cargo" and "freight" used with reference to the voyage on which the ship was engaged would, by the general usage and course of the trade, be considered to comprise steerage passengers, and the net profit arising from their passage-money. *Lewis* v. *Marshall*, 7 Man. & G. 729; 8 Scott (N.R.) 729; 13 L. J., C. P. 193; 8 Jur. 848.

"Safe Port"—Evidence as to Custom to lighten Ship.]—Where a vessel is chartered to proceed with a cargo to a port of call for orders to discharge at a "safe port" in the United Kingdom, the contract of the shipowner is to deliver the cargo at a safe port in the ordinary sense; and if it would be necessary to discharge part of the cargo in order to proceed to the port named by the charterer's agents the captain is entitled, unless it is otherwise provided by the charterparty, to refuse to proceed to the port so named, and in such a case evidence of a custom to lighten vessels to enable them to proceed to the port named is not admissible. *The Alhambra* (50 L. J., Adm. 36; 6 P. D. 68) followed; *Nielsen* v. *Wait* (55 L. J., Q. B. 87; 16 Q. B. D. 67) distinguished. *Reynolds* v. *Tomlinson*, 65 L. J., Q. B. 496; [1896] 1 Q. B. 586; 74 L. T. 591; 8 Asp. M. C. 150.

d. Alteration, Variation and Cancellation.

Authority of Agent.]—An agent at a foreign port to whom a ship is addressed for loading under a charterparty has no implied authority to vary the contract by substituting another and a distant port of loading, or a different quality or description of cargo. *Sickens* v. *Irving*, 7 C. B. (N.S.) 165; 29 L. J., C. P. 25; 6 Jur. (N.S.) 200.

Effect of.]—The stipulations in a charterparty may be varied by subsequent instructions, which may amount to a new contract pro tanto; and an insurance of freight upon a new voyage, though different from that described in the charterparty, may be good. *Hall* v. *Brown*, 2 Dow, 367, 375.

In Margin.]—A merchant entered into a charterparty in the following terms: "It is agreed between the owner of the good ship "Zwaan," now at Amsterdam, and to sail from thence for Liverpool on or before the 15th of March next, and the charterer, that the ship, being tight, staunch and strong, shall with all convenient speed be made ready," &c. as in the usual printed form of charterparty. The exception was as follows: "Restrictions of princes and rulers, the dangers and accidents of the seas and navigation, the act of God, fire, pirates and

enemies, throughout this charterparty always excepted." After the signing of the charter, the broker who had acted for the owner wrote in the margin, to come after the words "March next," "wind and weather permitting, with cargo or in ballast, for ship's benefit." He then took the charter to the charterer, and told him that he had made the note in the margin, which he said did not affect it. The charterer said that the note altered the matter, and he did not know that he would then accept the charter; and he ultimately refused to do so. The ship did not sail from Amsterdam, in consequence of what was admitted to be "the act of God":—Held, that the charterparty was avoided by the alteration so made in the margin. *Crookewit* v. *Fletcher*, 1 H. & N. 893; 26 L. J., Ex. 153; 5 W. R. 348.

By Parol.]—Assumpsit lies where a sealed charterparty was afterwards altered by parol, where the subsequent parol contract was distinct from, and not inconsistent with, the contract by deed being anterior to it in point of time and execution. *White* v. *Parkin*, 12 East, 578; 11 R. R. 488. And see *Davies* v. *Hawkins*, 3 M. & S. 488.

Where a shipowner covenanted to sail from London to Gibraltar, and there to deliver an outward cargo, and receive from the agents of the freighter at Gibraltar, or at Malaga, Cadiz, or Seville, as should be ordered by the agents at Gibraltar, such goods as they might load on board for the homeward cargo, and that the vessel should return direct to the port of London and deliver the homeward cargo; and the agents at Gibraltar ordered the captain to proceed to Cadiz, at which place other agents directed by parol that the homeward cargo should be delivered at Liverpool instead of London:—Held, that the shipowner having delivered the cargo at Liverpool could not recover the freight, the substitution by parol of Liverpool for London being inconsistent with the covenant contained in the charterparty. *Thompson* v. *Brown*, 1 Moore, 358; 7 Taunt. 656.

Cancellation—By Ship's Husband.]—A ship's husband cannot bind his owners by an agreement to cancel a charterparty, and pay a sum of money on such cancellation. *Thomas* v. *Lewis* or *Oxley*, 48 L. J., Ex. 7; 4 Ex. D. 18; 39 L. T. 669; 27 W. R. 111; 4 Asp. M. C. 31.

—— **Option to Cancel—Ship not ready to load.**]—A charterparty, provided that should the steamship not be ready to load on or before May 31, the charterer should have the option of cancelling the charter. On that day the vessel had discharged two holds only of her outward cargo, and was not completely discharged until the next day:—Held, that the charterers were entitled to cancel. *Groves* v. *Volkart*, 1 Cab. & E. 309.

Renunciation—Right to Sue for Breach.]—A mere intimation by the agent of the charterer to the master before the time of loading had expired that he had ceded the charterparty with all its rights and obligations to a third party, and that he must address himself to the third party for a cargo, does not amount to a renunciation of the charterparty so as to entitle the owner to sue as for a breach. *Barrick* v. *Baba*, 2 C. B. (N.S.) 563; 26 L. J., C. P. 280.

Alteration by Charterer's Agent abroad—Rate of Freight.]—See *Wiggins* v. *Johnson*, XIII. FREIGHT, infra, col. 418.

Freight — Substituted Voyage — Action on Charterparty.] — See *Thompson* v. *Brown*, XIII. FREIGHT, infra, col. 371.

Alteration of Voyage.] — See *Davidson* v. *Gwynne*, infra, col. 306.

e. Conditions and Warranties.

i. *Class of Ship.*

What is.]—In a charterparty made at New York, between British subjects, a vessel was described as "the A 1 Br. brig, 'Hannah Eastee,' of Liverpool":—Held that this description was a warranty by the owners that the vessel was at the time classed A 1 at Lloyds' in London. *Routh* v. *MacMillan*, 2 H. & C. 750; 33 L. J., Ex. 38; 10 Jur. (N.S.) 158; 9 L. T. 541; 12 W. R. 381.

Not Continuing.]—A description in a charterparty that a vessel is of a particular class is not a continuing warranty, but applies only to the classification at the time the charterparty is made. *French* v. *Newgass*, 47 L. J., C. P. 361; 3 C. P. D. 163; 38 L. T. 164; 26 W. R. 430; 3 Asp. M. C. 574.—C. A.

In a charterparty the ship was described as newly classed "A 1½. Record of American and Foreign Shipping Book." The ship was chartered to New Orleans to load cotton. Soon after her arrival there the certificate of her classification was cancelled, and the charterers were in consequence unable to obtain insurances on the cotton, and they refused to load the ship. In an action by the shipowners against the charterers for breach of the charterparty:—Held, that there was no breach of warranty by the shipowners, because the statement of the ship's classification in the charterparty was a warranty only that she was so classed at that time, and not that she was rightly, or would continue so classed, and that the shipowners were entitled to maintain their action. *Ib.*

The description of a vessel in a charterparty as A 1, warrants only that she was A 1 at the time of making the charterparty, not that she should continue to be so. *Hurst* v. *Usborn*, 18 C. B. 144; 25 L. J., C. P. 209; 4 W. R. 458.

Meaning of Term "Steamship."] — When a vessel by which goods are forwarded is described as a steamship, simpliciter, in the bill of lading forming the agreement between the freighter and the owner of the vessel, the contract is that the goods shall be transported in a ship whereof the primary and principal propelling power is steam, and the terms will not be satisfied by an auxiliary screw steamship making a sailing voyage with the occasional aid of her steam power. *Fraser* v. *Telegraph Construction and Maintenance Co.*, 41 L. J., Q. B. 249; L. R. 7 Q. B. 566; 27 L. T. 373; 20 W. R. 724.

Meaning of Term "Efficient."] — The term "efficient," as applied in a charterparty to a ship, must be construed with reference to the several classes of work which she has from time to time to accomplish. *Hogarth* v. *Miller*, 60 L. J., P. C. 1; [1891] A. C. 48; 64 L. T. 205; 7 Asp. M. C. 1—H. L. (Sc.)

Nationality of Ship—Knowledge of Freighter.]—To prove that a ship is British built, a British register, so describing her, is by itself no evidence. A ship was described in a memorandum for a charterparty as "the Swedish ship or vessel called 'the Maria.'" In fact she was British built and had a British register, but she had Swedish papers and a licence to sail as a Swedish ship—which was known to the freighter. In an action against the freighter for not loading—Held, that he could not set up as a defence that she was not a Swedish ship. *Reusse* v. *Meyers*, 3 Camp. 474.

ii. *Seaworthiness and Fitness.*

Implied Warranty.]—In every charterparty there is an undertaking on the part of the shipowner that the ship shall be seaworthy. *Lyon* v. *Mells*, 5 East, 428; 7 R. R. 726. S. P., *Dale* v. *Hall*, 1 Wils. 281. And see *Hollingworth* v. *Brodrick*, 7 A. & E. 40; 2 N. & P. 608; 8 L. J., Q. B. 80; 1 Jur. 430.

—— **Sufficiency of Crew.**]—The owner is bound to provide a competent master and crew. *Shore* v. *Bentall*, 7 B. & C. 798; 31 R. R. 302, n.; and see *Wynne* v. *Fellowes*, infra, col. 300.

Extent of Warranty.]—If a chartered vessel is seaworthy at the commencement of the voyage, but is afterwards damaged by perils of the sea, though the owner is not bound to repair the vessel, yet if he elects not to do so, he ought not to proceed with the vessel in the unseaworthy condition. *Worms* v. *Storey*, 11 Ex. 427; 25 L. J., Ex. 1.

A shipowner who accepts goods which he is to deliver in good condition, impliedly contracts to perform the voyage in a ship which is seaworthy. *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72; 37 L. T. 333; 3 Asp. M. C. 516.

The implied warranty of seaworthiness into which the owner of a ship enters with the owner of her cargo, attaches at a time when the perils of the intended voyage commence, that is, when she sets sail with the cargo on board for her port of destination; and this warranty is broken if she is then unfit to encounter these perils, although she may have been seaworthy whilst lying in the port of loading, and also at the time of starting from her anchorage for and arriving at the place of loading appointed by the charterer, and of commencing to take on board her cargo. *Cohen* or *Cohn* v. *Davidson*, 46 L. J., Q. B. 305; 2 Q. B. D. 455; 36 L. T. 244; 25 W. R. 369; 3 Asp. M. C. 374.

A vessel was chartered for a voyage to Dundee from the port of Sunderland, where she was lying in a seaworthy condition. Pursuant to the terms of the charterparty, and by the orders of the charterer, the vessel proceeded to a wharf situate in the port of Sunderland, and there loaded on board a cargo of cement. At the time when she commenced taking in the cargo she was seaworthy; but by the time of setting sail on her voyage she had from some unknown cause become unseaworthy. The owners of the vessel were not guilty of negligence in sending her to sea in the condition in which she then was. Soon after starting from Sunderland she began to leak; but the wind being fair for the voyage to Dundee, the master resolved to keep his course, and he was not guilty of any negligence in not returning to Sunderland. The vessel did not reach Dundee, but foundered at sea, and the cargo of cement was totally lost:—Held, that the warranty of seaworthiness implied by law upon entering into the charterparty had been broken, and that the charterer was entitled to recover the value of the cargo shipped by him on board the vessel. *Ib.*

In every contract for the conveyance of merchandise by sea there is, in the absence of express provision to the contrary, an implied warranty by the shipowner that his vessel is seaworthy. *Kopitoff* v. *Wilson*, 45 L. J., Q. B. 436; 1 Q. B. D. 377; 34 L. T. 677; 24 W. R. 706; 3 Asp. M. C. 163.

In an action to recover damages for the loss of iron armour-plates, which were lost on board a ship, it appeared that the shipowners, by their servants, stowed the ship, and that during rough weather one of the plates broke loose and went through the side of the ship, which in consequence was lost. At the trial the judge told the jury, as a matter of law, that a shipowner warrants the fitness of his ship when she sails, and not merely that he will honestly and bonâ fide endeavour to make her fit, and left to them the questions, was the vessel at the time of the sailing, in a state, as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season? secondly, if she was not in a fit state, was the loss that happened caused by that unfitness?—Held, that the direction was right and correctly stated the liability of a shipowner, even though he did not hold himself out as a common carrier. *Ib.*

In the contract of a shipowner to carry goods shipped on board his vessel, there is no implied condition that the vessel shall be seaworthy. *Schloss* v. *Heriot*, 14 C. B. (N.S.) 59; 32 L. J., C. P. 211; 10 Jur. (N.S.) 76; 8 L. T. 246; 11 W. R. 596.

But to an action by the shipowner against the merchant who shipped goods on board, for the latter's share of an average loss, it is a good plea, on the ground of avoiding circuity of action, to plead that the ship was not seaworthy at the commencement of the voyage and that the average loss was caused and arose from and in consequence of such unseaworthiness. *Ib.*

Throwing up Charter by Reason of Unseaworthiness of Ship.]—A. agreed to charter a ship for twelve months after the completion of her then present voyage. After the completion of the voyage and when he was ready to load the ship she was detained as unseaworthy; and the repairs were not finished until more than two months after the completion of the voyage:—Held, that the charterer was entitled to throw up the charterparty. *Tully* v. *Howling*, 46 L. J., Q. B. 388; 2 Q. B. D. 182; 36 L. T. 163; 25 W. R. 290; 3 Asp. M. C. 61—C. A.

Voyage in Stages.]—By a charterparty a ship was to proceed to Oran, and there load a part cargo of esparto, for delivery at Garston, with liberty to fill up with ore, or other dead-weight cargo, for owner's benefit, and to call at any ports in any order. She loaded at Oran, and left with a supply of coal insufficient for a voyage thence to Garston. She called at Huelva, and was filled up with ore, but no further supply of coal was taken on board. After leaving Huelva, the ship went ashore, by reason of the insufficient supply of coal, and the cargo was lost. In an

action for non-delivery of the esparto :—Held, by the court below, that the voyage was an entire voyage from Oran to Garston, and that the warranty of seaworthiness at the commencement of that voyage having been broken, the plaintiffs were entitled to recover :—Held, on appeal, that even if the voyage could be treated as one divided into stages, the warranty of seaworthiness, which attaches at the commencement of each stage, had been broken at Huelva, and the plaintiffs were entitled to recover. *Thin* v. *Richards*, 62 L. J., Q. B. 39 ; [1892] 2 Q. B. 141 ; 66 L. T. 584 ; 40 W. R. 617 ; 7 Asp. M. C. 165—C. A.

Fitness for Cargo.]—A ship was chartered to sail to Manilla for orders to load there, or at Yloilo, a full and complete cargo of sugar in bags, hemp in compressed bales, $\frac{\text{and}}{\text{or}}$ measurement goods, and therewith to sail to Cork, &c., the freight to be at the rate of 4*l.* 2*s.* 6*d.* for dry sugar, 4*l.* 5*s.* for wet sugar, and 4*l.* 15*s.* for hemp or measurement goods ; the master engaging that the vessel before and when receiving cargo should be a good risk for insurance, and that during the voyage he would take all proper means to keep the vessel tight, staunch and strong, and in every way fitted and provided for the voyage. At Yloilo the charterer provided a full cargo of wet sugar in bags. In the course of loading it was found that the quantity of molasses which had drained, and which might have been expected to drain, from the wet sugar was so great as to render the ship unseaworthy unless removed, and that the ship's pumps were unable to remove it. The ship was in all other respects seaworthy, but could not have been rendered seaworthy for that cargo without a delay which would have frustrated the objects of the voyage:—Held, that the charterer was entitled under the charterparty to supply a full cargo of wet sugar, and to have a ship provided which was fit for such a cargo. *Stanton* v. *Richardson*, 45 L. J., C. P. 78 ; 33 L. T. 193 ; 24 W. R. 324 ; 3 Asp. M. C. 23—H. L.

There is no undertaking on the part of a shipowner that his vessel (if really fit) shall be free from suspicion of unfitness to receive a cargo on board. *Towse* v. *Henderson*, 4 Ex. 890 ; 19 L. J., Ex. 163.

Damages.]—A ship was chartered and put up at the Mauritius as a general ship, and received on board sugars consigned to London. In consequence of the unseaworthiness of the ship she was forced to return to the Mauritius, and part of the sugars which were damaged was there landed and sold. The owners of the sugars brought actions against the charterers for the short delivery. They having no defence suffered judgment by default, and attended the execution of the writs of inquiry. The owner of the vessel had notice of the actions and of each step therein, and was invited to take on himself the defence, which he declined to do :—Held, that the charterers were entitled to recover the sums paid by them in those actions, and also the costs incurred by them therein. *Blyth* v. *Smith*, 6 Scott (N.R.) 360 ; 5 Man. & G. 405 ; 12 L. J., C. P. 203 ; 7 Jur. 948.

Declaration for freight on a charterparty, whereby the ship being tight and every way fitted for the voyage should, at Sunderland, load a cargo of coals and proceed to Constantinople, being paid freight on the quantity delivered, "one-fourth of the freight to be advanced to the owners' agent in London, on the ship having sailed, less five per cent. thereon for assurance, interest and commission." Averment, that the defendant caused the ship to be loaded with a cargo of coals, and "that she, being so loaded, sailed for C. pursuant to the charterparty." Plea, that the ship was not, at the commencement of the voyage, tight and every way fitted for the voyage, and that by reason thereof the ship and cargo were lost ; and a second plea, that after the ship sailed, the plaintiff was guilty of negligent and improper conduct with regard to the management of the ship, by reason whereof the ship and cargo were lost :—Held, that the first plea was not a good plea in avoidance of circuity of action, as the damages sustained by the defendant were not necessarily identical in amount with the sum claimed by the plaintiff ; but that it was a bar to the action, on the ground that the advance on the freight had never become payable. *Thompson* v. *Gillespy*, 5 El. & Bl. 209 ; 24 L. J., Q. B. 340 ; 1 Jur. (N.S.) 779 ; 3 W. R. 505.

Ship of Peculiar Construction—Special Appliances.]—See *The Marathon*, 48 L. J., Adm. 17 ; 40 L. T. 163 ; 4 Asp. M. C. 75 ; XII. Bill of Lading, post, col. 327.

Proof of Unseaworthiness—Ship Unseaworthy shortly after Sailing.]—Unseaworthiness at sailing may be inferred from proved unseaworthiness shortly after sailing. *Watson* v. *Clark*, 1 Dow, 336 ; 14 R. R. 73, and cases supra, col. 257.

Liability for Damage to Cargo.]—See *Hotham* v. *East India Co.*, and cases infra, XV. Cargo, cols. 550 seq.

Action for Breach of Contract as to Seaworthiness—Insurance—Pleading.]—Action by shipper against shipowner for breach of contract that the ship was seaworthy at commencement of voyage, whereby plaintiff was prevented from insuring : plea that before any damage accrued to the plaintiff the ship was made seaworthy :—Held, bad. *Dunbar* v. *Smithwaite*, 3 W. R. 68.

See also post, XII. Bill of Lading, Seaworthiness, Warranty.

iii. *Position and Sailing.*

Position of Ship.]—By a charterparty it was agreed that the ship "Ceres," of the measurement, &c., "expected to be at Alexandria about the 15th of December," being tight, &c., "should with all convenient speed" sail and proceed to that port, and there receive from the charterers a cargo of cotton seed. In an action against the owner, the breach alleged in the declaration was, that the ship was not expected to be at Alexandria about the 15th of December, 1871, but was then in such part of the world and under such engagements that she could not perform those engagements and arrive at Alexandria about the said day :—Held, a good breach, the descriptive statement amounting to a warranty that the ship was in such a position that she might reasonably be expected to arrive at Alexandria by the day named. *Corkling* v. *Massey*, 42 L. J., C. P. 153 ; L. R. 8 C. P. 395 ; 28 L. T. 636 ; 21 W. R. 680 ; 1 Asp. M. C. 18.

A plea, that, at the time of making the charterparty, the ship was, to the charterer's knowledge, engaged for a certain voyage, and that the charterparty was made subject to a condition that she should with all convenient speed fulfil her engagement and then proceed to the port of loading, and that she did so, is a good plea. *Ib.*

"Ship now at Rangoon."]—In an action by the vendors against their vendees for refusal to accept, evidence was given to shew the circumstances under which the contract was made, and that it was of vital importance that the vessel should be in the port named at the time of making the contract. The jury found, that the condition "Ship now at Rangoon," had not been fulfilled, and that it was a condition absolutely vital:—Held, that it was rightly left to the jury to say under what circumstances the contract was made, and that the words "Ship now at Rangoon" amounted to a warranty justifying the defendants in saying that there had been a failure of performance of a condition precedent and in refusing to carry out the contract. *Oppenheim* v. *Fraser*, 34 L. T. 524; 3 Asp. M. C. 146.

Held, also, that the finding of the jury was rightly taken as an element in enabling the court to say that the words amounted to a condition precedent. *Ib.*

"Now in port."]—By a charterparty, dated London, the 19th of October, 1860, A.'s ship was chartered to B. as follows: "It is this day mutually agreed between A., owner of the good ship or vessel called the M., of 420 tons or thereabouts, now in the port of Amsterdam, and B., of London, merchant, that the ship being tight, staunch, strong, and every way fitted and ready for the voyage, shall, with all possible despatch, proceed direct to Newport, Monmouthshire," and there take in cargo. On October 15th the ship was at Nieuwediep, sixty-two miles from Amsterdam, and not in the port of Amsterdam, and under favourable circumstances would have reached the docks at Amsterdam in twelve hours more, but in consequence of contrary winds and the absence of steam-tug power, she remained at Nieuwediep over the 19th of October, and did not reach the docks till the 23rd of October. She discharged her cargo with all possible dispatch, was immediately made ready for sea, and proceeded direct to Newport, where she arrived on the 1st of December. B. altogether refused to load the ship:—Held, that the words "now in the port of Amsterdam," in the charterparty, imported a warranty, and that as the ship was not in the port of Amsterdam at the time when the charterparty was made, he was justified in saying that there had been a failure of performance of a condition precedent, and in refusing altogether to carry out the contract. *Behn* v. *Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204; 9 Jur. (N.S.) 620; 8 L. T. 207; 11 W. R. 496—Ex. Ch.

Time for Sailing—Warranty.]—To an action for not loading a vessel, in pursuance of the terms of a charterparty, the defendant pleaded that it was agreed by the charterparty, between the plaintiff, original charterer of the good ship called the "Dove," A 1, of the measurement of 149 tons or thereabouts, now at sea, having sailed three weeks ago or thereabouts, and the defendant, that the ship, being tight, staunch, &c., should proceed to Marseilles (after having delivered her cargo at Genoa), and there load goods of the defendant, and therewith proceed to a safe port in the United Kingdom, calling at Cork or Falmouth, for a certain rate of freight, thirty working days to be allowed, Sundays excepted. The plea then averred that time was an essential and material part of the contract; and the probable situation of the ship, with reference to the date of her sailing and the object of her voyage, was also an essential part of the contract; and that, in point of fact, at the time of making the charterparty, the ship had not sailed three weeks, but a materially and unreasonably later time, of which the defendant had no notice or knowledge, for which cause the defendant neglected and refused to load the ship:—Held, that the time at which the ship sailed was material, and that the statement in the charterparty amounted to a warranty. *Ollive* v. *Booker*, 1 Ex. 416; 17 L. J., Ex. 21.

Guarantee of Despatch twenty-four hours after Arrival.]—It was agreed by charterparty that a vessel should sail to Sydney $\frac{\text{and}}{\text{or}}$ Moreton Bay, and thence proceed to Callao, Peru, where the captain should report his arrival to G., who should send the captain orders for loading a cargo of guano at the Chincha Islands, to which place the vessel should at once proceed, and after completing her loading, proceed to any safe port in the United Kingdom; freight to be paid at the rate of 4*l.* sterling per ton weight of guano. "The owners guarantee that for the freight of 4*l.* per ton, the ship shall be despatched for Australia within twenty-one days after arrival; if detained over twenty-one days 3*l.* 10*s.* per ton to be the rate of freight; if ordered from Sydney to Moreton Bay, the time so occupied not to be reckoned in the days as above." The vessel sailed from Liverpool on the 5th July, 1853, and anchored inside Sydney Heads on the 25th October, 1853. She was ordered to Moreton Bay, but bad weather and the insubordination of a portion of the crew prevented the vessel from leaving Sydney Harbour until the 4th November, when she proceeded on her voyage, and on the 12th anchored inside the Flanders Rocks and outside Moreton Bay. She was taken in charge of a pilot, and on the 14th arrived at her anchorage, where she remained until the 5th December. Some of the crew having deserted, and others refused to work, the remainder was not sufficient to navigate the vessel safely to Callao, and no addition to the crew could be procured at Moreton Bay. On the 5th December the master caused the anchor to be got up and the sails set by the men who were willing to work, with the assistance of the harbour-master and pilot's crew, and the vessel proceeded on her voyage to Callao, but was shortly afterwards becalmed. During the night several of the seamen deserted. On the 6th the vessel proceeded some distance further, when the greater part of the crew refused to proceed to Callao, on the ground that the ship was not sufficiently manned, and they compelled the captain to return to Sydney. The vessel arrived at Sydney on the 18th December, and remained there until the 6th January, 1854, when she sailed to Callao, where she ultimately arrived and brought home a cargo of guano:—Held, that under these circumstances the ship was not despatched from Australia within

twenty-one days after her arrival, and consequently that the owners of the vessel were not entitled to the freight of 4*l.* per ton. *Sharp* v. *Gibbs*, 1 H. & N. 801.

—— **Condition precedent.**]—Where a charterparty, dated 6th of February, but averred not to be executed till the 15th of March, contained a covenant by the owner that the ship should and would proceed from D., where she then lay, on or before the 12th of February, on her outward-bound voyage, and return, &c., and a covenant by the freighter, that, in consideration of everything above mentioned, he would pay freight for the voyage; the voyage being averred to be performed, and the freight earned, the owner may recover for it, without averring that the ship sailed on or before the 12th of February, such covenant that the ship should sail on or before the 12th of February being either no condition precedent, but only an independent covenant, for breach of which the party had his remedy in damages; or not of the substance of the contract, which was for the performing of the voyage for which the ship was chartered, and earning the freight; or being rendered impossible to be performed by the parties themselves not having executed the deed till after the time appointed for doing the act, and thereby dispensing with the performance of it. *Hall* v. *Cazenove*, 4 East, 477; 1 Smith, 272; 7 R. R. 611.

Stipulations in a charterparty, that the vessel, being tight, staunch and strong, shall sail with convenient speed, and within a reasonable time, are not conditions precedent to the performance of a contract to load on the part of the charterer, although if, by reason of the non-compliance with those stipulations, the object of the charterparty and of the voyage was wholly frustrated, that may be an answer to an action for breach of the contract. *Tarrabochia* v. *Hickie*, 1 H. & N. 183; 26 L. J., Ex. 26.

By a charterparty it was agreed, that the vessel should proceed to Trieste, and there load a full cargo of wheat, and, being so loaded, should therewith proceed to a port in the United Kingdom, "the vessel to sail from England on or before the 4th of February then next":—Held, that the sailing of the vessel from England on or before the day named was a condition precedent to the owner's right to sue the merchants for not providing a cargo at Trieste. *Glaholm* v. *Hayes*, 2 Scott (N.R.) 471; 2 Man. & G. 257; 10 L. J., C. P. 98.

The defendant chartered a ship of T. from Sunderland to Barcelona: by the charterparty, half the freight was to be advanced to the master on his signing the bills of lading. T., being indebted to the plaintiff, gave him an order on the defendant, requiring the defendant to pay to the plaintiff, on the ship "being loaded and sailed, out of the advance," 73*l.* The defendant wrote at the foot of the order, that he agreed to the above. The vessel being loaded and in a fit state for sailing, but the clearances not being completed, nor the bills of lading signed, left Sunderland Harbour, with the captain on board. She crossed the bar; and the captain returned to land, in order to get the papers completed, and sign the bills of lading; he signed them, and got the advance of freight from the defendant, who deducted a sum to meet the 73*l.* The vessel stood off and on, waiting for the captain; but it being found that she had been injured, she returned to Sunderland Harbour to repair, the captain not having joined her, and did not afterwards sail:—Held, that the sailing of the vessel was a condition precedent to the liability of the defendant to pay the 73*l.* *Hudson* v. *Bilton*, 6 El. & Bl. 565; 26 L. J., Q. B. 27; 2 Jur. (N.S.) 784.

—— **"Ready to receive Cargo."**]—In an action for damages for loss of freight and for demurrage, it was proved that the defendants made a contract with the plaintiff containing these clauses: "Steamer to load end of November or early December. Charterers having the option of cancelling if she is not ready to receive cargo by the 12th December next. Steamer to be loaded on usual berth terms, 2 per cent. commission to us." The vessel arrived on the 10th December, and her stern having been fastened to the breakwater, the captain gave the defendants notice that he was ready to receive cargo, but the merchants refused to take the notice that the vessel was "ready to receive cargo" until she was moored alongside the quay, which could not be done before the 18th December. Meantime the merchants cancelled their contracts with the defendants, and the vessel was loaded at a lower rate of freight than that specified in the contract:—Held, that the plaintiff was entitled to recover damages for the loss of freight, as the vessel was "ready to receive cargo" within the meaning of the contract, although not moored alongside the quay, and that the matter was not affected by an alleged custom at the port, that a vessel was not to be considered "ready to receive cargo" until moored alongside the quay; but that the plaintiff was not entitled to damages for demurrage or detention of the vessel after 12th December, as the contract came to an end on that date. *Hick* v. *Tweedy*, 63 L. T. 765; 6 Asp. M. C. 599.

—— **"Ready to Load."**]—A charterparty provided that, should the steamer not be ready to load on or before the 31st May, 1882, the charterer should have the option of cancelling the charter. On that day the vessel had discharged two holds only of its outward cargo, and was not completely discharged till the middle of the following day:—Held, that the charterers were entitled to cancel the charter. *Groves* v. *Volkart*, 1 Cab. & E. 309. Affirmed in C. A. And see *The Austen Friars*, *Smith* v. *Dart*, infra; *Oliver* v. *Fielden*, col. 504.

—— **Obligation to Load—Date of Arrival.**]—A condition that owners will provide "steamers to load between August and early December inclusive, at times to be in good time mutually arranged, but as nearly as possible a steamer a month," contained in a charterparty, under which the charterers assume absolutely the obligation of loading such ships, does not make the punctual arrival of the ship at dates mentioned in a subsequent letter a condition precedent to the arising of the charterers' obligation to load, where the ships have been delayed by perils of the sea, which are excepted, or by towage which is allowed by the charterparty. *Potter* v. *Burrell*, 66 L. J., Q. B. 63; [1897] 1 Q. B. 97; 75 L. T. 491; 45 W. R. 145; 8 Asp. M. C. 200—C. A.

—— **"Now Sailed or about to Sail"—Waiver.**]—The description in a charterparty of the ship as "now sailed, or about to sail," held to be of the substance of the contract, and not a representa-

tion; and that those words were a condition precedent to the contract, and not a mere warranty. The charterers could therefore have refused to load. *Bentsen* v. *Taylor*, 63 L. J., Q. B. 15; [1893] 2 Q. B. 274; 4 R. 510; 69 L. T. 487; 42 W. R. 8; 7 Asp. M. C. 385—C. A.

Where charterers have a right to repudiate the contract, but induce the shipowner to send the ship to the port of loading in the belief that they would only claim damages in respect of increased freight and insurance premium:—Held, that they had waived their right to insist on the non-fulfilment of the condition, and were, therefore, liable for the freight. *Ib.*

—— **Sail with the next Wind.**]—Defence to action for freight that the ship did not sail with the next wind:—Plea held bad. *Constable* v. *Clavery*, infra, col. 300.

—— **Quarantine.**]—By a charterparty of a steamship it was agreed that she should go to "three safe loading places" between two named ports, and there load from the charterers a cargo of oranges, and being so loaded proceed to London . . . and deliver the same pursuant to bills of lading . . . (the act of God . . . and all dangers of the seas, rivers, and steam navigation of what nature and kind soever during the said voyage, always excepted), and the charterers thereby promised to load the cargo, and stipulated, after a provision for working and lay days, that "should the steamer not be arrived at first loading port free of pratique, and ready to load on or before the 15th of December next, charterers have the option of cancelling or confirming this charterparty." By dangers of the seas the steamer, although arrived at the first loading port, was not free of pratique and ready to load on the 15th of December, and the charterers therefore cancelled the charterparty. At the trial of an action against them for not loading the cargo, the judge left to the jury the disputed question whether the port was a "safe loading place," and they found in the affirmative:—Held, that the excepted dangers clause applied only to the voyage, and not to the clause giving the option to cancel the charterparty if the ship was not ready to load on the day fixed, and therefore the cancellation was justified. *Smith* v. *Dart*, 54 L. J., Q. B. 121; 14 Q. B. D. 105; 52 L. T. 218; 33 W. R. 455; 5 Asp. M. C. 360.

A ship has not arrived within the meaning of a charterparty provision requiring the charterer to load within a fixed time after her arrival, if she cannot be loaded by reason of quarantine unknown to both parties when the charterparty was entered into. Lord Blackburn's opinion in *Hudson* v. *Ede*, and *Postlethwaite* v. *Freeland*, col. 472, considered. *White* v. *Steamship Winchester Co.*, 13 Ct. of Sess. Cas. (4th ser.) 524.

A ship that has not obtained pratique, and is prohibited by regulations of the port from communicating with the shore, is not "ready to load" within the meaning of those words in a charterparty. *The Austen Friars*, *Smith* v. *Dart*, 6 R. 739; 71 L. T. 27; 7 Asp. M. C. 503.

—— **"Leave Amsterdam."**]—A ship was chartered to "sail and proceed from Amsterdam with all convenient speed to Liverpool, to leave Amsterdam not later than all (*sic*) March." On the 30th of March the ship, having a portion of her ballast on board, left the docks at Amsterdam, and on the same evening got to the entrance of the North Holland Canal. On the 31st of March she proceeded to Alkmaar, where she remained during the 1st and 2nd of April, taking in the remainder of her ballast. On the 3rd of April she proceeded on her voyage, and quitted Nieuwediep, and arrived at Liverpool on the 17th:—Held, that the term "leave Amsterdam" did not mean "sail on her voyage from Amsterdam," and consequently the stipulation in the charterparty had been complied with. *Van Buggen* v. *Baines*, 9 Ex. 523; 2 C. L. R. 543; 23 L. J., Ex. 213.

—— **Where Accident within Exceptions.**]—A merchant at Liverpool entered into a charterparty with the owner of the ship as follows: "It is mutually agreed between the owner of the good ship 'Zwaan,' now at Amsterdam, and to sail from thence for Liverpool on or before the 15th of March next, and ——, of Liverpool, that the ship, being tight, staunch and strong, shall with all convenient speed be made ready," &c., as in the usual printed form of charterparty. The exception was as follows:—"Restrictions of princes and rulers, the dangers and accidents of the seas and navigation, the act of God, fire, pirates and enemies, throughout this charterparty always excepted." The ship did not sail from Amsterdam in consequence of what was admitted to be "the act of God":—Held, that notwithstanding the words "throughout this charterparty," the sailing of the ship from Amsterdam on the 15th of March was a condition precedent to the obligation of the charterer to take and load the ship. *Crookewit* v. *Fletcher*, 1 H. & N. 893; 26 L. J., Ex. 153; 5 W. R. 348. *See also cases* post, col. 277.

—— **To Sail Direct.**]—By a charterparty between the owner and the captain of a ship and the chartered agent abroad, for the carriage of timber from Riga to Portsmouth at a stipulated rate per load, the former bound himself, after receiving his cargo on board, to sail with the first favourable wind direct to the port of Portsmouth. The ship, however, unnecessarily entered the harbour of Copenhagen, where she was detained several weeks, by means whereof the charterer was put to considerable expense in having fresh insurances effected upon the cargo. In an action for the freight:—Held, that the covenant to sail direct to Portsmouth was not a condition precedent; and that the deviation could not be given in evidence either as a bar to the action or to diminish the damages. *Bornmann* v. *Tonke*, 1 Camp. 377; 10 R. R. 747.

A shipowner, by charterparty of October 20th, 1832, agreed to go in ballast from P. to St. M., and bring back a cargo of fruit direct to L.; the charterer was to be allowed thirty-five running days for loading and unloading, to commence on December 1st then next; and if the vessel did not arrive at St. M. by the 31st January, 1833, the charterer was to be at liberty to rescind the charterparty:—Held, that the shipowner was bound to proceed at once to St. M., and was not at liberty to make an intermediate voyage for his own purposes, although, notwithstanding such intermediate voyage, he arrived at St. M. before the 31st January, 1833. *M'Andrew* v. *Adams*, 4 M. & Sc. 517; 1 Bing. (N.C.) 29; 3 L. J., C. P. 236.

—— **Waiver.**]—By a charterparty made at Malta, dated the 24th of February, 1854, the chartered ship was described as "coppered A 1, of

Malta," of a certain measurement, "now at anchor at this port," and it was agreed that she being tight, staunch, and strong, and properly manned, and every way fitted for the voyage, should, with all convenient speed, proceed in ballast to Alexandria, in Egypt, and there load from the charterer a cargo of beans and wheat. At the date of the charterparty the ship was not coppered, nor was she lying at anchor in port, nor had she obtained her register. She was an entire new vessel, in dry dock, her coppering being in course of completion. The ship was not ready to sail until the 28th of March, and, from the state of the weather, she did not sail until the 30th of that month, and reached Alexandria on the 12th of April. No objection was made by the charterer, at the time of the delay. On her arrival the master gave notice to the charterer's agent there that he would be ready to receive cargo on the 14th of that month. Before the ship's arrival at Alexandria, the charterer's agent had made a cession to the charterparty, and the agent referred the master to the cessionary, informing him that his principal had nothing more to do with the charterparty than to guarantee the solvency of the cessionary. Freights had fallen considerably below the rates named in the charterparty between the date of the charterparty and the date of the cession. The cessionary sought to invalidate the cession on account of the delay in the arrival of the ship, and on that ground refused to give the captain any cargo. The captain refused to acknowledge the cessionary or release the charterer, but at the same time expressed his readiness to receive a cargo from any one under the order of the charterer's agent. The ship lay at Alexandria waiting for cargo the whole of her lay days and the ten demurrage days, but received no cargo from the charterer. The captain afterwards took a small cargo and returned to Malta. In an action brought by the shipowner against the charterer in Malta :—Held, first, that it was unnecessary to determine whether the completion of the coppering of the ship was a condition precedent or not to the maintaining an action against the charterer, as it was clear that that statement had reference to the time of sailing and not to the date of the charterparty. *Dimech* v. *Corlett*, 12 Moore, P. C. 199. And see *Bentson* v. *Taylor*, supra, col. 265, as to waiver.

Held, secondly, as to the stipulation that the ship should sail "with all convenient speed," that as the parties had not expressly stated for themselves in the charterparty that unless the ship sailed on a specified day the charterparty was to be at an end, and as the charterer resided at Malta and had made no objection at the time to the delay, or had given evidence that any other loss than that occasioned by the falling of freights had taken place in consequence of the delay, his position was not thereby altered, and an action was therefore maintainable against the charterer upon the charterparty. *Ib.*

To Sail with Convoy.]—The owner of a ship is bound by a representation of his broker, who put up the ship at the Royal Exchange, and at the coffee-house, as a general ship warranted to sail with convoy, and distributed handbills to the same effect. *Runquist* v. *Ditchell*, 3 Esp. 64 ; 2 Camp. 556, n.

—— **No Convoy — Loss of Insurance — Damages.**]—The defendant put up a ship at Lloyd's as about to sail with the first convoy. The plaintiff shipped goods in her, and insured them with a warranty that the ship would sail with convoy. Before the ship sailed preliminaries of peace were signed, and the ship sailed without convoy, none being appointed by the government, but with French, Spanish, and American passports. No notice of her sailing without convoy was given to the plaintiffs. The ship was lost in collision the day after she sailed. The plaintiffs sued the defendants for breach of contract, whereby they lost the benefit of their insurance :—Held, that they were entitled to recover. *Philips* v. *Baillie*, 3 Dougl. 374.

—— **To Sail with Convoy—Warranty or not.**]—A ship advertised to sail with convoy was blown out of the Downs, whilst waiting for convoy, and eventually, after endeavouring to put into Falmouth to wait for convoy, sailed for Grenada without convoy, and was taken. There was no mention of convoy in the bill of lading. In an action by the cargo owner against the shipowner for having lost the benefit of his insurance through the ship sailing without convoy, a verdict was given for the defendant ; but a new trial was directed in order that the question whether the advertisement amounted to a warranty, and as to the effect of the omission of mention of convoy in the bill of lading might be argued. *Snell* v. *Marryatt*, Abbott on Shipping, 13th ed. 357.

To Arrive at Port of Loading.]—Proviso in a charterparty, that, if a ship did not arrive at her port of loading on or before, &c., unless prevented by stress of weather or unavoidable impediment, the freighter should not be obliged to ship a cargo :—Held, that, if ordinary diligence was used in the voyage to reach the port of loading, the owners were within the exception of the proviso, though the ship was delayed till after the stipulated time by causes which extraordinary exertion might have counteracted. *Granger* v. *Dent*, M. & M. 475 ; 31 R. R. 752.

Where a ship was freighted to go in ballast to Jamaica, and bring home a cargo, and the freighter undertook to provide a full cargo for her in time for the July convoy, provided she arrived out and was ready by the 25th of June :—Held, where she did not arrive out till after the 25th of June, that the freighter was entirely discharged from his contract to furnish a cargo. *Shadforth* v. *Higgin*, 3 Camp. 385.

Where the plaintiff covenanted that on the arrival of a ship at a certain port, he would receive the defendant's cargo, and sail for England therewith with the next June convoy, provided the ship arrived and was ready to load sixty-five running days before the sailing of such convoy :—Held, that it was not a condition precedent to the defendant's part of the contract that the ship should so arrive, but he was still bound to supply a cargo under a stipulation to that effect in the contract. *Deffel* v. *Brocklebank*, 4 Price, 36 ; 3 Bligh, 561.

"Always Afloat"—Neap Tides—Lighterage — Demurrage.] — By a charterparty the "C." (described as expected ready to load about the 10th of April) was to proceed to the North Dock, Swansea, and there load, always afloat, a full and complete cargo of about 2,100 tons of fuel. It was also agreed that if the "C." was unable to complete loading at the North Dock, the char-

terers were to bear the expense of lighterage necessary to enable her to complete her loading elsewhere. The "C." arrived at the North Dock on the 30th of April, and having there loaded about 1,916 tons of fuel, was removed by her master from the dock, and the remainder of her cargo was taken to her in lighters. This was done because, the tides being neap, the "C." would have been unable to cross the sill of the North Dock when fully laden, and would have been detained there about a week, though there was sufficient water in the dock for her to have completed her loading remaining always afloat:—Held, that the "C." was not "unable to complete her loading at the North Dock," and that the fear of detention by being neaped did not justify her removal by the master. *The Curfew*, 60 L. J., Adm. 53; [1891] P. 131; 64 L. T. 330; 39 W. R. 367; 7 Asp. M. C. 29.

Damages.]—The defendant having guaranteed that, in consideration of the plaintiff's shipping goods by his ship, she should sail with or before any other vessel in the berth, under penalty of forfeiting half the freight, and another ship having sailed before her, and the only plea being, payment into court:—Held, that the sailing of the vessel with or before any other was the event intended to be secured; that the half freight was therefore recoverable as liquidated damages; and that it was unnecessary for the plaintiff to give evidence of any actual damage sustained by him. *Sparrow* v. *Paris*, 7 H. & N. 594; 31 L. J., Ex. 137; 8 Jur. (N.S.) 391; 5 L. T. 799.

When a contract was made in the following terms:—"We undertake to ship for you by the 'Warrior Queen,' guaranteeing that she sails not later than the first week in July, or forfeit 2*s.* 6*d.* per ton, 300 or 400 packages, one-third yarn, at a through rate of 42*s.* 6*d.*, free of commission, provided they are forwarded per M. & Co., on or before the 29th inst.;" and the defendant, in answer to a declaration for breach of the contract by reason of the nonshipment of a portion of the packages so sent, pleaded the payment of 2*s.* 6*d.* per ton on the packages as and for the forfeit according to the agreement:—Held, that the plea was good. *Heugh* v. *Escombe*, 4 L. T. 517.

Representation or Warranty—Ship not at Place Named.]—Assumpsit on charterparty by which defendant hired a ship from plaintiff to go to Cronstadt, and there take a full cargo of tallow and deals, &c., and proceed to London; allowance for lay days and demurrage; averment that the ship went to Cronstadt; breaches that the defendant did not load a cargo as agreed, but shipped deals only and not tallow; and that he detained the ship beyond the time agreed on, whereby the plaintiff earned less freight, and lost the use of his ship during her detention. Plea, that plaintiffs had represented that the ship was at W., and that plaintiff had entered into the charterparty on that understanding, whereas she was not at W. Replication, that at the time, &c., the plaintiffs also stated to the defendants, and it was mentioned in the charterparty, that the ship was on a voyage from W. to H., and the plaintiffs believed she was at W., whereas she had sailed from W. for H. Rejoinder, that the representation mentioned was in the charterparty, and was part of the contract, and that the ship was not at the time, &c., at W.:—Held, on special demurrer, that the mere representation as alleged in the plea was no answer to the declaration; and that the rejoinder, if it alleged a warranty, was a departure. *Elliott* v. *Von Glehn*, 13 Q. B. 632; 18 L. J., Q. B. 221.

Held, by Erle, J., that, if the rejoinder had not been a departure, the breach of warranty would not have been an answer to the action, the defendant having to some extent availed himself of the contract. *Ib.*

Covenant that Ship should Arrive by Named Day—Non-arrival—Refusal to Load.]—A shipowner covenanted that his ship should sail from M. for W., and the charterparty contained a proviso that if the ship should not arrive at W. by a day named the freighter should be at liberty to load her or not as he pleased. In an action by the freighter against the shipowner for not sailing for W., the defendant pleaded that he was prevented by weather from sailing and arriving at W. by the day named:—Held, on demurrer, that the defendant was liable, having undertaken that his ship should arrive by the day named. *Shubrick* v. *Salmond*, 3 Burr. 1637.

Covenant—Ready to Sail by Day Named.]—The plaintiff by charterparty covenanted that his ship should be ready to sail by a day named to load figs at Naples, and return to Topsham; and the defendant covenanted to pay freight for the same. The plaintiff sued the defendant for freight; the defendant pleaded that the ship was not ready to sail by the day named, whereby he lost his profit. Demurrer to plea allowed, the covenants being reciprocal. *Shower* v. *Cudmore*, Sir Th. Jones, 216.

Covenant to Unload and Sail.]—Covenant in charterparty that the ship having unloaded at T. would sail for D., and there load defendant's cargo. She did not unload at T.:—Held, that her unloading at T. was not a condition precedent to recovery of freight, but a separate covenant. *Ohlsen* v. *Drummond*, 4 Dougl. 357; 2 Chit. 705.

iv. *Capacity.*

Description of Warranty.]—To an action for not loading a ship according to the terms of a charterparty, in which the shipowner was described as "of the ship 'A.,' of the measurement of 180 to 200 tons, or thereabouts," the charterer pleaded that by the charterparty the ship was warranted to be of the measurement of 180 tons to 200 tons, or thereabouts; and that the ship was of a measurement greatly and unreasonably exceeding 200 tons, and was not of the measurement of 180 tons to 200 tons, or thereabouts; whereupon he did not load:—Held, that the plea was not proved, inasmuch as the statement of tonnage in the charterparty was matter of description only, and did not amount to a warranty *Barker* v. *Windle*, 6 El. & Bl. 675; 25 L. J., Q. B. 349; 2 Jur. (N.S.) 1069; 4 W. R. 603—Ex. Ch.

A cargo of guano was shipped from the Chincha Islands to London, by the "Oriente." The "Oriente," having become disabled, put into Valparaiso, was condemned, and her cargo taken out of her. The captain, "for account and risk of the owner of the cargo," chartered the "Fairy Queen" to take on "the cargo brought by the

'Oriente,' being 470 tons more or less, not exceeding what she can reasonably stow," at the rate of 5*l.* 2*s.* 6*d.* per ton. The owner of the cargo had an agent at Valparaiso, of which the captains of the "Oriente" and the "Fairy Queen" were aware, but no reference was made to him. After the guano had been loaded on board the "Fairy Queen," the captain of that vessel said that he had not more than 350 tons on board; and ultimately the captain of the "Oriente" agreed that freight should be paid on the full quantity of guano mentioned in the charterparty; and in order to carry out the agreement, a bill of lading was signed by the captain of the "Fairy Queen," making the guano deliverable to M. & Co., the agents for the general average settlement of the "Oriente," or their assigns, he or they paying freight for the guano as 470 tons, as per charterparty:—Held, that the charterparty contained no warranty that the cargo amounted to 470 tons more or less; and therefore the owners of the cargo were not liable under the charterparty for not loading a full cargo. *Gibbs* v. *Grey*, 2 H. & N. 22; 26 L. J., Ex. 286; 3 Jur. (N.S.) 543; 5 W. R. 608.

A charterparty provided that the ship should load a cargo of creosoted sleepers and timber, the charterers to have the option of shipping 200 tons of general cargo, and contained the following words: "Owners guarantee ship to carry at least about 90,000 cubic feet, or 1,500 tons deadweight." A lump sum was payable as freight. The ship was in fact able to load no more than 65,000 cubic feet, equivalent to 1,120 tons deadweight of such cargo. In an action by the charterers against the owners for damages:—Held, that the words above mentioned did not amount to a guarantee that the ship would carry 90,000 cubic feet of the specified cargo. *Carnegie* v. *Conner*, 59 L. J., Q. B. 122; 24 Q. B. D. 45; 61 L. T. 691; 6 Asp. M. C. 447.

Condition Precedent.]—Where, by a charterparty made at Liverpool for a voyage from Liverpool to Sydney, the charterer agreed to pay for the use and hire of the ship, in respect of the voyage, 1,550*l.* in full, on condition of her taking a cargo of not less than 1,000 tons of weight and measurement:—Held, that the stipulation or condition of the ship taking a cargo of not less than 1,000 tons of weight and measurement was not a condition precedent; and that, even if it was so originally, the charterer having had a substantial part of the consideration for his promise to pay, could not plead it in bar. *Pust* v. *Dowie*, 5 B. & S. 20; 34 L. J., Q. B. 127; 13 W. R. 459—Ex. Ch.

Measurement of Cargo, how ascertained.]—By a charterparty it was agreed that "a ship should load a cargo, and proceed to a port in Great Britain, and deliver the same on being paid freight at and after the rate of 35*s.* per 180 English cubic feet taken on board, as per Gothenburg custom":—Held, that the freight was to be ascertained by measuring the cargo, according to the method used at Gothenburg, and not according to the method used at the port of discharge. *The Skandinav*, 51 L. J., Adm. 9?—C. A.

As to Weight.]—By a charterparty made at Liverpool for a voyage from Liverpool to Sydney, the charterer agreed to pay for the use and hire of the ship, in respect of the voyage, 1,550*l.* in full, on condition of her taking a cargo of not less than 1,000 tons of weight and measurement:—Held, that 1,000 tons of weight and measurement meant 1,000 tons of a cargo of goods in the ordinary proportions of the port of lading, viz. one-third weight and two-thirds measurement, and not as for the Sydney market, in which the proportion is two-thirds weight and one-third measurement. *Pust* v. *Dowie*, supra.

In Fresh or Salt Water.]—A charterparty contained a guarantee that a vessel should carry 3,000 tons dead weight upon a draught of twenty-six feet of water:—Held, that both parties to the charter must have contemplated loading a cargo in the river, and that, consequently, the guarantee would apply to fresh as well as to salt water. *The Norway (Owners)* v. *Ashburner*, 3 Moore, P. C. (N.S.) 245; Br. & Lush. 404; 11 Jur. (N.S.) 892; 13 L. T. 50; 13 W. R. 1085.

Marginal Note—Guarantee as to Ship's Capacity—Stowage of Machinery and Coal.]—By a charterparty made between the respondents and the appellants it was agreed that the appellants' vessel should proceed to Glasgow and there "load all such goods and merchandise as the charterers should tender alongside for shipment, not exceeding what she could reasonably stow and carry," &c. It was provided that the freight should be a lump sum of 2,200*l.*, and the charterparty contained this guarantee:—"Owners guarantee that the vessel shall carry not less than 2,000 tons dead weight," and this provision: "Should the vessel not carry the guaranteed dead weight as above any expenses incurred from this cause to be borne by the owners, and a pro ratâ reduction per ton to be made from the first payment of freight." The cargo intended to be carried was a general cargo consisting in part of railway locomotive machinery, and a note was by consent of the parties written upon the margin of the charterparty specifying the "largest pieces" of machinery which were to be included in the cargo by number, weight, and measurement. The charterers tendered a cargo not in excess of 2,000 tons dead weight, consisting of railway machinery, including locomotives and tenders, two parcels of coals, and general goods. The large pieces of machinery were much more numerous than specified in the marginal note. The vessel sailed with only 1,691 tons dead weight. It was not disputed that she contained a carrying capacity up to the guarantee; and it was admitted that 2,000 tons dead weight of the cargo tendered could not have been carried on the vessel unless the coal had been packed with the machinery, which was not done. The charterers claimed a deduction in the freight:—Held, that the marginal note amounted to a representation, and the cargo being such a cargo as was not contemplated, and the fact being that the vessel carried less than the guaranteed dead weight because the charterers tendered large machinery in excess of their representation, they were not entitled to the benefit of the stipulation for reduction of the freight, and the whole lump freight was payable:—Held, also, that the stowage of coal among machinery without the consent of the shippers of the machinery and of the coal was not proper stowage, and that it was the duty of the respondents and not the duty of the appellants to obtain such consent. *Mackill* v. *Wright*, 14 App. Cas. 106—H. L. (Sc.)

Quantity of Cargo — "About."] — Under a charterparty providing that the ship shall load empty petroleum barrels, as many as may be required by the master, say about 5,000; the word "about" entitles the master to require at his option the shipment of 10 per cent. more or less than the amount specified. *Alcock* v. *Leeuw*, 1 Cab. & E. 98.

Freight—Vacant Space.]—See *Potter* v. *New Zealand Shipping Co.*, post, col. 424.

3. Exemptions from Liability.

"Perils of the Seas."]—Where there is an exception in a charterparty of perils of the sea, a loss from the ship's running foul of another by misfortune is within the exception, and is a loss by perils of the sea. *Buller* v. *Fisher*, 3 Esp. 67.

A vessel chartered for a voyage from the Cape to Hondeklip Bay, there to load a cargo of copper ore, and proceed therewith to Swansea, having loaded part of her cargo, received damage to her capstan in a storm, such that she was unable to load the rest of her cargo, 120 tons, which were ready, until the damage was repaired. The master, instead of running for the Cape, 180 miles distant, where the damage could have been repaired, proceeded to St. Helena, 1,800 miles distant, expecting to be able to repair there, and intending to return for the rest of the cargo; but not being able to get repairs at St. Helena, he proceeded to Swansea with a cargo short of the 120 tons. The shipowner having sued the underwriter upon a policy of insurance upon chartered freight, as for a total loss of freight upon the 120 tons by perils of the sea, the jury found that the master acted throughout as a prudent owner, uninsured, would have acted:—Held, that the shipowner could not recover, for that the master was not prevented by perils of the sea from procuring repairs and earning the freight. *Philpot* v. *Swann*, 11 C. B. (N.S.) 270; 30 L. J., C. P. 358; 7 Jur. (N.S.) 1291; 5 L. T. 183.

The exception in a charterparty of perils of the sea applies not only to the voyage contracted for, but also to the preliminary voyage to the port of loading. *Hudson* v. *Hill*, 43 L. J., C. P. 273; 30 L. T. 555.

Pleading.] — See *Wynne* v. *Fellows*, Holt, 446, infra, col. 300.

Condemnation.]—The capture of a chartered ship, and condemnation and sale by a decree of a vice-admiralty court, do not, if the decree is reversed by the court of appeal (although more than three years afterwards), with costs and damages, amount to a prevention by the perils enumerated in the charter; but the shipowner is bound to perform his contract or to pay damages. *The Newport*, Swabey, 335; 6 W. R. 310—P. C.

Duration of Exception.]—A charterparty provided that a ship should proceed from a port where she was lying, to a usual loading-place, and there load a full and complete cargo, and proceed to a certain other port. The charterparty contained a clause, "The act of God, the Queen's enemies, restraints of princes and rulers, fire and all and every other dangers and accidents of the seas and rivers and navigation, of whatever nature and kind soever, during the voyage, always excepted":—Held, that the passage from the port where the ship lay to a usual place of loading was part of the voyage, and within the exception. *Barker* v. *M'Andrew*, 18 C. B. (N.S.) 759; 34 L. J., C. P. 191; 11 Jur. (N.S.) 637; 12 L. T. 459; 13 W. R. 779. And see *Bruce* v. *Nicolopulo*, infra, col. 277.

Obligation to repair Vessel and complete Voyage.]—The exception of perils of the sea contained in a charterparty will not relieve the shipowner from his obligation to complete the voyage by carrying the cargo to the port of destination in the chartered ship, if the damage caused by such perils is capable of repair within a reasonable time and at a cost not exceeding the value of the ship when repaired. *Assicurazioni Generali and Schenker* v. *Bessie Morris Steamship Co.*, 61 L. J., Q. B. 754; [1892] 2 Q. B. 652; 4 R. 33; 67 L. T. 218; 41 W. R. 83; 7 Asp. M. C. 217—C. A.

"Perils of Navigation."]—H., by a charterparty, engaged a vessel of G., name to be given up by G. to H. as soon as known, the vessel to proceed from the port of Hull to the port of Alexandria, with liberty to G. to ship cargo on the outward voyage to Alexandria, and to call at intermediate ports; the ship on arriving at the port of Alexandria to take in a cargo to be shipped by H.'s agents and proceed with the same at a certain stipulated rate of freight to be paid by H. to G. to the ports of Hull or London. The ship was to arrive at Alexandria within three weeks of November 15th, 1870, but the charterparty contained the usual exceptions as to perils of navigation. The ship did not arrive at the port of Alexandria until considerably after the margin of time allowed by the charterparty, whereby H., by losing the market for his cargo, sustained damage. The delay was caused by perils of navigation within the exception clause of the charterparty arising on the outward voyage from Hull to Alexandria to take in H.'s cargo. G. pleaded the exception and the delay:—Held, that the plea afforded an answer to the action, inasmuch as the exception in the charterparty covered dangers of navigation occurring on the outward voyage before H.'s cargo was shipped as well as the transit with his cargo on board from Alexandria to Hull or London. *Harrison* v. *Garthorne*, 26 L. T. 508; 20 W. R. 722; 1 Asp. M. C. 303.

Pirates.] — Pirates are a peril of the sea within the meaning of a charterparty relieving the shipowner from liability for perils of the sea. *Pickering* v. *Barkley*, Styles, 132.

Construction — "Accidents of the Seas" and "Unforeseen Circumstances" excepted—Stress of Weather—Deviation.]—The owners of a steamship agreed by charterparty, excepting "dangers and accidents of the seas," to send her to Barrow to load iron to be at Glasgow not later than October 14th, "unforeseen circumstances excepted." The steamer, which was loading coals at Glasgow, completed her cargo, which she delivered at Dublin, but owing to bad weather did not arrive at Barrow until October 16th. She loaded the iron on October 17th, but owing to bad weather did not arrive at Glasgow until October 26th:—Held, that, since under ordinary circumstances of weather, the ship could have delivered her coals at Dublin and arrived with the iron at

Glasgow on October 14th, the jury were entitled to rely on that fact, and that the owners were not liable. *Donaldson* v. *Little*, 10 Ct. of Sess. Ca. (4th ser.) 413.

"Dangers and Accidents of Navigation"—Collision.]—A charterparty provided that a ship should load a cargo of coal and deliver the same at the port of discharge at a freight of so much per ton on the quantity delivered (the act of God, &c., and all and every other dangers and accidents of the seas, rivers and navigation always excepted), the freight to be paid two-thirds in cash ten days after the vessel's sailing, and the remainder in cash on the right and true delivery of the cargo agreeably to bills of lading, less cost of coal delivered short of bill of lading quantity:—Held, that a collision attributable solely to the negligence of those in charge of the other vessel was a "danger or accident of navigation" within the meaning of the charterparty, and therefore that the shipowners were not liable in respect of non-delivery of part of the cargo shipped caused by such a collision; but that the charterers were entitled nevertheless under the charterparty to set off the cost of the coal so undelivered against the balance of freight payable on delivery of the remainder of the cargo at the port of discharge. *Woodley* v. *Michell* (11 Q. B. D. 47) distinguished. *"Garston" Sailing Ship Co.* v. *Hickie*, 56 L. J., Q. B. 38; 18 Q. B. D. 17; 55 L. T. 879; 35 W. R. 33; 6 Asp. M. C. 71—C. A.

"Dangers and Accidents of the Seas."]—Rice was shipped under a charterparty and bills of lading which excepted "dangers and accidents of the seas." During the voyage rats gnawed a hole in a pipe on board the ship, whereby sea-water escaped and damaged the rice, without neglect or default on the part of the shipowners or their servants:—Held, that the damage was within the exception, and that the shipowners were not liable. *Hamilton* v. *Pandorf*, 57 L. J., Q. B. 24; 12 App. Cas. 518; 57 L. T. 726; 36 W. R. 369; 52 J. P. 196; 6 Asp. M. C. 212—H. L. (E.)

"Dangers of the Seas and Rivers"—Timber Raft.]—Timber had been towed alongside a vessel lying in a river for shipment, and the master's receipts for the quantity delivered had been received, and owing to a rapid current and strong wind then prevailing the usual means for securing the timber proved inefficient and a large amount was lost:—Held, that the loss was a loss within the exception of a charterparty excluding all "dangers and accidents of seas and rivers." *Pyman* v. *Burt*, 1 Cab. & E. 207.

Effect of, on Option to Cancel.]—See *Smith* v. *Dart*, ante, col. 265.

Seaworthiness—Engineers' Neglect—Error or Negligence of Navigation.]—By charterparty the shipowner was exempted from liability for "act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers, and errors or negligence of navigation of whatsoever kind during the said voyage." The ship was lost through failure of steam power to keep off a lee shore. The failure of steam power was because the water had been allowed to get too low in the boilers, so that they heated and contracted suddenly and leaked:—Held, that the loss was by "error or negligence of navigation," and that the owners were not liable. *Cunningham* v. *Colvils*, 16 Ct. of Sess. Cas. (4th ser.) 295.

Muddy Water in Boiler.]—A steamship charterparty exempted the owners from liability for "act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers and (or) errors or negligence of navigation of whatsoever nature and kind during the said voyage." The ship was lost through the break-down of her boiler owing to muddy water that was in it before she sailed. The charterers sued the owners for loss of cargo:—Held, that the owners were liable, as the ship was unseaworthy when she sailed. *Seville Sulphur and Copper Co.* v. *Colvils*, 15 Ct. of Sess. Cas. (4th ser.) 616.

"Restraints of Princes."]—In an action for breach of a charterparty, by which it was agreed that a vessel should proceed to a port of loading, and after loading a cargo convey it to a foreign port, the act of God, Queen's enemies, restraints of princes and rulers, fire and all and every other dangers and accidents of the seas . . . during the voyage excepted, it was pleaded that before breach there was a war between the country of the port of destination and another country, so that the performance of the charterparty became illegal, and the shipowner refused to perform it:—Held, that the plea was good, as the blockade was within the meaning of the exception, "restraints of princes," and that the shipowner was not bound to have proceeded to the port of loading, or to have waited in anticipation of the removal of the blockade, in the absence of anything to lead to the inference that it would be removed within a reasonable time. *Geipel* v. *Smith*, 41 L. J., Q. B. 153; L. R. 7 Q. B. 404; 26 L. T. 361; 20 W. R. 332; 1 Asp. M. C. 268.

Seizure by agents of British government without authority (semble) not within the exception of restraints of princes. *Evans* v. *Hutton*, 2 Man. & G. 954; 5 Scott (N.R.) 670; 2 D. P. C. 600; 12 L. J., C. P. 17.

Duration of Exception.]—The plaintiff and the defendants agreed, by charterparty, that a ship then at Liverpool, of which the plaintiff was master, should with all convenient speed be made ready, and should, at Liverpool, receive and load from the charterer's agents a full cargo, and, being so loaded, should proceed to Stettin and deliver the same, and so end the voyage, restraint of princes, &c., during the voyage, always excepted, and the ship was to be loaded at Liverpool without detention; and the defendant thereby agreed to load the vessel at Liverpool, as in the charterparty stated, with the cargo at Liverpool:—Held, that the exception was applicable only after the ship had quitted Liverpool. *Crow* v. *Falk*, 8 Q. B. 467; 15 L. J., Q. B. 183; 10 Jur. 374.

A vessel, after discharging her outward cargo for the owners' benefit, was to proceed to Galatz or Ibraila, as ordered at Constantinople or Sulina by the charterer's agents, and there load a cargo of corn, and therewith proceed homewards and discharge at a port in the United Kingdom, and so end the voyage; restraints of princes and rulers, the dangers of the seas, navigation, fire, pirates and enemies during the voyage always mutually excepted:—Held, that the voyage commenced from the period of the discharge of the outward cargo, and that the exception as to the

restraints of princes applied to the loading at Ibraila, where the vessel proceeded; and, consequently, that it was a good plea to an action by the owner against the charterer, for not loading a cargo at Ibraila, that he was prevented from loading by the restraint and prohibition of the ruler of the country wherein Ibraila is situate. *Bruce* v. *Nicolopulo*, 11 Ex. 129; 3 C. L. R. 775; 24 L. J., Ex. 321; 3 W. R. 483. And see *Barker* v. *M'Andrew*, supra, col. 274.

"Queen's Enemies."]—When a charterparty contains the exception "Queen's enemies," an apprehension of capture, founded upon circumstances calculated to affect the mind of a master of ordinary courage, judgment and experience, will justify delay in port during the continuance of the risk; nor is such delay less justifiable in the case of a ship belonging to a belligerent nation, but carrying a neutral cargo. *The San Roman*, 41 L. J., Adm. 72; L. R. 3 Adm. 583; 26 L. T. 948; 1 Asp. M. C. 346. Affirmed, 42 L. J., Adm. 46; L. R. 5 P. C. 301; 28 L. T. 381; 21 W. R. 393; 1 Asp. M. C. 603.

—— Reading Charterparty with Bill of Lading.]—When a charterparty contains the exceptions "Queen's enemies, restraints of princes," &c., and a stipulation that the master is to sign bills of lading in pursuance thereof "without prejudice to this charterparty," and the bills of lading are signed containing no exception but "dangers of the seas only excepted," the cargo being thereby consigned to consignees named therein, who had notice of the terms of the charterparty at the time it was entered into, the contract is contained in both instruments, and the stipulation in the bills of lading does not supersede the stipulations in the charterparty. *Ib.*

Prevention from Loading by Accident, &c.]—When a charterer by his charterparty undertakes to load a ship within certain given lay days, "accidents or causes occurring beyond the control of the shippers or affreighters, which may prevent or delay her loading or discharging, including civil commotion, strikes, riots, stoppage of trains, always excepted," or to pay demurrage, he cannot excuse default in loading within the lay days by giving evidence of general disturbance and cessation of work in the district about the time; but to exempt himself from liability must shew a disturbing cause, actually preventing the loading of the particular ship. *The Village Belle*, 30 L. T. 232; 2 Asp. M. C. 228. See *Crockewit* v. *Fletcher*, ante, col. 266.

Want of Men.]—Where a charterparty provided that, in case of the "inability of the ship to execute or proceed on the service," certain persons should be at liberty to make such abatement out of the freight as they should think reasonable:—Held, that an inability of the ship to proceed to sea for want of men to navigate her, was within the proviso, although such want of men arose from the ravages of the smallpox amongst the original crew, the death of some, and the desertion of others from fear of the distemper, and an impossibility of procuring others on the spot in their room. *Beatson* v. *Schank*, 3 East, 233; 7 R. R. 436.

Lay Days—Demurrage.]—Where it was agreed by charterparty that the charterer should not be liable for delay in loading caused by neaps and stoppage of navigation and the lay days were exceeded in consequence of the lighters which were bringing the cargo (one of salt) down the rivers Weaver and Mersey to Birkenhead, the place of loading, being delayed by neaps of exceptional lowness at the junction of the Mersey and Weaver, and it was proved that it is the invariable practice for all salt intended for foreign exportation to be brought to Birkenhead from the Weaver by water; that there are no storehouses for salt at Birkenhead; and that it is never kept there to await the arrival of vessels:—The charterer was held to be relieved from liability under the above exceptions, upon the ground that they must be taken to apply to bringing the cargo to Birkenhead for loading purposes. *Allerton Sailing Ship Co.* v. *Falk*, 6 Asp. M. C. 287. Distinguishing *Grant* v. *Coverdale*, XIV. DEMURRAGE, post, col. 479.

Negligence of Crew "during Voyage."]—Under a charterparty, which provided that the shipowners were not to be responsible for "any act, neglect or default whatsoever of the crew or other servants of the shipowners during the voyage," the "C. P." proceeded to Newfairwater and commenced to load a cargo for Greenock. During the loading the cargo was damaged by water entering the ship through a valve, which had been negligently left open by one of the engineers belonging to the ship. In an action brought by the charterers to recover damages in respect of the loss so occasioned:—Held, that the loss was occasioned during the "voyage" within the meaning of the charterparty, and that the defendants were not liable:—Held, also (on a counter-claim by the defendants for general average contribution in respect of the loss), that the defendants were entitled to recover, as the negligence of their own servants which had caused the loss was negligence for which they were not responsible. *The Carron Park*, 59 L. J., Adm. 74; 15 P. D. 203; 63 L. T. 356; 39 W. R. 191; 6 Asp. M. C. 543.

See also cases as to exceptions, infra, XII. BILL OF LADING.

4. PROVISIONS AS TO BILLS OF LADING AND DOCUMENTS.

Master bound to sign Bills of Lading.]—It was stipulated by a charterparty made between the plaintiffs and the defendants that the master of the ship should sign bills of lading as presented, or pay a named penalty. He refused to do so, and sailed from the port of loading without having signed any bills of lading. He proceeded to the port of discharge, delivered a portion of the cargo to the consignees, but ceased doing so and warehoused the remainder, as they, acting under instructions from the charterers, claimed to deduct from the freight an amount equal to the penalty named in the charterparty. In an action by the charterers against the shipowners for conversion and for penalties:—Held, that the plaintiffs could recover nominal damages for the breach of contract in not signing bills of lading as presented. *Jones* v. *Hough*, 49 L. J., Ex. 211; 5 Ex. D. 115; 42 L. T. 108; 4 Asp. M. C. 248—C. A. See also *Seeger* v. *Duthie*, 8 C. B. (N.S.) 72; 30 L. J., C. P. 65; 7 Jur. (N.S.) 239; 3 L. T. 478; 9 W. R. 166—Ex. Ch.

—— On Terms of Sub-charter—Notice of Lien.]—A shipper who has loaded on the terms of a

sub-charter is not affected by notice of a stipulation in the original charterparty that the owner is to have "a lien on the cargo for arrears of hire." He has a right to have bills of lading signed on the terms of the sub-charter. *Tharsis Sulphur and Copper Mining Co.* v. *Culliford*, 22 W. R. 46.

—— **Obligation to inquire as to Existence of Bills of Lading.**]—The goods of a shipper in a general ship are not affected by a clause in a charterparty of which he has no notice or knowledge, giving the shipowner a lien on all cargo and freight for arrears of hire due under the charterparty. Semble, the fact that no bills of lading were given for the goods makes no difference in this respect as to the rights and liabilities of the parties. T. hired a ship from M., and by the charterparty gave M. a lien on all cargo and freight for arrears of hire. T. advertised the ship as a general ship, and gave no notice of the charterparty. B. shipped goods and obtained a receipt, but no bill of lading. The hire being in arrears, M. detained the goods of B. for the whole of the arrears:—Held, that M. was not entitled to detain the goods of B., and that B. was entitled to damages for their detention. *The Stornoway*, 51 L. J., Adm. 27; 46 L. T. 773; 4 Asp. M. C. 529.

To obtain Consular Manifest.]—In an action by the owners of a vessel against a charterer, the declaration alleged that it was customary at Liverpool for the shippers of goods by vessel to make out for the captain a correct copy of each bill of lading, and that the shippers of the cargo did make out copies of eight bills of lading for the captain, and did deliver the copies to the charterer for the captain, and that it was necessary, as the charterer knew, for the purposes of the voyage, that before sailing a consular manifest should be made out, and that it was his duty as charterer, and having in his possession the captain's copies of the bills of lading, on request of the owners of the ship, to hand over and give all such copies for the purpose of enabling a complete consular manifest to be made out, and that he was requested to do so, but only handed over six out of the eight bills of lading:—Held, that there was no such duty as alleged to hand over the copies of the bills of lading, and that, therefore, the declaration was bad, and there was no cause of action. *Dutton* v. *Powles*, 2 B. & S. 174; 31 L. J., Q. B. 191; 8 Jur. (N.S.) 970; 6 L. T. 224; 10 W. R. 408—Ex. Ch.

As to Bill of Health.]—In an action on a charterparty, in which the shipowner covenanted "that the vessel should be sufficiently furnished with everything necessary and needful for the voyage in question," which was to Cagliari, in Sardinia:—Held, that it was his duty to have a bill of health on board; and, the charterer having been put to great inconvenience and expense on account of the ship not being provided with such document, that the shipowner was responsible for the loss occasioned thereby. *Levy* v. *Costerton*, Holt, 167; 4 Camp. 389; 1 Stark. 212; 16 R. R. 808.

As to Passes.]—By a charterparty it was agreed between the owners of a vessel and the charterers that the vessel should sail to Callao; that the vessel being tight, staunch, strong and well conditioned for the voyage should load a cargo of guano at the Chincha Islands, to which place she should at once proceed, calling on her way at Pisco to obtain the necessary pass to load, which should be given to the captain by the charterers' agent free of expense, within twenty-four hours of his application. Breach, that the charterers made default in providing the agreed guano, and only provided an insufficient and a less quantity. Plea, that Callao and the Chincha Islands are a part of the republic of Peru, and that by the laws of that republic, a vessel proceeding from Callao to the Chincha Islands for guano is obliged to procure from the government a written pass so to do, and the vessel could not lawfully have proceeded from Callao to the Chincha Islands without such pass; that the government refused to give such pass; and thereupon the vessel was repaired at Callao, and the government did afterwards give a pass, for the vessel to proceed to take in guano, upon the condition that more guano should not be placed on board than would make the vessel draw eighteen and a half feet; that the vessel did, by virtue of such pass, proceed to the Chincha Islands, and the charterers caused to be loaded on board her sufficient guano to make her draw eighteen and a half feet, and they could not, without violating the laws of Peru, have loaded a greater quantity, and if they had done so, the vessel and cargo would have been liable to seizure:—Held, that the plea was bad, since the obligation was on the charterers to procure the proper pass, and it was not alleged that they were prevented from so doing by reason of the vessel not being well conditioned. *Kirk* v. *Gibbs*, 1 H. & N. 810; 26 L. J., Ex. 209.

5. Performance.

a. Nominating Port.

Duty of Captain to wait for Orders at Port of Call.]—The master of a ship, under a charterparty to load a cargo at a foreign port, and thence proceed to a port in Great Britain, as ordered, is not bound, in default of orders, to wait at the foreign port until he has communicated with the charterer. *Sieveking* v. *Maas*, 6 El. & Bl. 670; 25 L. J., Q. B. 358; 2 Jur. (N.S.) 515; 4 W. R. 606—Ex. Ch.

—— **To obey Directions as to Place of Discharge.**]—Under an open charterparty to deliver at a certain port it is the duty of the master to obey the directions of the owner of the cargo as to the place of discharge in such port. *The Felix*, 37 L. J., Adm. 48; L. R. 2 A. & E. 273; 18 L. T. 587; 17 W. R. 102.

At what Time.]—A charterparty, by which it is agreed that a ship, after delivering her outward cargo at Malta, shall, with all convenient speed, sail to one of the several ports as shall be ordered at Malta, contains an implied promise, on the part of the charterer, that the ship shall be ordered at Malta to sail to such port, within a reasonable time after her arrival at Malta. *Woolley* v. *Reddelien*, 5 Man. & G. 316; 6 Scott (N.R.) 199; 12 L. J., C. P. 152; 7 Jur. 930. S. P., *Whitwell* v. *Scheer*, 8 A. & E. 301; 3 N. & P. 398; 7 L. J., Q. B. 244.

What Port.]—A ship was to proceed to Honduras, and there load "at one of the usual and customary ports or places of loading, including

the rivers Ulna and Dulce," a cargo of mahogany and logwood. The freighter by letter directed the captain to proceed to Belize, in the bay of Honduras, and address himself to S., "who will furnish you with a homeward cargo of mahogany and logwood agreeable to charterparty." The captain took the ship to Belize, where S. put a small quantity of logwood on board, and directed the ship to go to Ulna, where about half a cargo was put on board. S. then sent the ship to two other places of loading in Honduras, at which the cargo was completed:—Held, that it was a question for the jury, whether the ship was sent to Belize as her port of loading; and that, if she was, the freighter was liable for the extra expenses of her going to all the other places for the residue of her cargo; but that, if Belize was not to be considered her port of loading, Ulna certainly was, and the freighter would, at all events, be liable for the extra expense of her going for cargo to other places after Ulna, as by the charterparty the freighter was to load at one of the usual ports or places of loading in Honduras. *Brown* v. *Johnson*, Car. & M. 440; 10 M. & W. 331; 11 L. J., Ex. 373.

Duty to name Port before Voyage begins.]—Declaration on a charterparty stated that it was agreed thereby that the ship should sail in ballast to a safe and convenient port near Cape Town, and there load a full cargo; and the plaintiff agreed to load the vessel and pay freight. Averment, that though the plaintiff was ready and willing to appoint and put on board a proper person as supercargo, who would have indicated a safe and convenient port near Cape Town to receive the cargo, the defendant would not permit the ship to proceed in ballast on the voyage:—Held, bad on general demurrer for not averring that the plaintiff gave notice to the defendant of a safe and convenient port, &c., or anything equivalent in law to such notice; it being the duty of the charterer to select the port and give notice of it before the commencement of the voyage. *Rae* v. *Hackett*, 12 M. & W. 724; 13 L. J., Ex. 216; 8 Jur. 421.

Naming Place of Discharge at given Port.]—See *Parker* v. *Winlow* and cases, XIV. DEMURRAGE, post, cols. 463 seq.

b. Hostile and Blockaded Ports.

Operation of War on Contract.]—The master of a North German ship, lying at Constantinople, entered into a charterparty with North German subjects, there resident, to carry a cargo to a port in the United Kingdom or on the continent to be delivered to English consignees. The charterparty and the bill of lading given under it were in the English language, and it was stipulated that the ship should call at one of three ports of the United Kingdom for orders. The ship duly called at Falmouth, and was ordered to proceed to an English port to discharge:—Held, that as the intention of the parties as to what law should govern, was to be gathered from the circumstances of the case, and, as the giving of the orders fixed the seat of the contract in England, the law of England applied. *The Wilhelm Schmidt*, 25 L. T. 34; 1 Asp. M. C. 82. And see *Bowden, Ex parte*, 4 El. & Bl. 963.

War then existed between France and Germany. The master sailed from Falmouth, but through a reasonable fear of capture, put into Dunkirk. The ship remained there for two months, waiting for a steam tug, which was considered necessary by the charterers' agents to avoid capture, the master expressing himself ready to sail with the first fair wind. The ship was then sent forward by steam power, at the charterers' agents' expense. The cargo was damaged, and the plaintiffs lost profits by the delay:—Held, that the master was justified in putting into and remaining in port, and that the shipowners were not liable for the damage caused by the delay. *Ib.*

By a charterparty in the English language entered into at Constantinople between the master of a North German vessel, and North German merchants there resident, it was agreed that the vessel should load a cargo and proceed therewith to Falmouth, Plymouth or Queenstown, for orders for a safe town in the United Kingdom, or on the continent between Havre and Hamburg, Queen's enemies, &c., excepted. The cargo was laden, and the vessel sailed, but her master learning on his voyage that war existed between France and Germany, put into Gibraltar. During the war there would have been great risk of capture off that port, and off the port of call if the vessel had proceeded on her voyage; her master in consequence remained there until the end of the war (nine months). He then sailed, and arriving at a port of call was ordered to an English port. The cargo was damaged by the delay. In a claim by the consignees:—Held, that by both English and North German law the master was justified in putting into and remaining in port, and that the shipowners were not responsible for the damage caused by the delay. *The Express*, 41 L. J., Adm. 79; L. R. 3 A. & E. 597; 26 L. T. 956; 1 Asp. M. C. 355.

A charterparty for a voyage from Liverpool to Lima or Valparaiso provided that the vessel should proceed to the port of discharge, or as near thereto as she could safely get, and there deliver her cargo in the usual and customary manner. A specified number of days was agreed upon for loading the vessel at Liverpool; but there was no such agreement as to the discharge at her port of destination. The vessel arrived at the port of discharge, and remained there discharging till, owing to the apprehension of a bombardment by a hostile fleet, the authorities suspended all landing of goods for seven days, after which she returned and her discharge was completed:—Held, that the discharge of the cargo being an act to be done by the shipowner and freighter, the shipowner could not maintain an action against the freighter for the loss from the delay. *Ford* v. *Cotesworth*, 10 B. & S. 991; 39 L. J., Q. B. 188; L. R. 5 Q. B. 544; 23 L. T. 165; 18 W. R. 1169—Ex. Ch.

A Prussian ship, carrying a cargo of nitrate of soda (contraband of war), arrived off Dunkirk, to which port she had been ordered by the consignees of cargo, and whilst lying there waiting for the tide, her master heard that war had broken out between France and Prussia, and he thereupon put back to the Downs, where he arrived on July 17th, to make inquiries, but hearing nothing more, and being stopped by his owner, he put into Dover on the 18th, and there getting intelligence, refused to proceed to Dunkirk. The ship was running under charter entitling her to be sent to a safe port. War was not actually declared till July 19th, but was

imminent on July 16th:—Held, that the ship on July 16th was not bound to go to Dunkirk, as she would have been liable to penalties for trading with the enemies of her country and capture by French cruisers; that even if war did not actually exist till July 19th the master was justified in pausing for a reasonable time to make inquiries, and that under the circumstances he did not exceed that time by staying in Dover till after the declaration of war. *The Teutonia*, 8 Moore, P. C. (N.S.) 411; 41 L. J., Adm. 57; L. R. 4 P. C. 171; 26 L. T. 48; 20 W. R. 421.

Whilst the ship was lying at Dover the consignees demanded the delivery of cargo without any payment of freight. The master refused to deliver without payment:—Held, that he was entitled to freight. *Ib.*

A North German vessel shipped goods in the Black Sea for a port in the United Kingdom or on the continent under an English charterparty, by which she was to call at Falmouth or Plymouth for orders, such orders to be given by the charterer's agents in London by return of post, on receipt of the master's announcement of his arrival. She arrived at Falmouth on August 9th. Orders were given, but not till September 3rd, to proceed to Leith; but from that date until the arrest of the ship, on September 21st, negotiations were going on for discharge of the cargo at Falmouth. Between those dates the winds were light and variable, and the master remained in port for fear of capture by French cruisers in the Channel, war then existing between France and North Germany:—Held, that the delay was reasonable, and that neither by English nor North German law was the master bound to proceed, and that the negotiations waived the orders to proceed. *The Heinrich*, L. R. 3 A. & E. 424; 24 L. T. 914; 1 Asp. M. C. 79.

A charterparty between two British subjects on a voyage to Constantinople and thence to Odessa, there to load a cargo from the agent of the defendant, contained a stipulation that "in case of war having commenced previously to and continuing on the ship's arrival at Constantinople," he was to load the ship there at a reduced rate of freight:—Held, that this stipulation related to war between Great Britain and Russia, and therefore an action could not be maintained for not loading at Constantinople, by reason of war between Russia and Turkey having commenced before and continuing on the ship's arrival there. *Avery* v. *Bowden*, 6 El. & Bl. 953; 26 L. J., Q. B. 3; 3 Jur. (N.S.) 238; 5 W. R. 45—Ex. Ch.

A declaration stated that the plaintiff and the defendant agreed by charterparty that the plaintiff's ship should proceed to Odessa, and there load a cargo from the defendant's agent, a certain number of running days to be allowed for loading; that the ship proceeded to Odessa; that the time for loading had elapsed, but the defendant made default in loading. Plea, that before breach of contract war was declared between Great Britain and Russia, by which the contract was rescinded. After the ship had arrived, and before the declaration of war, the defendant's agent repeatedly told the master that he should be unable to procure a cargo for the ship, and he endeavoured to persuade the master to quit Odessa without a cargo upon terms inconsistent with the charterparty. The master continued to demand a cargo until the declaration of war was known at Odessa; and on a later day, but before the expiration of the running days, left Odessa in ballast:—Held, that the declarations of the defendant's agent did not amount to a breach of contract, and therefore, inasmuch as the defendant had the whole of the running days for performing his contract, the plea was proved. *Reid* v. *Hoskins*, 6 El. & Bl. 953; 26 L. J., Q. B. 5; 3 Jur. (N.S.) 238; 5 W. R. 45—Ex. Ch.

A captain of an Austrian vessel which was chartered prior to the war between France and Sardinia and Austria, but which broke out before the charterparty was terminated, while the war was going on, and being then at Falmouth, was ordered by the charterers to go to Copenhagen, which he said he could not do then, but must go somewhere else, or wait till the war was over, as he should be captured by the French cruisers; and he was eventually ordered to go to Plymouth:—Held, that he was justified in thus delaying. *Pole* v. *Cetcovitch*, 9 C. B. (N.S.) 430; 30 L. J., C. P. 102; 7 Jur. (N.S.) 604; 3 L. T. 438; 9 W. R. 279. *S.C.*, at Nisi Prius, 2 F. & F. 104.

—— **Refusal to sail for.**]—Semble, where performance of the charterparty becomes illegal by reason of blockade, the master may refuse to sail. *The Tutela*, 6 C. Rob. 180.

—— **Knowledge of Blockade.**]—It is no defence for not sailing on a voyage towards a port agreed on that the port was in a state of blockade, if the defendant knew the fact at the time of entering into the charterparty. *Medeiros* v. *Hill*, 8 Bing. 231; 1 M. & Sc. 311; 5 Car. & P. 182; 1 L. J., C. P. 77.

But whether the damages are to be nominal or otherwise must depend upon the opinion of the jury as to whether, if the vessel had gone to the place, she would have been able to get in. *Ib.*

Blockaded Port—Delivery Elsewhere.]—Under a charterparty that a ship should proceed to Taganrog, or "so near thereto as she may safely get," and there deliver cargo:—Held, that this port being under blockade, it was not a fulfilment of the contract for the vessel to discharge at Constantinople, even though that might be a reasonable course to adopt. *Castel* v. *Trechman*, 1 Cab. & E. 276.

Trade with Blockaded Port.]—It is not a municipal offence by the law of nations for a neutral to carry on trade with a blockaded port. *The Helen*, 35 L. J., Adm. 2; L. R. 1 A. & E. 1; 11 Jur. (N.S.) 1025; 13 L. T. 305; 14 W. R. 136.

Refusal of Foreign Power to allow Ship to Load.]—Plaintiff knowing that the ship "R." was under a contract with the British government to load military stores as dead-weight at Malta, and that with such stores on board she would not, without special permission, be permitted by the Spanish government to load any cargo at a Spanish port, entered into a charterparty with her owners by which it was agreed that the "R.," "after loading dead-weight at Malta for owners' benefit," should proceed to a Spanish port, and there load a cargo of fruit. The ship proceeded with the military stores on board to Valencia to load plaintiff's cargo, but permission could not be obtained from the Spanish government to load. The ship was in all other respects ready to load:—Held, that no action could be maintained by the charterers against the shipowners for not being ready to load, as both parties were

prevented from performing their contract to be ready with a ship and cargo by the action of the superior power. *Cunningham* v. *Dunn*, 48 L. J., C. P. 62; 3 C. P. D. 443; 38 L. T. 631; 3 Asp. M. C. 359—C. A.

Charterers nominating Unsafe Port.]—A ship was chartered to proceed from England to a safe port in Chili, with leave to call at Valparaiso. On her arrival at Valparaiso, the charterers' agent named the port of Carrisal Bajo as the port of discharge, and directed the master to proceed thither. At the time Carrisal Bajo was named as the port of discharge, that port was closed by order of the Chilian government, and the ship could not proceed thither without confiscation. The ship was consequently detained for some time at Valparaiso, and, on the port being opened, sailed for Carrisal Bajo, and there discharged her cargo:—Held, that the charterers were liable in damages to the shipowners for the detention of the ship at Valparaiso, as they had not named a safe port within the meaning of the charterparty. *Ogden* v. *Graham*, 1 B. & S. 773; 31 L. J., Q. B. 26; 8 Jur. (N.S.) 613; 5 L. T. 396; 10 W. R. 77.

Hostile or Neutral Port—Covenant to get Licence.]—If a vessel is chartered to any ports of an island, part of which is hostile and part neutral, and the freighter covenants to procure a licence; if the ship trades to a neutral port of the island, it is no breach of the covenant, that the freighter has procured a licence which would not authorise the like trade to a hostile port. *Johnson* v. *Greaves*, 2 Taunt. 344.

Licence—Illegal Contract.]—A. commissioned B. to get a charterparty effected on his ship, Russian built and British owned. She was accordingly chartered to go to America, and take in there a cargo of permitted goods, rice and cotton being specified, and to sail therewith to Cadiz, Lisbon or Gottenburgh, as directed by a previous agreement; it appeared to have been in the contemplation of the parties to carry the goods to some port in the United Kingdom, and that the ship should carry no licence:—Held, that this was not an illegal contract, so as to deprive A. of his right to his commission for procuring the charterparty to be effected. *Haines* v. *Bush*, 1 Marsh. 191; 5 Taunt. 521.

Condemnation of Cargo.]—The general, but not universal, rule is, that where a ship is condemned for breach of blockade, the cargo follows the same fate. *Baltazzi* v. *Ryder*, 12 Moore, P. C. 168.

The presumption is against a vessel captured in entering a blockaded port, and an imperative and overwhelming necessity for so doing must be established by the owner to exempt from condemnation. *Ib.*

It is not competent to owners of a cargo on board a vessel condemned for breach of blockade, to save the cargo from condemnation by shewing their innocence in the transaction, as the owners of the cargo are concluded by the illegal act of the master, although it was done without the privity of the owners of the cargo, and even if it was done contrary to their wishes. *Ib.*

When a blockade is known, or might have been known, to the owners of the cargo, at the time when the shipment was made, and they might, therefore, by possibility, be privy to an intention of violating the blockade, such privity will be assumed as an irresistible inference of law, and it is not competent to rebut it by evidence, as in cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent. The master is to be treated as the agent for the cargo, as well as for the ship. *Ib.*

c. Deviation and Delay.

Deviation—Implied Contract.]—The law implies a contract by the owner of a vessel whether a general ship, or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course. *Davis* v. *Garrett*, 4 M. & P. 540; 6 Bing. 716; 8 L. J. (O.S.) C. P. 253; 31 R. R. 524.

The plaintiff chartered a ship to the defendant from London to Madeira, and the Cape of Good Hope, and thence to Bombay, and back to London. Instead of proceeding by the direct and usual course from the Cape of Good Hope to Bombay, the captain made a deviation to the Mauritius; and the defendant's agents at Bombay, in consequence of such deviation, refused to find a cargo. In an action by the owner against the defendant for not loading the ship with a cargo at Bombay, pursuant to the charterparty, it was left to the jury to say whether the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract into which he had entered; and they were told, that, if such was their opinion, the defendant was excused by the act of the plaintiff from furnishing a cargo. The jury having found for the defendant, the court refused to grant a new trial, holding the direction right. *Freeman* v. *Taylor*, 1 M. & Scott, 182; 8 Bing. 124; 1 L. J., C. P. 26.

—— **Justifiable.**]—A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property. The defendants' ship was chartered by the plaintiffs to carry a cargo of wheat from Cronstadt to the Mediterranean, the usual perils of the sea excepted. Whilst on her voyage she sighted and went to the assistance of a vessel in distress, called the "Arion," and the master in consideration of 1,000*l.* agreed to tow her into the Texel, which was out of his direct course. Whilst so doing, the defendants' vessel was stranded, and ultimately (with her cargo) was totally lost. In answer to questions put to them by the learned judge, the jury found that it was not reasonably necessary to take the "Arion" to the Texel in order to save the lives of those on board her; but that it was reasonably necessary to do so in order to save her and her cargo:—Held, that the deviation was unjustifiable, and consequently that the plaintiffs were entitled to recover against the owners the value of the cargo. *Scaramanga* v. *Stamp*, 49 L. J., C. P. 674; 5 C. P. D. 295; 42 L. T. 840; 28 W. R. 691; 4 Asp. M. C. 295—C. A.

Delay—To sail with Convoy.]—Where the plaintiff covenanted, that, on the arrival of a ship at a certain port, he would receive the defendant's cargo, and sail for England therewith, with the next June convoy, provided the ship arrived and was ready to load sixty-five running days before the sailing of such convoy; and the defendant covenanted to provide a cargo of produce in time for her to load the same, and join the June convoy for England, provided she arrived out and was ready to load and a notice

thereof was given to his agents, sixty-five running days previously to the sailing of the convoy, and on her arrival to receive the cargo and pay the current freight:—Held, that it was not a condition precedent to the defendant's part of the contract that the ship should so arrive, but he was still bound to supply a cargo, though not in time to enable the plaintiff to sail with that convoy. *Deffel* v. *Brocklebank*, 4 Price, 36; 3 Bligh, 561.

—— **Freighter Countermanding.**]—Where the master covenanted with the freighter that the vessel should proceed with the first convoy from England for Spain and Portugal, or either, as he should be directed by the freighter or his agents; and there make a right and true delivery of the cargo, agreeably to the bills of lading signed for the same; and so to take in a home cargo, and return and make a right and true delivery thereof at London, in consideration whereof, and of everything above mentioned, the freighter covenanted to load the vessel out and home, and pay certain freight per ton per month, part before, and the remainder on the right and true delivery of the homeward cargo at London:—Held, first, that the freighter, having first ordered the master to proceed to Lisbon, in consequence of which the master had taken in goods and signed bills of lading for that port, could not afterwards countermand that order, and order him to proceed to Gibraltar, without first recalling the bills of lading, or at least tendering sufficient indemnity to the master against the consequence of his liability thereon: secondly, that, supposing the freighter had such a power, yet his supercargo and agent, who was on board the vessel, had the like authority in the absence of his principal, even before the vessel sailed from this country, to alter again the destination to Lisbon: thirdly, that the master having proceeded with the outward cargo to Lisbon under the first order, and brought home a return cargo and delivered the same to the freighter at London, was entitled to his freight for that voyage, though he had not sailed with the first convoy; the sailing with the first convoy not being a condition precedent to his recovering freight for the voyage actually performed under the first order, but a distinct covenant for the breach of which he was liable. *Davidson* v. *Gwynne*, 13 East, 381; 11 R. R. 420.

Delay without Damage.]—A declaration stated, that it was agreed by a charterparty that the plaintiff's ship should load from the agents of the defendant at Nantes a cargo of wheat, and deliver the same at London on being paid freight; that the ship went to Nantes, and that the defendant refused to load a cargo. Plea, that the charterparty was entered into at London, while the ship was at London, and that the plaintiff, without the defendant's consent, sailed from London to Newcastle, and thence to other places than Nantes, by reason of which the ship did not arrive at Nantes "within a reasonable and proper time in that behalf," but "after a long and unreasonable time, to wit, thirty-eight days, after she would have arrived at Nantes, according to the usual length of the voyage, if she had sailed direct":—Held, that the plea was bad, as it did not appear that the defendant had, in consequence of the delay, lost the benefit of the voyage. *Clipsham* v. *Vertue*, D. & M. 343; 5 Q. B. 265; 13 L. J., Q. B. 2; 8 Jur. 32.

Port of Refuge—Necessity.]—Where a ship is forced to put back for repairs, in selecting a port of refuge the master must not make any greater departure from the proper course of the voyage than is reasonably necessary, having regard to the interests of all parties; but in determining what is reasonably necessary, the question of expense may be taken into account. *Phelps* v. *Hill*, 60 L. J., Q. B. 382; [1891] 1 Q. B. 605; 64 L. T. 610; 7 Asp. M. C. 42—C. A.

Bringing back Ship—Refusal to Despatch again.]—In an action upon a charterparty, by which the owner covenanted to take on board at London the freighter's goods, and to proceed therewith to Monte Video, and there deliver them, and receive another cargo, and proceed therewith to the port of discharge in Great Britain, and there deliver the same and end the voyage; in consideration of which the freighter covenanted to pay so much per month for freight during the voyage to Monte Video and back to her port of discharge; it is not enough to allege in the declaration that the ship, after taking in a cargo in Great Britain, and proceeding in part on her outward voyage, was, against the will and without the default of the owner, and through the act of the supercargo, the servant of the freighter, seized and brought back to London, and detained until restored to the owner, in consequence of which she required repair, and which the plaintiff caused to be done with proper despatch, and was ready and willing to cause the ship to prosecute and complete her voyage, and offered her to the defendant for that purpose, and requested him to despatch her; and upon this to assign a breach that he refused to despatch her and renounced the charterparty and further prosecution of the voyage, and discharged the plaintiff from the same, per quod he was hindered from endeavouring to complete the voyage, and to earn the money stipulated by the charterparty to be paid at her port of discharge; for the defendant having once despatched the ship, there was no obligation upon him to despatch her a second time. *Smith* v. *Wilson*, 6 M. & S. 78; 8 East, 437.

Master not signing Bills of Lading—Refusal to receive Goods.]—It was stipulated in a charterparty made between the plaintiffs and the defendants that the master of the ship should sign bills of lading as presented, or pay a named penalty. He refused to do so, and sailed from the port of loading without having signed any bills of lading. He proceeded to the port of discharge, delivered a portion of the cargo to the consignees, but ceased doing so, and warehoused the remainder, as they, acting under instructions from the charterers, claimed to deduct from the freight an amount equal to the penalty named in the charterparty. In an action by the charterers against the shipowners for conversion and for penalties:—Held, that the plaintiffs could not recover against the defendants for conversion of the cargo, as they had carried it for the plaintiffs, had intended to deliver the whole of it to the consignees of the plaintiffs, and had been prevented by the acts of the plaintiffs from completing the delivery. *Jones* v. *Hough*, 49 L. J., Ex. 211; 5 Ex. D. 115; 42 L. T. 108; 4 Asp. M. C. 248—C. A.

Discharging Cargo, Means for.]—The duty of providing, and making proper use of, sufficient

means for the discharge of a cargo, when a ship, which has been chartered, arrives at its destination, and is ready to discharge, lies upon the charterer. But that general duty may be qualified by words in the charterparty, and by the circumstances of the case. If, by the terms of the charterparty, the charterer has agreed to discharge the ship within a fixed period of time, that is an absolute and unconditional engagement, for the nonperformance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it. If there is no fixed time, the law implies an agreement, on his part, to discharge the cargo within a reasonable time. *Postlethwaite* v. *Freeland*, 49 L. J., Ex. 630; 5 App. Cas. 599; 42 L. T. 845; 28 W. R. 833; 7 Asp. M. C. 302—H. L. (E.) See also *Petersen* v. *Freebody*, infra, col. 535; *White* v. *Steamship Winchester Co.*, supra, col. 265.

Per Lord Hatherley: When the covenant merely engages that the merchant shall with all despatch, according to the custom of the port, unload the vessel, he will fulfil his contract if he employs all the usual methods of despatch at the port. *Ib.*

——**Expenses of.**]—The contract in the charterparty as to demurrage was this: The cargo was to be supplied as fast as it could be taken on board, "and to be received at port of discharge as fast as steamer can deliver as above . . . and ten days' demurrage over and above the said laying days" (there were no laying days mentioned in the charterparty) "at 30*l.* per day, payable day by day, it being agreed that for the payment of all freight, dead freight and demurrage, the owner shall have absolute charge and lien on the said cargo . . ." "The cargo to be brought to and taken from alongside the ship at merchants' risk and expense." The ship did not fulfil an engagement in the charterparty to proceed to the Surrey Commercial Docks by merely going to the gates of the docks, but when it had fulfilled the alternative to go as near thereto as it could safely get, the charterer was bound to take the cargo from alongside at his risk and expense. The shipowner was not bound to wait for an unreasonable period, until the dock authorities should be able to assign the ship a discharging berth in the docks. When a difficulty arose about the ship being admitted into the Surrey Commercial Docks, and the charterer would not name any other docks or place where the vessel might be unloaded, the shipowner gave notice to the charterer of the discharge of the cargo by lighters, and, on taking the timber into the docks, gave notice to the dock authorities that it was delivered there subject to the claim for freight, demurrage and delivery charges:—Held, that he was warranted in so doing. *Dahl* or *Donkin* v. *Nelson*, 50 L. J., Ch. 411; 6 App. Cas. 38; 44 L. T. 381; 29 W. R. 453; 4 Asp. M. C. 392—H. L.

Duty to perform Voyages within limited Time.]—In an action for a breach of a charterparty by the freighter against the owner of the vessel, the declaration stated that it was agreed by the parties that the vessel should proceed with all convenient speed to S. H., and there load a cargo of coals, and therewith proceed to L., and deliver the cargo at a safe wharf, at a certain amount of freight being payable per ton; that the charterparty should be in force for six successive voyages, and that they should be made not later than the last day of February. A breach, that the defendant would not permit the vessel for the fourth successive time, or for any time except three times, after the making of the charterparty, to proceed to S. H., and there to load a cargo of coals on board. Plea, that before breach, the last day of February expired:—Held, that the plea was no answer. *Wheeler* v. *Baridge*, 9 Ex. 668; 2 C. L. R. 1077; 23 L. J., Ex. 221.

"Full and complete Cargo"—Liberty to call at any Port in Order.]—By a charterparty a sailing barge, whose dead weight capacity was stated to be 125 tons, was to load a cargo or estimated quantity of 470 quarters of wheat in sacks and (or) other lawful merchandise, and proceed to Gosport within the port of Portsmouth, and she also had liberty to call at any port in any order. The charterer shipped 470 quarters of wheat, which weighed about 102 tons. After the wheat was shipped the shipowner loaded fifteen tons of wire-netting belonging to other shippers to be delivered at Portsmouth dockyard. Both the dockyard and Gosport are in the port of Portsmouth. The netting was discharged at the dockyard, but the ship, whilst proceeding from the dockyard to Gosport, was injured by coming in contact with one of the piles of a pierhead, and the cargo of wheat was damaged by water:—Held, that the charterparty did not bind the shipowner to treat the cargo of wheat as an entire shipload to the exclusion of other cargo, and that there had been no deviation in the voyage to Gosport. *Caffin* v. *Aldridge*, 65 L. J., Q. B. 85; [1895] 2 Q. B. 648; 73 L. T. 426; 44 W. R. 129; 8 Asp. M.C. 233—C.A.

Fear of Capture—Delay in Voyage.]—An apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment and experience, will justify delay in the prosecution of a voyage; and a ship is not answerable in a suit under the Admiralty Court Act, 1861, s. 6, for damage to cargo caused by such delay. *Anderson* v. *San Roman* (*Owners*), 42 L. J., Adm. 46; L. R. 5 P. C. 301; 21 W. R. 393; 28 L. T. 381; 1 Asp. M. C. 603—P. C.

Additional Cargo taken in and discharged at same Port.]—See *Caffin* v. *Aldridge*, supra.

Master deviating without Cause.]—The shipowner is not liable to the charterer for deviation by the master without reason and ultra vires. *Strickland* v. *Neilson*, 7 Ct. of Sess. Cas. (3rd ser.) 400.

Abandonment of Ship—Ship brought by Salvors to Port of Delivery—Right of Cargo Owner to Cargo without Payment of Freight.]—*See The Arno, and Cases*, infra, col. 385.

Damage to Cargo—Unnecessary Deviation.]—By a charterparty the ship was to proceed to Marianople and there load a cargo of wheat, and being so loaded was to proceed therewith to a safe port in the United Kingdom or on the continent between Havre and Hamburg, as ordered at Gibraltar. The charterparty also contained the following clause: "Should frost ensue . . . after the steamer has arrived at port of loading and the vessel is compelled to

leave to avoid being frozen in, the master is at liberty to leave . . . with part cargo, and to fill up for steamer's benefit at any open Black Sea, Azof, or Mediterranean port for United Kingdom, continent, or Mediterranean; but in case of leaving with part cargo the steamer shall complete the voyage as if a full cargo had been loaded, or shall forward such part cargo to its destination, provided that no extra expense be thereby caused to the receivers." Frost ensued, and, to avoid being frozen in, the ship left Marianople with a part cargo of wheat, shipped under bills of lading which incorporated all the conditions and exceptions contained in the charterparty, and proceeded to Novorissisk, where she filled up with linseed under bills of lading for delivery at King's Lynn docks. Upon the ship's arrival at Gibraltar she was ordered by the consignees of the wheat to proceed therewith to Cardiff; but instead of going there direct, she went in the first instance to King's Lynn, and there delivered the linseed before proceeding to Cardiff. On the voyage from King's Lynn to Cardiff the wheat was seriously damaged by one of the perils excepted in the bill of lading and charterparty. In an action by the holders of the bill of lading against the shipowners for breach of contract:—Held, that, by proceeding to King's Lynn, the ship had deviated from the voyage, and that her owners were therefore liable. *The Dunbeth*, 66 L. J., Adm. 66; [1897] P. 133; 76 L. T. 658; 8 Asp. M. C. 284.

Deviation—Light Dues.]—See *Newman* v. *Lamport*, supra, col. 239.

And see further, as to Deviation and Delay, post, XIV. DEMURRAGE—FROST PREVENTING LOADING, supra, col. 245.

d. Enforcing in Equity.

Parties who have mutually bound themselves, will be restrained from doing any act inconsistent with a charterparty which they have entered into bonâ fide. *Levin* v. *Deslandes*, 30 L. J., Ch. 457; 7 Jur. (N.S.) 837; 3 L. T. 461; 9 W. R. 218.

The court has jurisdiction to deal with questions relating to charterparties; and so when a charterparty has been entered into bonâ fide, it can, on a sufficient case being made, grant an injunction to restrain the breach of such a contract. *Ib.*

The master of an American vessel arriving in England, authorised by the owners to sell or charter the ship, entered into a charterparty with the plaintiff for a voyage to Ceylon and back. A few days afterwards the defendant purchased the ship from a party acting under a power of attorney from one of the owners to sell her. The greater part of the cargo had been put on board under the charterparty. The defendant attempted to stop the sailing of the ship:—Held, that the master having authority to charter the ship, which he had done, and the defendant knowing of the charterparty, an injunction would lie to restrain the purchasers from interfering with the sailing of the ship, in pursuance of the charterparty. *Messageries Imperiales Co.* v. *Baines*, 7 L. T. 763; 11 W. R. 322.

A vessel having been chartered to convey a cargo of coals to China and having become damaged, the master was forced to discharge the cargo, and the owner declined to reship it, on the ground that, having become wet, it was liable to spontaneous combustion. On a bill by the charterers to restrain the owner from employing the ship in any manner inconsistent with the charterparty, the court directed an inquiry as to the state of the cargo, and granted an injunction pending such inquiry. *Heriot* v. *Nicholas*, 12 W. R. 844.

The court of chancery cannot decree the specific performance of a charterparty, but it can restrain the parties from employing the ship in a manner inconsistent with the rights under a charterparty. *Le Blanch* v. *Granger*, 35 Beav. 187.

Although a court of equity cannot enforce the specific performance of a charterparty, yet it will restrain the employment of the vessel in a different manner, whether such employment is expressly or impliedly forbidden. *De Mattos* v. *Gibson*, 4 De G. & J. 276; 28 L. J., Ch. 165, 498; 5 Jur. (N.S.) 347, 555; 7 W. R. 100, 403, 514.

C. mortgaged a ship to D., with a power of sale. The ship was under contract by charterparty, to carry a cargo from U. to S., of which the mortgagee had notice. On a bill filed by the charterer of the vessel for a specific performance against the mortgagor, and for an injunction to restrain the mortgagee from interfering to interrupt the voyage:—Held, that the contract was not enforceable in a court of equity, and that the charterer was bound to shew that the mortgagee had done or threatened to do some act which had interfered with the performance of the contract, to entitle him to an injunction. *Ib.*

A shipowner entered into a contract to carry a cargo of coals from Birkenhead to Bombay. The charterparty contained the ordinary exception of perils of the sea. The ship, soon after sailing, was overtaken by a storm, and put into Belfast. The master of the ship had the coals unshipped, and, being advised that they were in too dangerous a state to be reshipped, he had them sold. The charterers filed a bill to restrain the shipowner from using the ship in a manner inconsistent with the charterparty. The vice-chancellor granted an injunction accordingly, with the intention of compelling the shipowner to send the ship back to Birkenhead to take on board a new cargo of coals for Bombay:—Held, upon appeal, that no such injunction could be granted. *Adamson* v. *Gill*, 18 L. T. 278; 16 W. R. 639.

6. LIABILITY OF CHARTERER OR AGENT.

Indefinite Period of Employment.]—By a charterparty to government for transporting emigrants from this country to the Cape of Good Hope, a shipbroker, on behalf of the owners, let a vessel to the commissioners of the navy for the space of —— calendar months certain, and thenceforward until they should give him notice that she was discharged, such notice to be given after her return to Deptford or Portsmouth; and the commissioners covenanted to pay freight at the rate of 14*s.* per ton per calendar month for so long time as the vessel should be continued in his majesty's service; and that after she had been in such service six months, the broker should have a bill of imprest for two months' freight more; and after ten months a like bill for two months; and a like bill whenever eight months should be due; and

the following memorandum was written in the margin: "Notwithstanding, it is herein agreed that the ship shall be discharged at Deptford or Portsmouth, it is hereby covenanted that she shall be discharged at the Cape of Good Hope when the service will admit of it":—Held, that under the terms of the charterparty the voyage was general, and that the ship was chartered for an indefinite period; and that the broker was only entitled to claim commission as for a voyage of that description, and not for a specific voyage outwards. *Holl* v. *Pincent*, 6 Moore, 228.

Charterers' Duty to Clear Ship.]—Where a ship had been addressed to a consignee, who was not in a position to clear the ship, and the captain was led by the charterers to have recourse to brokers, who cleared the ship and charged commission for so doing, which the captain paid on behalf of the owner:—Held, that an action was maintainable by the shipowner against the charterers, who had agreed that the ship should be consigned to their agents free of commission, and the cargo cleared free of expense to the shipowner. *Russell* v. *Griffith*, 2 F. & F. 118.

Expenses incurred by Reason of additional Clause.]—D. chartered a vessel to Puerto Cabello and home from Maracaibo at a fixed freight, and an additional clause was subsequently inserted in the charterparty giving the charterer the option of sending a part of the outward cargo on to Maracaibo, and stipulating that "any and every expense the vessel may incur in consequence of this additional clause shall be borne by the charterers." The charterer loaded the vessel with a cargo, part for Puerto Cabello and part for Maracaibo, and made out two manifests. On arriving at Puerto Cabello, the custom-house authorities insisted on seeing both manifests, and prohibited the discharge of the part of the cargo intended for Puerto Cabello on the false ground that there were contraband goods on board, by which the cargo was confiscated, and they also imposed a fine of 500 dollars on the master for having two manifests, and prohibited the discharge of the cargo or the clearing out until the fine was paid. The master appealed to the tribunals of the country and made counter-claims for delay. A revolution occurred in Venezuela about the same time, which prevented all commercial and legal proceedings; but eventually the government agreed with the master to pay him 5,000 dollars as compensation for the detention of the ship, and after a further delay she proceeded to Maracaibo. The 5,000 dollars were not paid:—Held, that the owner of the vessel was not entitled to recover from the charterer the damages or expenses he had been put to, either in repairing damage to the vessel occasioned by delay or the costs attendant upon the proceedings or otherwise, such damages not being contemplated by the additional clause. *Sully* v. *Duranty*, 3 H. & C. 270; 33 L. J., Ex. 319.

Cesser Clause—Loading in regular Turn.]—By a charterparty between the owners of a ship and the agents for the charterers, who were persons resident in Spain, it was agreed that the ship should proceed to L., and there load in regular turn from the agents of the charterers a full and complete cargo. It was also agreed that all liability of the agents "in every respect, and as to all matters and things as well before and during as after the shipping of the cargo, shall cease as soon as they have shipped the cargo." A cargo was loaded and shipped, but not in regular turn:—Held, that the agents were protected by the clause from liability for not so loading in regular turn, they having loaded and shipped the cargo before the commencement of the action. *Milvain* v. *Perez*, 3 El. & El. 495; 30 L. J., Q. B. 90; 7 Jur. (N.S.) 336; 3 L. T. 736; 9 W. R. 269.

See also as to cesser clauses, post, XIII. FREIGHT—XIV. DEMURRAGE.

Loss of Vessel after Expiration—Liability of Charterer—Act of God.]—A vessel was lost, through stress of weather, and without negligence, after the expiration of a charterparty:—Held, in an action by the representative of the owner against the charterer, in the absence of express stipulation, that there was no liability implied by law on the part of the person in possession for loss so occasioned. *Smith* v. *Drummond*, 1 Cab. & E. 160.

Liability of Trustee in Bankruptcy.]—Where a charterparty and bill of lading were entered into with the concurrence of the trustee in sequestration, though not expressly authorised by him:—Held, that the trustee was liable thereon. *Mackersack* v. *Molleson*, 13 Ct. of Sess. Cas. (4th ser.) 445.

Liability of one signing "as Agent for the Charterer."]—A charterparty was entered into between the plaintiffs, shipowners and defendants "as agents for charterers." It was signed by the defendants without qualification, but contained a clause that the ship was to load "from the agents of the said freighters," and a cesser clause, that the charter being entered into on behalf of others, the charterer's liability should cease on completion of loading and payment of advance. In an action on the charterparty:—Held, on demurrer, that the defendants were personally liable. *Hough* v. *Manzanos*, 48 L. J., Ex. 398; 4 Ex. D. 104; 27 W. R. 536.

7. DEMISE OF SHIP.

Liability of Owner for Negligence of Master and Crew.]—The plaintiffs hired from the defendant a vessel under a charterparty, by which the vessel was let to the plaintiffs for a specified time, and they were to have the whole reach of her holds, except what was reserved to the owner for the crew; the crew was to assist in loading and discharging, and the captain was to sign bills of lading and to furnish to the charterers a copy of the log. The defendant engaged and paid the master and crew. Whilst the vessel was upon a voyage under the charterparty, with a cargo on board belonging to the plaintiffs, she and her cargo were lost by the negligence of the master and crew:—Held, that the master and crew were the servants of the defendant for the purpose of navigating the vessel, and that he was liable to compensate the plaintiffs for the loss sustained by them. *Omoa and Cleland Coal and Iron Co.* v. *Huntley*, 2 C. P. D. 464; 37 L. T. 184; 25 W. R. 675; 3 Asp. M. C. 501.

The owner of a ship who, by a verbal agreement, gives up all control over her to the captain, but retains a right to one-third of the net profits, and is subsequently registered as managing owner under the Merchant Shipping Act, 1875, is liable

for the negligent management of the vessel by the captain, though occurring under a charterparty of which the owner knew nothing. *Steel* v. *Lester*, 47 L. J., C. P. 43 ; 3 C. P. D. 121 ; 37 L. T. 642 ; 26 W. R. 212 ; 3 Asp. M. C. 537.

What Amounts to—Lien of Owner.]—By a charterparty it was covenanted that the owner should receive on board in London all such goods as the freighter thought fit to load, and should proceed therewith to Madras, and there, after delivering her outward cargo, receive from the freighter's agents a homeward cargo, and deliver the same in London ; and that all the cabins but one, which was reserved for the use of the captain, should be at the disposal of the freighter, who was to appoint a supercargo to superintend the stowage of the goods. Freight to be paid at so much per ton on the register tonnage of the ship. The captain and crew were employed and paid by the owner :—Held, that there being no express words of demise of the ship itself in the charterparty, the freighter did not thereby become the owner for the voyage, but that the possession continued in the owner, and that he, therefore, had a lien upon the cargo for his freight. *Saville* v. *Campion*, 2 B. & Ald. 503 ; 21 R. R. 376.

The owner of a ship entered into a charterparty with the freighter, by which the former granted and let, and the latter hired and took, the ship for a voyage out and home. The owner covenanted that, the vessel being well manned and furnished, the master should receive on board at London goods to be sent alongside by the freighter, and deliver them from alongside at Newfoundland to the agents of the freighter, according to his bills of lading ; and, such cargo having been discharged there, should receive other goods in like manner and deliver them at Demerara, and, having discharged the same, should receive other goods there and deliver them at London, agreeably to bills of lading. The owner agreed that the ship's boats should assist in unloading and loading the cargoes when required by the freighter, provided no impediment was thereby made in carrying on the exclusive duties of the ship ; in consideration whereof the freighter covenanted to send and take the goods from alongside, and to pay for the freight and hire of the vessel for the voyage 2,600*l.* with primage, one quarter part on delivery of the cargo at Newfoundland, by good bills at sixty days' sight on London, and the remainder by good bills at two months' date from the day of the ship's report inwards at the port of London. The voyage was performed, and goods of third persons brought from Demerara, under bills of lading deliverable to the consignees on payment of certain specified freight therein mentioned, which freight the owner received. Bills of exchange for one quarter's freight were drawn on the freighter at Newfoundland, which were afterwards accepted and dishonoured by him, and no sum or bill for the remaining three-quarters' freight per charterparty was given or tendered to him on the return of the ship :—Held, that, taking the whole of the charterparty into consideration, the possession of the ship did not pass to the freighter, but remained in the owner ; and that the circumstance of his having agreed with the charterer as to the mode of payment of freight did not divest him of his lien on the cargo for freight ; and that it made no difference that he had delivered the homeward cargo and received the freight due upon the bills of lading, which was different from that due upon the charterparty. *Christie* v. *Lewis*, 5 Moore, 211 ; 2 Br. & B. 410 ; 23 R. R. 483.

Where no Possession by Owner.]—The owner of the ship has no lien for the hire stipulated by a charterparty for the voyage on goods shipped by the charterer, because the latter is the owner of the ship for the voyage ; and the first owner has no possession of the ship or goods, without which there can be no lien. *Hutton* v. *Bragg*, 7 Taunt. 14 ; 2 Marsh. 339 ; 17 R. R. 431.

As Transport to Crown.]—Where A. chartered his ship to the commissioners of the transport service on behalf of the crown to be employed as a transport, and the ship in the course of such employment made several voyages from Deptford to foreign ports and back :—Held, that by the terms of the charterparty, coupled with the nature of the service, a temporary ownership passed to the crown, so that A., during the time of such service, was not to be considered as owner within the charters granted to the Trinity House, which impose lighthouse duties and for buoyage and beaconage on the owners of ships. *Trinity House* (*Corporation*) v. *Clark*, 4 M. & S. 288.

With Right to Surplus—Presence of Agent.]—The owners of a ship by deed appointed A. to the command of the ship on a voyage from London to Calcutta and back. A. was to load the ship out and home, and to secure to the owners a certain amount of freight, retaining the surplus or making good the deficiency. An agent of the owners was to go on board to superintend the management of the stores, with power to displace A. and appoint another commander, in case of his breaking the agreement on his part :—Held, that the deed released the owners from their liability, as such, to make good the loss upon goods sent from Calcutta to London by the ship, and lost or damaged on the voyage, and that A. alone was responsible to the shippers for such nondelivery, he being owner of the vessel pro hâc vice. *Newberry* v. *Colvin*, 4 M. & P. 876 ; 7 Bing. 190 ; 1 C. & J. 192 ; 1 Tyr. 55 ; 9 L. J. (O.S.) Ex. 13—Ex. Ch. Affirmed in Dom. Proc. nom. *Colvin* v. *Newberry*, 1 Cl. & F. 283 ; 6 Bligh, 167.

Hire for Day—Owners' Servants.]—The defendants hired a steam vessel for the day to convey them to R. and back to L. The vessel was navigated by the master, engineer and crew of the owners, at their expense :—Held, that the defendants had not such exclusive possession of the vessel as to entitle them forcibly to expel the plaintiff, who had come on board with the master's permission for the purpose of being conveyed to R. *Dean* v. *Hogg*, 4 M. & Scott, 188 ; 10 Bing. 345 ; 3 L. J., C. P. 113.

Possession—Right to maintain Trespass.]—An owner of a ship, notwithstanding he has let her out by charterparty for twelve months, containing no terms of conveyance of possession, has a sufficient possession of her to maintain trespass. *Lucas* v. *Nockells*, 4 Bing. 729 ; 1 M. & P. 783 ; 2 Y. & J. 304 ; 1 Cl. & F. 438 ; 29 R. R. 721.

Tests of Possession.]—By a charterparty it was agreed that A. should let and B. should hire A.'s vessel for six months, during which time B. was to possess the entire and exclusive use and

disposal of the whole vessel, with the exception of the cabin, with room for the accommodation of the crew and for the stowage of stores and provisions; that the master should, as often as B.'s interest should require, take on board and properly stow all such goods, to the extent of a full and complete cargo, as should be tendered to him for that purpose, and proceed therewith upon such voyage or voyages as B. or his agent should direct; and that he should deliver the goods agreeably to the bills of lading; that the freight and primage should be payable to B. or his order; that in the event of the completion of the six months' voyage, or after she had commenced taking goods on board for a voyage, the term should be prolonged until the discharge of her cargo after her arrival at, or return to, a port in Great Britain; and that the owners or master should keep the vessel tight and manned, and provisioned and fitted with necessary stores. In consideration whereof, B. agreed to pay to A., at a certain rate per ton per month, to be paid by—one month's pay in advance in cash,—one month's pay after the vessel should be entered outwards,—one month's pay that day two months, —and one month's pay at the expiration of each succeeding month till the end of the term she might be employed, and the balance in cash on her final discharge, together with port charges; and that B. should have the privilege of putting in a master of his own appointment, he finding the cabin with all stores, and paying his wages, A. allowing the wages paid to his own master; A. not to be responsible for such master's acts and conduct should he deviate from the charter; B. to be responsible to A. for the conduct and integrity of such master:—Held, that the possession of the vessel was given up by A. to B. during the continuance of the contract; that the master so appointed by B. was in possession of the cargo as his agent, and not as the servant of A.; that personal credit was given to B. for the payment of the hire of the vessel; and that no lien upon or right of stoppage of the goods was reserved to the owners as a security for the payment of such hire. *Belcher* v. *Capper*, 4 Man. & G. 502; 5 Scott (N.R.) 257; 11 L. J., C. P. 274.

Liability of Owner to Shipper—Bill of Lading —Master and Servant.]—A person who is registered as the owner of a ship, and also registered as the managing owner under the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), is not liable to shippers under bills of lading signed by the master or ship's agent, for loss of cargo alleged to have arisen from the unseaworthiness of the ship, if he has divested himself by the charterparty of all control and possession of the vessel for the time being in favour of the charterers, who have all the use and benefit thereof, even if the shippers have no notice of the contents of the charterparty. *Frazer* v. *Marsh* (13 East, 238, ante, col. 65), followed. *Baumwoll Manufactur von Carl Scheibler* v. *Furness*, 62 L. J., Q. B. 201; [1893] A. C. 8; 68 L. T. 1; 1 R. 59; 7 Asp. M. C. 263—H. L. (E.)

8. Pleadings, Evidence and Damages.

Declarations.]—As to allowing several counts on a charterparty, varying its statements, see *Hernod* v. *Wilkin*, 11 Q. B. 1. See *Hoggett* v. *Exley*, 6 Bing. (N.C.) 207; 8 Scott, 480.

The owner of a ship covenanted by a charterparty with the freighters to take on board six pipes of brandy at Havre, and proceed therewith to Terceira, where the master was to take on board a full and complete cargo of green fruit, or other goods, as the freighters might think fit to send alongside, and despatch her therewith to London: and the freighters covenanted to pay freight for the fruit at certain terms therein specified, and on the brandy, at a certain rate therein also stipulated, and guaranteed the ship a complete cargo of fruit home. In an action by the owner against the freighters, for not putting a full cargo of fruit on board at Terceira, he averred a general performance of the covenants contained in the charterparty to be fulfilled:—Held, sufficient, as the covenant by the owner to take the brandy to Terceira was an independent and distinct covenant, and not to be considered as a condition precedent, as it went only to a part of the consideration of the contract. *Fothergill* v. *Walton*, 2 Moore, 630; 8 Taunt. 576; 20 R. R. 567.

Action on a charterparty by a freighter against a shipowner for not receiving cargo. Proof was given of a charterparty expressed to be between the defendant of one part, and G. S. & Co. (agents of the freighters) of the other, containing a memorandum, as follows:—"This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. S. & Co. shall cease as soon as the cargo is shipped." No notice of this memorandum was taken in the declaration:—Held, that it was not necessary to notice the memorandum. *Schmaltz* or *Schmalz* v. *Avery*, 16 Q. B. 655; 20 L. J., Q. B. 228; 15 Jur. 291.

In an action for breach of a charterparty by the freighter against the owner of a ship, for not performing the terms of a charterparty, the declaration alleged that it was agreed by the parties that the ship should proceed with all convenient speed to St. Helena, and there load a cargo, and therewith proceed to Liverpool, and deliver the cargo at a safe wharf, for a certain amount of freight (the act of God, the Queen's enemies, fire and all other dangers of the seas and navigation during the voyage always excepted); that the charterparty should be in force for six voyages, and that they should all be made not later than a certain day specified. The declaration averred that the freighter had done all things necessary on his part to entitle him to have the voyages performed, yet the ship did not make the voyages as agreed:—Held, that the declaration was good, although it did not contain any averment negativing the fact of the owner being within any of the exceptions contained in the charterparty, and that if he relied upon such fact, he was bound to plead it. *Wheeler* v. *Bavidge*, 9 Ex. 668; 23 L. J., Ex. 221.

A declaration stated that by a charterparty between the defendant, the shipowner and the plaintiff, it was agreed that the ship should proceed to two ports in Sicily, or usual place of loading, on and after the delivery of her outward cargo, and there load from the plaintiff's factors a full cargo, and thence proceed to Bristol, and that the vessel should have her orders before leaving Messina. The declaration alleged that the ship arrived at Messina, and laid as a breach, that the defendant within a reasonable time after the delivery of her outward cargo, and before the plaintiff could have given orders for the ship to proceed to the ports, made a contract with a third party for the conveyance of goods from Messina, and therewith and within such

reasonable time as aforesaid, and before such reasonable time had elapsed, loaded his ship, and afterwards proceeded to London, without taking on board the cargo agreed to be taken from the plaintiff and thereby wholly incapacitated and deprived himself of the power of fulfilling the charterparty, although the plaintiff within such reasonable time as aforesaid provided merchandise, and was ready and willing to load on board the ship the merchandise, and although the plaintiff would have been ready and willing to have named and appointed and given orders to the defendant to proceed to two ports and to have there loaded a full cargo :—Held, that the declaration was bad, as it did not shew that the vessel had sailed before the lapse of a reasonable time for the performance by the plaintiff of his part of the contract, and so did not shew that the defendant had incapacitated himself from performing his part of the contract, and that it ought to have contained an averment that the plaintiff had performed his part by giving orders, naming a port, &c., and by tendering a cargo within such reasonable time. *Matthews* v. *Lowther*, 5 Ex. 574 ; 19 L. J., Ex. 364.

Action on a charterparty, not under seal, varied by a subsequent agreement. The declaration stated, that, by a charterparty between G. L. J. & Sons, on behalf of the owners (not stating the plaintiffs to be the owners) of a ship at Pembroke, and the defendant described as the charterer, it was mutually agreed that the ship should, with all convenient speed, proceed to Cardiff, and there load a cargo of iron and coals at certain freight, and deliver the same at Alexandria ; forty running days to be allowed the charterer for loading at Cardiff and unloading. That the ship, with the consent of the plaintiffs, and at the request of the defendant, remained at Pembroke to receive coals, part of the cargo, instead of being loaded therewith at Cardiff, and that she there received coals on board. That the defendant did dispense with, and discharge the plaintiffs from, performing that part of the charterparty which related to the sailing of the ship with all convenient speed from Pembroke to Cardiff up to and until the time of the completing the loading of coals at Pembroke. That the ship sailed to Cardiff. Breach, that the defendant detained the ship there in loading for twenty days over and above the lay days and ten days of demurrage. It then stated, that the ship, being fully laden, proceeded to Alexandria ; assigning, as a second breach, that the defendant detained the ship there in unloading for a further time, viz. thirty days over and above the lay days and days of demurrage. There were two more breaches, one the nonpayment of freight for the cargo, which the plaintiffs duly delivered at Alexandria, and the other the nonpayment of demurrage :—Held, that the declaration was defective for not shewing by distinct averment or necessary implication that the plaintiffs were parties contracting by the charterparty as owners of the ship, and that such defect could not be cured by any admission in the pleas, whether found for or against the defendant. *Galloway* v. *Jackson*, 3 Man. & G. 960 ; 3 Scott (N.R.) 753 ; 12 L. J., Ex. 502—Ex. Ch.

Pleas.]—In a declaration on a charterparty, by which the ship was to sail from Hamburg, being tight, staunch, strong and every way fitted for the voyage, in the course of the next November, and proceed to Lima, and having discharged her outward cargo, forthwith to be made ready and proceed to Costa Rica, and there take on board a cargo, and then proceed to Liverpool ;—breaches were alleged as follows : that the vessel was not, in November or afterwards, until or when she sailed on the 20th December, tight, staunch, strong, or in any way fitted for the voyage : and that, though she did then sail from Hamburg, yet by reason of her not being tight, &c., when she so sailed, she was obliged to, and did, put back into Altona, and was detained there for a long time ; though she did then again set sail on her voyage from Altona, she did not proceed on the voyage according to its due course, or with proper despatch, but was unnecessarily delayed and deviated ; by means of which premises, the vessel did not arrive at Lima, and the plaintiff lost the benefit of a homeward cargo from Costa Rica. The defendant pleaded, as to so much of the declaration as related to the vessel not being fitted for the voyage, and by reason thereof being obliged to put back into Altona, and being detained there for such time as was necessary to put further ballast on board, payment into court of 1*s.* and no damages ultra ; and as to so much as related to her being detained at Altona beyond the time necessary to put the ballast on board, that she was not detained there by reason of her not being tight, staunch, &c. :—Held, that the latter plea was bad, as answering only a part of the breach to which it applied, viz. the detention at Altona, and the subsequent delay and deviation, even if that was a breach, and was not merely a statement of special damage. *Porter* v. *Izat*, 1 M. & W. 381 ; 1 Tyr. & G. 639.

—— **Deviation.**]—In an action upon a covenant to sail and not to deviate directly or indirectly, a plea of general performance is bad. *Lathwell* v. *Fisher*, 1 Keb. 334.

—— **Sail with next Wind — Traverse.**]—Action on freight on charterparty containing covenant to sail with next wind ; special plea and traverse, absque hoc, that plaintiff did not sail with next wind :—Held that the traverse is not well, for the voyage is the substance of the contract, and not sailing with the next wind. *Constable* v. *Clobury*, or *Clovery*, Noy, 75 ; Latch. 12.

—— **Loss by Perils of Sea—Seaworthiness.**]—Charterer covenants that the ship shall return within twelve months, perils of sea excepted ; the master warranting her seaworthy and well manned. Breach, that she did not return, not being delayed by perils of sea. Plea, that she was detained at Jamaica through seamen deserting and that the master did not provide others. Plea bad. *Wynne* v. *Fellowes*, Holt, 446.

—— **Certainty—Average.**]—Action of debt in charterparty. Breach assigned, nonpayment of freight, 200*l.* with average, not stating amount. Exception, uncertainty of average. Held, certain enough. *Dodd* v. *Atkinson*. *See* Cas. t. Hardw. 342.

Evidence—Letters as to Agency.]—A captain was instructed to apply for a cargo to A., and in the event of A. not being on the spot, then to apply to B. (both being agents of the charterers) for the same purpose. He applied to both accordingly, and was refused a cargo by both. An

action was brought by the owners to recover the freight; and in order to do away with the effect of the proof as to B.'s refusal, a letter from B. to the charterers was tendered to shew that, prior to such refusal, B. had renounced their agency:—Held, to be inadmissible. *Hassell* v. *Watson*, 2 Car. & K. 141.

Held, also, that A. having been on the spot, what passed between B. and the captain was important only in so far as it was confirmed and adopted by A. *Ib.*

—— **Notarial Copy of Charterparty made Abroad.**]—In Batavia, parties about to make a contract go before a notary, who writes in his book the contract, which is then signed by them. Copies of this contract may be obtained by either party in the absence of the other. A notarial copy of a charterparty was entered into at Batavia:—Held, not to be evidence either of the original contract, nor properly secondary evidence of it. *Brown* v. *Thornton*, 1 N. & P. 339; 6 A. & E. 185.

—— **Of Restraint of Princes.**]—On an issue joined on a plea by the charterer that he was prevented from loading by restraint of princes, it was proved no corn was exported from Ibraila during the vessel's stay; and evidence was given that Wallachia, in which Ibraila is situate, was invaded by the Russians, and at the time in question was under the command of Prince Gortschakoff, a Russian general, who, while at Ibraila, being applied to, to allow grain to be exported, refused, and desired the applicant to petition the commissary at Bucharest. Evidence was also tendered of copies of placards, in the name of Gortschakoff, posted on the walls of Ibraila, at the period of the ship's arrival, prohibiting the exportation of grain:—Held, that such evidence was admissible, and, coupled with the other evidence, proved the plea. *Bruce* v. *Nicolopulo*, 11 Ex. 129; 3 C. L. R. 775; 24 L. J., Ex. 321; 3 W. R. 483.

—— **Nature of Trade.**]—When by a charterparty the owner agreed that the ship then bound for Havre should proceed with all convenient speed to the North of England for coals, thence to Limerick, and there load a cargo of grain or other merchandise for the charterer, and the ship having been delayed by bad weather did not arrive at Limerick till long after the time expected:—Held, in an action by the owner on the charterparty that evidence on behalf of the charterer that the Limerick export grain trade is carried on only at a certain season, which had expired before the ship arrived, was inadmissible. *Hurst* v. *Usborn*, 18 C. B. 144; 25 L. J., C. P. 209; 4 W. R. 458.

—— **Custom to control Contract.**]—*See Cases* ante, cols. 252, 253.

Charterparty to date from Condemnation of Ship — Averment of Condemnation.] — In an action on a charterparty, whereby it was agreed to employ a ship of which the plaintiff was the captor, as soon as sentence of condemnation should have passed, the sentence must be taken to mean a legal sentence; and the party who sues for the freight must aver that the ship was condemned by a court having competent jurisdiction. *Unwin* v. *Wolseley*, 1 Term Rep. 674.

Arbitration Clause — Jurisdiction.]—Arbitration clause in a charterparty held not to oust the jurisdiction of the court. *Thompson* v. *Charnock*, 8 Term Rep. 139.

Pratique—Stipulation as to—No Authority to grant Pratique — Proof.] — By charterparty a vessel was to have ninety running days and ten days on demurrage, to commence from her arrival at Whidah, she being ready to unload and having received pratique. Declaration for breach of charterparty stated that the vessel arrived at Whidah, and being ready to unload, and having received pratique, &c., which allegation was traversed by plea. The plaintiff proved that the ship arrived and was ready to unload, and did unload, but did not procure a written document of pratique, there being no authority at Whidah to give the same:—Held, that the plaintiff had proved the issue upon him, and that the ship must be taken to have received pratique. *Balley* v. *De Arroyave*, 7 A. & E. 919; 3 N. & P. 114; 7 L. J., Q. B. 91.

Damages—Penalty and Profits.]—A ship was chartered to go to New Zealand, where the charterers were to load her, or by an agent there to give the owner notice that they abandoned the adventure; in which case they were to pay him 500*l.* The ship went to New Zealand, but found neither agent nor cargo there, and the captain made a circuitous voyage home by way of Batavia. This voyage, after making every allowance for increased expenses and loss of time, was more profitable than the original adventure to New Zealand would have been. The owner sued the charterer on the charterparty for breach of covenant:—Held, that he could not recover the 500*l.* penalty in addition to the profit of the homeward voyage. *Staniforth* v. *Lyall*, 7 Bing. 169; 4 M. & P. 829; 9 L. J. (o.s.) C. P. 23.

In an action against a charterer of a ship for not landing a cargo, the measure of damage is the amount of freight which would have been earned after deducting the expenses, and also any profit which the ship may have earned during the period over which the charter extended. *Smith* v. *M'Guire*, 3 H. & N. 554; 27 L. J., Ex. 465; 6 W. R. 726. *S. C.*, Nisi Prius, 1 F. & F. 199.

Semble, that a shipowner is not bound to take a new cargo for the most he can get, in order to reduce the damages to be paid by the charterer. *Ib.*

Unliquidated Penalty.]—More than the penalty of a charterparty may be recovered in an action in the covenants. *Winter* v. *Trimmer*, 1 W. Bl. 395. S. P., *Harrison* v. *Wright*, 13 East, 343; 12 R. R. 369.

Ship not ready to Sail — Natural Result of Breach — Notice of Special Circumstances.]—By the terms of the contract the defendants agreed with the plaintiffs to have a certain ship ready on a certain date, in the south West India Docks, to receive a cargo of tiles for shipment to Australia. The ship was not ready on the agreed day, and the tiles being kept waiting in the trucks in which the plaintiffs had had them brought into the docks, the plaintiffs were obliged to pay the railway company, the owners of the trucks, a certain sum for the detention, which sum they now sought to recover from the defendants as damages for their breach of contract. If the

plaintiffs had followed the ordinary course of business at the docks, they would have employed the dock company to bring the tiles into the docks up to the ship's side, and the dock company's scale of charges, which were slightly higher than the railway company's, would have included storage of the tiles at the docks for three weeks without further charge. The time during which the trucks were actually detained was less than three weeks:—Held, that the defendants had no right to assume that the plaintiffs would follow the ordinary course of business in the mode of bringing their goods into the docks, and that the plaintiffs were entitled to deliver the tiles in any manner they pleased, and that the detention of the trucks was the natural and ordinary consequence of the defendants' breach of contract. *Welch* v. *Anderson*, 61 L. J., Q. B. 167; 66 L. T. 442; 7 Asp. M. C. 177—C. A.

Legality of Voyage.]—The charterer of a ship from L. to B. and back, cannot plead to an action brought against him by the owner on the charterparty for not providing a cargo at B. that the ship sailed without convoy contrary to law, and that the plaintiff was privy thereto; it not being in the contemplation of the parties, when the contract was entered into, to violate the law. *Wilson* v. *Foderingham*, 1 M. & S. 469.

Amendment—Orders as to Port of Loading—Reasonable Time for giving Notice.]—Under 3 & 4 Will. 4, c. 42, s. 28, the judge has power to give leave to amend a declaration in an action on a charterparty by inserting a statement of its legal effect with reference to the duty of the charterer to exercise his option of naming the port of loading within reasonable time. *Whitwell* v. *Scheer*, 8 A. & E. 301; 3 N. & P. 391; 7 L. J., Q. B. 244.

Condition precedent—Loss of Ship—Finding of Court Martial.]—Covenant in a charterparty of a government transport, whereby if the ship should be lost, burnt, or taken, and it should appear to a court-martial that the master and crew had made the best defence they could, the freighters covenanted to pay the value of the ship:—Held, that the holding of the court martial is a condition precedent. *Davison* v. *Mure*, 3 Dougl. 28.

Seaworthiness.]—See *Dunbar* v. *Smurthwaite*, supra, col. 260.

Adding Parties—Ord. XVI. rr. 11, 48—Party out of Jurisdiction.]—See *Wilson* v. *Killick*, supra, col. 235.

Admiralty Jurisdiction.]—See *Watson* v. *Warner, and Cases* post, XXVI. ADMIRALTY LAW AND PRACTICE.

XII. BILL OF LADING.

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See also IV. OWNERS—AS TO LIABILITY TO PASSENGERS; XI. CHARTERPARTY; XII. FREIGHT; XV. CARGO.

1. STAMPING.

See 54 & 55 Vict. c. 39.

The indorsement and deposit of a bill of lading, as a security, did not require a stamp within 55 Geo. 3, c. 184, Sched. tit. "Mortgage." *Harris* v. *Birch*, 1 D. (N.S.) 899; 9 M. & W. 591; 11 L. J., Ex. 219.

2. FORM AND NATURE OF.

a. Form.

North German Code does not exclude Special Form.]—By the laws of England and of the North German confederation, a bill of lading is decisive as between shipowner and consignee, and the North German code, although providing a form of bill of lading, does not prevent a special form of contract. *The Patria*, 41 L. J., Adm. 23; L. R. 3 A. & E. 436; 24 L. T. 849; 1 Asp. M. C. 71.

Payment of Freight—Omission of usual Words.]—A bill of lading in mentioning the freight payable for a cargo, did not use the ordinary words "he or they paying freight for the same," but, after giving the names of the consignees to whose order the cargo was to be delivered, employed the words "freight for the goods 4*l.* 5*s.* per ton of twenty cwt. nett, delivered, with primage and average accustomed":—Held, that the two forms of expression were in effect the same, and constituted the ordinary condition that the goods were to be deliverable only on paying freight. *Wegnelin* v. *Cellier*, 42 L. J., Ch. 758; L. R. 6 H. L. 286; 22 W. R. 26.

Negotiability—"Or Order or Assigns."]—Semble, that a bill of lading, in which the words "or order or assigns" are omitted, is not a negotiable instrument. *Henderson* v. *Comptoir d'Escompte de Paris*, 42 L. J., P. C. 60; L. R. 5 P. C. 253; 29 L. T. 192; 21 W. R. 873; 2 Asp. M. C. 98—P. C.

When goods have been delivered to the person to whom the bill of lading was made out, and they have then been delivered to indorsees of the bill of lading, so that the indorsees unite in themselves a legal and equitable title to the goods, the omission of the words "or order or assigns" in the bill of lading is not sufficient to give the indorsees constructive notice of some equitable arrangement between the person to whom the bill of lading was made out and the

consignors. *Ib.* *And see*, as to negotiability, *Evans* v. *Marlett*, *and Cases* infra, col. 351.

Letters of Advice.]—Letters to a party who has accepted bills of exchange on the faith of a consignment, which gave him advice of the fact, are not equivalent to bills of lading indorsed. *Nichols* v. *Clent*, 3 Price, 547.

Clean Bill of Lading.]—See *Arrompe* v. *Barr*, infra, col. 317.

b. Duration and Currency.

Commencement.]—The liability of a shipowner for goods, the receipt of which is acknowledged by the master's signature to a bill of lading, commences from the time of delivery to the servants of the owner, although the goods are not put on board the ship. *British Columbia and Vancouver Island Spar, Lumber and Saw Mill Co.* v. *Nettleship*, 37 L. J., C. P. 235; L. R. 3 C. P. 499; 18 L. T. 291; 16 W. R. 1046.

Termination.]—A bill of lading remains in force until there has been a complete delivery of the goods thereunder to a person having a right to receive them. *Barber* v. *Meyerstein*, 39 L. J., C. P. 187; L. R. 4 H. L. 317; 22 L. T. 808; 18 W. R. 1041—H. L.

A. was indorsee of a bill of lading for cotton, drawn in a set of three, making the cotton deliverable in London on payment of freight. The cotton had been recently landed under an entry made by A., and carried to a sufferance wharf in the port of London, where it remained with a stop thereon for freight. On the 4th of March, 1865, A. obtained from B. an advance of 2,500*l.* on the deposit of two copies of the bill of lading; A. fraudulently retaining the third copy, which B. supposed to be in the hands of the captain. On the 6th and 7th of March (the stop for freight being then removed), A., who had in February instructed cotton brokers to take samples of the cotton and to offer it for sale, obtained from them advances to the amount of 2,000*l.* on the deposit of the third copy of the bill of lading; and on the 11th, being then informed of the prior advance by B., they sent such third copy of the bill of lading to the wharfinger, and procured the cotton to be transferred into their names, and afterwards sold it and received the proceeds:—Held, that the bill of lading, when deposited with B., retained its full force and effect, and consequently that there was a valid pledge of the cotton to B. before the advances made to A. by the brokers. *Ib.*

c. Revocability.

In what Cases.]—A bill of lading, by which goods are made deliverable to A., is revocable until the goods are or the bill of lading is delivered to A. The shipper of the goods, therefore, may change his purpose, and make the goods deliverable to anyone else. *Mitchel* v. *Ede*, 3 P. & D. 513; 11 A. & E. 888; 9 L. J., Q. B. 187.

Where a freighter of a ship to such ports as the master should be directed by himself or his agents, first ordered the master to proceed to one of them, in consequence of which he had taken in goods, and signed bills of lading for that port, he could not afterwards countermand that order, and order him to proceed to another port, without first recalling the bills of lading, or at least tendering a sufficient indemnity to the master, against the consequences of his liability thereon. *Davidson* v. *Gwynne*, 12 East, 381; 11 R. R. 420.

When goods have been put on board a ship to be conveyed on freight, and bills of lading have been signed by the master, the owner of the goods cannot before the sailing of the ship, insist on their being redelivered to him without paying the freight that would become due for their carriage, and indemnifying the master against the consequences of his signing the bills of lading. *Tindall* v. *Taylor*, 4 El. & Bl. 219; 3 C. L. R. 199; 24 L. J., Q. B. 12; 1 Jur. (N.S.) 112.

Of Indorsement.]—See *Mitchel* v. *Ede*, infra, col. 348.

d. Construction.

Intention.]—In construing bills of lading the intention of the parties as expressed in the contract is to be looked at, for no exception, of a private nature at least, which is not contained in the contract itself, or arising therefrom by implication of law, can be engrafted upon it. *Atkinson* v. *Ritchie*, 10 East, 533; 10 R. R. 372. S. P., *Spence* v. *Chadwick*, 10 Q. B. 517; 16 L. J., Q. B. 313; 11 Jur. 872.

Contract created by — As to Goods to be carried.]—When a bill of lading described the goods shipped as "Thirteen packages books, woodwork, whalebones, Dutch clocks, shoes and linen goods," and was also stamped by the master with the words, "value, weight and contents unknown":—Held, that the proper construction of the contract was, that the shipowners contracted to carry whatever goods were contained in the packages, and that they were therefore bound to carry silk stuffs contained in one of the packages, there being no evidence of wilful or fraudulent misstatement on the part of the shippers. *Lebeau* v. *General Steam Navigation Co.*, 42 L. J., C. P. 1; L. R. 8 C. P. 88; 27 L. T. 447; 21 W. R. 146; 1 Asp. M. C. 435.

Held, also, that, although the freight charged for linen goods was lower than that for silk stuffs, the shippers were not estopped from proving the delivery of silk stuffs to the shipowners. *Ib.*

As to Ships.]—Goods were shipped on board a vessel, under a bill of lading, "Shipped on board the steamship 'Hibernia' . . . from Singapore to London . . . with liberty to call at any ports, in or out of the route, to receive and discharge coals . . . &c., and to tranship the goods by any other steamer":—Held, that the contract of the shipowner was that the goods should be carried on board a ship in which the principal motive power during the voyage should be steam. *Fraser* v. *Telegraph Construction and Maintenance Co.*, 41 L. J., Q. B. 249; L. R. 7 Q. B. 566; 27 L. T. 373; 20 W. R. 724; 1 Asp. M. C. 421.

Construction according to Foreign or English Law.]—A German master of a German ship, chartered by German charterers, signed bills of lading which were in the English language, and stipulated for payment of freight in English money by English consignees of goods to be carried to a German port:—Held, that the contract must be construed by reference to the following rules: First—that the rights and obligations of the parties are to be determined by the law which they have declared themselves to intend;

secondly—that where there is no express declaration of intention, the presumption as to the law contemplated must be gathered from the circumstances of the case; thirdly—that where the contract is plain in its language, that language must receive the ordinary and natural construction, and does not admit the introduction of a law dehors the contract; fourthly—that the contract must be executed according to its terms, or abandoned, with due compensation to the party injured, unless supervening unforeseen circumstances have rendered the execution legally impossible; and, fifthly—that the happening of such circumstance may justify a reasonable delay in the execution of the contract, though not an abandonment of it. *The Patria*, 41 L. J., Adm. 23; L. R. 3 A. & E. 436; 24 L. T. 849.

The ship arrived at Falmouth on the 23rd of August, during the war between France and Germany. Hamburg was blockaded till the 18th of September. The consignees offered to take their cargo at Falmouth, and pay full freight, but were refused. The suit was commenced on the 1st of November:—Held, that whether the contract should be construed according to the general maritime law, or English or German law, the master was bound to have delivered the cargo at Hamburg or at Falmouth. *Ib.*

A bill of lading made in England is a contract to be governed and interpreted by English law, and therefore no substantive defence arising from delay in making the claim can be made apart from the express condition contained therein. *Moore* v. *Harris*, 45 L. J., P. C. 55; 1 App. Cas. 318; 34 L. T. 519; 24 W. R. 887; 3 Asp. M. C. 173—P. C.

Parol Evidence—Usage—Rate of Freight.]—By a bill of lading of wool from Odessa, freight was to be paid in London, on delivery, "at the rate of 80*s.* per cwt., gross weight, tallow, and other goods, grain, or seed, in proportion, as per London Baltic printed rates":—Held, that extrinsic evidence was admissible to shew, that, by usage of the trade, the meaning of the bill of lading was, that 80*s.* per cwt. of tallow was to be taken as the standard by which the rate of freight on all other goods was to be measured. *Russian Steam Navigation Co.* v. *Silva*, 13 C. B. (N.S.) 610.

Discount.]—A bill of lading provided that the goods specified therein should be deliverable to the order of the consignee or his assigns at Liverpool, he or they paying freight for the goods five-eighths of a penny sterling per pound, with primage and average accustomed:—Held, in an action by the shipowner against an indorsee of the bill of lading who had accepted the goods to recover the freight and primage, that the latter might give evidence of a mercantile custom existing at Liverpool, by which he was entitled to a deduction of three months' discount from the freight, inasmuch as the custom was binding, and was not inconsistent with the terms of the bill of lading. *Brown* v. *Byrne*, 3 El. & Bl. 703; 2 C. L. R. 1599; 23 L. J., Q. B. 313; 18 Jur. 700; 2 W. R. 471. See *Hall* v. *Janson*, 4 El. & Bl. 500.

The custom existing in Liverpool of allowing discount upon freights payable on bills of lading of ships from ports in North America, is applicable to freights from ports in California since its annexation to the United States. *Falkner* v. *Earle*, 3 B. & S. 360; 32 L. J., Q. B. 124; 9 Jur. (N.S.) 847; 7 L. T. 672; 11 W. R. 307.

Commission.]—The holder of a bill of lading comprising the whole cargo, has by custom a right to deduct "address commission" from the freight. *The Norway*, Br. & Lush. 404; 3 Moore, P. C. (N.S.) 246; 11 Jur. (N.S.) 892; 13 L. T. 50; 13 W. R. 1085. On demurrer, Br. & Lush. 226.

Primage.]—By a charterparty the charterer engaged to ship in Australia a full cargo for a port in England at a freight of 60*s.* per ton in full; ship paying all port-charges, pilotages and towages: the freight to be paid in cash on right delivery of cargo at port of discharge, less advances, exchange and commission: the captain to sign bills of lading for cargo as presented, at any rate of freight required by charterer; but, should the total freight by bills of lading amount to less than the total chartered freight, the difference to be paid the master in cash before sailing. The master (who was paid a fixed salary, "to include all charges and allowances") signed a bill of lading for the whole cargo, making the goods deliverable to "order or assigns, freight to be paid in cash at port of discharge, the rate of discharge, rate of freight, and other conditions as per charterparty, with 5 per cent. primage in cash on delivery as customary." The cargo was received at the port of discharge by the indorsees of the bill of lading, as agents of the charterer, and the freight paid:—Held, that they were not liable for primage. *Caughey* v. *Gordon*, 3 C. P. D. 419; 27 W. R. 50. *And see* V. MASTER, ante, col. 92.

Incorporation of Conditions of Charterparty—"Baltic Clause."]—The charterers of a vessel shipped a cargo on board her under a bill of lading by which the cargo was to be delivered at a port therein named "(the act of God, the queen's enemies, fire and all and every other danger and accidents of the seas, rivers and navigation of whatever nature and kind soever excepted) unto order or to assigns, they paying freight for the said coals, and all other conditions as per charter." One of the provisions of the charterparty was "Negligence clause as per Baltic Bill of Lading, 1885":—Held, in an action by the indorsees of the bill of lading against the shipowners to recover damages for the non-delivery of the cargo, that the words "all other conditions as per charter" only incorporated into the bill of lading those provisions of the charterparty which, from their nature, were to be performed by the consignee, and did not incorporate the "negligence clause as per Baltic Bill of Lading, 1885." *Russell* v. *Niemann* (17 C. B. (N.S.) 163) and *Gray* v. *Carr* (L. R. 6 Q. B. 522) discussed. *Serraino* v. *Campbell*, 60 L. J., Q. B. 303; [1891] 1 Q. B. 283; 64 L. T. 615; 39 W. R. 356; 7 Asp. M. C. 48—C. A.

Cesser Clause—Liability for Freight.]—A vessel was chartered to carry a cargo of coals from Cardiff to Rouen. The charterparty provided that the liability of the charterers should cease "when the ship is loaded and advance of freight with demurrage at Cardiff paid." "Ship to have a lien on cargo for freight, dead freight and demurrage." The bill of lading contained no restriction on the liability of the charterers. In an action for balance of freight:—Held, that the charterparty and bill of lading must be read together, and construed according to the plain meaning on the face of them, and

that the charterers' liability ceased on performance of the conditions in the charterparty. *Barwick* v. *Burnyeat*, 36 L. T. 250; 25 W. R. 395; 3 Asp. M. C. 376. And see *Benzon* v. *Kenneth*, post, col. 384.

—— **Demurrage—Liability of Charterers.**]—A charterparty contained stipulations for payment of freight and demurrage, and also a stipulation that "as this charterparty is entered into by the charterers on account of another party, their liability ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage." The charterers having placed the cargo on board at the port of loading, a bill of lading was signed whereby the goods were made deliverable to themselves at the port of discharge, "they paying freight, and all other conditions as per charterparty." In an action by the shipowner against them as consignees of the cargo, for demurrage in respect of delay at the port of discharge:—Held, that the cesser clause in the charterparty must be rejected as inapplicable in reading the bill of lading, which incorporated all the conditions of the charterparty applicable to the reception of the goods at the port of discharge, and, therefore, that the plaintiff was entitled to maintain the action. *Gullischen* v. *Stewart*, 53 L. J., Q. B. 173; 13 Q. B. D. 317; 50 L. T. 47; 32 W. R. 763; 5 Asp. M. C. 200—C. A. See also *Bryden* v. *Niebuhr*, ante, col. 252; and post, col. 466.

Exceptions and Perils — Conflict between Specific and General Provisions.]—Under a charterparty the appellants contracted to provide steamers for the purpose of bringing frozen meat to this country, and to fix and work proper refrigerating machinery, subject to the terms and conditions of a bill of lading of an agreed form, except as altered by the said charterparty. The bill of lading contained a wide exception clause. The refrigerating machinery proved defective, and the meat was damaged. In an action to recover damages from the appellants:—Held, that the general terms of the bill of lading were not incorporated into the agreement under the charterparty so as in any way to affect the express and specific stipulations of such agreement, and that if the said stipulations could not have full effect given to them in conjunction with the bill of lading, the bill of lading must be regarded as being to that extent altered by it. *Houston* v. *Sansinena*, 1 R. 203; 68 L. T. 567; 7 Asp. M. C. 311—H. L. (E.)

Deviation Clause—Perishable Cargo—Document partly consisting of Printed Common Form.]—A cargo of oranges consigned to Liverpool was shipped at Malaga under a bill of lading which described the ship as "bound for Liverpool," and contained a printed deviation clause whereby liberty was given "to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo or passengers, or for any other purpose whatsoever." By another clause the shippers agreed to all the stipulations of the bill of lading whether written or printed. After leaving Malaga the ship proceeded to a port in Spain in the contrary direction to Liverpool, and returned thence to Liverpool. By reason of the delay so caused, the oranges were damaged. The shippers sued the owners of the ship for damages for breach of contract:—Held, that the main object of the contract being the carriage of the oranges to Liverpool, the liberty given by the general printed words must be limited so as to make it a liberty consistent with the main object, and that, upon the true construction of the bill of lading, the liberty to deviate was confined to ports which were in the course of the voyage from Malaga to Liverpool; consequently, that the deviation in a contrary direction to Liverpool was not justified, and that the shipowners were liable. *Glynn* v. *Margetson*, 62 L. J., Q. B. 466; [1893] A. C. 351; 1 R. 193; 69 L. T. 1; 7 Asp. M. C. 366—H. L. (E.)

And see further as to construction of bill of lading with reference to charterparty, ante, XI. CHARTERPARTY, cols. 236, seq.

Evidence to Vary—Deviation—Loss by Perils of the Sea.]—The plaintiffs having purchased goods to be shipped from a foreign port on the terms that payment of the price was to be made in exchange for shipping documents, the bill of lading signed upon the shipment of the goods was, upon payment of the price, indorsed to them. The bill of lading, which contained the usual exception of sea perils, stated that the goods were shipped for delivery at Dunkirk on board a vessel lying at Fiume and bound for Dunkirk, with liberty to call at any ports in any order. The ship, instead of proceeding direct for Dunkirk, sailed for Glasgow, and was lost, with her cargo, off the mouth of the Clyde, by perils of the sea. In an action brought by the plaintiffs against the shipowners for non-delivery of the goods, evidence was given to shew that the shippers of the goods, at the time when the bill of lading was given, knew that the vessel was intended to proceed viâ Glasgow:—Held, that such evidence was not admissible to vary the terms of the bill of lading, which imported a voyage direct from Fiume to Dunkirk, subject to the liberty to call at any ports of call substantially within the course of such voyage; that Glasgow, being altogether out of the course of such voyage, was not such a port; and that the vessel was therefore lost while deviating from the voyage contracted for, and excepted perils clause did not exonerate the defendants from liability in respect of non-delivery of the goods. *Leduc* v. *Ward*, 57 L. J., Q. B. 379; 20 Q. B. D. 475; 58 L. T. 908; 36 W. R. 537; 6 Asp. M. C. 290—C. A.

Freight—Delivery without Payment.]—The words, "he or they paying freight for the said goods," in a bill of lading, are for the benefit of the master and shipowner and not of the the consignor. The master, therefore, may deliver goods to the consignee or his assigns, whether freight be paid or not, without incurring any liability to the consignor. *Shepard* v. *De Bernales*, 13 East, 505; 12 R. R. 442.

"Shipped on Board"—Goods floated to Ship.]—Timber sleepers were floated alongside a vessel on rafts and there delivered to the mate, who gave a receipt for them:—Held, that the goods were not "shipped on board" within the meaning of a bill of lading. *Thorman* v. *Burt*, 1 Cab. & E. 596; 54 L. T. 349; 5 Asp. M. C. 563.

Quay Rates—Custom inconsistent with Bill of Lading.]—A bill of lading stipulated that "the merchandise shipped thereunder was to be received on the quay at London and delivered therefrom by the person appointed by the steamship's agents, &c., the merchandise to be received and delivered according to the custom and usages of the respective ports." A custom was proved as to grain cargoes coming to London, that if the merchant does not demand delivery of the grain within twenty-four hours after the ship's arrival, the ship is entitled to discharge on the quay. The merchant did not demand delivery, and the grain was discharged on the quay:—Held, that the custom was not inconsistent with the bill of lading; and that the merchant was liable for quay rates. *Aste* v. *Stumore*, 1 Cab. & E. 321, n. Reversing *S. C.*, 1 Cab. & E. 219.

Right of Shipowner to land Goods at risk of Consignee.]—See *Wilson* v. *London, Italian and Adriatic Steam Navigation Co.*, infra, col. 534.

Liberty to Tow.]—The plaintiffs shipped goods at Liverpool on board the "Liberia," a steam vessel belonging to a steamship company, to be carried for freight, payable by the plaintiffs to the company, to Benin, on the coast of Africa, which goods, on the arrival of the "Liberia" at Bonny, were, in the usual course of the business of the company, and according to the terms of the bill of lading, transhipped on board the "Kwara," a small branch steamer belonging to the company, to be forwarded thereby to their destination at Benin. The "Kwara," with the plaintiffs' goods on board, left Bonny, and proceeded on her voyage to Benin, calling on her way at Brass, where she had both to discharge and take in cargo. Whilst lying in the harbour at Brass, and after having discharged and taken in cargo, and within two or three hours of being ready to proceed on her onward voyage to Benin, the "Kwara" was taken by her captain, at the request of the captain and owners of another vessel, to the mouth of the Brass river, some three miles from the harbour, for the purpose of towing off such other vessel which had got stranded on the breakers in attempting to cross the bar at the entrance of the river, and in her efforts to tow that vessel off, the "Kwara" herself, in consequence of her screw getting fouled with a rope, was wrecked, and the plaintiffs' goods were lost. It did not appear that human life was in any imminent danger, or that the assistance of the "Kwara" was sought for, except to save property. The bill of lading, given by the company on receiving the goods at Liverpool, contained a clause giving to their vessels "liberty to tow and assist vessels in all situations"; and also a memorandum in the margin as follows: "The within goods to be transhipped at Bonny, and forwarded to destination by branch steamer at ship's expense but shipper's risk." In an action by the plaintiffs to recover the value of their goods:—Held, first, that, under the express words of the clause in the bill of lading giving liberty "to tow and assist vessels," &c., the "Kwara" was justified and protected in going to the assistance of the other vessel in the manner and under the circumstances stated. *Stuart* v. *British and African Steam Navigation Co.*, 32 L. T. 257; 2 Asp. M. C. 497.

And see Drain v. *Henderson*, infra, col. 342.

Transhipment "at Shipper's Risk"—Ship's Expense.]—Held, secondly, that the words in the margin of the bill of lading "at shipper's risk," applied, as did also the words "at ship's expense," to the transhipment only of the goods from the one vessel to the other at Bonny, and not to the "forwarding of them from Bonny to Benin." *Ib.*

No Claim unless before Removal of Goods.]—By a bill of lading made in England by the master of an English ship certain packages of tea were "to be delivered from the ship's deck, where the ship's responsibility shall cease, at the port of Montreal . . . unto the Grand Trunk Railway Company, and by them to be forwarded thence per railway to the station nearest to Toronto, and at the aforesaid station delivered to the consignees or to their assigns." The instrument contained, in addition to a long list of excepted special risks, whether arising from negligence or otherwise, the following condition: "No damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed." In an action in Lower Canada against the shipowner for the value of damage done to the packages during the voyage, it appeared that they were landed, placed in shipping sheds, removed therefrom to railway freight-sheds in Montreal, and finally delivered to the consignees in Toronto. No notice of damages was given until thirteen days after the delivery was completed:—Held, that the condition, though in its first clause limited to insurable damage, clearly applied as regards its second clause to all damage, whether apparent or latent, which could by examination of the packages conducted with reasonable care and skill at the place of removal have been discovered. *Moore* v. *Harris*, 45 L. J., P. C. 55; 1 App. Cas. 318; 34 L. T. 519; 24 W. R. 887; 3 Asp. M. C. 173—P. C.

Excluding Merchant Shipping Act.]—A condition in a bill of lading provided, in effect, that, on the arrival of the vessel in dock, the consignee of a portion of the cargo should be ready to receive the goods, and that, in default, the master or agent of the ship should be at liberty to land the goods and warehouse them at the consignee's risk and expense. The vessel arrived, and the agent of the consignee made an immediate application for the goods, but was told that it was not known in what part of the ship they were. On receiving the same answer on the following day, the agent withdrew, handing to the mate a notice desiring him to give twenty-four hours' notice of his readiness to deliver the goods, in accordance, as the notice alleged, with 25 & 26 Vict. c. 63, ss. 66, 67. No such notice of readiness was given, and, there being no one to receive the goods, they were placed in a warehouse by the master of the ship, a charge of 5*l.* 17*s.* 3*d.* being thereby incurred. The consignee having threatened to charge his agent with the value of the goods unless he obtained delivery of the same, the agent paid the said sum under protest, and brought this action against the shipowner to recover such sum:—Held, that the special contract in the bill of lading excluded the operation of the Merchant Shipping Act Amendment Act; and that the act did not apply to a case where the shipowner was in bonâ fide ignorance of the position of the goods, regard being had to the premature demand of the agent of the consignee. *Oliver* v. *Colven*, 27 W. R. 822.

Introduction of Novel Clause.]—If a shipowner wishes to introduce into his bill of lading so novel a clause as one exempting him from general average contribution, he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type and in such a part of the document as that a person of ordinary capacity and care could not fail to see it—Per Lush, J. *Crookes* v. *Allen*, 49 L. J., Q. B. 201; 5 Q. B. D. 38; 41 L. T. 800; 28 W. R. 304; 4 Asp. M. C. 216.

Notice of Alteration of Destination—Advertisement of Voyage.]—Where a general ship has been advertised for a particular voyage, if her destination is in any respect altered, the owner is bound to give specific notice of the alteration to every person who has shipped goods on board. *Peel* v. *Price*, 4 Camp. 243; 16 R. R. 785.

Liability of Indorsee.]—The indorsee of a bill of lading is only liable to be sued on so much of the contract in the charterparty as incorporates the bill of lading. *Oliver* v. *Muggeridge*, 7 W. R. 164. *And see*, as to effect of indorsement, infra, cols. 343, seq.

Foreign Bill of Lading—Foreign Law—Short Delivery.]—See *Immanuel (Owners)* v. *Denholm*, infra, col. 425.

e. Presentation.

Time for.]—A bill of lading should be delivered as soon after its arrival as possible, without reference to the arrival or unloading of the cargo. *Barber* v. *Taylor*, 5 M. & W. 527; 9 L. J., Ex. 21.

Custom.]—A. sold goods to B., to be delivered free on board at Liverpool, for Trieste. The goods were placed by A. on board a steamer to be delivered to the order of B. By the custom of the trade, where goods are sold, to be delivered free on board, the price is not payable until production of a bill of lading, or some other document, giving evidence of their being on board. The owners of the steamer refusing to give out the bill of lading until a greatly increased amount of freight was paid, and B., when informed of that fact, declining to have anything to do with the matter, A. (who had not contracted to pay the freight) was unable to comply with the custom by producing the bill of lading:—Held, that B., by his conduct, dispensed with the strict compliance with the custom, and that consequently A. was entitled to maintain an action for the price of the iron, without producing a bill of lading. *Green* v. *Sichel*, 7 C. B. (N.S.) 747; 29 L. J., C. P. 213; 6 Jur. (N.S.) 827; 2 L. T. 745; 8 W. R. 663.

Duty of Shipmaster—Delivery without Production of Bill.]—Where by the terms of a bill of lading the goods are to be delivered to a named consignee or his assigns, the master is not entitled to deliver the goods to such consignee without the production of one of the parts of the bill of lading. The plaintiffs shipped goods in London on board a German vessel belonging to the defendants, under a bill of lading, drawn in two parts, by which the goods were to be delivered at a German port to the consignee named in the bill of lading, or to his assigns. The master delivered the goods at the port of discharge to the consignee without the production of either part of the bill of lading:—Held, upon proof that the German law did not essentially differ from the English law, that the defendants were liable for wrongful delivery of the goods. *The Stettin*, 58 L. J., Adm. 81; 14 P. D. 142; 61 L. T. 200; 38 W. R. 96; 6 Asp. M. C. 395.

The master after waiting a reasonable time at a foreign port, and no person having produced the bill of lading, may deliver the goods to some person to keep till the bill of lading is produced. *Howard* v. *Shepherd*, 9 C. B. 297; 19 L. J., C. P. 349.

Delivery in Absence of Bill of Lading is Wrongful.]—*Pirie* v. *Warden*, infra, col. 347.

Presentation for Signature—Advanced Freight—Loss of Ship.]—See *Oriental Steamship Co.* v. *Tylor*, infra, col. 411.

3. Effect of.

a. Signature by Master.

For what Goods.]—The master has no power to charge his owner by signing bills of lading for a greater quantity of goods than is on board. *Hubbersty* v. *Ward*, 8 Ex. 330; 22 L. J., Ex. 113.

He has no general authority from the owner to sign bills of lading for goods not received on board, and all persons taking a bill of lading by indorsement or otherwise have notice that his authority is limited to signing bills of lading for goods actually received on board. *Grant* v. *Norway* (10 C. B. 665; 20 L. J., C. P. 93; 15 Jur. 296) followed. *Cox* v. *Bruce*, infra, col. 323.

The captain of a merchant ship borrowed, in a foreign port, a certain sum for the ship's use, in consideration of which he took home goods for the lenders, and signed bills of lading, making the freight payable to them or their assigns at the port of discharge:—Held, that he exceeded his authority as improperly interfering with the shipowner's lien on the unpaid freight. *Reynolds* v. *Jex*, 7 B. & S. 86; 34 L. J., Q. B. 251; 13 W. R. 968.

Goods never on Board—Bill of Lading given.]—Where a master gives a bill of lading for goods not on board, whether fraudulently or not, the shipowner is not liable for damage thereby caused to an indorsee. *Grieve* v. *König*, 7 Ct. of Sess. Cas. (4th ser.) 521.

Rate of Freight.]—A master has no authority to sign bills of lading for a lower rate of freight than that for which the owner has contracted. *Pickernell* v. *Jauberry*, 3 F. & F. 217.

Binding on whom.]—When a master puts up a ship as a general ship, and the shippers have no knowledge of the existence of a charterparty, the contract in the bill of lading is between the shippers and the owner, and not the shippers and the charterer. *The Figlia Maggiore*, 37 L. J., Adm. 52; L. R. 2 A. & E. 105; 18 L. T. 532.

F. & Co. requested the defendants to purchase, through their branch house in Calcutta, a quantity of cotton on their behalf, and to ship it for Liverpool on board two of F. & Co.'s ships. By arrangement goods shipped on account of F. & Co. by the house at Calcutta were to be shipped at a nominal rate of freight. One of the ships was addressed to the defendants' Calcutta house, as agents for F. & Co., and having arrived at Calcutta a quantity of cotton, in pursuance of the order of F. & Co., was shipped

in her, for which the captain signed bills of lading making the cotton deliverable to order of the Calcutta house, and stating it to be "freight free on owners' account." The ship, while on her voyage to Calcutta, was sold by F. & Co., and became the property of the plaintiffs. No notice of this had reached the captain or the defendants when the shipment was effected. When the ship arrived at Liverpool, F. & Co. having become bankrupt, the defendants, to whom the house at Calcutta had indorsed the bill of lading, claimed to receive the cotton without paying any freight to the plaintiffs, in accordance with the terms of the bill of lading:—Held, that the terms of the bill of lading, under which the goods were shipped, were binding on the plaintiffs, and that no freight was payable by the defendants. *Mercantile and Exchange Bank* v. *Gladstone*, 37 L. J., Ex. 130; L. R. 3 Ex. 233; 18 L. T. 641; 17 W. R. 11.

A master signed bills of lading to deliver at Hamburg, "dangers of the seas only excepted":—Held, that though the charterparty contained other exceptions, the master was the agent of the owner as well as the charterer, and that, therefore, the terms of the bill of lading were binding. *The Patria*, 41 L. J., Adm. 23; L. R. 3 A. & E. 436; 24 L. T. 849; 1 Asp. M. C. 71.

Without Production of Receipt for Goods.]—Where the master gives a receipt for goods put on board, it behoves him not to sign a bill of lading till that receipt is given up. *Thompson* v. *Trail*, 2 Car. & P. 334; 6 B. & C. 36; 6 D. & R. 31; 5 L. J. (O.S.) K. B. 34; 30 R. R. 242.

Where the master receives goods on board, and gives a receipt for them, he is bound not to deliver the bill of lading, except to the person who can produce the receipt in exchange for it. *Craven* v. *Ryder*, 2 Marsh. 127; 6 Taunt. 433; Holt, 100; 16 R. R. 644. And see *Mitchell* v. *Scaife*, 4 Camp. 298; 16 R. R. 795.

When Goods on Board.]—The master of a vessel may properly sign bills of lading in favour of the shipper of goods, without production of the mate's receipts for the goods, if he is satisfied otherwise that the goods are on board the vessel and has no notice that anyone but the shipper claims any interest in them. *Hathesing* v. *Laing*, 43 L. J., Ch. 233; L. R. 17 Eq. 92; 29 L. T. 734; 2 Asp. M. C. 170.

The holder for value of bills of lading so given has a better title than an indorsee of the mate's receipts. *Ib.*

When Signature Fraudulently obtained—Property in Goods.]—The plaintiffs, merchants in London, purchased for C., but on their own credit, goods abroad, debiting C. with the price and a commission. The goods were warehoused in London in the plaintiffs' name. C., in his own name, engaged room for the goods in the ship "E.," which had been put up as a general ship for Calcutta. The plaintiffs, at C.'s request, delivered the goods to a lighterman, but with a view to preserve their lien, took the lighterman's engagement to give them the mate's receipt. The goods were shipped in the "E."; the mate's receipt in blank was handed to the lighterman, who gave it to the plaintiffs. C. promised the plaintiffs to redeem the mate's receipt, but never did so, and fraudulently induced the ship brokers to get bills of lading to C.'s order, to be signed by the master, though the mate's receipt was not produced. C. fraudulently indorsed these bills of lading for value to a bonâ fide indorsee. The plaintiffs had no communication with the ship brokers or captain till after the ship had sailed, when, the facts being discovered, they demanded the goods, both in this country and on the arrival of the ship at Calcutta. The goods were delivered by the captain at Calcutta to the holders of the bills of lading. An action was brought for this conversion against the shipowner and the captain. The captain and crew were appointed by the shipowner, but the ship was chartered for a lump sum to third parties, who put up the ship as a general ship. The refusal of the captain to deliver the goods at Calcutta was by the orders of the shipowners. The only question left to the jury was, whether the master was justified in signing the bills of lading without the production of the mate's receipt. The jury finding in the negative, the plaintiffs had the verdict against both defendants, on the pleas of not guilty and not possessed:—Held, that the property in the goods remained the property of the plaintiffs, there never having been any delivery animo transferendi to C.; and that the misdelivery at Calcutta was a conversion, and that the question, whether the plaintiffs were precluded from relying on their property or complaining of this conversion, was in effect properly left to the jury, and properly found by them. *Schuster* v. *M'Kellar*, 7 El. & Bl. 704; 26 L. J., Q. B. 281; 3 Jur. (N.S.) 1320; 5 W. R. 656.

Held, also, that the shipowner having authorised the detention at Calcutta, the verdict was proper. *Ib.*

Goods never on Board—Bills of Lading Act—Signature of Master's Agent.]—To an action for freight by a shipowner against the indorsees of the bill of lading, the defendants counterclaimed in respect of short delivery. All the goods that were actually put on board had been delivered to them; but the bill of lading acknowledged the receipt of a larger quantity. All the goods mentioned in the bill of lading had been floated alongside the ship in rafts, and mate's receipts given for them; but some of them were lost before they were shipped. The bill of lading was signed, "By authority of the captain, Wilh. Ganswindt, as agent." Ganswindt was the ship's broker at the shipping port:—Held, that apart from the Bills of Lading Act, a bill of lading is not conclusive against a shipowner, and he is not liable in respect of any goods not actually shipped; and that in the present case he was not liable under that act, as the bill of lading was not signed by or for him. *Thorman* v. *Burt*, 54 L. T. 349; 5 Asp. M. C. 563—C. A.

Refusal to sign — Penalty or Liquidated Damages.] — A charterparty contained the clause, "The captain shall sign charterers' bills of lading as presented without qualification . . . within twenty-four hours after being loaded, or pay 10*l.* for every day's delay as and for liquidated damages until the ship is totally lost or the cargo delivered." The captain wrongfully refused to sign the bills of lading as presented; but the charterers were unable to shew that they had sustained any damage by his conduct:—Held, that the clause imposed a penalty and not liquidated damages, and that the plaintiffs were only entitled to nominal damages. *Jones* v. *Hough* (supra, col. 288) commented on. *Rayner* v. *Rederiaktiebolaget Condor*, 64 L. J., Q. B.

540; [1895] 2 Q. B. 289; 15 R. 542; 73 L. T. 96; 8 Asp. M. C. 43.

Refusal to sign, at Freight Lower than Agreed.]—See *Hyde* v. *Willis*, 3 Camp. 202; 13 R. R. 791, infra, col. 423.

—— **Except subject to Charterparty.**]—A person who, without notice of any charterparty, has placed goods on board a vessel which has been advertised as a general ship, is entitled to have his goods returned to him if the captain refuses to sign bills of lading except subject to a charterparty containing objectionable provisions. *Peek* v. *Larsen*, 40 L. J., Ch. 763; L. R. 12 Eq. 378; 25 L. T. 580; 19 W. R. 1045; 1 Asp. M. C. 163.

—— **Clean Bill of Lading.**]—By charterparty the master and charterer agreed that the ship should load a full and complete cargo to be delivered on payment of a specified freight—"the captain to sign bills of lading as presented at any rate of freight without prejudice to this charterparty." A lien was given on cargo for freight, dead freight and demurrage. At the end of the lay days the ship was short of a full cargo by thirty-five tons. The master claimed dead freight and demurrage, and refused to sign bills of lading, unless qualified by reference to the charterparty. It was afterwards agreed that the charterer should fill up the ship, and that the master should sign "clean bills of lading, but under protest for three days' demurrage incurred here, to be settled at the port of discharge." The master still refused to sign bills of lading, except with a reference to the charterparty inserted:—Held, that he was bound to sign clean bills, i.e. such as contained no reference to the charterparty or to the matters previously in dispute. *Arrompe* v. *Barr*, 8 Ct. of Sess. Cas. (4th ser.) 602.

Signed in Blank—Negotiability.]—The validity of a bill of lading as a negotiable instrument is not affected by its having been signed by the master in blank as to the amount of cargo, which was afterwards filled in by the shipper. *Cowdenbeath Coal Co.* v. *Clydesdale Bank*, 22 Ct. of Sess. Cas. (4th ser.) 682.

Power of Master to fill in—Days available for Unloading.]—A charterparty for carriage of grain from the Black Sea provided that there should be "eleven running days, Sundays excepted, for loading and unloading, and ten days on demurrage over and above the said lays at 6*d.* per ton running day. The 1885 bill of lading to be used under this charter, and its terms to be considered as part thereof." The printed bill of lading as filled up by the master at the loading port, stated "*five and a half* (5½) laying days remain for discharging cargo"; the words and figures in italics being in the master's handwriting:—Held, that the bill of lading, as filled in, was binding on the shipowners; and that the half day was available for the indorsees of the bill of lading for unloading. *Allan* v. *Johnstone*, 19 Ct. of Sess. Cas. (4th ser.) 364.

Duty to present for Signature—Advanced Freight—Loss of Ship.]—See *Oriental Steamship Co.* v. *Tylor*, post, col. 411.

As to Quality, Quantity and State of Shipment.]—*See Cases* infra, col. 319.

Penalty for Delay in Signing.]—See *The Princess*, supra, col. 251.

Provision in Charterparty as to Non-Liability of Shipowner—Bill of Lading signed by Master not referring to Charterparty.]—See *Manchester Trust* v. *Furness, Withy & Co.*, ante, col. 238.

Master's Gratuity—Liability of Consignee.]—See *Hewitt* v. *Paul*, infra, col. 400.

See also further, as to bills of lading, XI. CHARTERPARTY.

b. Mate's Receipt.

Effect of.]—M. chartered a vessel with a cargo of salt, therewith to proceed to Calcutta; the freight to be paid on unloading, one third by freighter's acceptance at four months from the final sailing of the vessel, remainder on the right delivery of the cargo, agreeably to bills of lading. The captain to apply to F. for cargo and custom house business. F. proceeded to load the vessel, but before the whole cargo was on board M. stopped payment, and thereupon F. stopped the loading. F. presented bills of lading made out in his own name, which the owners of the ship refused to sign. M. presented none, and the ship sailed. On her arrival, F.'s agents tendered to the owners' agents the mate's receipt, and offered to pay freight, but they declined to deliver the salt. In an action for the conversion of the salt, the jury found that F. did not part with the control over the goods in putting them on board, and that the property did not pass to M.:—Held, that the sailing away with the goods was ample evidence of conversion, and that the conversion commenced from the time of sailing. *Falk* v. *Fletcher*, 18 C. B. (N.S.) 403; 34 L. J., C. P. 146; 11 Jur. (N.S.) 176; 13 W. R. 346.

A manufacturer at Newcastle consigned goods to E. & Co., his factors in London, specifically, to meet a bill of exchange drawn upon them, transmitting to them a receipt, signed by the mate of the vessel, acknowledging the goods to have been received on board to be delivered to E. & Co.:—Held, that E. & Co. had a sufficient property in the goods and right to the possession to entitle them to maintain trover against a wrongdoer, the consignor not having repudiated the contract upon which they were sent. *Evans* v. *Nichol*, 4 Scott (N.R.) 43; 3 Man. & G. 614; 11 L. J., C. P. 6.

—— **Meaning of "Connaissements."**]—The plaintiffs wrote to their agents, the defendants, regarding goods which S. had proposed to purchase: "Les informations sur S. sont telles que nous ne pouvons lui livrer les 2,500 caisses que contre connaissement. Si vous voulez, nous vous enverrons les connaissements, et vous ne les lui delivrerez que contre payement." The plaintiffs, who carried on business in Holland, consigned the goods to the defendants, with the bill of lading of a Dutch ship, and the defendants put them on board of a ship named by S., and they received and kept the mate's receipt, but no bills of lading of export ship was made up, nor was the price paid by S. when the ship sailed. In an action for delivering the goods without obtaining the price:—Held, that the instructions to the defendants were not carried out by obtaining the mate's receipt; that "connaissement" meant a bill of lading; and that, as the control over the goods had been lost without

payment of the price, the defendants were liable. *Stearine Co.* v. *Heintzmann*, 17 C. B. (N.S.) 56; 10 Jur. (N.S.) 881; 11 L. T. 272.

Evidence—Short Delivery.]—The plaintiff having verbally chartered a ship to carry iron from Glasgow to Swansea, the ship was loaded with iron bought by the plaintiff from W. & Co. The iron was weighed by the agents of W. & Co., to whom the mate gave a receipt signed by him for 330 tons, but there was no bill of lading. On delivery at Swansea, the quantity of iron was discovered to be 326½ tons only, but the mate deposed, and was not contradicted, to the delivery of all that had been shipped. The plaintiff having paid on the full amount of 330 tons to W. & Co., who refused to repay him the difference, sued the shipowner for short delivery:—Held, that there was no evidence of negligence in the shipowner, and that if there had been, it would not be negligence causing loss to the plaintiff. *Biddulph* v. *Bingham*, 30 L. T. 30; 2 Asp. M. C. 225.

Custom as to.]—A local custom of trade was alleged to exist at Bombay by virtue of which the mate's receipts for goods shipped on board a vessel are negotiable instruments, and pass the property in the goods in the same manner as bills of lading, and that masters of ships are bound to have the mate's receipt returned to them before signing any bill of lading for the goods mentioned in that receipt; and that if a captain signed a bill of lading without production and delivery to him of the mate's receipt for the goods, he will be bound, on the production of that receipt, to sign a fresh bill of lading, and to deliver the same to the person producing the mate's receipt, and that the goods mentioned in the receipt ought to be delivered to the person who produced the second bill of lading:—Held, that such a custom, if proved to exist, would be inoperative as against the captain and the shipowners. *Hathesing* v. *Laing*, 43 L. J., Ch. 233; L. R. 17 Eq. 92; 29 L. T. 734; 2 Asp. M. C. 170.

Evidence of Quantity—Timber Cargo lost Alongside.]—See *Pyman* v. *Burt*, 1 Cab. & E. 207, col. 322.

c. As to Quality, Quantity and Date of Shipment.

Under 18 & 19 Vict. c. 111, s. 3.]—This provision only applies to persons who have actually signed bills of lading; therefore, the owners of a ship are not estopped from shewing that a statement of weight contained in a bill of lading of goods shipped, signed by the ship's agent, is incorrect. *Jessel* v. *Bath*, 36 L. J., Ex. 149; L. R. 2 Ex. 267; 15 W. R. 1041.

The above section does not make a bill of lading conclusive evidence against the owner that the goods were put on board. *Meyer* v. *Dresser*, 16 C. B. (N.S.) 646; 33 L. J., C. P. 289; 10 L. T. 612; 12 W. R. 983.

The statute operates where a bill of lading is signed by the master, who is part owner, and who sues on behalf of himself and his co-owners. *Ib.*

Liability of Master.]—A flour company abroad shipped on board a vessel 1,676 bags of rye-meal, some of which weighed twelve stone each, and some eight stone each. They were shipped from lighters, all mixed together, and the master knew nothing of their relative capacity. The master signed two bills of lading, one for 1,200 bags and the other for 467 bags deliverable to order. The latter bill of lading was for 467 bags rye-meal, gross 35 tons 9 cwt., and at the foot of it was "contents unknown and not responsible for weight." The bags were all marked alike, and no means were taken to identify by marks in the bills of lading any particular bags, and there was nothing on the face of the bills of lading from which the master could see that they were intended for different consignees. When the ship arrived, the master, by mistake, delivered to the consignee of the 467 bags of twelve stone each, several bags which weighed only eight stone:—Held, that the master was responsible for the non-delivery of 467 bags of the proper weight. *Bradley* v. *Dunipace*, 1 H. & C. 521; 32 L. J., Ex. 22—Ex. Ch.

The master having been sued to judgment on a bill of lading, the owner cannot be sued, although the judgment is unsatisfied. *Priestly* v. *Fernie*, 3 H. & C. 977; 34 L. J., Ex. 172; 11 Jur. (N.S.) 813; 13 L. T. 208; 13 W. R. 1089.

Weights—Mistake and Misdescription as to.]—In an action for freight, the master is at liberty, notwithstanding the terms of the 18 & 19 Vict. c. 111, s. 3 (the Bills of Lading Act), to shew that the cargo actually received by him differs in weight from that signed for in the bill of lading; at all events where the weight mentioned in the bill of lading is a mere matter of measurement. *Blanchet* v. *Powell's Llantrisit Collieries Co.*, 43 L. J., Ex. 50; L. R. 9 Ex. 74; 30 L. T. 28; 22 W. R. 490; 2 Asp. M. C. 224.

—— Signature of Master not Conclusive.]—Bills of lading signed by the master are prima facie evidence that the quantities named therein were received on board by him; the onus of rebutting this presumption, and of shewing that a less quantity than that specified was received, lies on the shipowner. *M'Lean* v. *Fleming*, L. R. 2 H. L. Sc. 128; 25 L. T. 317; 1 Asp. M. C. 160.

A shipowner is not estopped by the signature of the bill of lading by the master from shewing that the goods or some of them were never actually put on board. *Brown* v. *Powell Duffryn Steam Coal Co.*, 44 L. J., C. P. 289; L. R. 10 C. P. 562; 32 L. T. 621; 23 W. R. 549; 2 Asp. M. C. 578.

By a charterparty for the conveyance of a cargo of coal from Cardiff to Buenos Ayres, it was stipulated that the master should "sign bills of lading for the cargo put on board as presented to him by the charterers, without prejudice to the terms of the charterparty." On arrival at the port of discharge, it was found that the coal delivered to the consignees was less by thirty-two tons than the quantity mentioned in the bills of lading, and the owners were called upon to pay, and paid, the difference of value to the consignees. In an action by the owners against the charterers to recover the amount so paid:—Held, that, inasmuch as the owners were under no legal liability, either at common law or under the Bills of Lading Act, to pay for such deficiency, the action was not maintainable. *Ib.*

In an action by consignees against a shipowner for the loss of one out of several boxes of machinery, which had been delivered on the quay to the people of the ship and the receipt

of which had been acknowledged by the signatures of the mate and captain on the bill of lading :—Held, that the owner was responsible, although there was no proof that the missing box was ever on board the ship. *British Columbia and Vancouver Island Co.* v. *Nettleship*, 37 L. J., C. P. 235 ; L. R. 3 C. P. 499 ; 18 L. T. 291 ; 16 W. R. 1046.

"Weight, Value and Contents Unknown"—Effect of Words.]—When, on a closed package being shipped for carriage, a bill of lading, containing an innocent misdescription of its contents, is presented to the master of the ship, and he, without asking questions or examination, stamps thereon "weight, value and contents unknown," there is a contract to carry the package whatever its contents may be. *Lebeau* v. *General Steam Navigation Co.*, 42 L. J., C. P. 1 ; L. R. 8 C. P. 88 ; 27 L. T. 447 ; 21 W. R. 146 ; 1 Asp. M. C. 435.

The plaintiffs delivered to the defendants, for carriage on board their ship, a closed case containing silk goods. The bill of lading, as tendered by the plaintiffs for signature, described the contents of the case as linen goods ; but before signing it the captain impressed upon it with a stamp the words "weight, value and contents unknown." The freight charged for silk was higher than that for linen goods, and the freight paid for the goods so delivered was that for linen goods ; but the plaintiffs represented the goods to be linen inadvertently, and without fraudulent intention. On the ship's arrival at her destination it was found that two pieces of silk had been abstracted from the case. In an action by the plaintiffs against the defendants as common carriers for non-delivery of the silk goods so lost :—Held, that the addition of the words "weight, value and contents unknown" to the bill of lading completely did away with the effect of the description of the goods as linen, and that consequently the contract was to carry the case and its contents, whatever they might be ; and the plaintiffs were entitled to maintain the action. *Ib.*

The master of a Russian ship received on board goods under a bill of lading in the ordinary form :—"Shipped in good order and condition, to be delivered in the like good order and condition at the port of London ;" certain perils being excepted ; and in the margin were the words, "Weight, contents and value unknown." The ship arrived and the goods were delivered, but a great number of them were found to be damaged both externally and internally, and the damage was recent, and not traceable to any inherent vice in them :—Held, that in the absence of proof on the part of the shipowners that the goods were in a bad condition when shipped, it was not incumbent on the consignees, in order to establish their case to prove where or how the goods became damaged. *The Peter der Grosse*, 34 L. T. 749 ; 3 Asp. M. C. 195—C. A. Affirming 1 P. D. 414.

Held, also, that the bill of lading afforded evidence that externally, and so far as met the eye, the goods had been shipped in good order and condition. *Ib.*

A bill of lading for manganese shipped on board stated the weight in writing, but contained a printed clause, "weights, contents and value unknown" :—Semble, that the person signing the bill of lading would not be concluded from showing that the written statement of weight was erroneous. *Jessel* v. *Bath*, 36 L. J., Ex. 149 ; L. R. 2 Ex. 267 ; 15 W. R. 1041.

A bill of lading, signed by a master since deceased, for goods to be delivered to a consignee or his assigns, he paying freight, is admissible as evidence of the consignee having an insurable interest in the goods ; but if the master guards his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading alone is not evidence either of the quantity of the goods or of property in the consignee. *Haddow* v. *Parry*, 3 Taunt. 303 ; 12 R. R. 666.

—— Whether conclusive as to Amount Shipped.]—A charterparty provided that the bill of lading should be conclusive evidence against the owners of the quantity of cargo received. The cargo (timber) was floated alongside the vessel, and receipts by the mate were then given for the same. Part of the cargo was lost by perils of the sea before shipment. The loss was notified by the master to the agent of the charterer, but, at the latter's request, the master was induced to sign bills of lading for the whole quantity received alongside :—Held, that the charterer had no claim against the shipowners in respect of the difference between the amount of cargo received alongside, and the amount shipped on board. *Pyman* v. *Burt*, 1 Cab. & E. 207.

The defendants chartered the plaintiff's ship for the carriage of a cargo of timber from Memel. The charterparty provided that the ship should there load from the agents of the said affreighters as customary a full cargo of fir sleepers, that the cargo should be brought to and taken from alongside the ship at merchants' risk and expense, and that the bill of lading should be conclusive evidence against the owners of the quantity of cargo received as stated therein. There was a custom at Memel, which, however, did not apply to charterparties in the form of the above-mentioned charterparty, that the captain should take delivery of the timber to be shipped at timber ponds up the river at some distance from the ship, the timber being then rafted down by fishermen to the ship, but being at the shipowner's risk during the process. The captain of the plaintiff's ship, on her arrival at Memel, not being aware of the provisions of the charterparty, allowed the mate to give receipts for the cargo at the timber ponds. Part of the timber included in such receipts was lost during the process of rafting the timber down to the ship, owing to the force of the current. The captain, having become aware of such loss and of the provisions of the charterparty, stated to the agent at Memel of the shippers, who had sold the timber to the defendants, that he did not see his way to signing clean bills of lading for the full quantity mentioned in the mate's receipt, a portion of the timber having been lost ; but, on being told by such agent and a clerk of the ship's brokers that he was bound to sign clean bills of lading for the full quantity, he did so. The bills of lading stated that such quantity was shipped in good order and well conditioned to be delivered on payment of freight and all other conditions as per charterparty. In an action for balance of chartered freight the defendants counterclaimed in respect of short delivery of cargo :—Held, that the bills of lading estopped the plaintiff from denying that the full amount of cargo stated therein was shipped. *Lishman* v.

Christie, 56 L. J., Q. B. 538; 19 Q. B. D. 333; 57 L. T. 552; 35 W. R. 744; 6 Asp. M. C. 186—C. A.

The master by signing the bill of lading does not bind the owner for more goods than were shipped. *McLean* v. *Munck*, 5 Ct. of Sess. Cas. (3rd ser.) 893.

Quality Marks—Estoppel.]—A bill of lading signed by the captain of a ship in respect of a shipment of bales of jute contained the following provision:—"If quality marks are used, they are to be of the same size as the leading marks and contiguous thereto, and, if such quality marks are inserted in the shipping notes and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain, and the ship shall be responsible for the correct delivery of the goods." The bill of lading described the bales as marked in proportions specified with different quality marks indicating different qualities of jute, which marks corresponded with those inserted in the shipping notes made out by the shippers. When the ship was discharged, however, it was found that there had in fact been shipped fewer bales marked with one of such quality marks and more marked with another of such marks indicating an inferior quality than stated in the bill of lading:—Held, that an indorsee of the bill of lading for value without notice of the incorrectness of the description of the marks therein, had no right of action against the shipowners either for breach of contract or upon the ground that they were estopped by the representation contained in the bill of lading. *Grant* v. *Norway*, (10 C. B. 665), followed. *Cox* v. *Bruce*, 56 L. J., Q. B. 121; 18 Q. B. D. 147; 57 L. T. 128; 35 W. R. 207; 6 Asp. M. C. 152—C. A.

"Quantity and Quality unknown"—Effect of.]—A bill of lading stating that goods were shipped in good order and condition, but also containing an indorsement by the master, "quantity and quality unknown," does not admit, as against the shipowners, that the goods were shipped in good order and condition. *The Prosperino Palasso*, 29 L. T. 622; 2 Asp. M. C. 158.

Evidence of the condition of goods on delivery tending to shew that the damage sustained could not be accounted for by any damage existing at the time of shipment, and that such damage, had it existed, must have been noticed by the master or officer in charge of the ship at the time of shipment, will not, where goods are shipped under a bill of lading indorsed "quantity and quality unknown," satisfy the onus cast upon the plaintiff seeking to recover against shipowners for damage to the goods. Positive evidence of the condition of the goods when shipped must be given. *Ib.* *See next case.*

A bill of lading, stating goods to have been shipped in good order and condition, but indorsed by the master with the words "quality and quantity unknown," does not admit as against the shipowner that the goods were shipped in good order and condition. *The Ida*, 32 L. T. 541; 2 Asp. M. C. 551—P. C. *See preceding case.*

There is no rule of law by which the consignee of goods under a bill of lading, stating goods to have been shipped in good order and condition, but containing the words "quantity and quality unknown," is bound to show that the goods were shipped in good order and condition, or fail in his suit against the shipowner for damage done to the cargo; but failing proof of the condition of the cargo when shipped, the consignee is bound to show that the damage which it sustained is traceable to causes for which the shipowner is responsible. *Ib.*

—— **Amount of Freight Payable.**]—A charter-party under which a ship was chartered for a grain cargo from the Danube to the United Kingdom, for freight "per imperial quarter delivered," contained a provision that, in the event of the cargo or any part being delivered in a damaged or heated condition, the freight should be payable on the invoice quantity taken on board as per bill of lading, or half freight upon the damaged or heated portion at the captain's option. The bill of lading stated that 1,021 kilos were shipped on board; but the master added at the end of the bill of lading, before signing it, the words "quantity and quality unknown." The cargo having become heated on the voyage, the master claimed to exercise his option, and to be paid freight upon the invoice quantity, as per bill of lading:—Held, that the addition of the words, quantity and quality unknown" to the bill of lading by the master did not take away his right to be paid freight upon the invoice quantity in the bill of lading, and that the object and effect of that memorandum were merely to protect the captain against any mistake which might occur in the invoice quantity in the bill of lading, in case of alleged short delivery or deterioration not caused by his default. *Tully* v. *Terry*, 42 L. J., C. P. 240; L. R. 8 C. P. 679; 29 L. T. 36; 2 Asp. M. C. 51.

Liability of Joint Owner—Custom to Weigh.]—Bark was shipped (green) at Penang, under a bill of lading describing it to be of a certain weight, and making it deliverable to the consignees in London on payment of freight at a certain rate per ton of 20 cwt. nett weight delivered. On arrival in London, the agent appointed by the managing owner demanded freight on the weight mentioned in the bill of lading, and refused to deliver the bark unless the consignees would pay according to that weight, or (under an alleged custom) incur the expense of weighing over the ship's side or at a legal quay. The consignees paid the money under protest, and brought an action against one of the joint owners to recover back the excess. The jury having negatived the alleged custom:—Held, that he was liable, notwithstanding that he had not interfered or in any way assented to the appointment of the agent by the managing owner, and that no part of the money had come to his hands. *Coulthurst* v. *Sweet*, L. R. 1 C. P. 649.

Where Fraud.]—A bill of lading is not conclusive between the shippers of the goods and the owners of the ship, but the owners may show that less goods than specified in the bill of lading were shipped, the master who signed the bill of lading having been misled by the fraud of the agent of the shippers. *Bates* v. *Todd*, 1 M. & Rob. 106.

A bill of lading represented a larger number of bales to have been shipped on board a vessel than was really shipped. This arose from the mistake of the mate, which, there was some evidence to show, was caused by the fraud of the person who

put the bales on board. The latter was either agent of the person named as shipper in the bill of lading, or of his vendor:—Held, that there was evidence that the misrepresentation was caused wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claimed. *Valieri* v. *Boyland*, 35 L. J., C. P. 215; L. R. 1 C. P. 382; 12 Jur. (N.S.) 566; 14 L. T. 362; 14 W. R. 637.

A capias is not grantable to hold the defendant to bail in an action by the indorsee of a bill of lading against the master of the ship for deceit in the representation in the bill of lading, signed by him, that the goods were "shipped in good order and well conditioned." *Gadsden* v. *McLean*, 9 C. B. 283.

Date of Shipment wrongly stated—Liability of Master—Authority of Ship's Brokers.]—Ship's brokers at a foreign port have not, as such, authority to relieve the captain from the duty of seeing to the accuracy of statements contained in bills of lading which they present to him for signature. *Stumore* v. *Breen*, 56 L. J., Q. B. 401; 12 App. Cas. 698—H. L. (E.)

Short Delivery—Quantity stated in Bill of Lading—Burden of Proof.]—See *Horseley* v. *Grimond*, post, col. 556.

Cargo Signed for in Bags—Non-delivery of Bags.]—*Shankland* v. *Athya*, post, col. 556.

Sale of Cargo—Quantity stated in Bill of Lading.]—See *Covas* v. *Bingham*, post, col. 547.

4. Exemptions from Liability.

a. Seaworthiness, Warranty.

Not excluded.]—When special clauses in a bill of lading exonerate the shipowner from the liability of even the perils induced by the negligence of his servants, it is necessary that the jury should find whether the vessel was or was not seaworthy when starting on the voyage. *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72; 37 L. T. 333; 3 Asp. M. C. 516.

A cargo of wheat was shipped at the port of New York for conveyance to Glasgow, and a specially-worded bill of lading contained clauses excepting "peril of the seas of whatever nature or kind soever and howsoever caused," including negligence of the crew. On the voyage the sea burst through an insufficiently-fastened port-hole, damaging the cargo. A jury found by special verdict that this port-hole had been insufficiently fastened, but did not find whether this happened before starting on the voyage:—Held, that there was an implied engagement to supply a seaworthy ship. *Ib.*

Held, also, that the jury not having found whether the vessel started on her voyage in a seaworthy condition, there was no finding upon which judgment could be entered; therefore the case must be reheard. *Ib.*

There is in the bill of lading an engagement that the ship shall be seaworthy. *Ib.*

Exceptions limiting Implied Warranty of Seaworthiness.]—A steamship which had broken her main shaft was salved by another steamship belonging to the same line. The breakdown was caused by a latent defect in the shaft without negligence on the part of the owners or their servants. In a salvage action brought by the owners, masters, and crew of the salving ship against the owners of cargo on board the salved ship:—Held, first, that the ship was unseaworthy when she started on the voyage. Secondly, that the implied warranty of seaworthiness in the bill of lading was an absolute warranty that the ship should be reasonably fit to perform the voyage, and not merely that the shipowner would do his best to make her so. Thirdly, that the exceptions in the bill of lading, "all and every the dangers and accidents of the seas, rivers, and canal, and of navigation of whatever nature or kind," had not the effect of limiting the warranty of seaworthiness, but that such exceptions only protected the shipowner from liability to the owners of cargo for loss or damage sustained by the latter through "danger or accidents" happening to a seaworthy vessel. *The Glenfruin*, 54 L. J., P. 49; 10 P. D. 103; 52 L. T. 769; 33 W. R. 826; 5 Asp. M. C. 413.

A steamship became disabled at sea owing to the breaking of her fly-wheel shaft, through a flaw in the welding existing at the commencement of the voyage, but not discoverable by the exercise of any reasonable care. The cargo on board her was shipped under three bills of lading, the first of which contained, amongst other excepted perils, the clause:—"warranted seaworthy only so far as ordinary care can provide"; the second: "warranted seaworthy only as far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers, and crew can ensure it"; and the third, "owners not to be liable for loss, detention, or damage . . . if arising directly or indirectly . . . from latent defects in boilers, machinery, or any part of the vessel in which steam is used, even existing at the time of shipment, provided all reasonable means have been taken to secure efficiency." A vessel belonging to the same owners towed the disabled vessel to a place of safety. In an action of salvage brought by the owners, master and crew of the salving vessel against the owners of cargo in the salved vessel:—Held, that the owners of the cargo had no remedy for breach of the contract of carriage, for the exceptions in the bills of lading were such as to constitute a limited warranty of seaworthiness at the commencement of the voyage, which limited warranty had been complied with by the shipowners. *Laertes, Cargo ex*, 56 L. J., P. 108; 12 P. D. 187; 57 L. T. 502; 36 W. R. 111; 6 Asp. M. C. 174.

Cattle—Limit of Value—Unfitness of Ship.]—The plaintiff shipped certain cattle on board the defendant's ship for carriage from London to New York under a bill of lading which provided as follows:—"These animals being in sole charge of shipper's servants, it is hereby expressly agreed that the shipowners, or their agents or servants, are, as respects these animals, in no way responsible either for their escape from the steamer or for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than 5*l.* for each of the animals." The ship had on her previous voyage carried cattle suffering from foot and mouth disease. Some of the cattle shipped under the bill of lading were during the voyage infected with that disease, owing to the negligence of the defendants' servants in not cleansing and disinfecting the

ship before receiving the plaintiff's cattle on board and signing the bill of lading, and the plaintiff in consequence suffered damage amounting to more than 5*l.* for each of the said cattle: —Held, that the provision in the bill of lading limiting liability to 5*l.* for each of the cattle did not apply to damage occasioned by the defendants not providing a ship reasonably fit for the purposes of the carriage of the cattle which they had contracted to carry. *Tattersall* v. *National Steamship Co.* 53 L. J., Q. B. 332; 12 Q. B. D. 297; 50 L. T. 299; 32 W. R. 566; 5 Asp. M. C. 206.

Special Appliances necessary—Ship of Peculiar Construction—Stowage.]—The warranty of seaworthiness in a bill of lading is a warranty that the ship is seaworthy at the time and reasonably likely to continue so during the voyage. If special appliances are necessary for the preservation of the cargo by reason of the ship's peculiar construction, the shipowner is liable to provide them. *The Marathon*, 40 L. T. 163; 4 Asp. M. C. 75.

Implied Warranty that Ship is fit to carry Cargo—Breakdown of Refrigerating Machinery.]—Exceptions in a bill of lading that a steamer shall not be accountable for a breakdown of machinery, nor for accidents to or defects in machinery, nor for neglect of engineers, do not abrogate the implied warranty that the vessel is fit to carry the particular cargo in accordance with the contract contained in the bill of lading. Such exceptions apply only to matters which may occur during the voyage, and not to the fitness of the vessel at the time when the goods were shipped. Under such a bill of lading the owners of a cargo of frozen meat are entitled to claim that there shall be refrigerating machinery on board the ship fit to preserve the cargo during the voyage. *Maori King* v. *Hughes*, 65 L. J., Q. B. 168; [1895] 2 Q. B. 550; 14 R. 646; 73 L. T. 141; 44 W. R. 2; 8 Asp. M. C. 65—C. A.

Charterparty — Warranty of Seaworthiness in.]—*See* ante, XI. CHARTERPARTY.

b. Liability to General Average.

Injury to Goods by Water employed to extinguish Fire.]—When a bill of lading contained an exception of "fire on board," and the goods carried under it were injured in consequence of the water used to extinguish a fire occurring during the voyage:—Held, that the exception did not exempt the shipowners from liability to contribution in general average towards the loss sustained by the owner of the goods so injured. Nor were they exempted by virtue of the Merchant Shipping Act, 1854, s. 503. *Schmidt* v. *Royal Mail Steamship Co.*, 45 L. J., Q. B. 646; 4 Asp. M. C. 217, n.

The exception in the bill of lading and the above section of the act had reference only to the obligation on the contract to deliver the goods, and did not take away the ordinary liability of the shipowner to contribute in general average, as owner, when a fire had occurred and a sacrifice had been properly made to save the whole adventure. *Ib.*

A bill of lading, by which the shipowner undertook to deliver the goods at a port to a railway company, to be by them carried inland and delivered to the consignees, contained an exception, "that the shipowner or railway company are not to be liable for any damage to any goods which is capable of being covered by insurance, or for any claim, notice of which is not given before the removal of the goods." On the voyage a fire broke out, and the cargo was damaged by the admission of water to extinguish the fire. The ship put back, and the shipowners delivered the cargo up, without taking security from any of the cargo owners, or taking any step for procuring an adjustment of general average:—Held, following *Schmidt* v. *Royal Mail Steamship Co.* (45 L. J., Q. B. 646), that the shipowners were not exempted from contribution to general average by the clauses in the bill of lading. *Crookes* v. *Allan*, 49 L. J., Q. B. 201; 5 Q. B. D. 38; 41 L. T. 800; 28 W. R. 304; 4 Asp. M. C. 216.

If a shipowner wishes to introduce into his bill of lading so novel a clause as one exempting him from general average contribution, he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type and in such a part of the document as that a person of ordinary capacity and care could not fail to see it. *Ib.*—Per Lush, J. (5 Q. B. D.) at p. 40.

c. Statutory Limitation.

Robbery.]—The owner of a ship was not liable beyond the value of the ship and freight, under 7 Geo. 2. c. 15, s. 1, in case of a robbery, in which one of the mariners was concerned, by giving intelligence and afterwards sharing the spoil. *Sutton* v. *Mitchell*, 1 Term Rep. 18. *See* 26 Geo. 3, c. 86, s. 1, *and* 17 & 18 Vict. c. 104, s. 503.

Fire.]—The 26 Geo. 3, c. 86, s. 2, did not apply to goods on board a lighter employed in carrying goods from the shore to be loaded on board ship. *Morewood* v. *Pollok*, 1 El. & Bl. 743; 1 C. L. R. 78; 22 L. J., Q. B. 250; 17 Jur. 881; 1 W. R. 304.

A gabbert (Anglicè, a lighter) was not a ship, or vessel, within 26 Geo. 3, c. 86, s. 2, and if goods on freight were shipped on board such vessel, and destroyed by fire accidentally or through the negligence of the master, the owners were not protected by that statute, but were responsible as at common law. *Hunter* v. *M'Gown*, 1 Bligh, 573; 20 R. R. 198.

Declaration of Value.]—A bill of lading, describing goods as "one box, containing about 248 ounces of gold dust," is not a declaration of the "true nature and value of such articles," within the Merchant Shipping Act, 1854, s. 503. *Williams* v. *African Steamship Co.*, 1 H. & N. 300; 26 L. J., Ex. 69; 2 Jur. (N.S.) 693.

On a shipment of a cargo from Valparaiso to England, a bill of lading described the property as "1,338 hard dollars," which was a coin current at Valparaiso at the time:—Held, that this was a sufficient compliance with 26 Geo. 3, c. 86, s. 3, it being the current coin of the place where the shipment was made. *Gibbs* v. *Potter*, 10 M. & W. 70; 11 L. J., Ex. 376; 6 Jur. 586. *And see* 17 & 18 Vict. c. 104, s. 503.

See also XX. COLLISION, LIMITATION OF LIABILITY.

d. Perils of the Sea.

Collision.]—Collision is a peril of the sea, semble. *Martin* v. *Crokett*, 14 East, 465; 13 R. R. 281.

Collision caused by Negligence.]—An exception of "accidents or damage of the seas, rivers, and steam navigation of whatever nature or kind soever," does not exempt a shipowner from responsibility for loss of goods by reason of a collision caused by the gross negligence of the master or crew. *Lloyd* v. *General Iron Screw Collier Co.*, 3 H. & C. 284; 33 L. J., Ex. 269; 10 Jur. (N.S.) 661; 10 L. T. 586; 12 W. R. 882.

A collision between two vessels brought about by the negligence of either of them, without the waves or wind or difficulty of navigation contributing to the accident, is not "peril of the sea" within the term of that exception in a bill of lading. *Woodley* v. *Michell*, 52 L. J., Q. B. 325; 11 Q. B. D. 47; 48 L. T. 599; 31 W. R. 651; 5 Asp. M. C. 71—C. A.

Goods were shipped on board a vessel, which was called the "Black Prince," under a bill of lading which contained an exception of barratry of the master and mariners, and accidents or damage of the seas. In the course of the voyage the "Black Prince," meeting a vessel called the "Araxes" under circumstances which rendered it the duty of the "Black Prince" to port her helm, neglected to do so, and the result was that the "Black Prince," with the goods on board, was run down and totally lost:—Held, that the conduct of the master, though a wilful default by the Merchant Shipping Act, 1854, s. 299, did not amount to barratry, nor was the loss a loss by accidents or damage of the seas within the exception. *Grill* v. *General Iron Screw Collier Co.*, 35 L. J., C. P. 321; L. R. 1 C. P. 600; 12 Jur. (N.S.) 727; 14 W. R. 893. Affirmed, 37 L. J., C. P. 205; L. R. 3 C. P. 476; 18 L. T. 485; 16 W. R. 796—Ex. Ch.

—— **Question for Jury.**]—The judge left it to the jury to say whether the collision was caused by the negligence of the crew, and whether there was any want of ordinary care on the part of the "Araxes" by the exercise of which the collision might have been avoided:—Held, a proper direction, and that he was not bound to leave it to them to say whether the persons in charge of the "Araxes" might not have mitigated the calamity by stopping or backing when they found a collision inevitable. *Ib.*

—— **Where no Fault of either Ship.**]—Goods were laden on board a ship, the bill of lading containing an exception of the perils of the sea; the ship ran foul of another ship without any fault in the master of either:—Held, to be an injury by the perils of the sea within the exception. *Buller* v. *Fisher*, Peake's Add. Cas. 183; 4 R. R. 902.

Foundering caused by collision with another vessel is within the exception "dangers and accidents of the sea" in a bill of lading; and excuses the shipowner for non-delivery of the goods if it occurs without fault in the carrying ship. *Woodley* v. *Michell* (11 Q. B. D. 47) overruled. *Wilson* v. *The Xantho*, 56 L. J., Adm. 116; 12 App. Cas. 503; 57 L. T. 701; 36 W. R. 353; 6 Asp. M. C. 207—H. L. (E.)

Carrying away of Tackle—Amount of Care necessary—Discharging.]—A vessel laden with goods arrived in the port of London, and was taken into the Commercial Dock to discharge her cargo. For this purpose she was fastened by tackle, on the one side to a loaded lighter lying outside her, and on the other to a barge lying between her and the wharf. The crew was discharged, except the mate, and lumpers were being employed in unloading her, when the tackle broke whereby she was fastened to the lighter, and in consequence she canted over, water got in through her ports, and the goods still on board were damaged:—Held, that this was a loss within the exception in the bill of lading of "all and every the dangers and accidents of the seas and navigation." *Laurie* v. *Douglas*, 15 M. & W. 746.

Held, also in an action by the freighters against the shipowners to recover damages for this loss), that the jury was properly directed, that the owners were only bound to take the same care of the goods as a person would of his own goods, that is, an ordinary and a reasonable care. *Ib.*

Barratry of Crew.]—A shipowner carrying goods under a bill of lading, by which he contracts to deliver in good order and condition, certain perils excepted, is bound to deliver in that condition, unless prevented by those perils, and is responsible for any damage to goods occasioned otherwise than by those perils. *The Chasca*, 44 L. J., Adm. 17; L. R. 4 A. & E. 446; 32 L. T. 838; 2 Asp. M. C. 600.

Injury to cargo damaged by sea water during a voyage, in consequence of the barratrous act of the crew in boring holes through the sides of the ship for the purpose of scuttling her, is not a loss by perils of the seas, within the meaning of the exception in a bill of lading, such as will exempt the shipowner from his liability for the damage under his contract to deliver in good order and condition. *Ib.*

Even if such a loss would come within the meaning of the words, "perils of the seas," in a policy of insurance, it is not included in those words as used in a bill of lading. *Ib.*

Stowage—Due Ventilation.]—A cause of damage to cargo, instituted under 24 Vict. c. 10, s. 6, by the consignees, who were also assignees of the bills of lading to recover damages on account of breaches of contract and duty with respect to certain parcels of oilcake, which in the bills of lading were agreed to be delivered in the like good order and condition as when shipped, the dangers of the seas only excepted. The oilcake, when delivered, was in a greatly damaged and deteriorated condition, occasioned by the packing and stowage:—Held, that as the proximate cause of danger arose from the nature and collocation of the cargo, consisting of animal, vegetable, and to some extent putrescible matter, and the want of due ventilation, it was not brought within the legal exception of "dangers of the seas." *The Freedom*, L. R. 3 P. C. 594; 24 L. T. 452; 1 Asp. M. C. 136—P. C.

Held, also, that it was enough for the consignees to have established that the shipowners had not performed their contract, since they had failed to produce sufficient evidence of due provision for ventilation of the ship's hold, so as to throw the onus on the consignees of proving that the damage might have been prevented by reasonable care and skill on the part of the shipowners. *Ib.*

Insufficient Fastening of Port.]—A ship sailed from America for Scotland with a cargo of wheat, and in the bill of lading perils of the

sea, however caused, were excepted. During the voyage the wheat was damaged by sea water. In an action by the indorsees of the bill of lading against the owners, the jury found that the water obtained access to the cargo in consequence of one of the ports being insufficiently fastened, and on this finding the court of session entered a verdict for the shipowners, on the ground that the loss was covered by the exception in the bill of lading:—Held, that, as in order to bring the loss within the exception it must be found that the ship sailed from the port in a seaworthy state, and the jury had not done so, a new trial must be had. *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72; 37 L. T. 333; 3 Asp. M. C. 516.

Loss by Perils during Deviation.]—The plaintiffs having purchased goods to be shipped from a foreign port on the terms that payment of the price was to be made in exchange for shipping documents, the bill of lading signed upon the shipment of the goods was, upon payment of the price, indorsed to them. The bill of lading, which contained the usual exception of sea perils, stated that the goods were shipped for delivery at Dunkirk on board a vessel lying at Fiume and bound for Dunkirk, with liberty to call at any ports in any order. The ship, instead of proceeding direct for Dunkirk, sailed for Glasgow, and was lost, with her cargo, off the mouth of the Clyde, by perils of the sea. In an action brought by the plaintiffs against the shipowners for non-delivery of the goods, evidence was given to show that the shippers of the goods, at the time when the bill of lading was given, knew that the vessel was intended to proceed viâ Glasgow:—Held, that such evidence was not admissible to vary the terms of the bill of lading, which imported a voyage direct from Fiume to Dunkirk, subject to the liberty to call at any ports of call substantially within the course of such voyage; that Glasgow, being altogether out of the course of such voyage, was not such a port; and that the vessel was therefore lost while deviating from the voyage contracted for, and the excepted perils clause did not exonerate the defendants from liability in respect of non-delivery of the goods. *Leduc* v. *Ward*, 57 L. J., Q. B. 379; 20 Q. B. D. 475; 58 L. T. 908; 36 W. R. 537; 6 Asp. M. C. 290—C. A.

Piracy.]—Piracy is a peril of the sea within the meaning of those words in a bill of lading. *Barton* v. *Wolliford*, Comb. 56. *Pickering* v. *Barclay*, 2 Roll. Abr. 248.

Danger of War—Foreign Contract.]—The master of a North German vessel, under a North German charterparty, gave a bill of lading for goods shipped on board his vessel, in South America, as part of a general cargo to be delivered in North Germany to English consignees. The English language, money and weight were used in the bill of lading, which contained the proviso, "the dangers of the sea only excepted." The master of the vessel, on her arrival at Falmouth, refused to proceed on account of the outbreak of war between France and Germany:—Held, that, whether the contract was governed by English, general maritime, or North German law, the master was bound to proceed, as the bill of lading was precise in its terms, and contemplating the happening of certain events, exempted him in only one event. *The Patria*, 41 L. J., Adm. 23; L. R. 3 A. & E. 436; 24 L. T. 849.

Confiscation.]—To an action by a shipper of goods under a bill of lading for carrying goods to be shipped on board a ship lying at Gibraltar, and bound for London, calling at Cadiz, from Gibraltar to London, "the act of God, all and every other dangers and accidents of the seas, rivers and navigation, of what nature and kind soever excepted," a plea, that the ship, in the course of her voyage to London, called at Cadiz, and that the goods were within the jurisdiction of the officers of customs of Cadiz, and within the jurisdiction of a court held at Cadiz, and that the goods were, by the authorities having jurisdiction in that behalf, and according to the law of Spain, lawfully taken out of the ship and detained, without the default of the shipowner, on a charge which was duly preferred in the court; and, by a decree of the court, made according to the law of Spain, were confiscated:—Held, that the loss was not within any of the exceptions in the bill of lading, but was occasioned by inevitable necessity, against which the shipowner ought to have provided by his contract; and that the plea afforded no answer, inasmuch as it did not allege any wrongful act or default by the shipper, or knowledge by him that the goods were contraband at Cadiz, nor that they were taken to Cadiz by his desire. *Spence* v. *Chadwick*, 10 Q. B. 517; 16 L. J., Q. B. 313; 11 Jur. 872.

Risk of Boats.]—Goods were shipped in London, to be conveyed to Jamaica. The goods were then sent on shore, according to the custom of the West India trade, in a shallop belonging to the ship, and lost by perils of the sea. The clause of exception in the bill of lading was in the following terms: "The act of God, and all and every other dangers and accidents of the seas, rivers and navigations, of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted":—Held, that, the shipowner was not liable for such loss under the bill of lading as the saving clause only extended to the same risk as if the goods had been on board the ship. *Johnston* v. *Benson*, 4 Moore, 90; 1 Br. & B. 454.

Detention by Bottomry Suit.] — The non-delivery of goods occasioned by a suit instituted in the admiralty court on a bottomry bond, was not an exception, within the meaning of "perils of the seas," in the bill of lading. *Benson* v. *Duncan*, 3 Ex. 644; 18 L. J., Ex. 169; 14 Jur. 218.

Burden of Proof of Loss by.]—Action for non-delivery of goods shipped under bill of lading; the burden of proof of loss by perils of the sea is on the defendant. *Beckford* v. *Clerke*, 1 Keb. 830. See also *The Xantho*, post, col. 553.

Timber Cargo—Loss by Perils of Sea whilst alongside.]—See *Pyman* v. *Burt*, ante, col. 275.

"Accidents of the Seas"—Damage caused by Heating—Ventilators closed.]—A cargo of maize and oats shipped on the defendants' steamship was damaged by heat proceeding from the bulkheads enclosing the engine and boiler space, which was unable to escape owing to the necessary closing of the ventilators for a period of seven days during a storm of exceptional severity:

and duration :—Held, that the loss was occasioned by "accidents of the seas." *The Thrunscoe*, 66 L. J., Adm. 172 ; [1897] P. 301 ; 77 L. T. 407.

Perils caused by Negligence of Crew.]—*See* infra, *e.* NEGLIGENCE OR FAULT OF MASTER AND CREW.

Charterparty—Exception of Perils of Sea, in.] —*See* XI. CHARTERPARTY.

e. Negligence or Fault of Master and Crew.

Generally.]—When a bill of lading exempted a shipowner from liability for the negligence of his master and crew, and a suit was instituted for damages to the cargo sustained in consequence of their negligence :—Held, that the shipowner was not liable for the damage. *The Duero*, 38 L. J., Adm. 69 ; L. R. 2 A. & E. 393 ; 22 L. T. 37.

Collision between two Ships belonging to same Owner.]—The plaintiffs shipped goods on board the defendants' vessel, the "Crown Prince," under a bill of lading, which contained exceptions of, among other things, "collision," and "accidents, loss, or damage from any act, neglect, or default whatsoever of the pilots, master, or mariners, or other servants of the company in navigating the ship." In the course of the voyage the "Crown Prince" came into collision with another vessel of the defendants, the "Atjeh." The plaintiffs' goods were in consequence lost. The collision was due to negligence, for which the "Atjeh" was mainly in fault ; but the "Crown Prince" also was in some degree to blame :—Held, that the defendants had not committed a breach of the contract created by the bill of lading, and that no action could be maintained against them on the ground of failure to perform the undertaking therein contained to carry the goods safely upon the voyage. Per Brett, L.J. : No stipulation on the part of the defendants could be implied as to the conduct of those on board the "Atjeh," and although the negligence of the "Atjeh" was not within the exceptions, nevertheless it was not within the contract created by the bill of lading. Per Baggallay and Lindley, L.JJ. : The exception "collision," although it did not cover the negligence of the "Crown Prince," covered the negligence of the "Atjeh," and the defendants were expressly relieved from liability for the negligence of the "Crown Prince" by the other exceptions in the bill of lading. *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 52 L. J., Q. B. 220 ; 10 Q. B. D. 521 ; 48 L. T. 546 ; 31 W. R. 445 ; 5 Asp. M. C. 65 ; 47 J. P. 260—C. A.

Held, further, that the defendants were liable in tort for the negligence of those engaged in navigating the "Atjeh," but that the amount payable by the defendants must be limited to one-half of the loss sustained by the plaintiffs, pursuant to the supreme court of judicature Act, 1873, s. 25, sub-s. 9. *Ib.*

Damage by Seawater through Uncased Pipe —Seaworthiness.]—A cargo was shipped on a vessel under a bill of lading which contained an exemption from liability in respect of defaults of master and crew in the navigation in the ordinary course of the voyage. The pipe of a water closet which had been left uncased at the sailing of the vessel was broken during the voyage by the pressure on it of the cargo ; sea water was in consequence admitted, to the damage of the cargo. It was found as a fact that it was usual to case such a pipe before a ship was loaded, and that after loading the pipe was not accessible without the removal of some part of the cargo :—Held, in an action by the indorsers of the bill of lading against the shipowners to recover damages for the injury to the cargo upon the above facts, that the ship was not seaworthy when it started on the voyage, and that therefore the exception in the bill of lading did not protect the shipowners from liability. *Steel* v. *State Line Steamship Co.* (3 App. Cas. 72), followed. *Gilroy* v. *Price*, [1893] A. C. 56 ; 1 R. 76 ; 68 L. T. 302 ; 7 Asp., M. C. 314—H. L. (Sc.)

"Management" of the Ship — Stevedore's Negligence.]—A bill of lading exonerated the shipowners from liability for damage to the cargo shipped "from any act, neglect or default of the pilot, master or mariners in the navigation or management of the ship." The goods were damaged by the negligence of the stevedore in stowing the cargo :—Held, that the defendants were liable, as a stevedore was not included in the clause, and improper stowage did not fall within the words, "management of the ship." *The Ferro*, 62 L. J., Adm. 48 ; [1893] P. 38 ; 1 R. 562 ; 68 L. T. 418 ; 7 Asp. M. C. 309.

Thieves—Theft by Servants of Shipowners.] —The list of exceptions in a bill of lading contained the words "thieves of whatever kind, whether on board or not, or by land or sea" :—Held, that these words did not protect the shipowner from liability for thefts committed by persons in the service of the ship, and, therefore, that he was responsible for a theft committed by stevedore's men employed to store the cargo, the stevedore, though appointed by the charterer, being paid by and in the service of the shipowner. *Steinman* v. *Angier Line*, 60 L. J., Q. B. 425 ; [1891] 1 Q. B. 619 ; 64 L. T. 613 ; 39 W. R. 392 ; 7 Asp. M. C. 46—C. A. *And see cases* infra, col. 341.

Perils of Sea occasioned by Master's Negligence — Insufficient Dunnage.]—A cargo of grain, shipped on board the "C.," was, in the course of the voyage, damaged by sea-water, which entered the vessel's hold through a rivet-hole at the foot of one of the stanchions supporting the main rail, the rivet having become loose owing to the working of the ship during bad weather. The bill of lading under which the cargo was shipped contained the following exceptions : "Perils of the sea—collisions, stranding, and other accidents of navigation excepted, even when occasioned by the negligence, default or error of judgment of the pilot, master, mariners, or other servants of the shipowners." After discovering the leakage, the master neglected to take proper measures to prevent its continuance :—Held, that the shipowners were protected by the exceptions in the bill of lading from liability for the damage consequent on the master's neglect to take proper measures to stop the leak. *The Cressington*, 60 L. J., Adm. 25 ; [1891] P. 152 ; 64 L. T. 329 ; 7 Asp. M. C. 27. *And see cases* supra, *d.* PERILS OF THE SEA.

"Accidents of Navigation."] — Whilst the defendant's steamship was lying at her moorings loading the plaintiffs' cargo of grain, under charterparty and bill of lading in the ordinary form, the circulating pump delivery valve in the side of the ship was reasonably and properly opened by the defendants' engineer, but was negligently and improperly left open, whereby a quantity of sea water entered the ship and damaged the plaintiff's cargo. To prevent the vessel foundering at her moorings, where the water was deep, the master had her towed into shallower water, where she settled on the ground, and the water was subsequently pumped out. For the loss so sustained the plaintiffs sued the defendants:—Held, that the defendants were not liable, as the negligence clause applied to "dangers and accidents of the sea or other waters," as well as to "accidents of navigation," and the words "unless stranded, sunk or burnt," constituted a condition preventing liability attaching to the shipowner for the damage occasioned by the valve being improperly open. Semble, that the defendants were also protected because the damage resulting from the incursion of water into the ship—caused by the use of the valve, whilst she had cargo in her, though she was still at her moorings and not in motion—was an "accident of navigation" within the meaning of the exception in the first part of the clause in question. *The Southgate*, [1893] P. 329.

Act, Neglect or Default "in the Navigation" of the Ship.]— Goods were shipped under a charterparty, in which one of the excepted perils was "any act, neglect or default whatsoever of master or crew in the navigation of the ship and in the ordinary course of the voyage." After the ship had arrived at the docks at the port of discharge, and the discharge had proceeded for some days, the chief engineer, with a view of stiffening the ship so as to allow the discharge to be continued, negligently opened the sea-valve for the purpose of filling the ballast tanks. The ballast-filling pipe had previously been disconnected by the workmen of contractors employed to do repairs in the ship, and in consequence the sea water, instead of passing through the pipe into the ballast tanks, escaped and damaged the goods:—Held, that the damage was not due to an excepted peril, for the negligence of the chief engineer was not negligence "in the navigation" of the ship. *Laurie* v. *Douglas* (ante, col. 330), considered. *The Accomac*, 59 L. J., Adm. 91; 15 P. D. 208; 63 L. T. 737; 39 W. R. 133; 6 Asp., M. C. 579—C. A. And see *The Carron Park*, supra, col. 278.

Negligence in Navigating Ship "or otherwise"—Damage from Rain or Contact with other Goods.] — Cotton-seed cake was shipped and carried in the defendants' ship under a bill of lading of which the plaintiffs were indorsees. The exceptions in the bill of lading were "the act of God," &c., negligence or default of pilot, master mariners, engineers, or other persons in the service of the ship, whether in navigating the ship "or otherwise," and exempted the shipowner from loss or damage to cargo from rain and from contact with other goods. The plaintiffs' goods were loaded in the hold of the ship at the port of G. It became necessary to complete the loading outside a bar in the outer roads, and the ship, with the cotton seed cake on board, proceeded there and anchored. Cotton bales not the plaintiffs' were then brought alongside in lighters and loaded, and the cotton seed cake was damaged either by rain water or by wet bales of cotton being placed upon it:—Held, that under the bill of lading the defendants, the shipowners, were exempted from liability for damage by rain or contact with other goods, after the goods had been shipped, whether the ship had started on her voyage or not; and that the words "whether in navigating the ship or otherwise" absolved the defendants from liability to damage whether in negligently navigating the ship, or in negligently bringing about those other losses or damages from which they had exempted themselves in the bill of lading. *Norman* v. *Binnington*, 59 L. J., Q. B. 490; 25 Q. B. D. 475; 63 L. T. 108; 38 W. R. 702; 6 Asp. M. C. 528.

Damage by Leakage, &c. — Negligence — Verdict of Jury.]—A bill of lading provided that the shipowner should not be liable for damage by leakage, lighterage, corruption, torn wrappers, &c. The jury found that the cargo, sugar, was damaged by leakage, but there was no proof of the cause:—Held, that the verdict was a verdict in favour of the shipowner. *Moes* v. *Leith and Aberdeen Shipping Co.*, 5 Ct. of Sess. Cas. (3rd ser.) 988.

Barratry of Crew.] — See *The Cressington*, supra, col. 334. *Taylor* v. *Liverpool and Great Western Steamship Co.*, infra, col. 341.

Negligent Stowage.]—Bags of sugar shipped by the plaintiffs were carried in the defendants' steamship from H. to L. at an agreed freight. The vessel was chartered for the voyage by P. & K., who signed the bill of lading as agents. It contained a clause that the owners of the ship should not be liable for the default of the pilot, master, or mariners in navigating the ship, and a further clause that the captain, officers and crew in the transmission of the goods should be considered the servants of the shipper, owner, or consignee. The sugar was negligently stowed under oxide of zinc and was consequently damaged. It did not appear how the sugar came to be shipped, nor with whom the plaintiffs made the contract of carriage:—Held, that the defendants were liable to compensate the plaintiffs for the damage done to the sugar; for either the defendants had contracted to carry the sugar upon the terms set out in the bill of lading, which did not relieve them from responsibility for negligent stowage; or if they had not contracted with the plaintiffs, they were liable for misfeasance, that is, for stowing the goods in such a manner as to come into contact with a mischievous substance. *Hayn* v. *Culliford*, 48 L. J., C. P. 372; 4 C. P. D. 182; 40 L. T. 536; 27 W. R. 541; 4 Asp. M. C. 128—C. A.

Negligence Clause—Shipment by Wharfinger—Adoption of Contract by Goods Owner.]—A. purchased goods from B. to be sent from London to Dublin by sea. B. employed C., a wharfinger, to ship the goods on the defendant's vessel. C. shipped the goods upon the terms that the defendants were not to be liable for negligence of officers or crew. It was not proved that B. knew that the goods were shipped upon these terms.

The goods were lost by negligence of officers and crew. A. had paid B. for the goods, not knowing the terms of shipment:—Held, that A. could not recover against the defendants for loss of the goods; the condition being valid and knowledge of B. immaterial. *Alexander* v. *Malcolmson*, Ir. Rep. 2 C. L. 621.

Negligence of Carpenter—Unseaworthiness.]—Owing to the negligence of a carpenter employed by the shipowners to see that a ship started on her voyage in a seaworthy condition, the ship started on her voyage in an unseaworthy condition, and her cargo was damaged in consequence of her unseaworthiness. The bill of lading exempted the shipowners from liability for damage resulting from faults or errors in navigation, or in management of the ship provided due diligence had been exercised by her owners to make her seaworthy:—Held, that the owners were liable for the negligence of the carpenter, and that it was no answer for them to prove that they personally had not been guilty of negligence, and in selecting him had used due diligence to secure a fit and efficient servant. *Dobell* v. *S. S. Rossmore Co.*, 64 L. J., Q. B. 777; [1895] 2 Q. B. 408; 14 R. 558; 73 L. T. 74; 44 W. R. 37; 8 Asp. M. C. 83—C. A.

Negligence of Stevedore.]—A clause in a bill of lading exempting the shipowner from liability "for any consequences, or any accident of navigation, or for any act, negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowners, in navigating the ship or otherwise," covers an injury to the cargo resulting from careless stowage by a stevedore employed by the shipowner. *Baerselman* v. *Bailey*, 64 L. J., Q. B. 707; [1895] 2 Q. B. 301; 14 R. 481; 72 L. T. 677; 43 W. R. 593; 8 Asp. M. C. 4—C. A.

"Ship Damage" — East India Company's Charter.]—Freighters of ships under charterparties with the East India Co.:—Held, not answerable for damage or loss occasioned by the act of God. "Ship damage" in those charterparties meaning damage from negligence, insufficient or bad stowage. *Hotham* v. *East India Co.* (1 Dougl. 272) disapproved. *Thompson* v. *Brown*, 7 Taunt. 656.

Burden of Proof—Sweating of Cargo—Negligence.]—A bill of lading of jute excepted "act of God, perils of the sea, fire, &c.," and continued—"but nothing herein contained shall exempt the shipowner from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or ventilation, or by improper opening of valves, sluices and ports, or by causes other than those above excepted." . . . "The ship to be liable for . . . sweat":—Held, that the shipowner was not liable for damage to cargo by sweat, unless it was proved that the sweat arose from fault of the ship. *Moes* v. *Leith and Aberdeen Shipping Co.* (supra) followed. *Horseley* v. *Baxter Brothers*, 20 Ct. of Sess. Cas. (4th ser.) 333.

Loss by excepted Peril, but preventable—Negligence.]—See *Laurie* v. *Douglas*, ante, col. 330.

Incorporation of Harter Act—"Management" of Ship.]—During the discharge of a cargo of oil-cake, carried under a bill of lading which incorporated the provisions of the Harter Act, water was admitted into one of the water-ballast tanks of the vessel in order to stiffen her, but owing to straining during exceptionally heavy weather on the voyage, a sounding-pipe communicating with the tank had been broken, and the water forcing its way up the sounding-pipe, escaped into the hold, and damaged the cargo. The fact that the sounding-pipe was broken might have been ascertained by means of the sounding-rod before the water was admitted to the tank, but the engineer had negligently omitted to use the sounding-rod or to take any measures to inform himself of the condition of the sounding-pipe:—Held, that the damage was caused by negligence in the "management" of the ship within the meaning of s. 3 of the Harter Act, and that the shipowner was not liable. *The Glenochil*, 65 L. J., Adm. 1; [1896] P. 10; 73 L. T. 416; 8 Asp. M. C. 219.

Charterparty—Exception of Negligence in.]—*See* ante, XI. CHARTERPARTY.

Notice—Limitation of Liability by — Negligence.]—See *Evans* v. *Soule*, ante, col. 74.

f. Other Exceptions.

King's Enemies.]—A bill of lading for goods shipped in a Russian port, on board a Mecklenburgh ship, for a port in this country, contained an exception of the king's enemies:—Held, that "the king's enemies" meant, or at all events included, the enemies of the sovereign of the person who made the bill of lading, viz., the Duke of Mecklenburgh; and, consequently, that the exception protected the captain against the consequences of a hostile seizure by the Danes, then at war with Mecklenburgh. *Russell* v. *Niemann*, 17 C. B. (N.S.) 163; 34 L. J., C. P. 10; 10 L. T. 786; 13 W. R. 93.

By a bill of lading the goods were made deliverable to order or assigns, "paying freight for the goods, and all other conditions as per charterparty":—Held, that this did not incorporate an exception in the charterparty as to "acts of enemies" and "restraints of princes." *Ib.*

Acts of Princes.]—The acts or restraints of princes and rulers provided against in a bill of lading refer to the forcible interference of a state or the government of a country taking possession of the goods manu forti, and do not extend to legal proceedings in foreign courts, nor, in an action founded on contract, can the act of any court of law, or judicial tribunal, deciding that the shipowners should hold possession of the goods to the order of the true owner, relieve them from performing their contract, such act or decision not having been expressly excepted against in the bill of lading. *Finlay* v. *Liverpool and Great Western Steamship Co.*, 23 L. T. 251.

Contraband of War — Reasonable Fear of Seizure—Cargo discharged short of Destination—Justification.]—The exception—restraint of princes—in a bill of lading under which the owner of a general ship contracts to carry goods contraband of war, entitles him upon war being declared to break his contract, although executed and not merely executory, and discharge the

goods before reaching the port of destination, without any direct or specific act of interference by sovereign authority. *Nobel's Explosives Co.* v. *Jenkins*, 65 L. J., Q. B. 638; [1896] 2 Q. B. 326; 75 L. T. 163; 8 Asp. M. C. 181.

An exception—that in case of blockade or interdict of the port of discharge, or if the entering of or discharging in the port be considered by the master unsafe by reason of war disturbances, he may land the goods at the nearest safe and convenient port at the expense of the owners—operates as soon as the captain, having a reasonable and well-grounded fear of seizure, considers the limit of safety has been reached, and justifies him in landing goods contraband of war at a port neither near nor convenient to the port of destination. *Ib.*

Goods confiscated for Breach of Spanish Revenue Laws.]—Where the exceptions in the bill of lading were "the act of God, the queen's enemies, fire and dangers of the seas, rivers and navigation (save risk of boats)" the shipowner was held liable for non-delivery of goods shipped for Spain and there confiscated for breach of Spanish revenue laws. *Spence* v. *Chadwick*, 10 Q. B. 517; 16 L. J., Q. B. 313.

Rust, Leakage, or Breakage.]—The clause in a bill of lading by which the shipowner is "not accountable for rust, leakage or breakage," is limited to the rust, leakage or breakage of the goods themselves, and does not protect the shipowner from liability for damage done to other goods in consequence of such rust, leakage or breakage. *Thrift* v. *Youle*, 46 L. J., C. P. 402; 2 C. P. D. 432; 36 L. T. 114; 3 Asp. M. C. 357.

The defendants caused to be shipped on board a vessel bales of palm-baskets and barrels of oil, under a bill of lading containing the clause, "Not accountable for rust, leakage or breakage." During the voyage some of the oil escaped from the barrels, and damaged the palm-baskets:—Held, that the clause in the bill of lading exempting the plaintiff from responsibility for leakage, did not extend to damage caused by the oil which had escaped from the barrels, and that the plaintiff was liable to compensate the defendants for the injury done to the palm-baskets. *Ib.*

—— **Where Gross Negligence.**]—A stipulation in a bill of lading, that the shipowner is "not to be accountable for leakage or breakage," does not exempt him from responsibility for a loss by these means, arising from the gross negligence of himself and his servants. *Phillips* v. *Clark*, 2 C. B. (N.S.) 156; 26 L. J., C. P. 168; 3 Jur. (N.S.) 467; 5 W. R. 582. *S. C.*, 5 Jur. (N.S.) 1081. And see *Craig* v. *Delargy*, col. 343.

A bill of lading containing the following memorandum: "Weights, measurement and contents unknown, and not accountable for leakage," protects the shipowner as to all leakage, whether ordinary or extraordinary, except that caused by negligence. *Ohrloff* v. *Briscall*, 4 Moore, P. C. (N.S.) 70; 35 L. J., P. C. 63; L. R. 1 P. C. 231; 12 Jur. (N.S.) 675; 14 L. T. 873; 15 W. R. 202. *S. C.*, nom. *The Helene*, Br. & Lush. 429.

A bill of lading of forty-seven casks of oil contained a memorandum in the margin, "not accountable for leakage." The casks of oil were, at the desire of the charterers, stowed in the same hold with rags and wool (being part of the cargo), whereby the casks became heated and leaked:—Held, that the condition that the shipowner should not be accountable for leakage was not limited to the quantity of leakage, and that such memorandum protected the shipowner as to all leakage, unless caused by the negligence of the shipowner, and that ignorance that casks so packed would become heated and leak did not amount to negligence. *Ib.*

A bill of lading for a quantity of sugar contained a memorandum in the margin that the shipowner was "not liable for leakage." The sugar, in consequence of improper stowage, was damaged during the voyage by the drainage from other sugar stowed above, which caused it to heat:—Held, that this was not damage by leakage within the meaning of the memorandum. *The Nepoter*, 38 L. J., Adm. 63; L. R. 2 A. & E. 375; 22 L. T. 177; 18 W. R. 49.

Onus of Proof.]—Goods were shipped on board a steamer under a bill of lading which contained an exception from liability for breakage, leakage or damage. The goods were found at the end of the voyage to be injured by oil. It was proved that there was no oil in the cargo, but that there were two donkey engines on deck, near the place where the goods were stowed, in lubricating which oil was used; there was no direct evidence of how the injury to the goods occurred:—Held, that the exception did not protect the shipowners from liability for damage accruing through the negligence of their servants, but that it did shift the onus of proof, and that it was incumbent upon the shipper to prove affirmatively the negligence of the shipowners' servants. *Czech* v. *General Steam Navigation Co.*, 37 L. J., C. P. 3; L. R. 3 C. P. 14; 17 L. T. 246; 16 W. R. 130. And see *The Norway*, infra.

Held, also that the above facts were evidence upon which a jury was justified in finding the existence of negligence. *Ib.*

In an action upon such a bill of lading to recover damages for loss by leakage of any kind, the burthen of proof is on the plaintiff to show that the leakage was caused by negligence. *The Helene*, *Ohrloff* v. *Briscall*, supra.

Damage by Rats.]—Under a bill of lading, whereby the shipowner undertakes to deliver goods "in good order, and well conditioned (the act of God, the Queen's enemies, fire, all and every other dangers and accidents of the seas, rivers and navigation, of whatsoever nature or kind soever excepted)," he is liable for damage done to the goods on board his ship by rats, though he has taken every precaution against them. *Kay* v. *Wheeler*, 36 L. J., C. P. 180; L. R. 2 C. P. 302; 16 L. T. 66; 15 W. R. 495—Ex. Ch. S. P., *Laveroni* v. *Drury*, 8 Ex. 166; 22 L. J., Ex. 2; 16 Jur. 1024; 1 W. R. 55.

By Stranding.]—In an action upon a bill of lading against the shipowner for loss of part of cargo alleged to have been jettisoned and sold in consequence of the ship stranding, the plaintiff is not entitled to recover, unless he proves affirmatively that the stranding was occasioned by the negligent navigation of the ship. *The Norway*, Br. & Lush. 404; 3 Moore, P. C. (N.S.) 245; 13 W. R. 1085.

"Thieves."]—A box of diamonds was shipped at Liverpool, on board a ship for New York, under a bill of lading by which were excepted

"pirates, robbers, thieves, vermin, barratry of master and mariners . . ." The box was stolen during the voyage or on the ship's arrival in port, before the time for delivery; but there was no evidence to show whether it was stolen by one of the crew or by a passenger, or, after her arrival, by some person from the shore:—Held, first, that "thieves" must be interpreted as in a policy of insurance, and only applied to thieves external to the ship. *Taylor* v. *Liverpool and Great Western Steamship Co.*, 43 L. J., Q. B. 205; L. R. 9 Q. B. 546; 30 L. T. 714; 22 W. R. 752; 2 Asp. M. C. 275. And see *Steinman* v. *Angier Line*, supra, col. 334.

Held, secondly assuming theft by one of the crew to be barratry, that it lay on the shipowners to bring the loss within one of the exceptions, by showing by whom the theft had been committed; and that the shippers of the diamonds were therefore entitled to recover for the loss. *Ib.*

A company received at Panama goods to be delivered in London, "the act of God, the queen's enemies, pirates, robbers, fire, accidents from machinery, boilers and steam, the dangers of the seas, roads and rivers, of what nature or kind soever excepted." The goods were carried by the company across the isthmus of Panama to Chagres, where they were shipped to Southampton, and there placed in a railway truck, whence they were secretly stolen in the course of their transit to London:—Held, that this was not within the exception a loss by robbers, or by dangers of the roads, since the word "robbers" meant, not "thieves," but robbers by violence; and "dangers of the roads" meant dangers of marine roads; or if of land roads, such dangers as are immediately caused by roads, as the overturning of carriages in rough and precipitous places. *De Rothschild* v. *Royal Mail Steam Packet Co.*, 7 Ex. 734; 21 L. J., Ex. 273.

Suffocation of Animals — Loss arising from Want of Ballast.]—A bill of lading of cattle to be carried from Rotterdam to London contained an exemption in the following terms: "Ship free in case of mortality, and from all damages arising from act of God, the queen's enemies, fire, accidents from machinery, or boiler, steam, or other dangers of the seas, rivers, roadsteads, or steam navigation whatsoever. The owners of the vessel will not be liable for the loss of or injury done to any horses, cattle, or other animals, except as to 50*l.* for horses, and 15*l.* per head of neat cattle, and 2*l.* per head as to sheep, pigs and dogs. The owners will not be liable for any loss arising from suffocation or other cause occurring to horses, dogs, cattle, or other animals; or from kicking, plunging or viciousness of the same in transit, nor for any damage arising from shipping or landing, or while in the possession of the owners or their agents before or after the voyage, from whatever cause they may remain in such possession." Several of the cattle were suffocated and killed from the vessel overturning, it having been sent to sea without proper ballast. The injury having been occasioned by the negligence of the owners of the vessel:—Held, that the owner of the cattle was entitled to recover notwithstanding the exception in the bill of lading. *Leuw* v. *Dudgeon*, 37 L. J., C. P. 5, n.; L. R. 3 C. P. 17, n.; 17 L. T. 145; 16 W. R. 80.

"Damage"—Construction—Does not include Theft.]—A bill of lading contained a clause: "The shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance":—Held, that "damage" would include damage to the goods amounting to a total loss or destruction of them, but did not apply to the case of the abstraction of the goods. *Taylor* v. *Liverpool and Great Western Steamship Co.*, supra.

Fruit Cargo—"Act of God Clause"—Shipped Wet.]—A bill of lading provided that freight should be payable as follows: "One-third in cash on arrival, and the remaining two-thirds on right delivery of cargo, less value of cargo short delivered or damaged (if any) not covered by the preceding 'act of God' clause." The cargo was shipped wet, but in other respects in sound condition, and the master signed bills of lading describing it as shipped "in good order and well conditioned." On arrival the cargo, which had been carried in the hold, was found, owing to the wet condition in which it had been shipped, to be damaged by sweating. This damage was not covered by the "act of God" clause:—Held, that the consignee was only entitled to make a deduction from the freight where the cargo was delivered in a damaged condition consequent upon a breach of contract by the shipowner. *The Barcore*, 65 L. J., Adm. 97; [1896] P. 294; 75 L. T. 168; 8 Asp. M. C. 189.

—— **"Inherent Deterioration"—Fault of Shipowner.**] — By charterparty the ship had liberty before loading fruit to load other cargo. By agreement between the master and the charter agent at the shipping port the fruit was loaded first and discharged last. Bills of lading for the fruit were signed, and expressed that the fruit was shipped "in good order and well conditioned," and were to be so delivered, except for "inherent deterioration." The fruit was delivered damaged, by reason, as alleged, of its being in the hold longer than if it had been shipped after the other cargo:—Held, that the shipowner was liable. *Lindsay* v. *Schofield*, 24 Ct. of Sess. Cas. (4th ser.) 530.

Liberty to tow Vessels—Liability to Goods Owner for Delay.]—The plaintiff, a cattle dealer, shipped cattle on a steamer plying from Belfast to Fleetwood. The ticket delivered to the plaintiff contained a clause giving liberty to tow and assist vessels. The steamer fell in with a vessel in distress, which she towed to Carrickfergus; after which she returned to Belfast and sailed again for Fleetwood where she arrived some hours after her usual time, whereby the plaintiff could not send his cattle to the fair. Carrickfergus was the nearest safe port for her to take the distressed ship to; and owing to the state of the tide at Fleetwood, she was not delayed in fact by her return to and stay at Belfast:—Held, that the shipowner was not liable for the loss of market for the cattle. *Drain* v. *Henderson*, 11 Ir. C. L. R. 497.

Loss by Excepted Peril, but Preventable—Absence of Negligence.]—Where the damage was caused by one of the excepted perils, but it would not have happened if the ship had been more securely moored whilst unloading, it was held that the shipowner was not liable to the cargo owner if he had exercised ordinary and reasonable care. *Laurie* v. *Douglas*, 15 M. & W. 746. *And see e.* NEGLIGENCE OR FAULT OF MASTER AND CREW, supra.

Leakage — Liability of Shipowner — Bill of Lading Act, 1855, s. 1.]—The purchasers of an oil cargo received from the shipper's agent the bill of lading stating that 369 casks had been "shipped in good order and well conditioned"; the master had added in writing, "not responsible for weight, quality, breakage or leakage." The shippers guaranteed against leakage above 1 per cent. About fifteen tons of oil were lost on the voyage by leakage of bad casks. The purchaser, at the shipper's suggestion, sued the shipowners for non-delivery according to bill of lading:—Held, that the purchaser had no higher right than the shipper, whose fault caused the loss. Held, also, that the shipowners were not liable upon the bill of lading for leakage not proved to have been caused by their fault. *Craig* v. *Delargy*, 6 Ct. of Sess. Cas. (4th ser.) 1269. *And see cases*, col. 339.

Excepted Perils—Loss during the Loading of Cargo at Ship's Risk.]—See *Nottebohm* v. *Richter*, infra, col. 506.

Conflict between Specific and General Exemptions.]—See *Houston* v. *Sansinena*, supra, col. 309.

Damage by Excepted Perils—Duty of Master to Minimise.]—See *Adam* v. *Morris*, post, col. 521.

Damage by "Sweat."]—See *Horseley* v. *Baxter Brothers*, supra, col. 337.

Act of God.]—See *Nugent* v. *Smith*, supra, col. 75.

5. Indorsement, Assignment and Transfer.

a. Generally.

Delivery or Indorsement.]—A bill of lading is the usual document entered into upon a contract for the carriage and delivery of goods by sea for freight. *Lickbarrow* v. *Mason*, 4 Bro. P. C. 57; 1 H. Bl. 360; 5 Term Rep. 683; 6 Term Rep. 131; 1 R. R. 425.

There is no distinction between a bill of lading indorsed in blank and an indorsement to a particular person. *Ib.*

A bill of lading is not a necessary instrument in the transfer of property of goods consigned to the owner. *Meyer* v. *Sharpe*, 5 Taunt. 74; 2 Rose, 124.

The property in a cargo, for which the master has signed bills of lading, may be transferred by delivery, without indorsement of the bill of lading. And the transfer will be good against all the world, except subsequent indorsees of the bill of lading for a valuable consideration. *Nathan* v. *Giles*, 5 Taunt. 558; 1 Marsh. 226; 15 R. R. 581.

By Shipper.]—Bills of lading, made out to the order of the shipper or his assigns, are negotiated and transferred by the shipper's indorsement. *Haille* v. *Smith*, 1 Bos. & P. 564.

Liability after Indorsement.]—Merchants in London received from a mere stranger residing abroad a bill of lading of goods, in a letter requesting them to effect insurance; they declined to do the business for the consignor, but acting bonâ fide with a view to his interest, indorsed the bill of lading to a friend of his, who received the goods, and afterwards failed with the proceeds in his hands:—Held, that the merchants, by indorsing the bill of lading, were liable to the consignor for the amount. *Corlett* v. *Gordon*, 3 Camp. 472; 14 R. R. 813.

Effect of 18 & 19 Vict. c. 111, s. 11.]—Before this enactment a bill of lading was not negotiable like a bill of exchange, so as to enable an indorsee to maintain an action upon it in his own name; the effect of the indorsement being only to transfer the right of property in the goods, but not the contract itself. *Thompson* v. *Dominy*, 14 M. & W. 403; 14 L. J., Ex. 320. S. P., *Howard* v. *Shepherd*, 9 C. B. 297; 19 L. J., C. P. 249.

Under the above statute the rights and liabilities of the consignee or indorsee of a bill of lading pass from him by indorsement over to a third person. *Smurthwaite* v. *Wilkins*, 11 C. B. (N.S.) 842; 31 L. J., C. P. 214; 5 L. T. 842; 10 W. R. 386. *S. C.*, 7 L. T. 65.

A bare assignee to whom the property in the goods has not passed, and who cannot therefore sue at common law, is not entitled to sue in the admiralty court. *The St. Cloud*, Br. & Lush. 4; 8 L. T. 54.

By 18 & 19 Vict. c. 111, s. 1, the consignee or indorsee of goods named in a bill of lading, and the indorsee of a bill of lading, to whom the property in the goods mentioned shall have passed by such indorsement, has transferred to and vested in him all rights of suit, and he is subject to the same liabilities, in respect of such goods, as if the contract in the bill of lading had been made with himself. *The Freedom*, L. R. 3 P. C. 594; 24 L. T. 452; 1 Asp. M. C. 136—P. C.

The right of suing upon a contract, under a bill of lading, follows the property in the goods therein specified; that is, the legal title to the goods as against the indorsee. *Ib.*

In a suit for damage to cargo and for improper delivery by the consignees, who were also assignees of the bills of lading:—Held, that they had a locus standi both as to negligence and breach of contract. *Ib.*

To entitle the indorsee of a bill of lading to have transferred to and vested in him a right of suit under 18 & 19 Vict. c. 111, the circumstances under which a bill of lading shall have been indorsed must be such that the property in the goods shall have passed to the indorsee by reason of the indorsement. *Fox* v. *Nott*, 6 H. & N. 637; 30 L. J., Ex. 259; 7 Jur. (N.S.) 663.

The plaintiff, who was the charterer, had taken an assignment of the bill of lading upon the terms that the freight should be paid:—Held, that he had not lost his right against the shipper for the freight. *Ib.*

The consignees named in a bill of lading are entitled to sue in the admiralty court for negligence in the carriage of the goods, or for a breach of the contract contained in the bill of lading, although the property in the goods has not passed to the consignees. *The Nepoter*, 38 L. J., Ad. 63; L. R. 2 A. & E. 375; 22 L. T. 177; 18 W. R. 49.

C., M. & Co. were in the habit of consigning goods to the plaintiffs for sale, and the plaintiffs from time to time accepted their bills and accredited them with the proceeds of sale of the goods. C., M. & Co. being at the time indebted to the plaintiffs upon the account current between them, consigned a cargo of sugar to the plaintiffs which was delivered in a damaged state:—Held, that as consignees of the cargo and creditors of

C., M. & Co., they were entitled to sue in the admiralty court for damage by reason of negligence or breach of duty. *Ib.*

The indorsees of a bill of lading of a cargo agreed to sell the cargo to B. & Co., but the purchase-money had not been paid, nor had the bill of lading been indorsed to B. & Co. In a suit in the court of admiralty for breach of contract for non-delivery of the cargo :—Held, that they were entitled to sue in the court under 24 & 25 Vict. c. 10, s. 6, when construed with the Bills of Lading Act (18 & 19 Vict. c. 111). *The Felix*, 37 L. J., Adm. 48 ; L. R. 2 A. & E. 273 ; 18 L. T. 587 ; 17 W. R. 102.

The plaintiffs were assignees for valuable consideration of bills of lading for 1,000 barrels of oil-cake shipped on board the "Figlia Maggiore," at New York, and which the master had agreed "to deliver in like good order and condition at the port of London." The vessel was at the time under a charterparty, of which the shippers were ignorant, the master having put up the ship as a general ship. The oil-cake was stowed with hogsheads of tobacco, oaken staves being placed between them. A suit having been brought by the assignees of the bills of lading against the shipowner for damage suffered by the oil-cake on the voyage :—Held, that as the vessel had been put up as a general ship, and as they had no knowledge of the charterparty, the owner was the proper person to be sued. *The Figlia Maggiore*, 37 L. J., Adm. 52 ; L. R. 2 A. & E. 106 ; 18 L. T. 532.

Held, also, that the property in the oil-cake had so vested in them as to entitle them to sue for breach of contract under 24 & 25 Vict. c. 10, s. 10, construed with s. 1 of 18 & 19 Vict. c. 111, and that, in any case, they were entitled to sue under the former section on the ground of negligence, and that the onus of proving negligence lay on them. *Ib.*

The rights and liabilities which the assignee of a bill of lading under 18 & 19 Vict. c. 111, s. 1, has transferred to him, are the same rights and liabilities in respect of such goods as if the contract contained in the bill of lading had been made with him. In these are not included the right and liabilities as between the shipper and the master dehors that contract in respect of other goods or of the charterparty. *The Helene*, Br. & Lush. 415. *S. C.*, nom. *Ohrloff* v. *Briscall*, 4 Moore, P. C. (N.S.) 70 ; 35 L. J., P. C. 63 ; L. R. 1 P. C. 231 ; 12 Jur. (N.S.) 675 ; 14 L. T. 873 ; 15 W. R. 202.

Danger of War—Refusal of Master to deliver.]—The master of a North German vessel under a North German charterparty gave a bill of lading for goods shipped on board his vessel in South America as part of a general cargo to be delivered in North Germany to English consignees. The master of the vessel, on her arrival at Falmouth, refused to proceed on account of the outbreak of war between France and Germany. The goods were stowed at the bottom of the hold under those of the other shippers, and as the charterers refused to consent to the unloading of the cargo at Falmouth, the master would not deliver to the consignees there, even on the offer of full freight :—Held, that the master was bound to deliver at Falmouth. *The Patria*, 41 L. J., Adm. 23 ; L. R. 3 A. & E. 436 ; 24 L. T. 849.

Consideration.]—The property of goods passes by the indorsement and delivery of the bill of lading by the consignee to another, if bonâ fide for a valuable consideration, and without collusion, although the indorsee knew at the time that the consignor had not received money payment for his goods, but had taken the consignee's acceptances payable at a future day not then arrived ; and after such assignment of the bill of lading the consignor cannot stop the goods in transitu upon the insolvency of the original consignee. *Cuming* v. *Brown*, 9 East, 506 ; 1 Camp. 104 ; 9 R. R. 603.

The forbearance or release of a pre-existing claim is not a sufficient consideration for the indorsement of a bill of lading so as to defeat an unpaid vendor's right of stoppage in transitu. *Rodger* v. *Comptoir d'Escompte de Paris*, 5 Moore, P. C. (N.S.) 538 ; 38 L. J., P. C. 30 ; L. R. 2 P. C. 393 ; 21 L. T. 33 ; 17 W. R. 468.

L. & Co., merchants carrying on business at Hong Kong, purchased goods of a merchant in Manchester, to be shipped to their firm at Hong Kong, to be paid for at certain credit. The goods were shipped deliverable to the order of L. & Co., and bills of lading signed. Before the goods arrived at Hong Kong, L. & Co. being insolvent, and being indebted to R. & Co., the agent of L. & Co., at Hong Kong, agreed to assign to R. & Co. all the estate of L. & Co., including the bills of lading in respect of the goods, and such bills of lading were in pursuance of the agreement indorsed to R. & Co. At the time the bills of lading were so transferred, no money was advanced or benefit conferred on L. & Co. by R. & Co. :—Held, that there was no sufficient transfer of the bills of lading for a valuable consideration so as to defeat the right of an unpaid vendor to stop the goods in transitu. *Ib.*

A., a merchant in London and in Hong Kong, purchased goods for shipment from B., and paid for them by his acceptance of B.'s draft against the shipment on the terms that A. should send them to his firm at Hong Kong, and that the proceeds should be remitted to A. in bills specially to meet such acceptance. A.'s firm at Hong Kong owed a large sum to C., and were under engagement to secure the debt by depositing shipping documents with him. Being threatened by C. with immediate legal proceedings, they promised him that if he would forbear to take such proceedings, and would release them from their obligation to deposit shipping documents, they would deposit with him a bill of lading for goods of a certain value, upon the understanding that the bill of lading, or the goods represented therein, should be returned to them upon payment of a sum equivalent to the value thereof. The bill of lading of the goods purchased from B. was accordingly indorsed to C., who had no knowledge of the terms made with B., and it was returned by C. according to agreement, on receipt of an equivalent sum :—Held, that C., by such forbearance and release, gave valuable consideration ; that the legal interest in the goods passed by the indorsement of the bill of lading, and that B. could not enforce his claim against the proceeds of sale received by C. in respect thereof. *Chartered Bank of India, Australia and China* v. *Henderson*, L. R. 5 P. C. 501 ; 30 L. T. 578.

Indorsement to Third Party—Act of Bankruptcy—Title of Trustee in Bankruptcy.]—Plaintiff consigned to E. F. certain goods under a bill of lading. E. F. on receiving the bill of lading, and before he had taken physical posses-

sion of the goods, indorsed it to G., his clerk, and directed him to sell the goods and account for the proceeds to the plaintiff; he then executed a deed of assignment to G. for the benefit of his creditors, and was subsequently adjudged bankrupt. Plaintiff and the trustee in bankruptcy, the defendant in the action, both claimed the proceeds of the sale, and an interpleader issue was directed. At the trial the jury found that the property in the goods had passed to E. F., and that he had acted as he had done because he believed the goods were the plaintiff's, and not because he wished to prefer the latter:—Held, that the transaction was not fraudulent, and void within s. 48 (1) of the Bankruptcy Act of 1883, because the jury negatived a fraudulent preference, but that the indorsement of the bill of lading to G. did not pass the property to G. as agent for the plaintiff or otherwise, and that the goods were still part of E. F.'s estate at the moment of executing the deed of assignment, and that, therefore, under s. 43 the trustee in bankruptcy was entitled to recover the proceeds of the sale. *Lauritzen* v. *Carr*, 72 L. T. 56.

Delivery in Absence of Bill of Lading—Indorsee—Right to Sue.]—In an action for damages against the master and shipowners:—Held, that delivery of the cargo by the master in absence of a bill of lading being wrongful, did not preclude the pursuers, who were subsequent indorsees, from acquiring right to the cargo; and that they could sue for damages. *Pirie* v. *Warden*, 9 Ct. of Sess. Cas. (3rd ser.) 523.

Past Consideration.]—The vendee of goods may, by assignment of the bills of lading to a bonâ fide transferee, defeat the vendor's right to stop them in transitu in case of the vendee's insolvency, although the consideration for which the assignment is made is a past one, and has not been got by means of the bills of lading. *Leask* v. *Scott*, 46 L. J., Q. B. 576; 2 Q. B. D. 376; 36 L. T. 784; 25 W. R. 654; 3 Asp. M. C. 469—C. A.

G. & Co., the consignees of certain goods from the defendant from abroad, for which they had accepted a bill of exchange at three months, being already indebted to the plaintiff, obtained a further loan on the condition of giving security. They delivered to him the bill of lading of the goods, together with other securities to the amount required. After this and before the arrival of the goods G. & Co. became insolvent:—Held, that the defendant was not entitled to stop the goods in transitu, for that it was not necessary that the consideration for the assignment of the bill of lading should be obtained by means of the bill of lading, and that there is in such case no difference between a past and present consideration. *Ib.*

A bill of lading assigned in part payment of a debt already due from the assignor to the assignee, is assigned for valuable consideration. *The Emilien Marie*, 44 L. J., Adm. 9; 32 L. T. 435; 2 Asp. M. C. 514. *And see S.C.*, infra, col. 349.

Restriction on Right of Indorsement.]—If a consignee, under a bill of lading, while the goods are yet in transitu, indorses the bill and gives notice thereof to the party entitled to the freight, and upon the indorsement he states in express terms that the owner of the freight, the party who may be ultimately entitled thereto, is to look to other persons for payment of it, and that indorsement is accepted and acted upon without objection or qualification on the part of the owner of the freight, that of itself, in point of law, constitutes a transfer of the liability, and a defence to any subsequent action. *Lewis* v. *M'Kee*, 38 L. J., Ex. 62; L. R. 4 Ex. 58; 19 L. T. 522; 17 W. R. 325—Ex. Ch.

Re-indorsement.]—Goods were shipped for Bombay under a bill of lading, making them deliverable to order or assigns. The consignor indorsed the bill of lading in blank, and deposited it with a banker as security for an advance of money, and on his repaying the sum advanced, the bill of lading was re-indorsed and re-delivered to him:—Held, that such re-indorsement of the bill of lading to him remitted the consignor to all his rights as against the shipowners under the original contract; and consequently that he was entitled to sue them for a breach, whether occurring before or after such re-indorsement. *Short* v. *Simpson*, 1 H. & R. 181; 35 L. J., C. P. 147; L. R. 1 C. P. 248; 12 Jur. (N.S.) 258; 13 L. T. 674; 14 W. R. 307.

Proof of Indorsement.]—In an action upon a bill of lading by an indorsee against the shipowners, for not delivering the goods, he put in a bill of lading, and proved that the consignors indorsed and delivered it to A., and that A. indorsed and delivered it to him for value:—Held, evidence of such an indorsement and delivery of the bill of lading as to vest the property in the goods in him, and so to transfer to him the right of action under 18 & 19 Vict. c. 111, s. 1. *Dracachi* v. *Anglo-Egyptian Navigation Co.*, 37 L. J., C. P. 71; L. R. 3 C. P. 190; 17 L. T. 472; 16 W. R. 277.

Indorsement after Loss—Insurable Interest.]—An indorsement made after loss of the cargo, in pursuance of a contract for sale made after the loss, does not give an insurable interest. *Seagrave* v. *Union Marine Insurance Co.*, 1 H. & R. 302; 35 L. J., C. P. 172; 12 Jur. (N.S.) 358; 14 L. T. 479; 14 W. R. 690.

Right where no Indorsement.]—Where, from all the facts, it may fairly be inferred that it was the intention of a seller to pass the property in goods shipped to order, the mere circumstance of the bill of lading being taken in the name of the seller, and remaining unindorsed, will not prevent its passing. *Joyce* v. *Swann*, 17 C. B. (N.S.) 84.

Indorsement to Agent.]—But the mere indorsement of a bill of lading by the consignor to an agent, to authorise him to stop the goods in transitu on account of his principal, will not enable such agent to maintain an action for the goods in his own name. *Waring* v. *Cox*, 1 Camp. 369.

Revocation of Indorsement.]—The shipper of goods, who has indorsed a bill of lading, may, before the goods or the bill are delivered to the indorsee, revoke the indorsement. *Mitchel* v. *Ede*, 11 A. & E. 888; 3 P. & D. 513; 9 L. J., Q. B. 187.

Right of Equitable Assignee to Sue for Detention of Bill of Lading.]—The plaintiff was in the habit of receiving goods consigned to him by L. for sale upon commission, and in order to place

L. in funds for the purchase of the goods, agreed to allow him to draw upon him. The documents of title of the goods were hypothecated to the plaintiff to enable him to provide funds to meet the bills so drawn by L. The plaintiff accordingly, and at the request of L., arranged for the sale of a parcel of goods, to be shipped by a vessel chartered by the buyers, and L. having drawn upon the plaintiff for that purpose, purchased and shipped the goods. The bill of lading was handed to L., but never forwarded to the plaintiff, and L.'s affairs being put in liquidation, the liquidator placed the bill of lading in the hands of the defendants with instructions not to part with it until they were paid the value of the goods, and they accordingly refused to give it up to the plaintiff:—Held, that the plaintiff had an equitable right to the bill of lading, and was entitled to sue the defendants for the wrongful detention of it. *Lutscher* v. *Comptoir d'Escompte de Paris*, 1 Q. B. D. 709; 34 L. T. 798; 3 Asp. M. C. 209.

Extent of Right of Assignees to Cargo.]—An assignee of a bill of lading may have a better right against the shipowner to recover for breach of the contract of carriage than the assignor. *The Emilien Marie*, 44 L. J., Adm. 9; 32 L. T. 435; 2 Asp. M. C. 504. *And see S. C.*, supra, col. 347.

An assignee of a bill of lading, who has given valuable consideration, without notice of any arrangement between the shipper and the various consignees giving priority to the holders of the other bills of lading in the case of short shipment, may claim from the shipowner full delivery of the cargo specified in his bill of lading, even though the arrangement has been made without the privity of the shipowner, and the master has indorsed the bill of lading, with the words "weight unknown." *Ib.*

A letter written by an assignor of a bill of lading to his assignee, informing the latter that the bankruptcy of the shipper and consignor (who has indorsed to the assignor) may possibly interfere with the proceeds of the shipment, so far as the assignor is concerned, and that he thinks it best to prevent the possibility of a hitch to send the bill of lading for the assignee to deal with, the latter having advanced money thereon, is not such a notice as will oblige the assignee to make inquiries as to the quantity of and the various rights to the cargo, so as to bind the assignee with constructive notice of any arrangement between the shipper and different consignees, giving priority to the holders of other bills of lading in the case of short shipment. *Ib.*

The rights of an innocent holder of a bill of lading are not affected by the fact that the master signed as agent for the charterers, unless the holder has notice of the charterparty, or that the master signed in that capacity. *Ib.*

An assignee of a bill of lading is entitled to the goods therein named, if he is a bonâ fide assignee for value, without notice of fraud or of insolvency on the part of the person to whom the goods were consigned. *The Argentina*, L. R. 1 A. & E. 370; 16 L. T. 743.

Set-off by Holders against Assignees of Freight.]—The holders of a bill of lading cannot, as against the assignees of the freight, set off a debt due to them from the original owner of the goods, who was also the assignor of the freight. *Wegnelin* v. *Ceilier*, 42 L. J., Ch. 758; L. R. 6 H. L. 286; 22 W. R. 26.

Liability of Consignee to take Delivery of Cargo.]—When there is no express stipulation in a bill of lading it is an implied term of the contract contained in it, that the consignee named in the bill of lading, or his assigns, will take delivery of the goods within a reasonable time; and the person to whom the property in the goods has passed, by reason of such consignment, is by virtue of the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1, subject to the liability so to take them. *Fowler* v. *Knoop*, 47 L. J., Q. B. 473. Affirmed, 48 L. J., Q. B. 333; 4 Q. B. D. 299; 40 L. T. 180; 27 W. R. 299—C. A.

Where the charterers and the shippers are the same persons, such contract will still be implied in the bill of lading, notwithstanding the existence of an express stipulation in the charterparty, between the charterers and the shipowner, in reference to the same matter. *Ib.*

Liability of Indorsee.]—See *Oliver* v. *Muggeridge*, supra, col. 313.

b. Passing Property.

Absolutely.]—Though the consignee named in the bill of lading should become insolvent, without having paid for the goods, yet his assignment made for a valuable consideration, and without notice to the assignee that the goods were not paid for, or that they were paid for by bills sure to be dishonoured:—Held, to pass them absolutely to his assignee, and to deprive the consignor of his right to stop in transitu, which, as against the original consignee, he might have exercised. *Lickbarrow* v. *Mason*, 2 Term Rep. 63; 4 Bro. P. C. 57; 1 H. Bl. 360; 5 Term Rep. 683; 6 Term Rep. 63; 2 H. Bl. 211; 1 R. R. 425.

When goods are at sea, the parting with the bill of lading, which is the symbol of the goods, is parting with the ownership of the goods themselves. *Barber* v. *Meyerstein*, 39 L. J., C. P. 187; L. R. 4 H. L. 317; 22 L. T. 808; 18 W. R. 1041.

The same principle applies to goods which, for the convenience of parties, have been landed at a sufferance wharf. *Ib.*

As long as the engagement of the shipowner has not been completely fulfilled, the bill of lading is a living instrument, and the transfer of it for value passes the absolute property in the goods. *Ib.*

It has not been fulfilled when the goods, though actually landed at a wharf, are subject to a stop-order. *Ib.*

The person who first gets the bill of lading (though only one of a set of three) gets the property which it represents; he need not do any act to assert his title, which the transfer of the bill of lading of itself renders complete, and any subsequent dealings with the others of the set are subordinate to the rights passed by that one. *Ib.*

Though the shipowner or wharfinger, having no notice of the transfer of one bill of lading, may be excused for delivering the goods to a person who produces to him another bill of lading, which has in reality been subsequently taken, that does not affect the legal ownership of the goods as between the holders of the two bills of lading. *Ib.*

—— **As Security.**]—The shipper of goods indorsed the bill of lading in blank, and delivered it to the defendants' bankers, by way of security for money advanced by them. The

goods, upon their arrival at the port of destination, were sold for an amount insufficient to pay the freight:—Held, that the property in the goods had not passed to the defendants within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), s. 1, so as to make them liable in an action by the shipowner for the freight. *Sewell* v. *Burdick*, 54 L. J., Q. B. 156; 10 App. Cas. 74; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376—H. L.

Bill of Lading a Negotiable Instrument.]—A bill of lading is a negotiable instrument, and the property in the goods is transferred by indorsement or delivery of the bill. *Evans* v. *Marlett*, 1 Ld. Raym. 271. *Wright* v. *Campbell*, 4 Burr. 2051; 1 H. Bl. 628. *Caldwell* v. *Ball*, 1 Term Rep. 250, infra; 1 R. R. 187. *Hibbert* v. *Carter*, 1 Term Rep. 745; 1 R. R. 388.

Goods not expressed to be delivered to Assignee.]—Indorsement of bill of lading is not a valid assignment, unless goods are directed to be delivered to assignee. *Brown* v. *Heathcote*, 1 Atk. 160.

Where the bill of lading provides for delivery to the order of the shipper who has sold the goods, the property is not transferred to the purchaser. *The Packet de Bilboa*, 2 C. Rob. 133, 136.

Delivery to Holder of Second Part of Bill of Lading—Goods Pledged to Holder of First Part—Liability of Warehouseman.]—Goods shipped to C., as owner, were, before arrival, pledged by him to the plaintiffs as security for an advance. The bill of lading was, as is customary, in three sets, "the one being accomplished, the rest to stand void," and made the goods deliverable to "C. or assigns," freight payable in London. C. indorsed one copy of the bill of lading marked "first" to the plaintiffs, and also gave them a letter of charge, making the bill of lading a collateral security for the advance, and empowering them to sell the goods represented by the bill of lading should default be made in the repayment of the advance. The vessel went on arrival into the dock of the defendants. C. duly entered the goods at the custom house, and they were afterwards, at the request of C., landed and deposited with the defendants, the freight being unpaid. The manifest, a copy of which the captain lodged with the defendants, authorised the defendants to deliver the goods to the holders of the bill of lading. On the following day the captain lodged with the defendants a stop-order for freight, pursuant to the Merchant Shipping Act, 1862. C. then produced and gave to the defendants, unindorsed, the second part of the bill of lading; the defendants then entered C. as the proprietor of the goods. C. paid the freight, the stop was taken off, and the defendants delivered the goods to W., on the production by him of a delivery order from C. C. shortly after went into liquidation, when the plaintiffs, producing the indorsed bill of lading, in vain demanded the goods of the defendant. In an action for conversion:—Held, that the dock company had not been guilty of conversion, and that the bank could not maintain an action against them. *Fearon* v. *Bowers* (1 H. Bl. 364) commented on. *Glyn, Mills & Co.* v. *East and West India Dock Co.*, 52 L. J., Q. B. 146; 7 App. Cas. 591; 47 L. T. 309; 31 W. R. 206; 4 Asp. M. C. 580—H. L. (E.)

In Three Parts.]—One part of a set of three bills of lading was indorsed to the partner of the vendor, and another to the vendee. The vendee made default in payment, and the vendor obtained delivery of the goods. In an action of detinue against the master, brought by an indorsee from the vendee, it appearing that by usage of trade the captain was not concerned to examine into the rights of different holders, the jury were directed to find a verdict for the defendant. *Fearon* v. *Bowers*, 1 H. Bl. 364.

Bonâ fide Assignment of Bill of Lading transfers the Property.]—"If the goods are bonâ fide sold by the factor at sea (as they may be where no delivery is given), the sale will be good; the vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered; and the owner can never dispute with the vendee because the goods were sold bonâ fide and with the owner's own authority"—Per Lord Mansfield. *Wright* v. *Campbell*, 4 Burr. 2046, 2051; 1 H. Bl. 628.

But new trial ordered, that the jury might determine whether the sale was fraudulent. *Ib.*

Priorities between different Holders.]—K., a miller in England, agreed with F. & Co., a firm in California, that they should send him cargoes of wheat, he accepting bills of exchange against the bills of lading. A cargo was sent, and a bill of lading, with a bill of exchange annexed, was sent to the agents in England of F. & Co., and by them the acceptance of K. to the bill of exchange was obtained. The bill of exchange was subsequently negotiated, and a bill of lading deposited by F. & Co. Six bills of lading were drawn, and one of them was inadvertently, as F. & Co. alleged, sent to K., who deposited it with a bank at Exeter by way of security. K. failed, and a bill was filed by the bank claiming the cargo as against the holders of the other bill of lading:—Held, that F. & Co. had full right to negotiate the bill of exchange with the bill of lading annexed, and that the bank must, at the time when they made an advance on the bill of lading, have known that there would be several bills of lading, and that one could not be negotiated without the other. The English bank had, therefore, no priority. *Gilbert* v. *Guignon*, L. R. 8 Ch. 16; 27 L. T. 733; 21 W. R. 281; 1 Asp. M. C. 498.

Where several bills of lading have been signed of different imports, no reference is to be had to the time when they were signed by the captain, but the person who first gets one of them, by a legal title from the owner or shipper, has a right to the consignment. *Caldwell* v. *Ball*, 1 Term Rep. 205; 1 R. R. 87.

And where such bills of lading, though different upon the face of them, are constructively the same, and the captain has acted bonâ fide, a delivery according to such legal title will discharge him from them all. *Ib.*

A master is justified in delivering goods to the holder of the first bill of lading presented. *The Tigress*, Br. & Lush. 38; 32 L. J., Adm. 97; 9 Jur. (N.S.) 361; 8 L. T. 117; 11 W. R. 538.

The indorsement or delivery of one of a triplicate set of bills of lading does not necessarily operate as an indorsement or a delivery of all. *Ib.*

The mere indorsement and delivery of one of a triplicate set of bills of lading is not necessarily such a negotiation as to preclude a vendor

from exercising his right of stoppage in transitu. *Ib.*

A. bought coal of B., to be shipped in a ship chartered by A., payment in cash against bill of lading in the hands of B.'s agent. Before shipment A. sold to C., and at the time of both sales the coal was unascertained. The coal was shipped, and three bills of lading signed for delivery to A. or order; one only was stamped and retained by B., another was sent to A. Not being paid, B. sent the stamped bill of lading to D., and the captain delivered the coal to him:—Held, that C. had no right of action against D. *Moakes* v. *Nicolson*, 19 C. B. (N.S.) 290; 34 L. J., C. P. 273; 12 L. T. 573.

Where the consignor of goods abroad advised the consignee by letter that he had chartered a ship on his account, and inclosed him an invoice of the goods laden on board, which were therein expressed to be for account and risk of the consignee, and also a bill of lading, expressing the delivery to be made to order, &c., he paying freight for the goods according to charterparty; and the letter of advice also informed the consignee that the consignor had drawn bills on him at three months for the value of the cargo:—Held, that the invoice and bill of lading sent to the consignee, and the delivery of the goods to the captain, vested the property in the consignee, subject only to be divested by the consignor's right to stop the goods in transitu in case of the insolvency of the other. *Walley* v. *Montgomery*, 3 East, 585; 7 R. R. 526.

The consignor's agent having obtained possession of the cargo under another bill of lading, and having refused to deliver it up unless the consignee would make immediate payment, which he declined doing, but offered his acceptances at three months in the manner before stipulated:—Held, that the consignee might maintain trover against such agent without having tendered payment of the freight either to him or the captain, the agent having possessed himself of the goods wrongfully. *Ib.*

Jus disponendi Reserved.]—B. sold to A. wheat, the price to be paid by bankers' draft on London at two months, to be remitted on receipt of invoice and bill of lading, which B. shipped by order of A., to be carried to M., for the account and at the risk of A., there to be delivered to A.; B. delivered the wheat to the master of the vessel, who took possession of it; the master signed a bill of lading to deliver the wheat to the order of B., who indorsed such bill of lading to A., and made an invoice, and sent the invoice and bill of lading to A. in a letter, requiring A. to remit in course, which letter, with the invoice and bill of lading, was received by A. A. having received the bill of lading and invoice, and having failed to remit the bankers' draft, B. assumed to revoke and rescind the sale, and caused the wheat to be stopped in its passage to A.:—Held, that, by the delivery of the wheat to the master of the vessel, for the account and at the risk of A., and the transmission of the indorsed bill of lading, B. had so parted with the property and right of possession as not to be entitled to intercept the delivery. *Wilmhurst* v. *Bowker*, 7 Man. & G. 882; 8 Scott (N.R.) 571; 12 L. J., Ex. 475—Ex. Ch.

The plaintiff, a merchant at Leeds, contracted with the London partner of a firm carrying on business as merchants at London and Odessa for the purchase of linseed, to be paid for half by drafts on the buyer, at three months from the time of advice of the sale reaching Odessa, and the remainder at three months from the date of shipment. The London partner forwarded the contract to the Odessa partner, and the latter drew upon the plaintiff two bills of exchange on account of the linseed, which were accepted and paid when due. In order to fetch the linseed the plaintiff chartered a vessel, which was to proceed with an outward cargo to Odessa, and there take on board, from the agents of the freighter, the linseed, and, being loaded, proceed to Hull, and deliver the same to the order of the freighter on being paid freight. The vessel having arrived at Odessa, the master applied for the linseed, and produced a copy of the charterparty, when he was informed that the cargo should be shipped in time. A letter was also sent by the Odessa partner to the London partner, informing him of the arrival of the vessel, and stating that a portion of the linseed was ready for her. The Odessa house commenced loading the vessel, but not being able to procure the entire quantity of linseed, the master consented to receive wheat in substitution, which was accordingly shipped. When the loading of the linseed was completed, the Odessa partner wrote to the London partner, stating that he should have the bill of lading by the next post. The Odessa partner afterwards procured the master to sign bills, making the goods deliverable "unto order or to assigns," and indorsed the bills of lading for value to a third person, who transferred them to the defendant:—Held, that there was no such delivery of the goods as to vest the right of property or possession in the plaintiff. *Ellershaw* v. *Magniac*, 6 Ex. 570.

B. & Co., merchants at Liverpool, sent orders to M. & Co., merchants of Charleston, to ship on account of B. & Co. cotton for the homeward voyage of their ship the "Charlotte." M. & Co. accordingly made considerable purchases of cotton, and shipped it on board the vessel of B. & Co. The master signed the bill of lading of the cotton to be delivered at Liverpool, "to order, or to our assigns, paying for freight for the cotton nothing, being owners' property," and M. & Co. indorsed the bill of lading, "Deliver the within to the bank of Liverpool, or order." M. & Co. informed B. & Co. that they had drawn bills upon them for the cargo on their account, by the "Charlotte," and desired them to insure the cotton. M. & Co. also sent to B. & Co. an abstract invoice, which stated that the cotton was shipped by M. & Co. on board the "Charlotte" for Liverpool, "by order and for account of B. & Co. there, and addressed to order." M. & Co. afterwards sent a full invoice, stating that the cotton was shipped for Liverpool "by order and for account of B. & Co. there, and to them consigned." M. & Co. not having sufficient funds of B. & Co. to pay for the cotton, sold the bills to a bank at Charleston, and delivered to the bank the bill of lading so indorsed, as a security for payment of the bills, which were dishonoured and taken up by M. & Co. B. & Co. became bankrupts before the arrival of the vessel, and on its arrival M. & Co. by their agent claimed to stop the cargo in transitu, and it was afterwards stowed in the warehouse of the defendants:—Held, first, that the property in the cotton did not vest absolutely in B. & Co., notwithstanding the delivery on board their ship, for by the terms of the bill of lading M. & Co. reserved to themselves a jus disponendi of the goods which the master acknowledged by signing the bill of

lading, making the cotton deliverable to their order or assigns, although by so doing the master might have exceeded his authority. *Turner* v. *Liverpool Docks*, 6 Ex. 543 ; 20 L. J., Ex. 393—Ex. Ch.

Held, secondly, that M. & Co. did not by their indorsement and delivery of the bill of lading to the bank, divest themselves of their property in or possession of the goods. *Ib.*

When by a bill of lading goods are made deliverable to the shipper, or his order, and not to the consignee, the jus disponendi, or control over the property in the goods shipped, remains with the shippers, although the invoice states that the goods were shipped "on account of and at the risk of" the consignee ; such statement being not conclusive, of itself, that the right to the possession of, as well as the property in, the goods was intended to be unconditionally passed to the consignee. *Shepherd* v. *Harrison*, 40 L. J., Q. B. 148 ; L. R. 5 H. L. 116 ; 24 L. T. 857 ; 20 W. R. 1 ; 1 Asp. M. C. 66.

The burthen of showing the existence of a different state of things lies on the person who contradicts what would be the ordinary legal conclusion from the transaction. *Ib.*

When a vendor for his own protection takes and keeps a bill of lading making the goods sold deliverable to his own order, and the goods are deliverable by the contract of sale on certain conditions, the vendor thereby preserves a hold over the goods until the conditions are fulfilled and the bill of lading handed over, or until the vendee offers to fulfil the conditions ; and such a hold confers, not only a right to the possession of the goods, but also a power to dispose of them, at least so long as the vendee continues in default. *Ogg* v. *Shuter*, 45 L. J., C. P. 44 ; 1 C. P. D. 47 ; 33 L. T. 492 ; 24 W. R. 100 ; 3 Asp. M. C. 77—C. A.

Imperfect Assignment by Indorsee.] — The delivery of a bill of lading indorsed puts it in the power of the indorsee to transfer the property to a bonâ fide purchaser for a valuable consideration, and deprives the original owner of any right of stoppage in transitu ; but, as between the original parties, the consignor and consignee, the question, whether the property passed, will depend upon what the real contract was. *Jenkyns* v. *Usborne*, 8 Scott (N.R.) 505 ; 7 Man. & G. 678 ; 13 L. J., C. P. 196.

A., of London, had ordered beans of B. & C., of Leghorn, through D., their agent. B. & C. shipped more than the quantity ordered, and drew two bills on A.—one for the quantity ordered, and the other for the residue ; and they transmitted those bills to A. through D., with a letter of advice and an indorsed bill of lading for the whole cargo. A. accepted the bill for the beans ordered, but declined to take the residue or to accept the bill drawn against them. D. consented to take the residue, and A. thereupon wrote a letter to him acknowledging such residue to be his, and inclosed an order to the captain to deliver them to D. D. thereupon handed over the bill of lading to A. D. accepted the bill drawn against the residue of the cargo, and paid it at maturity. Before the arrival of the ship D. sold the residue to E., who accepted a bill for the amount drawn by B., who happened to be in London, and handed to E. A.'s letter and delivery order. E. afterwards applied to F. for an advance of cash, and handed over to him such letter and delivery order ; and F. gave his acceptance to E. for the amount of cash required. Before E.'s acceptance became due, and before the arrival of the ship, E. stopped payment :—Held, that D. might stop the residue not taken by A. in transitu, and that the delivery order given by A. was not equivalent to a bill of lading. *Ib.*

Where no Property in Indorser.]—Unless the indorser of a bill of lading really and bonâ fide has property in the goods at the time of indorseing it, the Bills of Lading Act (18 & 19 Vict. c. 111) passes no property to the indorsee, and upon the intervention of the true owner the latter is entitled to receive the goods from the shipowner, who is thereupon relieved from the liability of delivering them according to the bill of lading. *Finlay* v. *Liverpool and Great Western Steamship Co.*, 23 L. T. 251.

Knowledge of Assignee of previous Transfer.] —If A. has an equitable title to goods on board a ship, and B., knowing of such a title, gets an indorsement of the bill of lading, he cannot recover such goods in an action of trover, but the captain will be justified in delivering the goods to A. *Dick* v. *Lumsden*, Peake, 251.

Wrongful Delivery under, by Captain.]—The consignor of goods abroad, upon a receipt of orders from a correspondent here, shipped goods on account and at the risk of the consignee, and took bills of lading from the captain making the goods deliverable to the consignor's own order, and transmitted one of such bills unindorsed with the invoice to the consignee, inclosed in a letter, informing him that he had drawn upon him for the amount, which he doubted not would meet due honour, and close the account, and the consignor, by way of precaution, also sent another bill of lading indorsed to his own agent :—Held, that upon the shipment, on account and at the risk of the consignee, the property in the goods vested in him, subject only to be divested by the consignor's stopping them while in transitu, and that upon the arrival of the goods, the consignee having obtained possession of them from the captain by the production of his indorsed bill of lading, the property became absolute in the consignee, however wrongfully parted with by the captain without authority from the shipper, and however liable the captain might be to him on that account. *Coxe* v. *Harden*, 4 East, 211 ; 1 Smith, 20 ; 7 R. R. 570.

London Dock Company—Delivery of Wine—Legal Owner or Holder of Bill of Lading.]—By a printed regulation of the London Dock Company orders for delivery cannot be acted upon unless signed by the party in whose name the goods stand in the company's books, or by a person duly authorised, in writing under the hand of the principal, to sign them. Wine was entered in the books of the company in the name of S., clerk to W., but the bills of lading were in the hands of H., the consignee of the wine. The wine not having been approved by W., H. agreed to take it back, and applied to W. to return a part of it ; but W. refused to do so until his acceptance for the wine should be returned to him. H. then exhibited the bills of lading to the company, which informed W. that it would deliver the wine to H. unless it should be restrained from so doing. W. and S. thereupon filed a bill against the company and H. for an

injunction to restrain the company from delivering the wine to H. without the written order of W. and S., or one of them, and praying that the company and H. might be ordered to pay the costs of the suit:—Held, that as the legal title to the wine was in H. by virtue of the bill of lading, the company was entitled to its costs, which, under the circumstances of the case, were ordered to be paid equally by W. and S. and H., W. and S. and H. also bearing their own costs equally. *Wright* v. *London Dock Co.*, 5 Jur. (N.S.) 1411—L.JJ.

"Passing of Property" in Goods—Indorsement by Way of Pledge.]—The mere indorsement and delivery of a bill of lading by way of pledge for a loan does not pass "the property in the goods" to the indorsee, so as to transfer to him all liabilities in respect of the goods within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), s. 1. *Sewell* v. *Burdick*, 54 L. J., Q. B. 156; 10 App. Cas. 74; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376—H. L. (E.)

Goods were shipped to a foreign port under bills of lading making the goods deliverable to the shipper or assigns. After the goods had arrived, and been warehoused, the shipper indorsed the bills of lading in blank, and deposited them with the indorsees as security for a loan. The indorsees never took possession of or dealt with the goods:—Held, that "the property" in the goods did not "pass" to the indorsees within the meaning of the Bills of Lading Act so as to make them liable in an action by the shipowner for the freight. *Ib.*

Liability for demurrage under a bill of lading is imposed on the holder by way of security only who presented the bill and demanded the delivery. *Allen* v. *Coltart*, 52 L. J., Q. B. 686; 11 Q. B. D. 782; 48 L. T. 944; 31 W. R. 841; 5 Asp. M. C. 104.

Adverse Claimants to Goods—Interpleader.]—Captain of ship may file interpleader where parties claim adversely under bill of lading; but otherwise where paramount to it. *Lowe* v. *Richardson*, 3 Madd. 277.

Hypothecation Note—Delivery Order—Property in Goods—Trover—Pledge.]—In an action for wrongfully depriving the plaintiffs of goods, it appeared that the goods had been consigned to England from a colony. The bills of lading provided that the goods were to be delivered to the order of the consignor or his assigns. The consignor drew bills of exchange on the consignee against the consignment, and sold the bills of exchange, with the bills of lading annexed, which he had indorsed in blank, to a colonial bank, who sent them to a bank in London, with a hypothecation note empowering the London bank to sell the goods if the bills of exchange were not accepted or not paid at maturity. The goods arrived in England, and were delivered to the defendants, who were a railway company, to be delivered to the order of the shipowners. The consignee paid the freight and other shipping charges and accepted the bills of exchange, but before the bills became due, he induced the defendants wrongfully to deliver the goods to him without producing a delivery order from the shipowners. When the bills became due the consignee requested the plaintiffs to advance the money and take up the bills. They did so, and received the bills of exchange and the bills of lading from the London bank, and ultimately obtained delivery orders from the shipowners in exchange for the bills of lading. When they presented the delivery orders to the defendants they found that the goods had already been given up to the consignee, and they thereupon commenced the present action:—Held, first, that the plaintiffs must be taken to be pledgees of the goods, and had therefore a property sufficient to entitle them to maintain the action independently of the Bills of Lading Act. Secondly, that the plaintiffs' right of action was not affected by the fact that at the date of the wrongful delivery they had not acquired their title to the goods. *Bristol Bank* v. *Midland Railway*, 61 L. J., Q. B. 115; [1891] 2 Q. B. 653; 65 L. T. 234; 40 W. R. 148; 7 Asp. M. C. 69—C. A.

"Contents Unknown"—No Evidence of Property in Consignee.]—If the bill of lading contains the words "contents unknown," so that it does not amount to a receipt for any goods in particular, it is not by itself evidence either of the quantity of the goods or of property in the consignee. *Haddow* v. *Parry*, 3 Taunt. 305; 12 R. R. 666.

Bill of Lading sent with Bill of Exchange—Conversion of Goods—Measure of Damages.]—A shipload of timber having been consigned to the defendants, the shipper sent the bill of lading and other shipping documents, and also a bill of exchange, to the plaintiffs in the usual course of business, to cover advances made by them to him. The plaintiffs handed the shipping documents and bill of exchange to agents who acted for them and for the defendants. The agents, at the plaintiffs' request, forwarded the bill of exchange to the defendants to be accepted by them. Shortly afterwards the defendants informed the agents that the cargo was out of condition, and that they could not accept it as it then was. The agents replied that the defendants should either return the bill accepted or the shipping documents. This the defendants refused to do, as they had paid part of the freight and intended to take possession of the cargo. Subsequently they stated that they had been compelled by the dock company to remove the cargo, but that, if the agents would repay them the freight and certain charges, and their profits on part of the cargo which they had sold, they would return the shipping documents. The agents replied that the matter must be left in the hands of the plaintiffs, the owners of the cargo. The defendants then returned to the agents the bill of exchange unaccepted, but retained the bill of lading as security against the freight and charges; offering to give it up upon payment of the freight and charges. Thereupon the plaintiffs brought an action against the defendants, claiming that they should be ordered to accept and deliver up the bill of exchange; and a declaration that until such acceptance and delivery they were not entitled to retain the bill of lading; and asking for a receiver, an injunction and damages. The action, owing to the delay of both parties, did not come on for hearing for four years:—Held, that the defendants, having refused to accept the bill of exchange, were bound to return the shipping documents; and that their taking possession of and dealing with the cargo was wrongful; and that the plaintiffs were entitled to damages, namely, the value of the cargo, less freight and

charges of selling part of the cargo; and to further damages in the nature of interest for being kept out of possession of the cargo, at the rate, under the circumstances of delay in the action, of 2½ per cent. *Rew* v. *Payne*, 53 L. T. 982; 5 Asp. M. C. 515.

c. Conditionally—Drawn against Bills of Exchange.

Effect of.]—P. shipped 600 tons of umber upon a vessel chartered for the plaintiff. The bill of lading made the umber deliverable to the order of P. or assigns. The plaintiff insured the umber. A bill of exchange drawn by P. on the plaintiff, which had been discounted by the defendants, to whom the bills of lading had been transferred, having been refused acceptance, a second bill was drawn by P. to the order of C. on the plaintiff, and was given to the defendants in exchange for the first bill, upon the terms that the plaintiff should accept and pay the second bill against the delivery of the bill of lading. The umber and the bill of exchange reached their destination at the same time, but the plaintiff declined to accept the bill. The umber was, therefore, entered at the custom house in the defendants' name. Subsequently the plaintiff tendered the amount of the bill of exchange and demanded the bill of lading, but the defendants refused to give up the bill of lading; the plaintiff offered a guarantee for the freight, which offer was not accepted by the defendants, and they sold the cargo:—Held, in an action by the plaintiff for the value of the umber so sold by the defendants, that the property in the umber passed to the plaintiff, and therefore that the plaintiff was entitled to recover. *Mirabita* v. *Imperial Ottoman Bank*, 47 L. J., Ex. 418; 3 Ex. D. 164; 38 L. T. 597; 3 Asp. M. C. 591.

K. & Co., merchants in New Orleans, purchased with their own money corn, as agents for the plaintiff in England, for the price of which they drew bills of exchange upon the plaintiff, which he accepted. The corn was shipped under bills of lading, making it deliverable to K. & Co. or their order, and invoices and a letter of advice were forwarded to the plaintiff, stating that the corn was shipped on his account. The bills of exchange drawn upon the plaintiff were purchased for their full amount by the defendant, of K. & Co., who indorsed and delivered to them the bills of lading as a security for the due payment of the bills of exchange, with a power of sale in case of non-payment. On the day when the bills of exchange fell due, the plaintiff offered payment to the holder of them, but the bills being accidentally mislaid, the money was not then received, but he was desired to pay the following morning, which he was unable to do: and the bills had never, in fact, been paid. The defendant having sold the corn under the power, the plaintiff brought trover:—Held, that he could not recover, as by the indorsement of the bills of lading to the defendant a special property passed to him in the corn, subject to which the plaintiff had a general property by the invoice and letter of advice, and that the offer of payment by the plaintiff did not discharge the plaintiff from his duty to pay the bills before the right to the possession of the corn attached. *Jenkyns* v. *Brown*, 14 Q. B. 496; 19 L. J., Q. B. 286; 14 Jur. 505.

The plaintiffs, merchants at New York, by direction and on account of B., forwarded to the defendant, a commission agent at Hull, employed by B., the invoices and bills of lading of two cargoes, against which they drew upon the defendant bills which he accepted and paid. The defendant sold the cargoes, which did not realise enough to cover his acceptances. The plaintiffs afterwards, and by direction of B., forwarded to the defendant the invoice and bill of lading of another cargo which had been purchased by B. with money supplied by the plaintiffs, and the bills of lading of which had been specially indorsed to them as a security, and were by them specially indorsed to the defendant; the plaintiffs at the same time stating that they had, by direction of B., drawn upon the defendant for part of the price. The defendant, without knowing that the plaintiffs had made advances to B., took the bill of lading, disposed of the cargo, and placed the proceeds to the credit of B.:—Held, that the defendant was not bound as between himself and the plaintiffs to accept the bills drawn against the last cargo, because no privity could arise between the plaintiffs and the defendant except by express contract, and the indorsement of the bill of lading by the plaintiffs to the defendant, and his receiving it and disposing of the cargo, did not, under the circumstances, create such a contract. *Depperman* v. *Hubbersty*, 17 Q. B. 767.

A. consigned goods to B. abroad, and ordered a cargo in return, for which he sent his own ship. The return cargo was delivered to A.'s captain, B. stating it to be "on A.'s account, as A.'s own goods, and to be delivered to A." The return cargo consisting of more goods than the proceeds of those consigned to B., B. drew bills on A. for the difference, which he sent to his agent with a bill of lading drawn in blank, and desiring the agent, in case of A.'s refusal to accept the bills, to indorse the bill of lading to C.; A. refused to accept the bills, and the bill of lading was accordingly indorsed to C. The ship arrived, and C. demanded the cargo, as indorsee of the bill of lading; the captain, however, refused, and delivered them to A., who deposited them with D. as his warehouseman; D. then received notice from B. to hold the goods for B. as his property; in consequence of which D. refused to redeliver them to A. In an action of trover by A. against D.:—Held, that D. was not estopped by having received the goods as warehouseman of A. from setting up the claim of a third person as a defence, supposing that claim to be a good one, and that though the goods might have been delivered to the captain, on condition of A.'s accepting the bills, yet, as no such condition was imposed at the time of the delivery, that the delivery was complete, and vested the property absolutely in A. *Ogle* v. *Atkinson*, 1 Marsh. 323; 5 Taunt. 759; 15 R. R. 647.

A continental bank, having contracted to sell and ship 1,400 quarters of rye, to be paid for by an acceptance at three months, put the rye on board the "Agatha." The vessel proved to be capable of containing from 200 to 300 quarters more grain than the quantity shipped, and therefore the bank filled up the vacant space with maize. One bill of lading only was given for the cargo, and the bank wrote on the 24th April to the purchasers, with the invoices and drafts: "The maize is on the same bill of lading as the rye . . . as there would, no doubt, be a loss on the maize, we presume you will wish to leave it

for account of shippers; but if you will accept the bill we will get an undertaking from the bank to hold you harmless for so doing." The purchasers, who had made a sub-sale of the cargo, replied: "The drafts and invoices of this cargo are to hand, and we observe that the bills of lading are in the hands of the . . . bank. We think . . . we are entitled to ask a guarantee from the bank that the 'Agatha' shall deliver the weight specified in the invoice. Would you have the kindness to ask the bank for this, and telegraph to us . . . their acquiescence, or the contrary. We would be obliged also by a copy, or the original, of the charterparty, and copy of the bill of lading for our government. We leave, as you suggest, the maize to the shippers; the transaction in rye is a very bad one. We return you inclosed draft invoices of maize." On the 8th May the purchasers refused to accept the bill of exchange for the rye, upon the ground that the bank had not given them a proper bill of lading. In an action for such non-acceptance:—Held, that the purchasers had, by a new agreement, waived any objection to the bill of lading in respect of the maize being included therein, and were therefore liable. *Imperial Ottoman Bank* v. *Cowan*, 31 L. T. 336—Ex. Ch.

In 1845 the defendants, commission agents in London, wrote to the plaintiffs, merchants at Madras, as follows: "At the request of K. and L. of Glasgow, we beg to open a credit in your favour to the extent of 1,500*l.*, to be applied to the execution of an order they have given you for Madras handkerchiefs, and for costs of which, as produced, you draw on us at the customary date, on forwarding bills of lading to our order." In consequence of this letter, two orders given by K. and L. were executed by the plaintiffs, who forwarded the goods and bills of lading to the defendants, and they accepted and paid bills drawn on them in accordance with the letter. In February, 1847, K. and L. wrote to the plaintiffs, inclosing patterns for a third order, and saying, "You will draw for cost, and consign goods as before." The plaintiffs executed this order, and on the 21st of August shipped the goods on account of K. and L., and sent to the defendants the invoice and bill of lading inclosed in a letter, saying, "We have, as usual, drawn upon you at six months for the equivalent of the amount of invoice." The bill of lading stated the goods to have been "shipped by the plaintiffs, and to be deliverable to the defendants or their assigns, on payment of freight." The invoice stated that the goods were consigned to the defendants on account and risk of K. and L. The letter containing the bill of lading and invoice was received by the defendants on the 26th of August, and the goods arrived in London on the 21st of October. On the same day the plaintiffs' agent received a bill drawn against the goods, and presented it to the defendants for acceptance, but they refused to accept it. On the 27th of October K. and L. stopped payment. The goods were received by the defendants under the bill of lading, and sold, and the proceeds retained by them. On the 4th of March, 1848, the plaintiffs gave the defendants notice that they claimed to stop the goods in transitu, the defendants having refused to accept the bills; and the plaintiffs subsequently brought an action to recover the proceeds of the sale:—Held, first, that it was a question for the judge, and not for the jury, to decide whether, under the circumstances, the property in the goods vested absolutely in K. and L., or merely conditionally on the acceptance of the bill by the defendants. *Key* v. *Cotesworth*, 7 Ex. 595; 22 L. J., Ex. 4.

Held, secondly, that the contract was not subject to the condition, either precedent or subsequent, that the defendants should accept the bill, but that the property in the goods vested absolutely in K. and L. upon the delivery on board the ship, and transmission of the bill of lading to the defendants. *Ib.*

Held, also, that if the plaintiffs had intended to preserve their right of property in the goods until the bill was accepted, they should have transmitted the bill of lading indorsed in blank to an agent, to be delivered over only in case the bill was accepted. *Ib.*

Representation that Bills would be Accepted—Right to Bills of Lading.]—An agent and manager of a London firm, who resided in Sweden, assured a merchant there about to draw bills on that firm that the bills would be accepted; whereupon bills of lading for timber were sent to the London firm and bills were drawn against them:—Held, that this assurance, though acted on, was not to be treated as equivalent to an acceptance of the bills, so as to vest in the London firm legal rights as from the time of the assurance given. *Hoare* v. *Dresser*, 7 H. L. Cas. 290; 28 L. J., Ch. 611; 5 Jur. (N.S.) 371; 7 W. R. 374.

Part of the timber did not arrive; the agent having obtained the shipping documents from a purchaser to whom he had sold it, and who had accepted the bills, by stating that he would return them, which he did not do:—Held, not entitled to retain them, he having misled the purchaser into accepting the bills. *Ib.*

Carrier Setting up Jus tertii.]—A., who resided at Manchester, contracted to buy of B. at Dumfries a quantity of oak-bark, to be shipped for delivery at Liverpool. B. accordingly shipped the bark, to be delivered at Liverpool to the defendants, who were wharfingers and carriers there, to be by them forwarded to A. at Manchester. The bark was to be paid for in cash, and B. sent a bill of lading, making it deliverable to A. or his assigns, together with a bill of exchange payable on demand, through his bankers, to the Manchester and Salford Bank, with instructions to present the bill for acceptance. The bank at Manchester was unable to find A., and accordingly they returned the bill of lading and draft to B. Before the bill of lading had been so returned, B., who was at Liverpool when the bark arrived there, believing, from the representations of an agent of the plaintiff (who had bought the bark of A.), that the bill of lading had been duly handed over to A., assented to the bark being delivered to the defendants for the purpose of its being carried to Manchester for the plaintiff; but, upon subsequently discovering that A. had not got the bill of lading or paid for the bark, B. claimed and received it from the defendants:—Held, that, under the circumstances, the property in the bark never passed to A., and consequently that B. had a right to countermand the delivery; and that it was competent to the defendants, notwithstanding that they had received the bark, to be carried for the plaintiff, to set up the title of B. in an action brought against them by the plaintiff. *Sheridan* v. *New Quay Co.*, 4 C. B. (N.S.) 618; 28 L. J., C. P. 58; 5 Jur. (N.S.) 248.

Accompanying Bills of Exchange.]—When a bill of lading, and a bill of exchange to cover the goods included in the bill of lading, are sent in a letter to a vendee of the goods, it is a well-understood rule that the bill of exchange must be accepted, or the bill of lading cannot be retained. *Shepherd* v. *Harrison*, 40 L. J., Q. B. 148; L. R. 5 H. L. 116; 24 L. T. 857; 20 W. R. 1; 1 Asp. M. C. 66—H. L. (E.)

When the bill of exchange is not accepted, but the bill of lading is retained, the bill of lading, acquired in that manner, gives no right of property to the person so acquiring it. *Ib.*

It is not necessary for the shipper to advise the consignee expressly that he is not to use the bill of lading unless he accepts the bill of exchange. *Ib.*

Where A. having sent orders to his correspondents abroad to ship cargoes of wheat, afterwards withdrew his orders, but his correspondents, nevertheless, shipped a cargo of wheat on his account and at his risk, sending with it an indorsed bill of lading enclosed to A., informing him of their having drawn bills on their agents in town for the amount, and requesting him to furnish funds for their acceptance, which bills were afterwards dishonoured, A. giving orders not to accept them:—Held, that no property vested in A. to enable him to receive the goods, he not having accepted the bills drawn upon the agents in town. *Brandt* v. *Bowlby*, 2 B. & Ad. 932; 1 L. J., K. B. 14.

Proof in Bankruptcy—Amount Due on Bills.]—A party accepted bills to meet goods consigned to him. The acceptances were made payable "on delivery of the bills of lading." The bills of lading remained, with the bills of exchange, in the possession of the bank who had discounted the latter for the drawers:—Held, on the bankruptcy of the acceptor, that the goods were part of his estate, which the bank held as security for their debt, and therefore that the bank could only prove for the amount due on the bills of exchange after deducting the value of the goods. *Brett, Ex parte, Howe, In re*, 40 L. J., Bk. 54; L. R. 6 Ch. 838; 25 L. T. 252; 19 W. R. 1101.

Right on Transfer.]—Corn merchants in California agreed to send cargoes of wheat to a miller in England, the reimbursement to be by his acceptance against bill of lading. The corn merchants shipped a cargo, and made out the bill of lading in six parts. Three parts, with corresponding bills of exchange drawn on the miller for the price of the cargo, were indorsed by the corn merchants, and transferred to a Californian bank for valuable consideration. These bills of exchange were, with the bills of lading annexed, accepted by the miller. One indorsed part of the bill of lading was inadvertently sent by the corn dealers to the miller, and by him transferred to an English bank for valuable consideration. The bills of exchange were not met by the miller:—Held, that the corn merchants were entitled to deal as they did with the cargo by transferring the bills of lading; that the English bank could not, under the circumstances, claim as holders of the bill of lading without notice; and that the English bank had no priority. *Gilbert* v. *Guignon*, L. R. 8 Ch. 16; 27 L. T. 733; 21 W. R. 281; 1 Asp. M. C. 498.

Stoppage in transitu—Bill of Lading, to what Extent Negotiable.]—B., a Dantzic merchant, sold wheat to W., an Amsterdam merchant, to be paid for by drafts, to be drawn by B. on C., a London merchant, against bills of lading. W. was in fact, though that was not disclosed to B., acting for P., another London merchant. W. wrote to C., opening a credit on account of P., in favour of B., to be drawn on against bills of lading, P. to be debited with the amount. B. forwarded a bill of lading, indorsed by him in blank to C., in a letter, stating that, "according to instructions from W., we hand you bill of lading, and request you to follow his instructions respecting the document, by whose order and for whose account we draw on you; which draft we recommend to your kind protection." On the day after C.'s receipt of this letter, the draft was left with C. for acceptance; P. on the same day, being in actual possession of the bill of lading, pledged it with G., who bonâ fide gave value for it. On the evening of the same day P. was arrested on a criminal charge, and he afterwards became bankrupt. W. also failed. B. stopped the cargo in transitu. G. brought trover against him for the cargo:—Held, that B., primâ facie, had the right to stop in transitu, and that G., though a bonâ fide transferee for value of the indorsed bill of lading from P., was not entitled to the cargo, unless P. had not merely possession of the bill of lading, but a right to transfer it, inasmuch as bills of lading are not negotiable to the same extent as bills of exchange. *Gurney* v. *Behrend*, 3 El. & Bl. 622; 23 L. J., Q. B. 265; 18 Jur. 856; 2 W. R. 425.

But held, that C. was entitled to hand over the bill of lading to P., the letter from B. not imposing any condition to prevent C. from doing so. *Ib.*

By a bill of lading, goods were deliverable to S. if he should accept and pay a bill of exchange; if not, to the holder of the bill of exchange; S. accepted the bill, and indorsed the bill of lading for a valuable consideration, but did not pay the bill when due:—Held, that upon its dishonour the property in the goods vested in the holder of it, and that he might maintain trover for the goods against the indorser of the bill of lading. *Barrow* v. *Coles*, 3 Camp. 92; 13 R. R. 763.

Appropriation of Policy Moneys.]—Bills were drawn against cotton consigned to England. The cotton was hypothecated, by means of a letter in favour of a bank which bought the bills; at the same time bills of lading and a policy were handed to the bank. The letter contained a power to keep insured, and a power to sell the cotton in case of non-payment, and to apply any balance, after satisfaction of the bills, towards other debts due from the consignor to the bank:—Held, that money received on the policy could not be applied in payment of anything beyond what was due on the bills. *Latham* v. *Chartered Bank of India*, 43 L. J., Ch. 612; L. R. 17 Eq. 205; 29 L. T. 795; 2 Asp. M. C. 178.

Other Conditions—Authority of Captain.]—The plaintiffs were indorsees for value of bills of lading indorsed to them for value by M. under the following circumstances:—The defendants had agreed to buy of M. all the ore of a certain mine, the ore to be shipped at a Spanish port by him, f. o. b., on vessels chartered by the defendants or by him, and to be paid for by bills of

exchange against bills of lading on the execution of a charter, and on a certificate that there was enough iron in dock to load the vessel chartered. On being so paid for, the ore was to be the property of the defendants. Some cargoes of the ore having been taken, and all of it paid for, the "Trowbridge," a vessel chartered by the defendants, was loaded with ore by M., who had, however, no intention to ship it for them, and previously informed them thereof. He then presented to the captain the bills of lading, which stated that the shipment was by S., and made the cargo deliverable to the order of S.; but no such person as S. existed. The captain, being bound by the charter to sign bills of lading as presented, signed the bills. M. indorsed the name of S. and his own name on the bills of lading, and then pledged them to the plaintiffs:—Held, that they were entitled to the ore represented by such bills. *Gabarrow* v. *Kreeft*, 44 L. J., Ex. 238; L. R. 10 Ex. 274; 33 L. T. 365; 24 W. R. 146; 3 Asp. M. C. 36.

Another vessel, the "Macedonia," having been also sent by the purchasers of the ore, under a charterparty, by which the shipowner agreed to deliver the cargo to the freighters or assignees, but which did not authorise the captain to sign bills of lading as presented, she was loaded by M., who at the commencement of the loading intended that it should be in fulfilment of his contract. He, however, obtained bills of lading as in the former case, and indorsed them to a third person, to whom the cargo was delivered. In an action by the purchasers of the ore against the shipowner for non-delivery of the cargo to them, according to the charterparty:—Held, that as the cargo had been delivered according to the bills of lading, the defendant was not liable. *Ib.*

6. Pledging.

By Owners of Ship and Cargo.]—The owner of a vessel, and part owner of the cargo, sanctioning a pledge by his partners of the bills of lading, which were signed for the delivery of the goods on payment of freight, pledges the goods and the freight of them together, unless the freight is expressed to be excepted. *Grote* v. *Milne*, 4 Taunt. 133.

Effect of, on Stoppage in transitu.]—*See cases* post, col. 570.

Pledge by Holder of Bill of Lading of Goods belonging to Third Party.]—B., having sold 500 sacks of flour to H., consigned them to him by sea, with 500 more to sell on commission. The captain of the vessel executed and handed to B. two duplicate bills of lading, expressed to be "to order or assigns"; and one of them having been forwarded by B. to H. unindorsed, the latter, on the 9th February, 1878, deposited it with a discount company (who carried on business in the same town as himself) to secure an advance of 600*l.* then made to him. On the 11th February H., who, in the meantime, and without informing B. of the transaction of the 9th, had obtained from him the duplicate bill of lading duly indorsed, deposited it also with the company, at whose instance he, on the 13th, further executed to them a letter of lien, antedated the 9th, upon the whole cargo, in respect both of the 600*l.* advance and of about 800*l.*, the amount of certain bills of exchange previously discounted for him by the company, and just reaching maturity. The vessel arrived shortly afterwards, and the company discovered that H. was owner of only half the flour, whereupon B., having brought an action to have his own half relieved from the company's lien:—Held, that the plaintiff was entitled to the relief sought. *Blake* v. *Belfast Discount Co.*, 5 L. R., Ir. 410.

See also *Glyn, Mills & Co.* v. *East and West India Docks Co.*, col. 351.

7. Lien of Shipping Agent.

A shipping agent, having a lien on the bill of lading of goods which he has shipped, may, if the lien is not satisfied before they have reached their destination, have the goods brought home in order to retain his lien on them, and is not liable to an action for so doing. *Edwards* v. *Southgate*, 10 W. R. 528.

8. Forged.

Bills of Exchange Accepted in Respect of—Rights of Acceptor.]—A cotton broker of New Orleans was in the habit of sending cotton over to England, and the plaintiff was in the habit of accepting his bills, in consideration of the assignment to him of bills of lading for the cotton. In 1870, in the course of this business, a bank, to whom two bills of the cotton broker on the plaintiff were indorsed, sent them for the plaintiff's acceptance, and with the bills they sent a memorandum, "The bank holds bills of lading for 504 bales of cotton." The plaintiff thereupon accepted the bills, and retiring them before they became due received the bills of lading, and went to the captain of the ship on his arrival and presented the bills of lading, which turned out to be forgeries:—Held, that, notwithstanding the representation contained in the memorandum sent by the bank, the plaintiff could not call on the bank to repay him the value of the bills. *Leather* v. *Simpson*, 40 L. J., Ch. 177; L. R. 11 Eq. 398; 24 L. T. 286; 19 W. R. 431; 1 Asp. M. C. 5.

A bank presented a bill of exchange to the drawees for their acceptance, accompanied by a ticket representing that the bank held bills of lading to cover it. The drawees thereupon accepted the bill, relying on the statement that the bank held bills of lading, which both parties thought to be genuine. The bills of lading had been forged by the drawer of the bill of exchange:—Held, that the drawees were not entitled to demand from the bank genuine bills of lading before paying the amount of the bill of exchange. *Baxter* v. *Chapman*, 29 L. T. 642; 2 Asp. M. C. 170.

XIII. FREIGHT.

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See also XI. CHARTERPARTY; XII. BILL OF LADING.

1. NATURE OF.

Admissibility of Evidence to Explain.]—Evidence is not admissible to explain the meaning of the word "freight," which is not an ambiguous term. *Krall* v. *Burnett*, 25 W. R. 305.

What it is.]—Freight is the reward payable to a carrier for the safe carriage and delivery of goods. It is payable only on safe carriage and delivery. If the goods are safely carried, the master has a lien on the goods for the amount of the freight due for such carriage, and cannot be compelled to part with the goods till such freight is paid. *Kirchner* v. *Venus*, 12 Moore, P. C. 361; 5 Jur. (N.S.) 395; 7 W. R. 455.

Freight, for many purposes, is considered as part of the ship, inseparably appurtenant thereto. *Willis* v. *Palmer*, 7 C. B. (N.S.) 340; 29 L. J., C. P. 194; 6 Jur. (N.S.) 732; 2 L. T. 626; 8 W. R. 295.

The term "freight," in common parlance, is ambiguous, and may mean a sum of money to be paid at all events upon the taking of goods on board to be carried on a voyage, in lieu of the expectation of earning freight upon the contingency of the ship's arrival. *Andrew* v. *Moorhouse*, 5 Taunt. 435; 1 Marsh. 122; 15 R. R. 544.

On Shipowner's Own Goods.]—Where the owner of a ship is also the owner of the cargo on board, no freight can be earned by the voyage, and therefore where an owner of a ship and cargo had bills of lading drawn reserving a nominal freight, on the security of which he obtained certain bills of exchange:—Held, that the acceptors of the bills had no claim against the produce of the sale of the cargo. *Cellier* v. *Hinde*, 17 L. T. 341; 16 W. R. 184.

Though freight may not be payable in respect of a man's own goods conveyed in his own ship, it becomes so if he makes third persons, who have advanced him money, the consignees of those goods, and the goods are by the bill of lading deliverable to their order. *Wequelin* v. *Cellier*, 42 L. J., Ch. 758; L. R. 6 H. L. 286; 22 W. R. 26.

Nominal.]—Goods, which by the terms of the bill of lading have been carried upon a nominal amount of freight, can be lawfully demanded by the holder of the bill of lading, on payment of that amount. *Keith* v. *Burrows*, 46 L. J., C. P. 801; 2 App. Cas. 636; 37 L. T. 291; 25 W. R. 831; 3 Asp. M. C. 481—H. L. (E.)

The owner of a ship cannot, by his subsequent acts, give to his mortgagees, as against the holder of a bill of lading, rights different from those possessed by himself under it. *Ib.*

2. WHEN PAYABLE.

a. Generally.

Legality.]—A vessel freighted from Dantzic to London was, on her arrival, and after a delivery of part of her cargo, seized by the revenue officers on suspicion that she was not Prussian built; the treasury on petition ordered the ship to be restored on condition that the cargo should be exported, and on payment of 50*l.* as a satisfaction to the seizing officers:—Held, that this was sufficient to show that the voyage was illegal without condemnation; and that, although the freighters afterwards accepted and exported the cargo according to the terms of the order, the master was precluded from recovering freight. *Blanck* v. *Solly*, 1 Moore, 531; Holt, 554; 19 R. R. 469.

Payable on Completion of Voyage.]—Freight cannot be recovered on a charterparty, unless the stipulated voyage has been actually performed; and there is no implied promise to pay a compensation for carrying goods a part of the vogage, unless they are voluntarily accepted at a place short of the port of destination. *Osgood* v. *Groning*, 2 Camp. 466; 11 R. R. 765.

Although freight should be made payable by the shipper on the shipment of the goods, it is not merely on that account earned without a performance of the voyage. *Mashiter* v. *Buller*, 1 Camp. 84. S. P., *Clark* v. *Druisina*, 1 Marsh. 123.

The freight upon a charterparty is not earned until the unloading and delivery of the whole cargo has been completed. *Brown* v. *Tanner*, 37 L. J., Ch. 923; L. R. 3 Ch. 597; 18 L. T. 624; 16 W. R. 882. See also *Metcalfe* v. *Britannia Ironworks Co.*, post, col. 375.

The shipowner gets no freight unless the ship delivers her cargo. *Anon.*, Siderf., pt. 1, 236.

Where Cargo-owner prevents Completion of Voyage.]—The master is entitled to recover his freight, if he has either carried his cargo to its destination, or if he has been precluded from carrying it by the act or default of the owner. *Cargo ex Galam*, 3 N. R. 254; Br. & Lush. 167; 2 Moore, P. C. (N.S.) 216; 33 L. J., Adm. 97; 10 Jur. (N.S.) 477; 9 L. T. 550; 12 W. R. 495.

The whole freight is payable if the owner of the cargo prevents the master of the ship from forwarding the goods from an intermediate port to their destination. *The Soblomsten*, 36 L. J., Adm. 5; L. R. 3 A. & E. 293; 15 L. T. 393; 15 W. R. 591. S. P., *Christy* v. *Row*, 1 Taunt. 300; 9 R. R. 776.

Special Contract—Freight Payable though Ship Lost.]—Freight held to be due from the last port of unlading to the time the ship was cast away, upon the words of the charterparty. *Cullen* v. *Mico*, 1 Keb. 831.

A ship was lost on a voyage from London to the Cape. The bill of lading contained the words "freight for the said goods being paid." The jury found that the shipper had a choice of paying a higher rate on delivery of the goods at the Cape, or a lower rate on shipping the goods in London, and that he had elected to pay the lower rate. In an action for freight at the lower rate, judgment for the plaintiff. *Andrew* v. *Moorhouse*, 5 Taunt. 435; 1 Marsh. 123; 15 R. R. 544.

Additional Freight—Agreement between Charterers' Agent and Master.]—Charterer held liable on an agreement between his agent and the master for additional freight for taking the ship to a loading port other than that for which she was chartered. *Simey* v. *Peter*, 3 Ct. of Sess. Cas. (3rd ser.) 883.

Condition of Cargo preventing Delivery.]—Where cargo cannot be carried to its destination by reason of its condition alone, the shipper cannot refuse payment of freight on the ground that the contract is not performed. *The Fortuna*, Edwards, 57.

Cargo not allowed to be Landed—Freight back to Port of Loading.]—A ship with a general cargo sailed from London for Havre with some petroleum on board. Under the bill of lading the shipowner was to deliver the petroleum at Havre, and it was to be taken out by the defendant within twenty-four hours after arriving at Havre, or ten guineas a day was to be paid for demurrage. On the ship's arriving at Havre, the authorities of the port made the captain take her away in consequence of the petroleum being on board. Thereupon he went to neighbouring ports, but was not allowed to stay there. Returning to Havre, he discharged his general cargo, and no bill of lading having been presented to him, and no application having been made to him for the delivery of the petroleum, he brought it back to London. On the shipowner claiming freight, back freight, demurrage, and expenses:—Held, that he was entitled to freight, back freight, and expenses. Freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, so that, although the petroleum could not be landed at Havre, it was in the port a reasonable time, during which the owner might have received it; and the freight was accordingly earned. *Argos, Cargo ex, Gaudet* v. *Brown*, L. R. 5 P. C. 134; 28 L. T. 745; 21 W. R. 707. Affirming, 42 L. J., Adm. 49. *See also cases*, infra, col. 377.

Special Contract—Freight not Payable unless Ship Return—Ship abandoned as Unseaworthy—Payment for Use of Ship.]—Where the charterparty (to the East India Co.) was so worded that no freight was payable unless the ship returned and discharged her lading; and after being used for two years under the charterparty, she was condemned at Bombay as unfit to return to England:—Held, in chancery, that the company were bound to account for what they had made of the ship, and to pay freight and demurrage. *Edwin* v. *East India Co.*, 2 Vern. 210.

Mahogany Cargo — Delivery of Freight — Measurement—Condition Precedent.]—By charterparty it was agreed that the shipowner should ship a cargo of mahogany at Honduras, and carry it to Norfolk, in Virginia, and there make a delivery of the same according to bills of lading, the freighter covenanting to pay freight on such true delivery at the rate of 3*l.* 8*s.* per ton of 400 superficial feet freight measurement. In an action for non-payment of freight, the defendant pleaded that by usage of the Honduras trade an account for the freight of the cargo, called a freight measurement, should be produced to the freighter by the master or owner on receiving the cargo before freight is payable; and that no such account was delivered by the plaintiff to the defendant. Also, secondly, that it was the duty of the plaintiff to deliver a freight measurement of the cargo, and that he had not done so:—Held, that both pleas were bad, one because evidence of usage could have been admitted at the trial to explain the terms of measurement, and the other because the alleged condition precedent of delivery of an account could not be added to the charterparty. *Gibbon* v. *Young*, 2 Moore, 224; 19 R. R. 510.

Non-payment of Freight—Demurrage.]—See *Moeller* v. *Young*, infra, col. 488.

Hire of Ship for Six Months certain—Ship Captured before Six Months expired.]—A master and part owner of a ship lying at Liverpool by charterparty let the ship to freight for a voyage to Madeira, and thence to Barbados and back to Liverpool, Greenock, or Bristol, with liberty for the freighters to order the ship from Barbados to any other West Indian island except Jamaica, they paying port charges and pilotage dues; the ship to be loaded by the freighters with a cargo for Madeira, to be delivered there according to the freighters' orders, and to take on board there such cargo as the freighters should direct, and to deliver such cargo in Barbados; and to load cargo at Barbados to be carried to Liverpool, Greenock, or Bristol, and so end the intended voyage; the freighters to pay for hire of the ship 136*l.* 10*s.* per month for six months certain, to commence eight days after she was ready to receive cargo at Liverpool, and to continue until she was discharged at Liverpool, Greenock, or Bristol, together with two-thirds of all pilotage, &c., charges; payment thereof to be made as follows: 136*l.* 10*s.* to be advanced before sailing from Liverpool by three months' bill and port charges and disbursements at Madeira and Barbados to be paid in part of freight; and the remainder of the freight to be paid on discharge at Liverpool, &c. The ship sailed and delivered cargo and took in more at Madeira, and sailed from thence for Barbados on the 9th October. On 10th November she was captured. Part of the freight for the first month had been paid, and the shipowner claimed further freight for goods delivered at Madeira, or for the hire of the ship up to the date of her capture:—Held, that no freight could be recovered. *Byrne* v. *Pattinson*, Abbot on Shipping, 13th ed. 619.

Hire of Ship so long as Efficient—Breakdown of Machinery.]—See *Hogarth* v. *Miller*, infra, col. 388.

Delivery of Goods without receiving Freight—Liability for Freight continues.]—The bills of lading were for delivery to the defendant (the charterer) or his assigns, he or they paying freight. The defendant indorsed them to K.

& Co. specially, upon condition that they would accept, or promise to accept, certain bills of exchange, and would also promise to account with R. & Co., to whom half the cargo belonged, for a moiety of the proceeds, and on their refusal to do so, then to deliver to D. & Co., first obtaining from them a similar promise to accept the bills, and account to the defendant for a moiety of the proceeds. K. & Co. refused, and the cargo was delivered to D. & Co., but no promise was obtained from them. They did, however, pay the bills and account for the defendant's moiety, and gave him credit for the freight; but, notwithstanding, he was still in their debt:—Held, that the defendant was liable to the shipowner for the freight. *Penrose* v. *Wilkes*, stated, 13 East, 570.

In indebitatus assumpsit for freight, it appeared that goods were laden in Jamaica on board the plaintiff's ship, according to a bill of lading which stated them to have been shipped by W. J. on a vessel bound for London on account of the defendant, and that they were to be delivered in London to the consignees, they paying freight for the same at the rate therein mentioned. The goods, &c., shipped were the property of the defendant. The captain having delivered the goods to the consignees without receiving the freight, it was held that the defendant was liable by law to pay the freight to the shipowners, and that independent of any contract by the charterparty. *Domett* v. *Beckford*, 5 B. & Ad. 521; 2 N. & M. 374; 3 L. J., K. B. 10.

Substituted Voyage—Action on Charterparty.]—The plaintiff covenanted that his ship would receive from the freighter's agent at Gibraltar or elsewhere as specified as should be directed by the agent, a cargo, and therewith proceed to London, and there deliver it; and the freighter covenanted to pay freight for the ship for the voyage out and home 550*l.*—200*l.* on clearing outwards, 100*l.* at Gibraltar, a moiety of the rest in cash on delivery of the cargo in London, and the other moiety by a bill at two months from the completion of the delivery. The plaintiff, by direction of the plaintiff's agent, sailed for Cadiz, and from Cadiz to Seville, and there loaded a cargo which, by direction of the plaintiff's agent, he carried to and delivered at Liverpool:—Held, that the plaintiff could not, in an action upon the charterparty, recover the freight covenanted to be paid on delivery in London. *Thompson* v. *Brown*, 1 Moore, 358; 7 Taunt. 656.

Condition precedent or Separate Covenant—Ship "having unloaded at T."]—See *Ohlsen* v. *Drummond*, supra, col. 270. *Shower* v. *Cudmore*, supra, col. 270.

Action for Freight—Money in Court in Foreign Action.]—The freight having been paid into court in Spain by the Spanish consignee of cargo, at the suit of the charterer, quære, whether the shipowner can sue the charterer for freight in England. *Newland* v. *Horseman*, Cas. in Ch., pt. 2, 74.

b. On Transhipment.

Whole Freight Payable.]—The freighter of goods on which freight was to be paid on delivery at the port of destination, is bound to pay the whole freight originally contracted for, where transhipment has been found necessary, and the goods have been delivered at the port of destination, although the master consigned the goods under fresh bills of lading in the second vessel to his own agent, and the freight was at a much lower rate than that originally contracted for. *Shipton* v. *Thornton*, 1 P. & D. 216; 9 A. & E. 314; 8 L. J., Q. B. 73.

If a vessel during her voyage is injured, and is compelled to put into a port of refuge, then, by English law, the master is not bound to tranship. He is allowed a reasonable time, either to repair and carry on or to tranship. If he declines to do either, he may be called upon to deliver without payment of freight; but before a reasonable time has elapsed he cannot be required to deliver, except on payment of full freight and waiver thereof. *The Bahia*, Br. & Lush. 292; 11 Jur. (N.S.) 90; 12 L. T. 145.

Where a vessel is disabled at an intermediate port, the master is allowed a reasonable time to reship and tranship so as to earn his freight. *The Soblomsten*, 36 L. J., Adm. 5; L. R. 1 A. & E. 293; 15 L. T. 393; 15 W. R. 591.

German Law—Vessel Liable to Capture.]—By German law, if a vessel is liable to risk of capture, either party may withdraw from the contract of affreightment; but the master is not obliged to part with the cargo or to tranship it, unless distance freight, as well as all other claims of the shipowner and the contributions due from the cargo for general average, have been paid or secured:—Held, that a demand upon the master to tranship at his own risk and expense was not such a compliance with the German law as obliged him to tranship. *The Express*, 41 L. J., Adm. 79; L. R. 3 A. & E. 597; 26 L. T. 956; 1 Asp. M. C. 355.

Fraudulent Contract by Master.]—Merchants in London chartered the "Planter" to bring a cargo of guano to this country at a freight of 70*s.* a ton. Advances to a considerable amount on account of freight were made by the agents of the charterers to the captain of the "Planter" in South America. After the guano had been shipped, the "Planter," in consequence of sea damage, became incapable of proceeding on her voyage; and the agents of the charterers declining to take upon themselves the transhipment of the cargo to any other vessel for the purpose of its being conveyed to its destination, C., the master of the "Planter," chartered the "Alarm" for that purpose in his own name, and took a bill of lading from the plaintiff, who was the captain, which was made out to him as the shipper, the charterers being named therein as the consignees to whom the guano was to be delivered in this country. In that charterparty C. agreed to pay the same amount of freight as his owners had stipulated for in the original charterparty; but, by a private agreement between himself and the plaintiff he stipulated, that while the 70*s.* per ton should be required of the consignees on the delivery of the cargo, the plaintiff was to keep only 40*s.* per ton as the rate of freight as between him and C., and was to hand the difference to C. The guano having arrived in the "Alarm," the charterers demanded to have the cargo, offering to pay the difference between the amount of freight at the rate which they had contracted to pay by the original charterparty, and the advances which their agents in South America had made to the captain of the "Planter." The plaintiff insisted on the payment of the full freight, viz., 70*s.* per ton After some discussion, the guano was delivered to the charterers, without prejudice to the lien of the plaintiff, if any, for freight:—

Held, first, that the contract made by C. when he chartered the "Alarm" must be considered as a contract entered into by him on behalf of his owners, and not on behalf of the charterers. *Matthews* v. *Gibbs*, 30 L. J., Q. B. 55; 7 Jur. (N.S.) 186; 3 L. T. 551; 9 W. R. 200.

Held, secondly, that if the contract was entered into by C. as agent of the charterers, it was bad on two grounds; first, as being fraudulent, and fraudulent to the knowledge of the plaintiff; and, secondly, as being beyond the limits of any authority which C. could exercise in the position in which he was placed, and therefore the charterers were not bound by it. *Ib.*

c. Pro Ratâ Itineris.

Goods accepted at Intermediate Port.]—A shipowner has no claim to freight pro ratâ itineris peracti, except there is an acceptance of the goods by the shipper at the shorter destination, such that the law will imply a new agreement for freight pro ratâ. *The Newport*, Swabey, 335; 6 W. R. 310—P. C. And see *Osgood* v. *Groning*, ante, col. 368.

No freight is payable if the owner of the cargo is compelled against his will to take the cargo at an intermediate port. *The Soblomsten*, 36 L. J., Adm. 5; L. R. 1 A. & E. 293; 15 L. T. 393; 15 W. R. 591.

To sustain a claim for pro ratâ freight, there must be such a voluntary acceptance of the goods by their owner at an intermediate port, as to raise a fair inference that further carriage of the goods was dispensed with. *Ib.*

In an action on a charterparty, in which the defendant covenanted to pay so much for freight for "goods delivered at A.," freight cannot be recovered pro ratâ itineris if the ship is wrecked at B. before her arrival at A., though the defendant accepted his goods at B. *Cook* v. *Jennings*, 7 Term Rep. 381; 4 R. R. 468.

Goods Sold at Intermediate Port.]—Freight was payable by the terms of a charterparty upon delivery of cargo at the port of destination. The ship meeting with sea damage from heavy weather, the captain at an intermediate port justifiably sold part of the cargo shipped by the charterer, in order to raise funds for the necessary repairs. The cargo so sold realised more than it would have done if carried to the port of destination. The ship, having completed her repairs, proceeded to the port of destination with the remainder of the cargo. A general average statement was afterwards made up, under which the charterer received from the shipowner the amount realised by the cargo sold at the intermediate port. The shipowner claimed from the charterer freight pro ratâ itineris on the cargo so sold:—Held, that he was not entitled to such freight. *Hopper* v. *Burness*, 45 L. J., C. P. 377; 1 C. P. D. 137; 34 L. T. 528; 24 W. R. 612; 3 Asp. M. C. 149.

Where goods damaged on the voyage are landed at an intermediate port and sold without the assent of their owner, the shipowners are not entitled to freight pro ratâ itineris. *Acatos* v. *Burns*, 47 L. J., Ex. 566; 3 Ex. D. 282; 26 W. R. 624—C. A.

To entitle a shipowner, in the absence of a special contract, to demand pro ratâ freight, where the goods have been sold at an intermediate port (being so much damaged as not to be worth forwarding), it must be shown that the owner of the goods had an option of having them sent on or of accepting them at such intermediate port. *Hill* v. *Wilson*, 48 L. J., C. P. 764; 4 C. P. D. 329; 41 L. T. 412; 4 Asp. M. C. 198.

A cargo of rice shipped at Batavia, was by the bill of lading to be delivered at Rotterdam to the plaintiff, he paying freight for the same. The vessel, having encountered a hurricane, was compelled to put into the Mauritius, where the rice, having been found to be damaged and in a state of rapid putrefaction, was, of necessity, sold by the master, who acted bonâ fide, but without the knowledge of either the shipper or shipowner:—Held, that no freight was due, either for the whole voyage or pro ratâ itineris. *Vlierboom* v. *Chapman*, 13 M. & W. 230; 13 L. J., Ex. 384; 8 Jur. 811.

Where freight was to be paid at so much per ton, on a right and true delivery of the homeward-bound cargo, from Honduras Bay to London, and the ship and cargo, after capture and re-capture, having been wrecked at St. Kitt's, into which they were carried by the re-captors, a sale of the cargo was directed by the vice-admiralty courts there, on the application of the master, acting bonâ fide for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the shipowners:—Held, that the freighter might recover such proceeds in an action for money had and received, without allowing freight pro ratâ itineris; for such form of action is only a waiver of any claim for damages for the tortious act, taking the actual proceeds of the sale as the value of the goods (subject to the legal consequences of considering the demand as a debt, which admits of a set-off), but does not recognise the right of the vendor so to convert the goods. And here, the act of conversion (for such it must be taken to be) being made by the master, who is the general agent of the shipowners (and not, as in *Baillie* v. *Modigliani*, 6 Term Rep. 421, by the act of a court of competent jurisdiction), was unlawful, and discharged the claim of the shipowners for freight pro ratâ itineris. *Hunter* v. *Prinsep*, 10 East, 378; 10 R. R. 328. And see *Morris* v. *Robinson*, 5 D. & R. 35; 3 B. & C. 196; 27 R. R. 322.

Delivery at Port as near as Ship could safely get.]—A cargo of railway bars was shipped under a charterparty to be carried from a port in England to Taganrog, in the Sea of Azof, or so near thereto as the ship could safely get, freight to be paid in London against certificate of right delivery of cargo. On the arrival of the ship, on the 17th of December, at Kertch, which was as near as she could then get to Taganrog, the captain found the sea blocked with ice till the ensuing spring; and he proceeded to discharge the cargo, notwithstanding the opposition of the charterers' agent. By the bill of lading the cargo was deliverable at Taganrog to a Russian railway company "freight and other conditions as per charterparty." As no bill of lading was produced at Kertch, the captain placed the cargo in charge of the custom-house authorities; and they on the 27th of December delivered it to the agent of the railway company on his producing a written authority from the company, together with copies of the charterparty and bill of lading, notwithstanding the captain's claim to retain it until the claim was paid. The agent of the company gave a written acknowledgment that he had received the cargo on the power of the

charterparty and bill of lading passed to him by the railway company. The ship then sailed from Kertch. The shipowner having sued the charterers for freight :—Held, first, that he was not entitled to full freight, as the delivery at Kertch was not a delivery within the charterparty. *Metcalfe* v. *Britannia Ironworks Co.*, 46 L. J., Q. B. 443 ; 2 Q. B. D. 423 ; 36 L. T. 451 ; 25 W. R. 720 ; 3 Asp. M. C. 407—C. A.

Held, secondly, that he was not entitled to freight pro ratâ, as no new contract for such freight had been made. *Ib.*

See also cases under next sub-heads.

Abandonment—Salvage.]—Where a salving ship takes a crew off a vessel in distress and puts men on board of her, refusing to allow her own crew to return, and the two vessels are in company navigated into port, there is no such abandonment of the ship as to put an end to the contract of carriage, and consequently there will be freight due upon the consignees requiring delivery of the cargo, such freight being pro ratâ, assuming the port not to be the port to which the cargo ought to have been taken under the contract of carriage. *The Leptir*, 52 L. T. 768 ; 5 Asp. M. C. 411.

Blockade of Port of Loading—Delivery elsewhere.]—Under a charterparty that a ship should proceed to Taganrog, or "so near thereto as she may safely get," and there deliver cargo :—Held, that this port being under blockade, it was not a fulfilment of the contract for the vessel to discharge at Constantinople, even though that might be a reasonable course to adopt, and that no contract to pay freight pro ratâ could be implied, and that the charterers having paid the freight at Constantinople, under protest, were entitled to recover it back. *Castel* v. *Trechman*, 1 Cab. & E. 276.

Ship Lost during Voyage — Goods taken possession of by Owner.]—Where the goods were to have been carried to Glasgow and the ship was lost near Glasgow, the owners of part of the goods abandoned them to the assurers, who carried them to Bristol. As to these goods the master offered to carry them on in another ship to Glasgow, but delivery having been taken at Bristol, it was held that the whole freight was payable. As to other goods which the master declined to carry on to Glasgow, and which were taken possession of and carried on by the owners, it was held that pro ratâ freight was payable. *Lutwidge* v. *Grey*, cited in *Luke* v. *Lyde*, 4 Burr. 886, 887 ; stated Abbot on Shipping, 13th ed. 591. See *Luke* v. *Lyde*, infra, col. 382.

d. Capture.

Advances for Disbursements.]—Covenant by charterparty made between the master of the ship and the freighter, upon a voyage from Liverpool to Maranham, and thence back to L., that the freighter should pay for the freight from L. to M. 120*l.*, and from M. to L. at the rate of 2½*d.* per lb. for cotton, which should be delivered at L., such freight to be paid as follows, viz. 120*l.* for freight of the outward cargo, to M., and as much cash as might be found necessary for the vessel's disbursements in M., to be advanced by the freighter, his agents or assigns, to the master when required, free from interest and commission, at the current exchange of the place, and the residue of such freight to be paid on delivery of the cargo in L. The ship arrived at M., where the 120*l.* outward freight, and also 192*l.* for the necessary disbursements of the ship, were paid or advanced by the freighter to the master ; and the ship received her homeward cargo and sailed for L., but was lost by capture :—Held, that the freighter was not entitled to recover back the 192*l.* *De Silvale* v. *Kendall*, 4 M. & S. 37 ; 16 R. R. 373.

Freight Payable to Captor.]—Where the captor brings the cargo to its port of destination he is entitled to freight, but not otherwise ; pro ratâ freight not given, even where the goods are nearly at their destination and sold beneficially. *The Vrow Anna Catharina*, 6 C. Rob. 271.

Freight is not earned by the ship being brought by captors to Plymouth, the ship being bound to London. *The Wilhelmina Eleonora*, 3 C. Rob. 234.

Freight allowed to captors in respect of neutral goods carried to the claimants' own country, though not to their port of destination, the voyage under special circumstances having been substantially performed. *The Vrouw Henrietta*, 5 C. Rob. 75, n.

Freight on Enemy Goods in Neutral Ship.]—A neutral ship carrying enemy goods is entitled, on condemnation of the goods, to the whole freight ; capture being equivalent to delivery. *The Copenhagen*, 1 C. Rob. 289, infra ; *The Prosper*, Edwards, 76.

The freight payable upon enemy goods in neutral ships is not necessarily the chartered freight, as raised by war risk. *The Twilling Riget*, 5 C. Rob. 85.

The captor of enemy goods in neutral ship takes them with the liability to pay freight—per Lord Stowell. *The Tobago*, 5 C. Rob. 218, 222.

Contraband.]—Freight is not allowed to the owner of a neutral ship carrying contraband of war. *The Oster Risver*, 4 C. Rob. 199.

Capture and Restitution—Pro ratâ Freight.]—A ship put into an English port in distress, the greater part of the voyage having been performed. The cargo was discharged in order to repair the ship. The ship and cargo were seized as prize, but afterwards restored. The ship and part of the cargo were afterwards sent to London, and the rest of the cargo forwarded to its destination :—Held, that the owners were entitled to pro ratâ freight. *The Copenhagen*, 1 C. Rob. 289. *S. C.*, supra.

Ship captured and restored with freight :—Held, that the whole freight was a charge on the cargo, though not carried to its destination. *The Martha*, 3 C. Rob. 106, n.

A ship and cargo having been condemned and sold by a French court, and the sentence afterwards reversed, freight pro ratâ, held payable, the shipowners having been prevented from carrying the cargo to the port of delivery by no fault of their own. *Baillie* v. *Moudigliani*, Park on Insurance, 8th ed. 116. See *The Fortuna*, Edwards, 57.

Capture and Recapture.]—A British ship, freighted from Liverpool in ballast to Lisbon, there took in a cargo for Ireland, and was captured off Falmouth ; afterwards recaptured and taken into Falmouth :—Held, that the whole of the freight was due to the shipowners from the cargo owners. *The Racehorse*, 3 C. Rob. 101.

Sale for Salvage—Common Incapacity to perform Voyage—Half Freight Decreed.]—A ship bound for Lisbon reached the Tagus, but was unable to get in by reason of blockade. She was blown off the coast, captured, recaptured and sold at Madeira by the recaptors for salvage :—Held, that upon principles of equity the loss arising from the common incapacity of the parties to the charterparty should be divided, and half the freight decreed to be paid. *The Friends*, Edwards, 246.

Pro ratâ Freight.]—Freight pro ratâ on capture and recapture not given to a ship brought back to the port or quasi port of her departure. *The Hiram*, 3 C. Rob. 180.

A ship bound for London, after taking in her cargo, but before breaking ground, was cut out of her port of lading in Jamaica by a French privateer; but was afterwards recaptured and carried into another port in the same island, where the cargo was sold by order of the Court of Admiralty for the benefit of the freighters :—Held, that the owners of the ship were not entitled to any part of the freight, though by the usage of the trade the ship was loaded at their expense. *Curling* v. *Long*, 1 Bos. & P. 634 ; 4 R. R. 747.

e. Restraint of Princes—Prohibited Cargo.

Restraint.]—If a ship freighted to H. is prevented by restraint of princes from arriving, and the consignees direct the master to deliver the cargo at G., and accept it there, he may maintain an action upon an implied contract to pay freight pro ratâ itineris. *Christy* v. *Row*, 1 Taunt. 300 ; 9 R. R. 776.

And if the master is prevented by the default of the consignees, or restraints of princes, from delivering the whole cargo there, he will be entitled to freight pro ratâ for the part delivered. *Ib.*

—— **Delay — Safe Port.**] — A charterparty made between English merchants at Valparaiso, and the owners of a Prussian ship, provided that the ship should proceed and deliver cargo at a port to be named by the charterers in Great Britain, or on the continent between Havre and Hamburg. The charterer named Dunkirk. On the arrival of the ship off Dunkirk, the master was informed by a pilot that war had commenced between Prussia and France. The master thereupon took the ship into Dover, and refused to deliver the cargo without payment of full freight. War was not in fact declared until three days afterwards :—Held, that as the port named by the charterer was an unsafe port, and Dover being a port which might have been named within the terms of the charterparty, the owners were entitled to full freight. *The Teutonia, Duncan* v. *Koster*, 8 Moore, P. C. (N.S.) 411 ; 41 L. J., Adm. 57 ; L. R. 4 P. C. 171 ; 26 L. T. 48 ; 20 W. R. 421 ; 1 Asp. M. C. 214—P. C.

Detention.]—A ship let to freight by the month, in attempting to enter a blockaded port by order of the freighters, was seized, and her cargo condemned ; but, being afterwards released, took in other goods, and delivered them to the freighters, according to the charterparty :—Held, that there was no suspension of the freight during the detention of the ship. *Moorsom* v. *Greaves*, 2 Camp. 627 ; 12 R. R. 763.

Convoy Recalled—Cargo Sold.]—Under an agreement in the nature of a charterparty, whereby the plaintiff let his ship to freight to the defendant on a voyage from Shields to Lisbon, with convoy, the freight to be paid on right delivery of the cargo ; the ship having sailed from Shields with her cargo, and joined convoy at Portsmouth ; and, after being detained near a month off Lymington, her sailing orders being recalled by the convoy, in consequence of the occupation of Portugal by the enemy ; and the defendant having refused to accept the cargo at Portsmouth, to which the ship returned, it was unloaded by the plaintiff, after notice to the defendant, and then was sold by consent of both parties, without prejudice :—Held, that he could not recover freight pro ratâ, or demurrage. *Liddard* v. *Lopes*, 10 East, 526 ; 10 R. R. 368.

Embargo taken off—Continuing Voyage.]—If a British merchant charters a Swedish ship on a voyage to St. Michael's for a cargo of fruit, and the charterparty contains the usual exception against the restraint of princes, and the ship is prevented from reaching St. Michael's within the fruit season by an embargo laid on Swedish vessels by the British government, the Swedish owner cannot, by proceeding on the voyage after the embargo is taken off, entitle himself to recover the freight against the British merchant. *Touteng* v. *Hubbard*, 3 Bos. & P. 291 ; 6 R. R. 791.

Position of Blockading Squadron.]—A blockading squadron may lawfully be at any distance convenient for shutting up the port blockaded, provided it does not obstruct any other ; and a ship will be considered as guilty of a wilful breach of the blockade which actually comes within reach of capture by the squadron, if the circumstances were such that a prudent man would have inquired whether that were the blockading squadron, although the captain was actually ignorant of its being so, not having inquired. *Naylor* v. *Taylor*, M. & M. 205 ; 9 B. & C. 718 ; 4 M. & Ry. 526 ; 31 R. R. 731.

Prohibition.]—A ship was let to freight for a voyage, to take out a small cargo of lead, and to bring home a return cargo, for which freight was to be paid at eleven guineas per ton for the whole ship's admeasurement. If, from political circumstances, she should be unable to discharge her cargo, and consequently to obtain a return cargo, the freighters agreed to pay a gross sum, less than the amount of the freight per ton ; the ship being prevented from discharging, and the freighter supplying no homeward cargo, the master took in goods on freight, and brought them home together with the lead :—Held, that he was entitled to receive the gross sum stipulated, and also to retain the freight which the ship had earned. *Bell* v. *Puller*, 2 Taunt. 285 ; 12 East, 496, n. ; 11 R. R. 574.

Upon a contract to fetch a cargo of corn from a particular place, where, on arriving, it is found that the government has prohibited the exportation of corn, freight is payable though the ship returns in ballast, after staying out her days of demurrage. *Blight* v. *Page*, 3 Bos. & P. 295, n. ; 6 R. R. 795, n.

Embargo.]—A ship was brought in under an embargo, with cargo on board not under the embargo. A claim by the ship for freight against the cargo, which was unloaded and sent on by

another conveyance, dismissed. *The Werldsborgaren*, 4 C. Rob. 17.

A cargo belonging to Englishmen on board a Swedish ship bound to Venice was detained under an embargo on Swedish ships at Falmouth, where the ship put in for shelter :—Held, that the cargo owners were bound to pay expenses incurred by the ship on account of cargo, but not freight. *Isabella Jacobina*, 4 C. Rob. 77.

—— **Knowledge of.**]—Where the plaintiff by charterparty, dated the 1st March, let to the defendant a ship to freight, and by its terms the plaintiff was to carry an outward-bound cargo of goods (not prohibited by restraint of princes) from Liverpool to Carolina in America, and to bring back a cargo of rice for the defendant, he paying freight for the same; and the plaintiff cleared out on the 22nd March from Liverpool with a cargo of salt, and on the 22nd May following arrived at Carolina, where the importation of British goods was prohibited by an order issued on the 1st March, the day the charterparty was dated; and also a further order prohibiting the exportation of goods to England, so that the plaintiff could not unload the salt nor bring back a cargo of rice :—Held, that the plaintiff could not recover for freight homewards, if it could be established that he knew of the prohibition at the time of the ship's clearance from Liverpool. *Heslop* v. *Jones*, 2 Chit. 550.

Back Freight.] — A ship with a general cargo sailed from London for Havre with some petroleum on board. Under the bill of lading the shipowner was to deliver the petroleum at Havre, and it was to be taken out by the defendant within twenty-four hours after arriving at Havre, or ten guineas a day was to be paid for demurrage. On the ship's arriving at Havre, the authorities of the port made the captain take her away in consequence of the petroleum being on board. Thereupon he went to neighbouring ports, but was not allowed to stay there. Returning to Havre, he discharged his general cargo, and no bill of lading having been presented to him, and no application having been made to him for the delivery of the petroleum, he brought it back to London. On the shipowner claiming freight, back freight, demurrage and expenses :—Held, that he was entitled to freight, back freight and expenses. Freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant. And although the petroleum could not be landed at Havre, it was in the port a reasonable time, during which the owner might have received it; and the freight was accordingly earned. *Argos, Cargo ex, Gaudet* v. *Brown*, L. R. 5 P. C. 134; 28 L. T. 745; 21 W. R. 707. Affirming 42 L. J., Adm. 49.

Where no application for delivery is made, the captain may land and warehouse the cargo at the expense of the merchant; and where that is forbidden by the authorities of the port, he is not justified in destroying the cargo; but, in the absence of advices, he may take it to such a place as in his judgment is most convenient for the merchant, and may charge to the merchant all expenses properly incurred; consequently, here the shipowner was entitled to back freight and expenses. The demurrage and the expenses incurred in the ineffectual attempt to land at the neighbouring ports were not allowed, but were looked on as part of the expenses of the voyage. *Ib.*

Arrest of Cargo before reaching destination.]—See *Galam, Cargo ex*, supra, col. 219.

See also cases as to RESTRAINT OF PRINCES, ante, CHARTERPARTY, BILL OF LADING.

f. Damage to Cargo—Short Delivery.

Consignee Accepting.]—If the consignee of goods accepts any benefit by the carriage, he cannot defend himself from the payment of freight, on the ground that the goods have been damaged by the master in carrying them, though the damage exceeds the amount of the freight. *Shields* v. *Davis*, 6 Taunt. 65; 4 Camp. 119.

Effect of, in Action for Freight by Shipowner.]—Freight is recoverable as upon a right and true delivery of the cargo agreeably to the bills of lading, upon proof of having delivered the entire number of chests, for which bills of lading had been signed; though it appeared that the contents of the chests were damaged by the negligence of the master and crew on board, in not ventilating them sufficiently; the party injured having his counter-remedy by action for such negligence. *Davidson* v. *Gwynne*, 12 East, 381; 11 R. R. 420.

Where the master and freighter of a vessel of 400 tons mutually agreed in writing, that the ship, being every way fitted for the voyage, should with all convenient speed proceed to St. Petersburg, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight for hemp 5*l.* per ton, for iron 5*s.* a ton, one-half to be paid on right delivery the other at three months :—Held, that the delivery of a complete cargo was not a condition precedent; and that the master might recover freight for a short cargo at the stipulated rates per ton, the freighter having his remedy in damages for such short delivery. *Ritchie* v. *Atkinson*, 10 East, 295; 10 R. R. 307.

If a shipper of goods sustains a loss by reason of the misconduct or negligence of the shipowner or his agents, his remedy is by action, and he cannot resist payment of freight on the ground that the goods were unfit for use when they arrived at the port of destination. *Garrett* v. *Melhuish*, 4 Jur. (N.S.) 943; 6 W. R. 491.

In cases of short delivery under a bill of lading, a deduction may be made from the freight of such proportion of the freight as would have been payable if the goods had been delivered, and this, even though the freight is lump freight; but the value of the goods not brought to destination may not be deducted from freight, but must, if necessary, be the subject of a separate action. *The Norway*, 12 L. T. 57; 13 W. R. 296.

A consignee of goods under a bill of lading has no right to deduct from the freight payable on delivery of goods the value of articles which, though mentioned in the bill of lading, turn out not to have been put on board. *Meyer* v. *Dresser*, 16 C. B. (N.S.) 646; 33 L. J., C. P. 289; 10 L. T. 612; 12 W. R. 983.

The whole freight named in a bill of lading is payable to the shipowner carrying under it, although a less quantity of goods than the quantity named in the bill of lading is delivered, if the quantity delivered is no less than the quantity received by the shipowner. *Blanchet* v. *Powell's Llantivit Collieries Co.*, 43 L. J., Ex.

50 ; L. R. 9 Ex. 74 ; 30 L. T. 28 ; 22 W. R. 490 ; 2 Asp. M. C. 224.

—— **Custom.**]—This being the general law, it cannot be altered by a universal practice of merchants, which is not confined to any particular place or trade, to have the value of such goods deducted from the freight. *Meyer* v. *Dresser*, supra.

—— **Foreign Law.**]—By French law, the whole freight is payable whether the whole quantity named in the bill of lading is carried or not, and therefore, in the case of a bill of lading executed in France, it is immaterial whether or not the shipowner received the whole quantity named in the bill of lading. *Blanchet* v. *Powell's Llantivit Collieries Co.*, supra.

The law of a foreign country, entitling a consignee to reduce the claim against him for freight by the value of goods put on board and lost, but which amounts to an allowance by way of set-off, and not to an extinguishment of the claim for freight, is matter of procedure only, and therefore does not apply to an action for freight brought in this country against the consignee. *Meyer* v. *Dresser*, supra.

—— **Charterer cannot Abandon Goods when Damaged.**]—A charterer, whose cargo has been damaged by the fault of the master and crew, so as, upon arrival at the port of discharge, to be worth less than the freight, is not entitled to excuse himself from payment of freight by abandoning the cargo to the shipowner. *Dakin* v. *Oxley*, 15 C. B. (N.S.) 646 ; 33 L. J., C. P. 115 ; 10 Jur. (N.S.) 655 ; 10 L. T. 268 ; 12 W. R. 557.

Lump Freight—Part of Cargo Lost by Perils of Sea.]—A charterparty from Riga to London provided that the ship should load a full and complete cargo of lath-wood, and deliver the same on being paid freight as follows : a lump sum of 315*l*. There was the usual exception of sea risks, and the freight was to be paid half on arrival and the remainder on unloading and right delivery of cargo. Part of the cargo, loaded in accordance with the charterparty, was lost by perils of the sea, without any default of the master or crew :—Held, that the shipowner was, on delivery of the remainder of the cargo, entitled to the full sum. *Robinson* v. *Knights* or *Knight*, 42 L. J., C. P. 211 ; L. R. 8 C. P. 465 ; 28 L. T. 820 ; 21 W. R. 683 ; 2 Asp. M. C. 10.

Loss by Pirates.]—Covenant to pay freight on delivery. Cargo partly spoiled by pirates :—Held, freight not payable. *Bright* v. *Cowper* Brownl. & G. pt. 1, 21.

Loss by Fire.]—By a charterparty a ship was to load at Colombo or Cochin, from the charterers' agents, a full and complete lading, and proceed to London, and discharge there, fire and other dangers of the sea excepted, a lump sum freight of 5,000*l*., to be paid after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the custom house. Part of the cargo loaded in accordance with the charterparty was lost by fire, without any default of the master or crew, and the remainder was delivered in London :—Held, that the shipowner was entitled under the charterparty to the full sum of 5,000*l*. *Merchant Shipping Co.* v. *Armitage*, 43 L. J., Q. B. 24 ; L. R. 9 Q. B. 99 ; 29 L. T. 809 ; 2 Asp. M. C. 185—Ex. Ch.

Loss of Cargo before Delivery.] — Cement was shipped under a bill of lading which stipulated that freight should be paid "within three days after arrival of ship, and before delivery of any portion of the goods." The ship arrived in port with the cement on board, but was within the three days, in consequence of an accidental fire, scuttled with a view to the saving of ship and cargo ; and on her being raised the cement was found to be useless, having ceased to exist as cement, and the consignees refused to accept it or to pay freight :—Held, that the shipowners, not being ready to perform their part of the contract, were not entitled to sue for freight. *Duthie* v. *Hilton*, 38 L. J., C. P. 93 ; L. R. 4 C. P. 138 ; 19 L. T. 285 ; 17 W. R. 55.

When Payable Pro rata.]—In case of a loss at sea, freight must be paid only in proportion to the goods saved, and the part of the voyage which has been performed. *Luke* v. *Lyde*, 2 Burr. 882 ; 1 W. Bl. 190.

Memorandum of Charter — Consideration.]—A., owner of a vessel, took in a cargo at Calcutta, to be carried thence to St. Petersburg, which was purchased by his supercargo on his account ; but B. & Co. advanced 26,000*l*. towards such purchase, and bills of lading were made out by the captain, stating the cargo to be shipped by B. & Co. on account of A., to be delivered at St. Petersburg to B. & Co.'s order or their assigns. The words, "he or they paying freight," were struck out of the bills of lading, which were indorsed by B. & Co. and transmitted to the defendants, their correspondents in London. Before the ship sailed, a memorandum for charter was entered into at Calcutta, between A.'s supercargo and the captain, whereby it was agreed that the ship should be despatched with a cargo for St. Petersburg, to be there delivered to the order of the freighter, on being paid freight at a certain rate therein stipulated. The ship, in proceeding on the voyage, was lost, but part of the cargo was saved, and sold with the consent of the captain for 13,000*l*. The defendants, as indorsees of the bills of lading, applied for the proceeds of the salvage, which had been previously claimed by the plaintiffs, as agents on the part of A. ; and the captain also claimed a lien thereon for pro ratâ freight ; on which the defendants agreed by letter (if the plaintiffs would cause the claims of A. and the captain to be withdrawn) to be accountable to them, as the agents of A., for whatever might appear to be due for the pro ratâ freight the ship was entitled to, agreeably to the charterparty entered into by A.'s supercargo and the captain. In pursuance of this agreement these claims were withdrawn, and the defendants received the amount of the salvage, and then refused to pay the pro ratâ freight, as the instrument entered into at Calcutta was merely a memorandum for charter ; and insisted that there was no consideration for the defendants' promise. But, in an action for nonpayment of the pro ratâ freight under the agreement :—Held, that the plaintiffs were entitled to recover, as the defendants were aware of the circumstances which had happened before the agreement was entered into. *Thornton* v. *Fairlie*, 2 Moore, 397 ; 8 Taunt. 354.

Reloading and Continuing Voyage.]—A ship was chartered from London to B., there to deliver her cargo, reload, and proceed to a port between G. & A.; freight for voyage out and home, 1,300*l.*, if delivered at G., in S., London or Liverpool; 200*l.* to be paid in London on the vessel's departure, the remainder on final delivery of the homeward cargo. The ship proceeded to B., delivered her cargo there, and sailed again with a cargo of hides, which the charterers consigned to G. At F. the ship and about one-third of the hides were lost. The vice-consul of F., acting on behalf of the charterers, at the request of the captain of the ship, transmitted the residue of the hides, by another vessel, to the consignees of the charterers at G., where they were accepted, and the freight from F. to G. paid by the charterers:—Held, that the plaintiff was not entitled to the 1,300*l.* freight; that he was not entitled pro ratâ itineris for freight to B., or from F. to G., but that he was entitled to freight, pro ratâ, from B. to F. *Mitchell* v. *Darthez*, 2 Scott, 771; 2 Bing. (N.C.) 555; 1 Hodges, 418; 5 L. J., C. P. 154.

Short Cargo—Charterparty and Bill of Lading Freight—Cargo Shipped by Shipowner in place of Part Burnt—Amount of Freight Due.] — See *Aithen* v. *Ernsthausen*, post, col. 500.

Full Cargo not taken.]—Covenant to carry 180 men to Jamaica at 5*l.* per head; 160 carried, and alleged by plaintiff to be all that were offered; defendant alleging that 180 were offered. Judgment for plaintiff. (*Anon.*) v. *Noell*, 1 Keb. 100.

Freight Payable on 240 tons whether Shipped or not—Refusal to ship 240 tons tendered.]—Plaintiff, by charterparty, agreed with defendants to carry a cargo from B. to L. at 15*s.* per ton; the defendants agreeing to pay for 240 tons whether that weight were shipped or not, freight to be paid on right delivery. The plaintiff alleged right delivery, and that the freight amounted to 180*l.*; that the defendants paid 146*l.* only, and claimed the difference. The defendants pleaded that they tendered 240 tons for shipment, and that the plaintiff refused to carry more than a part of the 240 tons, and that the ship might reasonably have carried the whole. Held, on demurrer, that the plea was a good defence. *Clements* v. *Russell*, 4 Ir. Ch. R. 318.

Commission on Freight — Ship Lost before loading.]—"Commission" on freight expressed to be payable to charterers "on completion of the loading or should the vessel be lost." The vessel was lost before arriving at the loading port:—Held, commission not payable. *Sibson* v. *Ship Barcraig Co.*, 2 Ct. of Sess. Cas. (4th ser.) 91.

Dates Damaged—Not Merchantable as Dates, but of value for Distillation.]—A vessel with dates on board was sunk and afterwards raised. The dates, which were shipped under bill of lading making freight payable on right delivery, were not merchantable as dates, but were of considerable value for purposes of distillation. Held, that no freight was payable. *Asfar* v. *Blundell*, 65 L. J., Q. B. 138; [1895] 2 Q. B. 196; 15 R. 481; 73 L. T. 648; 44 W. R. 130; 8 Asp. M. C. 106—C. A.

Charterparty—Ceaser Clause—Bill of Lading—Short Delivery.]—A ship was chartered for a voyage from Greenock to Monte Video for a lump freight of 550*l.*, of which 150*l.* was to be paid on clearing at Greenock, and "bills of lading for the balance payable abroad to be taken (sic) by the captain, on receipt of which documents all responsibility in charterer to cease." The cargo was chiefly coal. The charterer divided the 550*l.* freight amongst the various items of cargo, and presented bills of lading together making up that sum for the master's signature, the charterer being consignee. The bill of lading for the coal was for 453½ tons at 22*s.* 6*d.* per ton freight. The master signed this, with a note "weight and contents unknown." The coal was discharged at Monte Video, turning out 398 tons only, the master waiving his lieu for freight. The charterer's agents, in settling for the balance of freight, retained for coal short delivered 24*l.*, and 6*2l.* freight thereon. The owners sued the charterers for the balance of the chartered freight:—Held, that the bills of lading having been granted put an end to the charterer's liability on the charterparty; that the shipowners could recover freight on 398 tons only; that, in absence of proof that any of the coal shipped had not been delivered, the charterer could not retain the 24*l.* *Benyon* v. *Kenneth*, 8 Ct. of Sess. Cas. (4th ser.) 594.

g. Abandonment, Loss, or Detention of Ship.

Loss of Ship — Freight Payable at fixed Periods.]—A ship employed by a charterparty on both an outward and a homeward voyage at so much per month, and which was lost in the homeward voyage was held to have earned the freight due for the outward voyage. *Mackrell* v. *Simond*, 2 Chit. 666.

The freight, being reserved at so much per month, was earned at the end of each month, although the stipulated time of payment was from four months to four months, and the ship was lost at the end of fourteen months. *Havelock* v. *Geddes*, 10 East, 555; 10 R. R. 380.

By a charterparty the freighter covenanted to pay to the owner freight at and after the rate of so much per ton per month, for the term of six months at least, and so in proportion for less than a month, or for such further time than six months as the ship might be detained in the service of the freighter, until her final discharge, or until the day of her being lost, captured, or last seen or heard of; such freight to be paid to the commander of the ship in manner following, viz., so much as might be earned at the time of the arrival of the ship at her first destined port abroad, to be paid within ten days next after her arrival there, and the remainder of the freight at specified periods:—Held, that this constituted one entire covenant, and that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight; and that the ship, having been lost on her outward voyage, the owner was not entitled to recover freight at so much per calendar month to the day of the loss. *Gibbon* v. *Mendez*, 2 B. & Ald. 17; 20 R. R. 337.

By charterparty freight was payable one month after the ship sailed; the voyage, Glasgow to Demerara, usually lasting six weeks. The ship was lost three days after sailing:—Held, that freight was payable. *Leitch* v. *Wilson*, 7 Ct. of Sess. Cas. (3rd ser.) 150.

Abandonment — Effect on Freight.] — By the abandonment of a ship by the crew during a voyage, without any intention to retake possession, a right is given to the owner of cargo on board to treat the contract of affreightment as at an end. A ship with a cargo of resin in barrels, on a voyage from America to Rotterdam, was, owing to the perils of the sea, abandoned by her crew off the American coast. She was afterwards saved by another vessel, and brought with her cargo by the salvors into a port in England, and there arrested in an action for salvage by her salvors. Before the shipowner had released the ship or cargo, the owners of the cargo applied for and obtained from the admiralty court an order for the release of the cargo to them without payment of any freight, upon their giving bail to the salvors:—Held, that the cargo owners were entitled to treat the contract of affreightment as at an end, and that therefore the order of the admiralty court was rightly made. *The Cito*, 51 L. J., Adm. 1; 7 P. D. 5; 45 L. T. 663; 30 W. R. 836; 4 Asp. M. C. 468—C. A.

—— **Derelict—Recovery by Shipowner at Port of Discharge — Cargo Owner's Right to Cargo without Payment of Freight.**]—If a ship is abandoned by her master and crew during a voyage, and the cargo owner exercises his right of treating the abandonment as a determination of the contract of affreightment, the subsequent recovery of the vessel by the shipowner from salvors at the port of discharge will not revive the contract, and the owner of the cargo will be entitled to have it returned to him without payment of freight. *The Arno*, 72 L. T. 621; 8 Asp. M. C. 5—C. A.

—— **Cargo Rescued by Salvors.**]—A barque bound from Charleston with a cargo of cotton, shipped under bills of lading for Bremen, the dangers of the seas excepted, was abandoned in the English Channel in consequence of damage received in a collision, and was taken possession of as a derelict by salvors, who towed her into an English port, and there placed her in safety. To recover salvage reward for their services the salvors promoted causes of salvage in the high court of admiralty against the barque, her cargo and freight, and caused her and her cargo to be arrested at the port to which they had so towed her. Under an order of unlivery obtained in one of these causes the cargo was unladen and found to be much damaged by sea water, and on the application of some of the salvors, and with the consent of the cargo owners, but contrary to the wishes of the owners of the ship, who offered to give bail and carry the cargo on to Bremen, the court, considering that a sale would be for the benefit of all interested, decreed that the cargo should be sold, but reserved all questions of freight. Pleadings as to freight were afterwards entered into, and the shipowners claimed to be paid, out of the proceeds of the cargo in the registry, the full amount of the freight stipulated to be paid on delivery of the cargo at Bremen:—Held, that under the circumstances the shipowners were not entitled to any freight. *The Kathleen*, 43 L. J., Adm. 39; L. R. 4 A. & E. 269; 31 L. T. 204; 23 W. R. 350; 2 Asp. M. C. 367.

—— **Ship Abandoned as Unseaworthy.**] — Freight held to be payable though the ship was abandoned abroad as unfit to come home. *Edwin* v. *East India Co.*, 2 Vern. 210. Citing *Westland* v. *Robinson*, not reported.

—— **Right of Underwriters.**]—When on the abandonment of a ship on the voyage the cargo is taken to its destination in another vessel hired by the captain, the underwriters of the ship are not entitled to the freight due on the delivery of the cargo. *Hickie* v. *Rodocanachi*, 4 H. & N. 455; 28 L. J., Ex. 273; 5 Jur. (N.S.) 550; 7 W. R. 545.

A shipowner loaded his ship, which was bound for Liverpool, with goods on his own account, and he insured the ship and the freight of the goods by distinct insurances. The ship was stranded at S., on the English coast, twenty miles from Liverpool. The shipowner abandoned the ship to the insurers on the ship. After the abandonment the shipowner, at his own expense, had a part of his goods taken out and conveyed by lighters to Liverpool, and he, at his own expense, procured assistance, by which the ship, with the remainder of his goods on board, was brought to Liverpool. Afterwards the assurers accepted the abandonment. On the assured claiming for the loss of the ship from the assurer, the assurer claimed credit for the freight of the goods of the shipowner:—Held, that nothing in the nature of freight for the carriage of the shipowner's goods to S. passed to the abandonees; but that they were entitled to an allowance for the carriage of the part of the goods from S. to Liverpool in the ship, after the abandonment, to be estimated at the current rate of freight, as if brought from Liverpool by another ship. *Miller* v. *Woodfall*, 8 El. & Bl. 493; 27 L. J., Q. B. 120; 4 Jur. (N.S.) 302.

Guarantee of Freight — Ship Lost.] — The charterer of a ship, being unable to provide a cargo, agreed with the shipowner for the cancellation of the charterparty upon the terms that he should guarantee a freight of 900*l*. The ship sailed with a cargo of which the freight was 556*l*. 14*s*., and was lost:—Held, that the charterer was liable at least for the difference between 900*l*. and 556*l*. 14*s*. *Carr* v. *Wallachian Petroleum Co.*, 36 L. J., C. P. 236; L. R. 2 C. P. 468; 16 L. T. 460; 15 W. R. 874.

Contract with several Companies.] — The plaintiffs shipped goods at Liverpool on board the defendant's ship, to be carried, as stated by the bill of lading, "viâ Colon (Aspinwall) and Panama to San Francisco; that is to say, by arrangement between the West India and Pacific Steamship Company, the Panama Railway Company, and the Pacific Mail Steamship Company, to be carried to Colon (Aspinwall) by the packets of the West India and Pacific Steamship Company, from Colon (Aspinwall) to Panama by the Panama Railroad Company, and thence to the port of destination by the Pacific Mail Steamship Company . . . freight and primage to be considered as earned, ship lost or not lost"; the freight being 14*l*. 5*s*. per ton payable in Liverpool. The whole freight at the aforesaid rate was paid to the defendants' agent at Liverpool, and the bill of lading was signed by him "for the service from London to Colon (Aspinwall)," and by the agent of the two other companies "for the service from Colon (Aspinwall) to San Francisco." The private arrangement entered into between the three companies for the division of the freight between themselves was set forth in the case, to

which was added also a copy of the handbook published by the defendants containing the rates of freight charged for the carriage of goods from Liverpool to Colon (Aspinwall), to Panama, and to San Francisco, but not the charges for conveyance from one to another of the three last-mentioned places. The ship, having sailed from Liverpool, was lost with all her cargo before reaching Colon (Aspinwall), and the defendants, after receiving notice of the loss, paid over to the two other companies their proportion of the freight, which had been paid by the plaintiffs. The plaintiffs having brought an action against the defendants for money had and received to recover the proportion of freight so paid over to the two other companies, viz. for the carriage of the goods from Colon (Aspinwall) to Panama, and from Panama to San Francisco:—Held, that the bill of lading formed one contract between the plaintiffs and the defendants for the conveyance of the goods from Liverpool to San Francisco, for one entire consideration, viz. the amount of freight paid, and not several contracts between the plaintiffs and each of the companies; and therefore, as the consideration for which the freight was paid had not wholly failed, the plaintiffs could not maintain the action against the defendants. *Greeves* v. *West India and Pacific Steamship Co.*, 22 L. T. 615—Ex. Ch.

Charterers Absolved from Loading — Insurance.]—By a charterparty, which contained the exceptions of dangers and accidents of navigation, the vessel was to proceed with all convenient speed from Liverpool to Newport, and there load a cargo of iron rails for San Francisco, and the freight was to be paid on right delivery of the cargo. The vessel duly proceeded on her voyage from Liverpool to Newport, but before arriving there she took the rocks at Carnarvon Bay. She was ultimately got off the rocks, and though the damage she sustained was not such as to constitute a total loss, either actual or constructive, the time necessary for getting her off and repairing her so as to be a cargo-carrying ship, was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers, and the latter accordingly abandoned the contract, and hired another vessel, by which they forwarded the rails to San Francisco:—Held, by a majority of the court, that under these circumstances there was a total loss of chartered freight by perils of the sea within the meaning of a policy of insurance on chartered freight on the voyage. *Jackson* v. *Union Marine Insurance Co.*, 44 L. J., C. P. 27; L. R. 10 C. P. 125; 31 L. T. 789; 23 W. R. 169; 2 Asp. M. C. 435—Ex. Ch.

Cesser of Payment of Hire.]—In a charterparty it was stipulated that the appellants should provide and pay for the provisions and wages of the captain and crew, and maintain the ship in a thoroughly efficient state in hull and machinery for the service; and that "in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage whereby the working of the vessel was stopped for more than forty-eight consecutive hours, the payment of hire should cease until she should be again in an efficient state to resume her service." When the vessel was on a voyage under the charterparty, her high-pressure engine broke down, and it was found necessary to employ a tug in aid of the ship's low-pressure engine, to tow the ship to her destination:—Held (Lord Bramwell dissenting), that the appellants had no claim for hire for the voyage on which the tug's assistance was required, the ship not being independently efficient for that purpose. *Hogarth* v. *Miller*, 60 L. J., P. C. 1; [1891] App. Cas. 48; 64 L. T. 205; 7 Asp. M. C. 1—H. L. (Sc.). *And see cases as to* CESSER CLAUSE, cols. 309, 447, seq.

Hire during Discharge of Cargo.]—On the ship's arrival in port, she discharged her cargo, for which her steam winches were available:—Held (Lord Morris dissenting), that the appellants were entitled to payment of hire for the full time actually occupied in discharging the cargo, the ship being in an efficient state for that particular employment. *Ib.*

During Repairs.]—Where a vessel was chartered for six months certain, the freighter to pay 200*l.* per month, and so in proportion for any longer time she might be employed, the owner to keep the ship in repair during the voyage; and, in consequence of perils of the sea, the vessel was obliged to be repaired twice in the course of the voyage, which detained her uselessly to the freighter for twenty-eight days:—Held, that he was still liable for freight during such detention. *Ripley* v. *Scaife*, 7 D. & R. 818; 5 B. & C. 167; 2 Car. & P. 132.

A covenant in a charterparty, that the owner shall at his expense forthwith make the ship tight and strong for a voyage for twelve months, and keep her so, is not a condition precedent to the recovery of freight after the freighter has taken the ship into his service, and used her for a certain period; but if the freighter is afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages; but if the owner's neglect to repair in the first instance precluded the freighter from making any use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action. *Havelock* v. *Geddes*, 10 East, 555; 10 R. R. 380.

For non constat, but that, after she had been used by the freighter, she wanted repair, without any default of the owner; or that he was guilty of any delay in making the repairs; and the freight would still run on during the time of repair. *Ib.*

Contract to Indemnify against Loss on Re-charter—Agent to Re-charter—Shipping own Cargo—Ship Lost—Meaning of Contract.]—See *Yeames* v. *Lindsay*, 3 L. T. 855; 9 W. R. 313; infra, col. 918.

3. PAYMENT.

a. To whom.

i. *Generally.*

Master.]—The master has a special property in the vessel, and may declare for the freight of goods as carried in his vessel, though he is not owner. *Shields* v. *Davis*, 6 Taunt. 65; 4 Camp. 119.

A captain with whom a contract is made in his own name may sue for freight under it. *Seeger* v. *Duthie*, 8 C. B. (N.S.) 72; 30 L. J., C. P. 65; 7 Jur. (N.S.) 239; 3 L. T. 478; 9 W. R. 166—Ex. Ch.

Where the master covenanted to proceed with goods from London to Tangiers, "there to apply

to the correspondents, factors or agents of the charterer for orders, whether he was to proceed to St. Lucar or Cadiz; and that, pursuant to the orders, he would make a right and true delivery to the correspondents, factors or agents of the charterer agreeably to bills of lading"; and the charterer covenanted that he would pay to the master immediately on a right and true delivery of the cargo, in full for the freight of the ship, at a certain rate in sterling money; and afterwards bills of lading were signed and delivered, making the cargo deliverable at Tangiers and St. Lucar, to P. (the charterer's agent at Tangiers), or his assigns, he or they paying freight for the goods so much in sterling money, at the current exchange at Cadiz on London; and the master was ordered by P. at Tangiers to deliver the cargo at Cadiz (by which it was averred that the master was prevented from delivering the same to any of the correspondents, factors or agents of the charterer at Tangiers or St. Lucar agreeably to the bills of lading), and did deliver it at Cadiz, to the agent of the defendant in that behalf, according to the charterparty; the master, who had received the freight from the agent, on delivery of the cargo to him, was held entitled to recover it from the charterer. *Shepard* v. *De Bernales*, 13 East, 565; 12 R. R. 442.

Obligee of Bottomry Bond.]—The receipt of freight by the obligee of a bottomry bond is, in law, a receipt of it by the shipowner, whose master has given that bond in discharge of expenses incurred in the necessary repairs of the ship. *Benson* v. *Chapman*, 2 H. L. Cas. 696; 8 C. B. 950; 13 Jur. 969.

Master or Shipowner.]—Where a master entered into a contract of affreightment, not under seal, and the shipper agreed to pay the freight at the end of the voyage by a bill at two months, without saying to whom:—Held, that the owner was entitled to receive the freight, without the intervention of the master, and that the freighter was not liable to the captain upon the contract, after he had paid the owner. *Atkinson* v. *Cotesworth*, 5 D. & R. 552; 3 B. & C. 647; 1 Car. & P. 339; 3 L. J. (O.S.) K. B. 104; 31 R. R. 450.

Agent of Ship's Husband.]—Freight to be earned by a ship on a homeward voyage belongs to the shipowner, so that an agent employed by a ship's husband to obtain a charterparty has no authority to cause it to be paid to himself, for the purpose of setting it off against a debt due to him from the ship's husband. *Walshe* v. *Provan*, 8 Ex. 843; 1 C. L. R. 823; 22 L. J., Ex. 355.

Third Party.]—Where the bill of lading provides that freight shall be payable to a third party, M., and not to the shipowner, payment for freight to the master or shipowner affords no answer to an action by M. in the name of the shipowner for nonpayment of freight. *Kirchner* v. *Venus*, 12 Moore, P. C. 361; 5 Jur. (N.S.) 395; 7 W. R. 455.

Agreement as to Joint Adventure—Assignment.]—The plaintiffs, who were shipowners, having offered their vessel for hire to the defendants, the latter objected to take it, on the ground of its being too large, whereupon the plaintiffs offered to take half the ship, as adventurers, in partnership with the defendants. It was then arranged that a charterparty should be executed by the plaintiffs and the defendants, and that an agreement as to the adventure should be signed by A., the plaintiffs' clerk, as their agent, and a memorandum of guarantee should be signed by the plaintiffs, the same to be one transaction. The agreement stated that the trading cargo should be upon the joint account and risk of the defendants and A., and that, after payment or deduction of the freight, the profit or loss should be borne and received, or paid by the parties in equal moieties. The plaintiffs, by the memorandum of guarantee, guaranteed A. from all losses and expenses happening in the course of such trading. The plaintiffs being indebted to D. & Co., subsequently deposited the charterparty with them as a security, with an indorsement upon it directed to the defendants, and requiring them to pay the amount of what was due to D. & Co. Notice of this was afterwards given to the defendants. The action was brought by D. & Co. to recover the freight due under the charterparty:—Held, that the defendants were bound to pay freight to the shipowners, and that the parties were then to bear and receive equally the loss and profit of the adventure. *Boyd* v. *Mangles*, 3 Ex. 387; 18 L. J., Ex. 273. See *Mangles* v. *Dixon*, 3 H. L. Cas. 702.

Privity of Contract.]—Messrs. G., merchants in Spain, entered into a charterparty with the master of a vessel, at a port in Spain, and by the charterparty it was agreed that the vessel should load a complete cargo of flour, the captain to sign bills of lading at more or less freight without prejudice to the agreement; and the vessel was to proceed with her cargo to Liverpool, and deliver the same on payment of the freight in a lump sum of 100*l*. Messrs. G. loaded the vessel with 1,350 sacks of flour, and consigned the same to L. de B., in England. P. put on board 500 sacks, for which the master gave a bill of lading, providing for the delivery of the same in the name of P. to the defendants, "paying him freight according to contract with Messrs. G." These 500 sacks were shipped on the joint account of P. and the defendants, and the latter, whilst the flour was in transit, became the sole owners thereof, by purchase from P. of his interest therein. P. sent the bill of lading to the defendants, inclosed in a letter, stating that the bill of lading did not express the freight, but that he had given a letter or order in favour of Messrs. G., that, on good delivery, the defendants would pay Messrs. G. the freight on the 500 sacks. The amount of freight mentioned in this letter exceeded that specified in the charterparty. In this letter or order there was a request to the defendants to deliver the amount of the freight to L. de B. On the delivery of the cargo L. de B. paid the whole amount of the freight to the master, and afterwards applied to the defendants for payment of the freight of the 500 sacks, but they refused to pay the full amount of the freight claimed, on the ground that the flour had been damaged in the carriage. In an action by the master against the defendants for the freight of the 500 sacks of flour:—Held, that there was no evidence of any contract between the defendants and the master with respect to this portion of the cargo; but that the defendants, if liable, were only liable to Messrs. G., upon a sub-contract with them. *Zwilchenbart* v. *Henderson*, 9 Ex. 722; 23 L. J., Ex. 234.

Owners or Charterers—Exceptions.]—By a charterparty it was "agreed that (the cabin and state-rooms, and sufficient room, ship's stores, provisions, water, and crew throughout this charterparty being excepted, reserving, however, every such room only for that purpose as the owners would, were the ship to be loaded for their exclusive benefit) the vessel shall immediately be ready, and take on board from the charterers (who were to have the full reach of the vessel's hold from bulkhead to bulkhead, including the deck) a full and complete cargo," and thereupon proceed to Halifax:—Held, that the owners of the vessel, and not the charterers, were entitled to the freight for goods loaded on the deck of the vessel. *Neill* v. *Ridley*, 9 Ex. 677; 2 C. L. R. 1018.

—— **Authority of Master.**]—By a charterparty between the captain, for the owners of a ship, and the charterers, the charterers agreed to pay a lump sum of freight, part to be received by the captain abroad, and the balance to be paid by the charterers' acceptance, payable in London at three months' date from the day of sailing. The charterers were to have the option of naming the lumpers and stevedores, and such goods only as they might direct were to be received on board. It was also agreed that the master should, at the charterers' request, sign bills of lading in the usual manner, and at any rate of freight that might be filled in, and made payable in any manner the charterers might choose, without prejudice to the charter. The vessel was loaded by the charterers as a general ship, and the master signed bills of lading presented by the charterers, at such rates and payable in such manner as they requested. The bills of lading did not specify to whom the freight was to be paid:—Held, that the master signed the bills of lading as agent of the charterers, and therefore the shipowner was not entitled to claim from the shippers the freight which remained due from them when the charterers stopped payment. *Marquand* v. *Banner*, 6 El. & Bl. 232; 25 L. J., Q. B. 313; 2 Jur. (N.S.) 708.

Under Bill of Lading.]—A defendant shipped at Liverpool on board the plaintiffs' vessel goods, and the master signed a bill of lading which stated that the goods were shipped by the defendant "as agent," and were to be delivered at the port of Colombo, "unto order or assigns, he or they paying freight for the goods." Before the shipment, the plaintiffs advanced to E., on whose account the goods were shipped, 400*l.*, upon an undertaking by him that he would indorse to them, as a security, a bill of lading of the goods, wherein the freight should be payable by E. in this country. The defendant indorsed the bill of lading to E., who indorsed it to the plaintiffs as a security for the advance, and a further advance made upon an estimate between the plaintiffs and E., of the value of the goods, freight free. E. not having paid the freight:—Held, that the defendant was liable under the bill of lading to pay the freight to the plaintiffs. *Fox* v. *Nott*, 6 H. & N. 630; 30 L. J., Ex. 259; 7 Jur. (N.S.) 663.

Bankruptcy of Shipowner—Notice by Assignees to Charterer.]—Where the master of a ship on behalf of the owner lets the ship on charterparty to A., and the owner becomes bankrupt, and his assignees give notice to A. not to pay any further sums of money on account thereof to the master; this notice will affect A. as to all sums paid afterwards by him to the master, beyond what the master had actually paid or stood engaged for on account of the ship, at the time of the notice; but will not defeat payments made to that extent. *Wilkins* v. *Mure*, 1 Cox, 150.

Receiver Appointed in Chancery—Arrest of Freight in Admiralty.]—*The Bloomer*, 11 L. T. 46; infra, XXVI. ADMIRALTY LAW AND PRACTICE, col. 920.

Payment to Ship's Husband—Disbursements.]—A ship's husband is entitled to receive freight, and to deduct his disbursements therefrom. *Harris* v. *Reynolds*, 4 W. R. 278.

Part Owner may Sue for.]—An action for freight may be brought by a part owner on behalf of himself and the other part owners. *De Hart* v. *Stephenson*, 45 L. J., Q. B. 575; 1 Q. B. D. 313; 24 W. R. 367.

Dissenting Part Owner.]—A part owner is not entitled to any part of the freight earned upon a voyage from the setting out of which he dissents. *Boson* v. *Sandford*, Carth. 63; Levinz, pp. 3, 258.

Shipowner or Charterer.]—Shipowners chartered their ship to carry coals from England to Jamaica as ordered, and bring home a cargo of sugar at specified rates of freight—"master to sign bills of lading as required, without prejudice to this charterparty, and if the draft for payment of coal freight is drawn to his order, to indorse the same payable to charterers' order." The charterers afterwards contracted with various shippers for carriage of their goods, and bills of lading were given to them by the master, at the request of the charterers:—Held, that the shipowners had no direct right of action against the shippers for freight, and that it could not be arrested in the hands of the shipper, so as to found jurisdiction against the shipowners. *Mitchell* v. *Burn*, 2 Ct. of Sess. Cas. (4th ser.) 900.

Sub-Freight paid to Shipowner—Prepaid by Shipper—Repayment.]—A shipmaster, appointed by the owners of a ship under charterparty, has a lien on cargo put on board by a sub-freighter to the extent of the sub-freight. Therefore a person to whom cargo was consigned, who had paid the master full freight in ignorance that the shipper had paid part of the freight to the charterer, cannot get repayment of it from the shipowners. *Youle* v. *Chapman*, 6 Ct. of Sess. Cas. (3rd ser.) 427.

ii. *On Assignment.*

Of Ship.]—If the owner of a ship, having chartered her for a voyage, assigns her before its completion, and afterwards assigns the charterparty to another, if she earns freight, the assignee of the ship is entitled to the freight as incident to the ship. *Morrison* v. *Parsons*, 2 Taunt. 407; 11 R. R. 622.

But he cannot sue on the charterparty otherwise than in the name of the assignor. *Ib.*

A covenant in a charterparty to pay freight to the owner for the hire of the vessel is not transferred to the vendee by a bill of sale of the ship made during the voyage; and such owner afterwards becoming bankrupt, his assignees, and not

the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charterparty. *Splidt* v. *Bowles*, 10 East, 279 ; 10 R. R. 296.

Re-Transfer of Ship by Way of Security—Possession.]—A re-transfer of a ship to a vendor, absolute in terms, but intended as a security for the payment of the purchase-money, the ship then being on a voyage, and the transfer not mentioning freight, does not pass the freight to the transferee until, at all events, he has claimed it, and done some act tantamount to taking possession. *Gardner* v. *Cazenove*, 1 H. & N. 423 ; 26 L. J., Ex. 17 ; 5 W. R. 195.

Where Agreement for Partnership.] — The plaintiffs, who were shipowners, offered their vessel for hire to the defendants, and the latter objected to take it, on the ground that it was too large, whereupon an arrangement was entered into for a partnership adventure in the vessel. The plaintiffs being indebted to D. & Co., subsequently deposited the charterparty with them as a security with an indorsement upon it, directed to the defendants, requiring them to pay the amount of what was due to D. & Co., and notice was given to the defendants. In an action by D. & Co. to recover the freight due under the charterparty :—Held, that the transaction amounted to an absolute assignment to D. & Co. *Boyd* v. *Mangles*, 3 Ex. 387 ; 18 L. J., Ex. 273.

Of Freight—After Vessel Sold.]—The right to freight is incidental to the ownership of the vessel which earns it, and therefore a transfer of a share in a ship passes the corresponding share in the freight, under an existing charterparty, without the mention of the word "freight." *Lindsay* v. *Gibbs*, 22 Beav. 522 ; 2 Jur. (N.S.) 1039 ; 4 W. R. 788.

A ship was chartered by her owner. Afterwards, in June, 1854, he sold twenty-four shares of the ship to A., and the remaining forty shares to B., and in December he assigned the freight to C. A. registered before, and B. after, C.'s assignment ; but C. gave the first notice to the charterers :—Held, that C.'s right to the freight had priority over B., but not over A. *Ib.*

Freight to be Earned.]—An assignment by the owners of a ship of freight to be earned, is good. *Douglas* v. *Russell*, 4 Sim. 524. Affirmed, 1 Myl. & K. 488.

A., a shipowner, assigned to B. the freight earned and to be earned by one of his ships, and afterwards chartered her to C. for a voyage to S. The outward freight was paid before the ship sailed. The charterparty afterwards was delivered to B. by A.'s direction, and B. gave notice of the assignment to C. Afterwards, but before the ship returned, A. became bankrupt :—Held, that the homeward freight was not in A.'s order and disposition at his bankruptcy, and, therefore, that B. was entitled to it. *Ib.*

An assignment of the freight and profits of a ship does not extend to profits not in existence, actual or potential, at the time of the assignment ; therefore, where C. assigned by deed to S. the freight, earnings and profits of a ship, which ship afterwards, in a voyage to the South Seas, obtained a quantity of oil, the produce of whales taken in the said voyage :—Held, that this oil did not pass to S. by the assignment, for the assignor had no property, actual or potential, in the oil at the time of assignment, and the voyage was not then contemplated. *Robinson* v. *Macdonnell*, 5 M. & S. 228 ; 5 B. & Ald. 134.

An assignment to a third party of freight, or a fixed sum out of freight, passes, as between part owners, only net freight, but a mortgagee, not in possession when the freight was received, has no locus standi afterwards to insist on such a construction. *The Edmund*, Lush. 58 ; 29 L. J., Adm. 76 ; 2 L. T. 192.

A., in consideration of money advanced and to be advanced by B. & Co., assigned all the freight to arise from a ship, under any existing or future charterparty or other contract, for or in respect of her intended voyage to India and back to England. After the freight had been earned and ascertained, A. became bankrupt :—Held, that such assignment was good, and that his assignees were not entitled to sue for the freight. *Leslie* v. *Guthrie*, 1 Scott, 683 ; 1 Bing. (N.C.) 697 ; 4 L. J., C. P. 227.

Notice of Assignment given before Payment.]—Action upon a charterparty for freight. Plea, discharge. Replication, on equitable grounds, that before the discharge the plaintiff assigned his interest in the charterparty to S., of which the defendant had notice, and that the discharge was given in fraud of S., and that the action was brought by S. in the name of the plaintiff for the sole benefit of S. :—Held, a good replication. *De Pothonier* v. *De Mattos*, El. Bl. & El. 461 ; 27 L. J., Q. B. 260 ; 4 Jur. (N.S.) 1034 ; 6 W. R. 628.

Set-off—Notice of Assignment.]—In an action for freight the defendant pleaded a set-off, to which the plaintiff replied, on equitable grounds, that while the freight was in the course of being earned, he assigned it for value to A., of which the defendant, before the debt became due and before the action was brought, had notice ; and that the plaintiff was suing only as trustee for A. :—Held, no answer to the plea. *Wilson* v. *Gabriel*, 4 B. & S. 243 ; 8 L. T. 502 ; 11 W. R. 803.

—— **By Holders of Bill of Lading.**]—The holders of a bill of lading cannot, as against the assignees of the freight, set off a debt due to them from the original owner of the goods who was also the assignor of the freight. *Wegnelin* v. *Collier*, 42 L. J., Ch. 758 ; L. R. 6 H. L. 286 ; 22 W. R. 26.

Fraud—Release by Shipowner before Sale of Ship.]—Action by a shipowner upon a charterparty for nonpayment of freight by the charterer, and for money payable for freight, and on an account stated. Pleas, a discharge before breach ; payment, and (on equitable grounds) a parol release of the plaintiff by the defendant after the cause of action accrued. A replication, that, before action accrued, and before release or discharge or payment, all the right, title and interest of the plaintiff in the ship, and in the charterparty, were assigned to S., and then became, and are vested in him, of which the defendant had notice before the release or discharge or payment ; that the plaintiff released and discharged the defendant, and made the payment without the authority, knowledge or consent of S. ; that the release and discharge were given by the plaintiff to the defendant and obtained by the defendant from the plaintiff and the payment made fraudulently, and with

the intent to defraud S., and prevent him from recovering in respect of the causes of action, and that the action was brought by S., in the name of the plaintiff, on behalf of S.; that the plaintiff had no interest in the action, and that it had been commenced and carried on for the sole use and benefit, and at the sole expense and cost of S.—is a good replication, on equitable grounds. *De Pothonier* v. *De Mattos*, El. Bl. & El. 461; 27 L. J., Q. B. 260; 4 Jur. (N.S.) 1034.

iii. *On Mortgage.*

Extent of Right of Mortgagees.]—A mortgagee of a ship does not, ordinarily speaking, obtain by the mortgage alone a transfer, by way of contract or assignment, of the right to freight. The mortgagor remains dominus of the ship, with regard to everything relating to its employment or non-employment, or to any rate of freight to be earned by its employment, until the mortgagee takes possession. The mortgagee on taking possession becomes the owner, and it is by virtue of that ownership, and not by virtue of any antecedent contract or right, that he is entitled to receive the freight which, by contract or otherwise, is lawfully payable. *Keith* v. *Burrows*, 46 L. J., C. P. 801; 2 App. Cas. 636; 37 L. T. 291; 25 W. R. 831; 3 Asp. M. C. 481—H. L. (E.)

A mortgage of a vessel carries with it the freight, and the mortgagee intervening by taking possession, or by an act equivalent to taking possession, before the freight becomes payable, is entitled as against the mortgagor, or his assignees in bankruptcy, to receive it. *Rusden* v. *Pope*, 37 L. J., Ex. 137; L. R. 3 Ex. 269; 18 L. T. 651; 16 W. R. 1122.

By the mortgage of a ship, accruing freight passes to the mortgagee as incident to the ship, notwithstanding 6 Geo. 4, c. 110, s. 45, which enacted that the mortgagee should not be deemed owner, except for the purpose of making a transfer. *Dean* v. *M'Ghee*, 4 Bing. 45; 2 Car. & P. 387; 12 Moore, 185; 5 L. J. (O.S.) C. P. 44. S. P., *Kerswell* v. *Bishop*, 2 C. & J. 529; 2 Tyr. 602; 1 L. J., Ex. 227.

Freight Already Paid to Mortgagor.]—The mortgage of a ship carries with it the right to receive the freight earned by the ship; and although the mortgagee cannot recover back from the mortgagor freight which he has allowed the mortgagor to receive, yet he may at any time intercept the freight by giving notice to the mortgagor, consignee or charterer, that he intends to exercise his right of property, and to require the freight to be paid to him. *Wilson* v. *Wilson*, 41 L. J., Ch. 423; L. R. 14 Eq. 32; 26 L. T. 346; 20 W. R. 436; 1 Asp. M. C. 265.

A mere mortgage of a ship does not give a mortgagee a right to the earnings of a ship received by the mortgagor after the execution of the mortgage, but before the mortgagee takes possession. *Willis* v. *Palmer*, 7 C. B. (N.S.) 340; 29 L. J., C. P. 194; 6 Jur. (N.S.) 732; 2 L. T. 626; 8 W. R. 295.

At what Time Right Accrues.]—When an entire ship is in mortgage, in order to defeat the right of the mortgagor to receive the freight, the mortgagee must take possession of her before the completion of the voyage; but where the mortgagor of certain shares is ship's husband, if the mortgagees join with the owners of the other shares in the appointment of a new ship's husband before the completion of the voyage, the mortgagor loses all right as ship's husband to receive the freight. *Beynon* v. *Godden*, 3 Ex. D. 263; 39 L. T. 82; 26 W. R. 672; 4 Asp. M. C. 10—C. A.

Deductions—Advances by Charterers.]—By the terms of a charterparty it was provided that the charterers should advance necessary funds for the ship's disbursements, not exceeding a specified amount, at the port of lading. Previously to entering into the charterparty the owner had mortgaged the ship and freight. The charterers made advances for the ship's disbursements, considerably in excess of the amount specified in the charterparty. Before the freight became due the mortgagee took possession of the ship, and stopped the cargo for freight:—Held, that the charterers were not entitled to deduct from the amount due for freight the advances made by them in excess of the sum provided by the charterparty. *Tanner* v. *Phillips*, 42 L. J., Ch. 125; 27 L. T. 717; 21 W. R. 68; 1 Asp. M. C. 448.

Payment of Wages.]—If the brokers of the mortgagee of a ship, who has taken possession, receive the freight, it is not recoverable from them by the assignees of the mortgagor (he having become bankrupt), if a sum equal in amount has been applied by the mortgagee to the payment of the seamen's wages. *Dean* v. *M'Ghee*, supra.

Priorities—Claim for Necessaries.]—A claimant for necessaries has no maritime lien and no equity to precede the mortgagee. *The Two Ellens, Johnson* v. *Black*, 8 Moore, P. C. (N.S.) 398; 41 L. J., Adm. 33; L. R. 4 P. C. 161; 26 L. T. 1; 20 W. R. 592.

—— **Between Mortgagees.**]—The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout not only what is due on his first mortgage, but also the amount of any subsequent charge which he may have acquired on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight. *Liverpool Marine Credit Co.* v. *Wilson*, 41 L. J., Ch. 798; L. R. 7 Ch. 507; 26 L. T. 717; 20 W. R. 665.

—— **Mortgagee and Assignee of Freight.**]—A vessel was chartered to proceed to A., there take in a cargo to be shipped by the charterers, and return direct to London. After the ship's arrival in the port of London, and whilst the cargo was in course of delivery, a mortgagee, under an ordinary statutory mortgage made prior to the date of the charterparty, took possession:—Held, that he thereby acquired a right to the freight in priority to an assignee of the freight by a deed executed subsequently to the charterparty, notice of which had been given to the charterers. *Brown* v. *Tanner*, 37 L. J., Ch. 923; L. R. 3 Ch. 567; 18 L. T. 624; 16 W. R. 882; 1 Asp. M. C. 208.

Mortgagee Suing in his own Name.]—It was formerly held that the mortgagee of a ship could not sue in his own name for the freight accruing

after the mortgage, and before he took possession. *Chinnery* v. *Blackburne*, 1 H. Bl. 117, n.; 3 Dougl. 391; 2 R. R. 731. And see *Briggs* v. *Wilkinson*, 9 D. & R. 871; 7 B. & C. 30; 5 L. J. (o.s.) K. B. 349.

Title to Goods.]—S. & F., owners of a ship, mortgaged her to the plaintiff, and also assigned to him all the freight to be earned by the ship. S. & F. retained possession of the ship, and sent her to Cuba, expecting to find there a return cargo; but none was ready. The captain, therefore, determined to buy for his owners a return cargo for an English port, and he obtained a cargo of wood from T. & Co., who supplied it to him, and took a bill of lading for the wood from the captain, who by the bill of lading bound himself "to deliver it in the like good order in the said port, or in such other my manifest may appoint, to order ——, who, on faithful delivery being shewn, shall pay me —— for freight and conveyance." A black line was drawn through the space in the bill of lading usually filled up with the amount of the freight. T. & Co. sent to M. & Co., of Havannah, the bill of lading and the invoice of the goods, stating them to be "shipped by order of M. & Co., of Havannah, and for account of risk of whom it may concern." M. & Co. paid T. & Co. for the goods, and drew bills for the price on an English merchant, who refused to accept them. The defendant thereupon accepted the bills for the honour of the drawer, and paid them when due. He also received the bills of lading indorsed in blank to T. & Co. S. & F. became bankrupt. The plaintiff took possession of the ship on its arrival in England, and claimed freight for the cargo:—Held, that he was so entitled, as the goods remained the property of T. & Co. under the bill of lading. *Gumm* v. *Tyrie*, 6 B. & S. 299; 34 L. J., Q. B. 124; 13 W. R. 436—Ex. Ch.

Right of Mortgagees to Freight.]—See *Keith* v. *Burrows*, and Cases supra, cols. 178–182.

See also *Lindsay* v. *Gibbs*, and Cases infra, col. 444.

b. By Whom.

i. *Consignor or Consignee.*

Goods deliverable to Order under Bill of Lading—Assignment of Freight.]—Though freight may not be payable in respect of a man's own goods conveyed in his own ship, it becomes so if he makes third persons, who have advanced him money, the consignees of those goods, and the goods are by the bill of lading deliverable to their order. *Weguelin* v. *Cellier*, 42 L. J., Ch. 758; L. R. 6 H. L. 286; 22 W. R. 26.

T. & Co., who acted as the London bankers for Holm of Stockholm, consented to open a credit in his favour with merchants at Akyab for the purchase of "rice for the English market shipped by vessels of my own, the 'Java,' &c., at, &c., f. o. b." The rice was purchased and shipped on board the "Java," and made deliverable to the order of T. & Co., who accepted bills to cover the purchase. The bill of lading was indorsed to them; it described the goods "to be delivered in like good order, &c., unto T. & Co. or their assigns; freight for the goods 4*l.* 5*s.* per ton of 20 cwt. net, delivered with primage and average accustomed." While the "Java" was on its voyage, Holm obtained advances from C. & Co., to whom he assigned the freight as security:—Held, that, under these circumstances, C. & Co. were entitled to the freight, and T. & Co. were, like all other consignees of a cargo, liable to pay it under the terms of the bill of lading, although the cargo was in fact brought to England in Holm's own vessel, the "Java." *Ib.*

Implied Contract.]—On a bill of lading of goods "shipped by A. to be delivered to B. or his assigns, he or they paying freight," if the goods are delivered without receiving the freight, the shipper is not liable for the freight, there being no charterparty. *Drew* v. *Bird*, M. & M. 156.

Unless he has made a subsequent promise to pay such freight. *Ib.*

A charterparty was entered into in London on the 17th of June, 1872, between the master of a ship lying at London, and L., a shipbroker, to carry 407 tons of iron from H. to G., at freight of 7*s.* 3*d.* per ton. Freight to be paid in London on signing bills of lading, the owner or master to have an absolute lien for freight. On the following day L. chartered the ship to the defendant at 8*s.* per ton for the same amount of iron. The charter contained similar clauses as to freight and lien, and the following clause at the end: "The brokerage of 5 per cent. is due on the execution of this charter to L., by whom the vessel is to be entered and cleared at the port of loading." Though the defendant thought he was treating with L. as broker for the ship, L. had no authority in fact to act as broker for the plaintiff, or to receive the freight; and neither the plaintiff nor the defendant knew of the charter entered into by the other. The cargo having been put on board by the defendant, the master signed bills of lading making it deliverable to consignees or assigns, "they paying freight for the goods as per charterparty." The plaintiff did not demand the freight on signing the bills of lading. The cargo was duly delivered at the port of discharge, and in the meantime L. obtained payment of the freight of 8*s.* per ton from the defendant and afterwards stopped payment, leaving the 7*s.* 3*d.* per ton unpaid to the plaintiff. The plaintiff having sued the defendant for the 7*s.* 3*d.* per ton for the carriage of the iron:—Held, that he could not recover, for that he and the defendant never were ad idem, and consequently there was no express contract between them; and that, under the circumstances, no contract to pay reasonable freight for the carriage could be implied on the shipment of the goods. *Schmidt* v. *Tiden*, 43 L. J., Q. B. 199; L. R. 9 Q. B. 446; 30 L. T. 891; 22 W. R. 913; 2 Asp. M. C. 307.

Goods were laden in Jamaica on board a ship, according to a bill of lading, which stated them to have been shipped by J., on a vessel bound for London, on account of the defendant, and that they were to be delivered in London to the consignees, paying freight for the same at the rate therein mentioned: the goods so shipped were the property of the defendant. The captain having delivered the goods to the consignees without receiving the freight:—Held, that the defendant was liable by law to pay the freight to the shipowners, independently of any express contract by charterparty. *Domett* v. *Beckford*, 5 B. & Ad. 521; 2 N. & M. 374; 3 L. J., K. B. 10.

Where the master, as agent for his owners, entered into a charterparty with a partner in the house of M. & Co., for the delivery of goods upon a stipulated freight, and the goods were delivered to M. & Co., who were the consignees named in

the bill of lading:—Held, that the owners could not maintain an action against that partner for the freight. *Schack* v. *Anthony*, 1 M. & S. 573.

Rights against Both.]—If the master signs a bill of lading, expressing that upon the delivery of the cargo freight is to be paid by the consignees, he does not thereby renounce his claim for freight against the consignor. *Christy* v. *Row*, 1 Taunt. 300; 9 R. R. 776.

Entry of Name at Custom House—Custom to Charge.]—Where goods are shipped to the orders of the shipper, the custom of charging the person in whose name the goods are entered at the custom house with freight, can only exist where the same person is consignee, or where the consignee is unknown. *Artaza* v. *Smallpiece*, 1 Esp. 23. See *Cock* v. *Taylor*, infra, col. 403.

Evidence to Charge Consignee.]—The consignee of goods, where there is no bill of lading, is not in general liable for the freight; but prior dealings with him, and payments by him of the freight on former occasions of the same kind, are evidence to shew that in the particular case he contracted on the receipt of the goods to pay the freight. *Coleman* v. *Lambert*, 5 M. & W. 502; 9 L. J., Ex. 43.

Effect of Clause "He or they Paying Freight."]—The usual clause in a bill of lading, engaging the master of the ship to deliver the goods to the consignee or his assigns, "he or they paying freight for the said goods," is introduced for the benefit of the master only, and not for the benefit of the consignor; and therefore the master is not bound to the consignor to withhold the delivery of the goods, unless the consignee or his assigns pay the freight. Nor does it vary the case that the consignor was also the charterer of the ship. *Shepard* v. *De Bernales*, 13 East, 565; 12 R. R. 442.

What Deductions.]—A. consigns goods to B., with directions to pay over the net proceeds to C.; B. employs D. to dispose of them. In an action by C. to recover the proceeds from D., D. is entitled to make the same deductions for freight as B. (who was the owner of the ship in which the goods were brought) might have made. *Blackburn* v. *Kymer*, 1 Marsh. 223, 278; 5 Taunt. 584, 672.

Expenses to which charterers have been subjected by the master's refusal for a time to receive parts of the cargo on board could not be set off against a claim for freight by the shipowner, nor deducted from damages. *Seeger* v. *Duthie*, 8 C. B. (N.S.) 72; 30 L. J., C. P. 65; 7 Jur. (N.S.) 239; 3 L. T. 478; 9 W. R. 166—Ex. Ch.

Mortgagees of Cargo—Consignees.]—The consignees in the bills of lading were the bankers of the owner of the ship, at whose request the consignment was made. The consignors drew bills upon them for the price of the cargo, which they paid at maturity:—Held, that they did not thereby become owners for the purpose of freight, and were entitled to the first charge on the proceeds of the cargo. *Collier* v. *Hinde*, 17 L. T. 341; 16 W. R. 1184. *And see*, supra, IX. MORTGAGE.

Chancery Jurisdiction.]—The court will not entertain a bill by a shipowner against a freighter for an account of what is due in respect of freight, though the charterparty expressed that the freight was to be paid according to the quantity of the cargo, and it was charged that, in the bill of lading that quantity was stated untruly. *Long* v. *Young*, 2 L. J. (O.S.) Ch. 139.

The court will entertain a suit for an account of the freight of a ship grounded on a contract which also contains stipulations affecting to give an ultimate right of property in the ship, and which may not be capable of being recognised or enforced as a whole, for want of being registered; provided the title to the freight is distinct from, and does not necessarily depend upon, a title to the ship claimed under such contract. *Davenport* v. *Whitmore*, 2 Myl. & C. 177; 6 L. J., Ch. 58.

T., by instrument under seal, chartered N.'s vessel to convey merchandise to the port of London, and consigned the merchandise to L. and H., who were to pay the freight within ten days after delivery to them. The merchandise was delivered to L. and H., pursuant to the bill of lading. N. held to have no right against L. and H., and N.'s bill dismissed against the present representatives of H., L. having become bankrupt. *Nockells* v. *Lingham*, 2 Jur. 438.

Liability for—Bill of Lading.]—See *Sewell* v. *Burdick*, ante, col. 357.

Consignee for Sale—Liability for Freight.—Deposit of Freight with Wharfinger]**—25 & 26 Vict. c. 63, ss. 66-72.**]—Where a shipowner has, under s. 67 of the Merchant Shipping Acts Amendment Act, 1862, deposited goods with a warehouseman, and the consignee for sale in this country has deposited the amount of freight under s. 70 of the same act, the shipowner's lien is discharged, and the consignee may obtain delivery of the goods ex warehouse without a contract being implied on his part to undertake any personal liability for the amount of the freight. *White* v. *Furness, Withy & Co., The Inchulva*, 64 L. J., Q. B. 161; [1895] A. C. 40; 11 R. 53; 72 L. T. 157; 7 Asp. M. C. 574—H. L. (E.)

Master's Gratuity—Liability of Consignee.]—By charterparty cargo was to be delivered upon payment of freight at a stated rate, and 1*s.* per ton gratuity for the captain on good delivery of the cargo. One of the bills of lading for part of the cargo stated that the goods shipped were to be delivered, "assigns paying freight for the said goods as per charterparty":—Held, that the consignees were liable for the master's gratuity:—Held, also, that though part of the goods were damaged by sea perils, the gratuity was payable. *Howitt* v. *Paul*, 5 Ct. of Sess. Cas. (4th ser.) 321.

ii. *Agent, Factor, Broker, or Charterer.*

Liability of—Payment Unauthorised.]—The brokers employed by the assignees of a bill of lading sold the goods, but when called upon for delivery, found them to be stopped for freight, which, to obtain possession of the property, they paid, although their principals had formerly directed them not to do so, as the freight had been paid in Bengal:—Held, that this advance by the brokers was made in their own wrong, though the freight had not in fact been paid in Bengal, as the principals supposed. *Howard* v. *Tucker*, 1 B. & Ad. 712.

—— **Receipt of Cargo—Practice.**]—Where the consignees of a West India cargo, deliverable by bill of lading to them or their assigns, he or they paying the freight for the same, indorsed it on their brokers, for advances made by them, and the cargo on its arrival was landed at the West India Docks in the names of the consignees, but was entered at the custom-house by the brokers in their own names, and afterwards they obtained delivery from the West India Docks under an order from the consignees for that purpose, and not under the bill of lading:—Held, that the receipt of the cargo by the brokers under the order of the consignees was not a sufficient ground to raise an implied assumpsit on their part to pay the freight, and the entry at the custom-house made no difference; but as it appeared from previous dealings that they had been in the habit of receiving goods in the same manner, and paying the freight for them, that was considered sufficient to raise such an implied promise. *Wilson* v. *Kymer*, 1 M. & S. 157. See *Cock* v. *Taylor*, infra, col. 403.

—— **Acceptance.**]—A. and B., merchants abroad, shipped tobacco for Liverpool, consigned to A. himself there, to whose order the bills of lading were made; one of these bills was sent inclosed in a letter from the shippers to C. at Liverpool, advising him of such consignment to A., and that A. intended to proceed to Liverpool, but in case he should not arrive in time, desiring C. to do the best for them. The tobacco having arrived in a damaged state before A., was required to be landed, and was deposited in the king's warehouse pursuant to the statute, and afterwards C., acting as agent for A. within the knowledge of the captain, made an entry of it in his own name in the custom-house to avoid seizure:—Held, that this was not such an acceptance of the cargo by C. as would make him liable to the captain for the freight. *Ward* v. *Felton*, 1 East, 507.

Signing as Agent.]—A party received on board his ship coals from the Burntisland Company, to be carried to London; and the captain signed a bill of lading, by which the coals were made deliverable unto "N. T. for the London Gas Company, or to his assigns, he or they paying freight for the goods 10*s.* per ton in cash of true delivery." On the arrival of the ship in London N. T. produced the bill of lading and received the goods under it, and afterwards offered to pay the freight by a bill at two months:—Held, that he was not personally liable, inasmuch as on the face of the bill of lading he was a mere agent to receive the goods for the company, the property vesting in the company. *Amos* v. *Temperley*, 8 M. & W. 798; 11 L. J., Ex. 183. And see *Fox* v. *Nott*, supra, col. 391.

Where the consignee and agent of a vessel chartered for a specific voyage entered into an agreement with the captain, describing himself as "consignee and agent of the brig and cargo on behalf of H., merchant of L.," the agreement stating that "it was witnessed that the parties agreed that the vessel should go to another port, there discharge the remainder of her cargo, and receive a full and complete homeward cargo at the same freight as she would have got had she proceeded on the voyage stipulated in the charter-party," and the consignee signed the agreement in his own name, without describing himself as agent:—Held, that he thereby made himself personally liable to pay the amount of the freight of the homeward voyage. *Kennedy* v. *Gouveia*, 3 D. & R. 503; 26 R. R. 616.

Evidence of Usage.]—The manager of a stone quarry signed a shipping note, expressing that stone was shipped on board the plaintiff's vessel to be carried for the owner of the quarry, who, however, never appeared. In reality it was shipped for the purchaser of the stone, the real consignee. In an action for freight and demurrage, evidence of usage that the quarry owner never paid freight or demurrage, was admitted, and the question whether the stone was shipped for the manager of the quarry was left to the jury upon all the circumstances. *Dickenson* v. *Lano*, 2 F. & F. 188.

Indorsing Bills of Lading.]—*See* infra.

Liability of Charterer—Cesser Clause.]—Notwithstanding that a charterparty provides that the liabilities of the charterer are to cease on the vessel being loaded, "the master and owner having a lien on the cargo for all freight and demurrage under this charterparty," the liability of the charterer to pay the charterparty freight will continue after the vessel is loaded, if the charterparty enables bills of lading to be presented in such a form as to make the owner's lien not commensurate with the liability which is to cease. *Clink* v. *Radford* ([1891] 1 Q. B. 625), followed. *Hansen* v. *Harrold*, 63 L. J., Q. B. 744; [1894] 1 Q. B. 612; 9 R. 315; 70 L. T. 475; 7 Asp. M. C. 464—C. A.

Charterers' Agent collecting Freight—Liability to Shipowner.]—On the ship's arrival the charterers' agent, to whom the ship was addressed, collected the freight from consignees on delivery of the goods, and without authority from master or owner compromised a claim for damage to a butt of wine by a money payment:—Held, that he must account for the full freight to the shipowner. *Broadhead* v. *Yule*, 9 Ct. of Sess. Cas. (3rd ser.) 921.

iii. *Assignee, Appointee, or Indorsee.*

Effect of Indorsing Bills of Lading.]—Goods shipped at Bombay, on board a ship, were, by the bill of lading, to be delivered unto order or to his and their assigns, on paying freight for the same. The shipper indorsed the bill of lading and forwarded it to East India agents in London, who indorsed it in blank to their factors in Liverpool. On the arrival of the goods at Liverpool the factors presented the bill of lading to the shipowner and received the goods, and he debited them with the freight. The factors, without having paid the freight, became bankrupt, and thereupon the shipowner claimed from them and took possession of the goods:—Held, that the East India agents were not liable for the freight. *Tobin* v. *Crawford*, 5 M. & W. 235. Affirmed, 9 M. & W. 716; 12 L. J., Ex. 490—Ex. Ch.

Goods were consigned to I. C. & Co. or their assigns, "he or they paying freight for the same"; I. C. & Co. indorsed the bill of lading to K., their broker, and then became bankrupt; the shipowners, in ignorance of the circumstances, applied to I. C. & Co. for the freight, and then sued K. for it:—Held, that he was liable. *Dougal* v. *Kemble*, 11 Moore, 251; 3 Bing. 383; 4 L. J. (o.s.) C. P. 103; 28 R. R. 648.

The indorsee of a bill of lading, which directs the goods to be delivered to order or to assigns, paying freight, is liable for the freight, though he is only acting as broker for the consignee; and though twelve months have elapsed since the landing of the goods without any demand of freight, he is bound not to deliver the goods till he knows that freight has been paid. *Bell* v. *Kymer*, 1 Marsh. 146; 5 Taunt. 477; 3 Camp. 545. *See* 15 R. R. 261.

But an indorsee of a bill of lading, who has indorsed the same over before the arrival of the vessel and delivery of the cargo, does not, under 18 & 19 Vict. c. 111. s. 1, remain liable for the freight. *Smurthwaite* v. *Wilkins*, 11 C. B. (N.S.) 842; 31 L. J., C. P. 214; 5 L. T. 842; 7 L. T. 65; 10 W. R. 386.

Receiving Goods—Evidence of Promise to Pay.]—The master having contracted by the bill of lading with the shippers to deliver goods to certain persons or their assigns, he or they paying freight for the same, the demanding and taking of such goods from the master by a purchaser and assignee of the bill of lading, without the freight having been paid, is evidence of a new contract and promise on the part of such purchaser, as the ultimate appointee of the shippers for the purpose of delivery, to pay the freight. *Cock* v. *Taylor*, 13 East, 399; 2 Camp. 587; 12 R. R. 378.

Where a ship was chartered on a voyage out and home for a specified time, at a certain rate of payment on the homeward cargo, in full for the hire of the ship for the time, to be paid in part by an advance on the ship's clearing for the outward voyage, and the rest on her return, by bills payable at a future day; and, on the loading the homeward cargo, a bill of lading was signed to deliver the goods to the charterers or their assigns, he or they paying freight for the goods, as per charterparty:—Held, that the indorsees of the bill of lading for valuable consideration were not liable to the shipowner upon an implied assumpsit to pay the freight arising out of the receipt of the goods under the bill of lading. *Moorsom* v. *Kymer*, 2 M. & S. 303; 3 Camp. 549, n.; 15 R. R. 261.

Goods being shipped in India for London on account of a person there, the bill of lading was forwarded to him, and he indorsed it over for value. The bill of lading, signed by the captain, stated the freight to have been paid in Bengal, but it was found after the above transfer that the freight never had been paid, through default of the shipper:—Held, that the shipowners, who detained the goods, could not claim payment of the freight from the assignees of the bill of lading. *Howard* v. *Tucker*, 1 B. & Ad. 712.

An implied assumpsit for freight, upon the delivery of goods without first receiving the freight, will not lie against three persons for whose use the cargo was purchased, but who are not the consignees, or holders of the bills of lading, and who have assigned all their effects to a trustee for the benefit of their creditors and themselves, two of them only, without the third, receiving the goods as agents for that trustee. *Pinder* v. *Wilks*, 5 Taunt. 612; 1 Marsh. 248.

—— **Under Spanish Bill of Lading—"Assigns."**] —An indorsee of a Spanish bill of lading, to whom the goods have been delivered under it, is liable for the freight, although the bill of lading is for delivery to the consignees, without saying "or their assigns," such bills of lading appearing by evidence to be usually passed by indorsement. *Renteria* v. *Ruding*, M. & M. 511.

—— **Evidence of New Contract.**]—A special verdict was found, in an action for the recovery of freight, that, by a memorandum of charterparty, the ship was chartered for a voyage from a foreign port to London, to load at the foreign port a cargo, and to deliver the same at London, on payment of a specified freight; that the ship received on board a cargo under a bill of lading, by which the goods were deliverable to the shipper or his assigns, he or they paying freight for the same as per charterparty:—Held, first, that, from an acceptance of the goods by an assignee of the bill of lading, the law could not imply a contract by him to pay freight; and that no such contract could have been implied, even if the bill of lading had made no reference to the charterparty, but had merely specified a sum to be paid for freight, though, in the latter case, at all events, the facts might be evidence from which a jury might find such a contract. *Sanders* v. *Vanzeller*, 3 G. & D. 580; 4 Q. B. 260; 2 G. & D. 244; 12 L. J., Ex. 497—Ex. Ch.

Held, secondly, that the court could not infer a contract by the defendant to pay freight. *Ib.*

Where an indorsee of a bill of lading, or a consignee, other than the original charterer, becomes liable for freight, such liability results not from the original contract of affreightment, but from a new contract, the consideration for which is the delivery of the goods. *Kemp* v. *Clark*, 12 Q. B. 647; 17 L. J., Q. B. 305; 12 Jur. 676.

No contract to accept the cargo, or any part of it, within a reasonable time, and to pay the freight, can be inferred from the mere fact of the assignee of the bill of lading presenting it to the captain and demanding the delivery of the cargo. *Moller* v. *Young*, 5 El. & Bl. 755; 25 L. J., Q. B. 94; 3 Jur. (N.S.) 393; 4 W. R. 149—Ex. Ch.

Where, after such a demand by the assignee of a bill of lading, the captain delivered a portion of the cargo, and then refused to deliver the remainder until paid freight for the portion already delivered, and the assignee then refused to pay any freight until the whole cargo should be delivered:—Held, that there was not evidence from which a jury might infer a promise on the part of the assignee to pay at once for the portion of the cargo delivered. *Ib.*

An assignee of a bill of lading, who claims and receives goods under it, is bound by the terms of the bill of lading, not only as to the amount of freight, but also for demurrage, if he does not unload the ship within the time limited by the bill of lading, according to its terms, and there is a sufficient consideration arising on the claim of the goods by the consignee, from which the law will infer a promise by the consignee to pay such demurrage as well as the freight. *Stindt* v. *Roberts*, 5 D. & L. 460; 2 B. C. Rep. 212; 17 L. J., Q. B. 166; 12 Jur. 518.

As against Mortgagee.]—S., a partner in a firm at Liverpool, and sole owner of the ship "Ellen," entered into an arrangement, by which she was, in 1850 and 1851, consigned, during several voyages, to H., a partner in the firm of H. & C. H., at New Orleans, with general instructions to do the best he could, either in loading the vessel on freight, or shipping cotton, on the joint

account of S. and H. On these occasions, as is usual when cotton is shipped on account of the shipowner, a nominal freight, or "no freight, being owners' property," was inserted in the bills of lading; but in stating the partnership accounts in respect of the sale of the cotton, the current rate of freight was charged in favour of S., and to the debit of the joint adventure. On the 4th of April, 1851, S. wrote to H.:—"We hope you have brought cotton, and that the 'Ellen' has arrived. What you do we will confirm." Again, on the 26th of April, "Whatever you do for the 'Ellen' will be confirmed by us." On the 8th of May, 1851, H. & C. H. shipped on board the "Ellen" 447 bales of cotton, and the master signed a bill of lading, by which the cotton was "to be delivered unto order or to assigns, he or they paying freight for the said cotton 1*s.* per bale, being owners' property, when draft against same is paid, say 3,590*l.* 9*s.* 8*d.*, with primage and average accustomed." On the 15th of May, H. & C. H. again shipped 381 bales of cotton, and a similar bill of lading was signed by the master. The draft for 3,590*l.* 9*s.* 8*d.*, dated 8th of May, 1851, was for the invoice price of the cotton, and was on the firm of which S. was a partner, and was purchased, on the day of its date, by the plaintiffs, merchants at New Orleans, who took, at the same time, from the shippers, an indorsement in blank of the first bill of lading, as a security for the due payment of the draft. A bill of exchange, dated 15th of May, 1851, for 3,169*l.* 19*s.* 3*d.*, was in like manner drawn for the price of the cotton in the second bill of lading; and that bill of exchange was also purchased by the plaintiffs, the second bill of lading being also indorsed to them. In both cases the cotton was purchased of third parties, and not of the plaintiffs. These bills, when due, were dishonoured by S., and taken up by the plaintiffs. On the 10th of May, 1851, S., being indebted to the defendants, assigned to them the "Ellen" by way of mortgage, with all her freight and earnings, with power of sale and authority to receive freight. The "Ellen" arrived at Liverpool on the 28th of July, 1851, when the defendants took possession of her and her cargo, and claimed from the plaintiffs, as indorsees of the bills of lading, payment of the current rate of freight. The plaintiffs tendered the amount of freight reserved by the bills of lading, which being refused they paid the amount claimed under protest, and brought an action for money received to their use:—Held, that the plaintiffs were entitled to recover, since the circumstances shewed a clear authority from S. to H. to ship the cotton upon the terms of the bills of lading; and although the second of these bills was signed after the mortgage, yet it did not invalidate the transaction as against the plaintiffs, who took the bills bonâ fide, and without notice. *Brown* v. *North*, 8 Ex. 1; 22 L. J., Ex. 49.

Custom as to Discount.] — A bill of lading expressed that goods shipped at Newcastle were deliverable at Liverpool to order or assigns, "he or they paying freight for the goods five-eighths of a penny sterling per pound, with 5 per cent. primage and average accustomed." By the usual custom of the trade at Liverpool, three months' interest or discount is deducted from freights payable under bills of lading on goods coming from certain ports, including Newcastle. An assignee of a bill of lading having received the goods, the shipowner claimed the freight without any deduction, contending that the custom was not binding in law, as contradicting the written contract. The assignee paid the freight, less the discount:—Held, that the custom was binding, and explained the bill of lading. *Brown* v. *Byrne*, 3 El. & Bl. 703; 2 C. L. R. 1599; 23 L. J., Q. B. 313; 18 Jur. 700; 2 W. R. 471.

Assignee of Freight or Consignee of Goods.] —Where, by a bill of lading, goods were to be delivered "to A., net proceeds paid to T. or to his assigns, he or they paying freight for the goods as per charterparty": — Held, that the freight was to be paid by A., and that the nett proceeds to be paid to T. were what remained after such freight and other charges had been satisfied. *Thomson* v. *Adam*, 5 Moore, 280; 2 Br. & B. 450.

c. Time.

Freight Payable in London.] — The words "freight payable in London" in a bill of lading define the place only, not the time, of payment. *Krall* v. *Burnett*, 25 W. R. 305.

Goods were put on board a ship consigned for Calcutta, at 39*s.* per ton, "payable in London": —Held, that it was for the jury to say from the surrounding circumstances whether the contract was a contract for freight, contingently on the ship's arrival at her destination, or for a sum payable on the receipt of the goods on board of her. *Lidgett* v. *Perrin*, 11 C. B. (N.S.) 362; 2 F. & F. 763.

Delivery of Cargo and Payment—Concurrent Acts.]—By the terms of a bill of lading, freight was to be paid "one-third in cash on arrival at B., and two-thirds on right delivery of the cargo, by good and approved bills payable in London at four months, or cash, deducting usual interest, at the option of the shippers." The vessel arrived at B. The one-third freight was paid, and the consignee of the cargo declared his election to pay the remaining two-thirds in cash, less interest: —Held, that the delivery of the cargo and payment of the balance of the freight were to be concurrent acts, and that the master was not bound to deliver the cargo unless the consignee paid or was ready and willing at the same time to pay the balance of the freight. *Paynter* v. *James*, 18 L. T. 449; 16 W. R. 768—Ex. Ch. Affirming L. R. 2 C. P. 348.

Delivery of Bill of Lading.]—A declaration stated that, in consideration that the plaintiff had taken the defendant's goods on board his ship to be carried to A., he promised to pay the money due for freight and carriage of the same on the delivery of the bill of lading, and that the bill of lading was delivered, by reason whereof he became liable to pay a large sum for freight and carriage of the goods:—Held, bad, because it did not appear that anything became due for freight on the delivery of the bill of lading. *Blakey* v. *Dixon*, 2 Bos. & P. 321.

Unloading or Right Delivery of Cargo.]— A charterparty provided that freights should become payable on the unloading or right delivery of a cargo, one-third in cash and the remainder by approved acceptances at three months, or cash equal thereto, but under certain circumstances the vessel was to be taken on hire at a certain rate, payment to be made in cash on account of three months' hire and the balance on

the ship's return. The ship having loaded a cargo of guano at Saldanha Bay, proceeded therewith to England, and, under the charterer's instructions, went to Southampton to discharge her cargo. The charterers wrote to the captain there, stating that without prejudice to the charterparty, or any dispute connected with the ship, their wishes were that it should be landed and warehoused in the Southampton docks in bulk, which was accordingly done:—Held, that, upon such landing of the cargo, the balance of the freight became payable. *Fenwick* v. *Boyd*, 15 M. & W. 632.

Final Loading.]—The term "final loading of a vessel from the port of loading," stated in a charterparty as the period for payment of freight or a part of it, means the final departure from the port, and being at sea ready to proceed on her voyage, and not merely having the clearances on board and being ready to sail. *Roelandts* v. *Harrison*, 9 Ex. 441; 2 C. L. R. 995; 23 L. J., Ex. 169.

Months.]—Where a ship is freighted by the month, the months are calendar, not lunar ones. *Jolly* v. *Young*, 1 Esp. 186.

Monthly Freight Payable in Advance—Liability—Termination of Hiring.]—By a charterparty it was provided that the charterer should pay freight "at the rate of 709*l.* per calendar month . . . and at and after the same rate for any part of a month, hire to continue until her re-delivery to the owner, payment for the said hire to be made in cash monthly in advance." It was also provided that the owner should have a lien upon cargoes and sub-freight for any amount due to him under the charter, and that the charterer should have a lien on the ship for all moneys paid in advance and not earned:—Held (reversing the judgment of Mathew, J., dissentiente Smith, L.J.), that the charterer was bound to pay the full freight in advance at the beginning of each month, although it might be probable that the hire would not continue for the whole month. *Tonnelier* v. *Smith*, 77 L. T. 277—C. A.

"Port"—Final Sailing of Ship from last Port.]—By the terms of a charterparty the owners were entitled to an advance of one-third of the freight within eight days "from final sailing of the vessel from her last port in United Kingdom." The vessel was loaded at Penarth dock, and was towed by a steam-tug seven or eight miles, bringing her out about three miles into the Bristol Channel. She there cast anchor, as the weather was threatening. While she was lying at anchor a storm broke her cables, and she ultimately ran ashore on Penarth beach, and the cargo was spoiled. The vessel had never been beyond the limits of the port of Cardiff as defined for fiscal purposes, but she had left what, for commercial purposes, is considered the port, and had been out at sea. She went ashore within the limits of the port in its commercial sense. The owners sued for one-third of the freight, and the charterers resisted the claim on the ground that the vessel had never sailed from her last port in the United Kingdom:—Held, that the word "port" must be taken in its ordinary commercial sense, and that as the vessel had got out to sea without any intention of returning, she must be taken to have finally sailed from her last port, that her being driven back into it by the weather made no difference, and that the one-third of the freight was payable. *Price* v. *Livingstone*, 53 L. J., Q. B. 118; 9 Q. B. D. 679; 47 L. T. 629; 5 Asp. M. C. 13—C. A.

The word "port" in a charterparty is to be understood in its popular, or business, or commercial sense; it does not in such a document necessarily mean the port as defined for revenue or pilotage purposes. Tests for determining the business meaning of the word "port" considered. *Garston Sailing-ship Co.* v. *Hickie*, 15 Q. B. D. 580; 53 L. T. 795; 5 Asp. M. C. 499—C. A.

A charterparty provided that a ship should load a cargo of coals at Cardiff, and then proceed to Bombay, the freight to be paid two-thirds in cash "ten days after the final sailing of the vessel from her last port in Great Britain," and the remainder in cash on delivery of the cargo. The ship loaded the coals in the Bute docks, at Cardiff, and, having cleared at the custom-house, started on her voyage to Bombay. She proceeded down the artificial channel leading from the docks to the river Taff, and, when about 300 yards beyond the junction of the channel with the river, she came into collision with a steamer, and was so much injured that she was compelled to return the next day to the docks for repairs:—Held, that at the time of the collision the ship was not outside the limits of the port, in the popular, business, or commercial sense of the word; that, consequently, she had not finally sailed from her last port; and that no freight was payable. *Ib.*

And see Cases cols. 368 seq., tit. 2. WHEN PAYABLE.

d. Manner.

i. *Advance of Freight.*

Condition Precedent—Failure of Voyage—Repayment.]—A ship was chartered for a homeward voyage from Calcutta, with an option to the charterers to send her on an intermediate voyage, "freight to be paid as follows: 1,200*l.* to be advanced to the master, and to be deducted, together with 1½ per cent. commission on the amount advanced and cost of insurance, from freight and settlement thereof, and the remainder on right delivery at port of discharge," The master was also "to sign bills of lading at any current rate of freight required, without prejudice to the charterparty, but not under the chartered rates, unless the difference be paid in cash." The charterers elected to send the vessel on an intermediate voyage, and paid the 1,200*l.*, and required the master to sign bills of lading below the chartered rates. The difference, amounting to 737*l.*, was demanded from them by the master, but they refused to pay it, claiming to set off against it the advances made on account of the vessel. The vessel was lost on her way to the intermediate port:—Held, that a payment in advance on account of freight cannot be recovered, even though the voyage fails; and that according to the terms of the charterparty the payment of the difference was to be a payment in the nature of freight, so that if the charterers had paid the difference in advance, they would not have been entitled to recover it; and that therefore the shipowner was entitled to recover the amount from them, notwithstanding the failure of the voyage. *Byrne* v. *Schiller*, 40 L. J., Ex. 177; L. R. 6 Ex. 319; 25 L. T. 211; 19 W. R. 1114; 1 Asp. M. C. 111—Ex. Ch. See *Watson* v. *Shankland*, infra.

—— **Freight or Loan.**]—A charterparty for a voyage to B., to load there a cargo of rice, and proceed therewith to London, contained the following stipulations:—"Cash for ship's disbursements to be advanced to the extent of 300*l.*, free of interest, but subject to insurance and commission; the freight to be paid on unloading and right delivery of the cargo." Whilst the ship was at B., the charterer's agent advanced to the captain cash for the ship's disbursements, and the captain drew a bill of exchange for the amount upon the owners. On her voyage homeward the ship was lost, and the owners refused to accept the bill. In an action by the charterer against the shipowners to recover the amount:—Held, that the advance was in part payment of freight, and not a loan, and therefore not recoverable. *Hicks* v. *Shield*, 7 El. & Bl. 633; 26 L. J., Q. B. 205; 3 Jur. (N.S.) 715; 5 W. R. 536.

—— **Loading and Sailing.**]—A debtor gave to his creditors the following order, addressed to B.:—"Please to pay H. & P. (on the 'Royal Oak' being loaded and sailed), out of the advance, 73*l.*"; and B. signed it, "We agree to the above, B. & Co." The ship having loaded, crossed the bar of Sunderland harbour, when the captain left her and went ashore to get the ship's papers and sign the bills of lading; the ship in the meantime stood off and on under easy sail, waiting for the captain's return:—Held, first, that the loading and sailing of the ship were conditions precedent to the payment of the money. *Hudson* v. *Bilton*, 6 El. & Bl. 565; 26 L. J., Q. B. 27; 2 Jur. (N.S.) 784.

Held, secondly, that the ship had not sailed. *Ib.*

—— **Seaworthiness.**] — A declaration for freight on a charterparty, whereby the ship, being tight and every way fitted for the voyage, should, at Sunderland, load a cargo of coals, and proceed to Constantinople, being paid freight on the quantity delivered, "one-fourth of the freight to be advanced to the owners' agent in London, on the ship having sailed, less five per cent. thereon for assurance, interest and commission," averred that the defendant caused the ship to be loaded with a cargo of coals, and that she, being so loaded, sailed for C., pursuant to the charterparty. Plea, that the ship was not, at the commencement of the voyage, tight and every way fitted for the voyage, and that by reason thereof the ship and cargo were lost:—Held, that the plea was not a good plea in avoidance of circuity of action, as the damage sustained by the defendant was not necessarily identical in amount with the sum claimed by the plaintiff; but that it was a bar to the action, on the ground that the advance of the freight had never become payable. *Thompson* v. *Gillespy*, 5 El. & Bl. 209; 24 L. J., Q. B. 340; 1 Jur. (N.S.) 779; 3 W. R. 505.

—— **Readiness of Ship — Captain's Attendance.**]—A charterparty contained stipulations, that the captain should attend daily at the brokers' office to sign bills of lading; that the ship should take on board all such lawful goods as the charterers might require; and then proceeded:—"In consideration whereof the charterers agree to pay freight for the use and hire of the ship 1,400*l.*, with a gratuity of 25 guineas to the master payable before leaving London." Then followed this clause:—"The owner agrees, that the ship shall be ready to sail at the expiration of the laying days, or sooner if required by the charterers. If the ship is not ready, either on the owner's or the charterer's part, at the above-named dates, then demurrage to be paid by the party in default at the rate of 7*l.* per diem. The ship to be ready on or before the 10th November, or the charterers to have the option of cancelling this agreement." The freight was stipulated to be paid, partly by bills of lading, at the port of destination, to the extent of 800*l.*, and balance of 600*l.* in cash, less seventy days' discount from the day of clearing from London:—Held, that the stipulations, on the part of the owner, were not conditions precedent to his right to sue for the 600*l.* as soon as the ship should have cleared from London. *Seeger* v. *Duthie*, 8 C. B. (N.S.) 72; 30 L. J., C. P. 65; 7 Jur. (N.S.) 239; 3 L. T. 478; 9 W. R. 166—Ex. Ch.

Ship Lost—Advance Freight to be Paid "if required."] — A charterparty provided that freight should be paid on unloading and right delivery of cargo, "one-third freight, if required, to be advanced, less three per cent. for interest and insurance." The ship was lost on the day of sailing, and shortly after the loss the shipowners demanded the advance freight:—Held, in an action by the shipowners to recover the advance freight, that the charterers were not liable. *Smith* v. *Pyman*, 60 L. J., Q. B. 621; [1891] 1 Q. B. 742; 64 L. T. 436; 39 W. R. 466; 7 Asp. M. C. 7—C. A.

—— **"Vessel lost or not lost"—Damages for Loss of Ship.**]—A stipulation in a charterparty that four-fifths of the freight should be paid in advance—"vessel lost or not lost"—does not prevent the charterer from recovering that amount as damages from the shipowner upon a loss of the vessel owing to negligence. *Great Indian Peninsular Ry.* v. *Turnbull*, 1 Cab. & E. 595; 53 L. T. 325; 33 W. R. 874; 5 Asp. M. C. 465.

—— **Date of Loss—Return of Freight.**]—By a charterparty for a voyage from the port of London to Calcutta and back on the usual terms, it was further agreed that the freighter, if he thought proper, might hire the vessel for an intermediate voyage within certain limits, for not less than six months; that, in that event, the master should refit the vessel for such voyage, and the complement of men should be kept up, and all necessaries provided; in consideration of which the freighter agreed to pay the owner of such voyage at the rate of 1*l.* a ton per month on the ship's tonnage, and to pay four months of such hire in advance; and at the end of six months two further months' pay, and so in every succeeding two months; and the balance due at the termination of such hiring in cash or approved bills. It was further stipulated, that, if the vessel should be lost or captured, the freight by time should be payable up to the period when she should be so lost or captured, or last heard of:—Held, that, under the former clauses of this agreement, the freighter could not claim a return of any part of the four months' advance, on the vessel being lost within that period; but that the advance, being in respect of freight, was absolute; and that the stipulation on this head was not qualified by the subsequent clause. *Saunders* v. *Drew*, 3 B. & Ad. 445.

—— **Presentation of Bills of Lading.**]—By a charterparty it was agreed that the ship should load a cargo and deliver the same at the port of destination on being paid freight on bill of lading quantity, one-third of the freight to be paid on signing bills of lading, and the remainder on unloading, in cash; the captain or agent to sign bills of lading for weight put on board, according to the railway or dock company's weight, within twenty-four hours. Shortly after the ship had sailed she sank with her cargo: —Held, that the charterers were bound, notwithstanding the loss of ship, to present bills of lading for signature by the captain or agent so as to entitle the shipowners to be paid the advance freight; and that therefore the shipowners could recover the amount of the advance freight as damages for breach of the contract to present bills of lading. *Smith* v. *Pyman* (supra, col. 410) distinguished. *Oriental Steamship Co.* v. *Tylor*, 63 L. J., Q. B. 128; [1893] 2 Q. B. 518; 4 R. 554; 69 L. T. 577; 42 W. R. 89; 7 Asp. M. C. 377—C. A.

Advances at Port of Loading—Deductions from Freight.] — See *The Red Sea*, infra, MARINE INSURANCE, IX. LOSSES (5).

Freight paid in full—Repayment of Advances—Money had and received.]—Where the mortgagee of a ship had received payment of freight from the charterer, under protest from the charterer that there was a sum to be deducted on account of advances to the captain pursuant to a stipulation in the charterparty, and the mortgagee gave an undertaking to refund such sum as might appear in the charterer's account, to be due by reason of such advances and afterwards to be at liberty to dispute any items of the account:—Held, that the charterer was entitled to recover the sum in an action for money had and received, it appearing that the sum had been bonâ fide advanced to the captain; the mortgagee to be at liberty to raise the question of the shipowners' liability for the advances in a separate action. *Gibbs* v. *Charleton*, 26 L. J., Ex. 321.

Advances to Captain by Charterers' Agent.]—A ship was chartered on a voyage from London to San Francisco, and Victoria, Vancouver's Island. By the terms of the charter, the cargo was "to be brought to and taken from alongside at merchant's risk and expense. The freight was to be a lump sum of 1,650*l.*, which was to be paid, 1,000*l.* on sailing, and the remainder on right delivery of the cargo; say, if the captain should so require, a moiety at each of the ports of discharge." The ship was to be consigned to charterers' agents at the port of discharge, paying a commission of not exceeding 2*l.* per cent. on amount of freight of 1,650*l.*; and the stevedore recommended by the charterers was "to be employed at ship's expense on usual charge." Owing to the fault of the stevedore in the stowage of the cargo, an expense to the amount of 70*l.* was incurred in getting at the cargo intended for San Francisco; this sum was advanced by the charterers' agents to the captain, with other money, as ship's disbursements, and included in an account which they laid before him, and which he signed under protest: —Held, in an action by the owner of the ship against the charterers for freight, that the 70*l.* could not be pleaded either as a set-off or as a payment. *Roberts* v. *Shaw*, 4 B. & S. 44; 32 L. J., Q. B. 308; 10 Jur. (N.S.) 147; 8 L. T. 634; 11 W. R. 829.

Insurance of Balance of Freight by Shipowner.]—Shipowner and charterer may agree, by the terms of a charterparty, that a portion of the stipulated freight shall be prepaid; and such prepayment will not affect its legal character of freight; the remainder may be the subject of insurance by the shipowner. *Allison* v. *Bristol Marine Insurance Co.*, 1 App. Cas. 209; 34 L. T. 809; 24 W. R. 1039—H. L. (E.)

A ship was chartered to sail from Greenock to Bombay, to carry a cargo of coals. Freight was to be paid on unloading and right delivery of the cargo at and after the rate of 42*s.* per ton of 20 cwts. on the quantity delivered. It was provided that "such freight is to be paid, say one-half in cash, on signing bills of lading less four months' interest at bank rate, but not less than 5 per cent. per annum, 5 per cent. for insurance, and 2½ per cent. on gross amount of freight in lieu of consignment at Bombay, and the remainder on right delivery of the cargo, less cost of coals short delivered, in cash, at current rates of exchange for bills on London at six months' sight." Half of the estimated amount of the freight was paid in London. The shipowner effected two insurances, one for 500*l.* on freight valued at 2,000*l.*, the other for 700*l.* on freight payable abroad valued at 2,000*l.* The ship was lost before entering Bombay harbour, but one-half of the cargo was saved and delivered. The master, in the belief that the prepayment had satisfied the freight on this half so delivered, made no demand on the charterer. The shipowner claimed on his policies as for a total loss of the other half of the freight:—Held, that on the proper construction of the policy the whole sum agreed upon constituted freight; that half of the whole sum of that freight had been paid in England; that it was not a prepayment of half the rate of freight calculated as distributed over the whole cargo, but of half the whole gross freight; that half of the whole remained to be paid abroad on right delivery of the cargo; that that half had been lost through perils of the sea; and that the shipowner was entitled on his policies on freight to recover as for the total loss of that half. *Ib.*

A ship was chartered to load a full cargo "on being paid freight, payable by charterer's acceptance on ship clearing the custom-house, subject to insurance." The ship having sailed, was lost, being at that time uninsured. In an action by the shipowner for nonpayment of the agreed freight: —Held, that it was no defence that the shipowner had not insured the freight. *Jackson* v. *Isaacson*, 3 H. & N. 405; 27 L. J., Ex. 392.

—— **Repayment of Freight.**]—When the charterers of a ship stipulate that they shall be entitled to insure their advances "against freight," at the owner's expense, and they fail to insure, they have, in the event of the ship perishing, no claim against the owners for repayment. *Watson* v. *Shankland*, L. R. 2 H. L. (Sc.) 304; 29 L. T. 349; 10 Ct. of Sess. Cas. (3rd ser.) 142; 2 Asp. M. C. 115.

By a charterparty made at Bombay, a ship belonging to merchants at Greenock, was to proceed from Bombay to Calcutta, and there load a cargo to be conveyed to the United Kingdom. A clause in the charterparty was as follows: "Sufficient cash for ship's ordinary disbursements to be advanced the master against freight; subject to interest, insurance, and two-and-a-half per cent. commission; and the master to indorse

the amount so advanced upon his bills of lading." While the ship was at Calcutta preparing for the voyage, various advances for the ship's ordinary disbursements were made by the indorsees of the charterparty, and the master gave them on account of such advances a bill drawn on the shipowners. They refused to accept the bill, on the ground that the master had no power to give it, and that under the charterparty the indorsees should have effected an insurance on freight to the amount of their advances. No such insurance was, however, effected, though they had time to insure after notice of the refusal to accept the bill. The ship having been lost on the voyage to the United Kingdom, the indorsees brought an action to recover the amount of their advances:—Held, that under the charterparty the shipowners had a right to rely on an insurance upon the advances being made by the indorsees, who had stipulated for and received the right to charge the premium; and that they having chosen not to insure must bear the loss. *Ib.*

Advance on Account of Freight—Bill—Liability of Owners.]—A charterparty made in Scotland, stipulated that money up to 1000*l.* should be advanced at Calcutta on account of freight. The charterers' agents there advanced 800*l.* for the ship's disbursements, and took a bill drawn by the master on the charterers for that sum. The charterers accepted the bill, but suspended payments, and the bill was never paid. In an action by an indorsee against the shipowners, as liable in recourse, and as having received the benefit of the advance, which he alleged was necessary:—Held, that the charterers' agents being consignees of the cargo, and taking delivery of it, were bound to make the advance on account of freight, and that there was no liability on the shipowners. *North Western Bank* v. *Bjornstrom*, 5 Ct. of Sess. Cas. (3rd ser.) 24.

Monthly Freight payable in advance—Termination of Hiring during the Month.] — See *Tounelier* v. *Smith*, supra, col. 407.

ii. *Bill of Exchange.*

Not Honoured—No Discharge.]—Where there is a charterparty covenanting for payment of freight on a right and true delivery of the goods at a foreign port, the freighter is not discharged by the master there taking from the freighter's agent, who was furnished with funds to pay him the freight, a bill of exchange upon a third person, by whom it is accepted, if the bill is not duly honoured, although the agent fails with the amount of the freight in his hands, unless the master had the offer of a cash payment, and preferred the bill for his own convenience. *Marsh* v. *Pedder*, 4 Camp. 257.

A., wishing to send goods to B. at X., employed C. to carry and deliver them to B., and engaged to pay C. for the freight: C., on delivering them according to the order, took a bill of exchange from B., drawn on A., which bill was never paid:—Held, that A. was liable to pay the amount of the freight to C., notwithstanding the bill of exchange. *Tapley* v. *Martens*, 8 Term Rep. 451.

—— **Taken instead of Money—Otherwise.**]—If, in a case where there is no charterparty, the captain of a ship delivers a cargo, and, as the best thing he can do for all parties under existing circumstances, takes a bill of the agent of the persons to whom the cargo on board belongs for the amount of the freight, this does not discharge the owners of the cargo, but they are liable for freight if the bill is dishonoured; but if it appears from the other side that he might have had his money of the agent, and chose to take the bill, it is otherwise. *Strong* v. *Hart*, 6 B. & C. 160; 9 D. & R. 189; 2 Car. & P. 55; 5 L. J. (o.s.) K. B. 82; 30 R. R. 272. See also *Marsh* v. *Pedder*, supra.

To Master.]—A., a broker in London, offered the master of a ship (who was half owner) a cheque for the balance due to the owners for freight received for them by A. This the master refused, but at his request A. opened a credit for part of the amount in favour of H. with a bank in New Brunswick. H. received the money, and drew a bill for the amount in favour of the bank upon A., who paid it at its maturity:—Held, that this was such a payment of freight, pro tanto, by A. to the master as bound the other owners. *Anderson* v. *Hillies*, 12 C. B. 499; 21 L. J., C. P. 150; 16 Jur. 819.

Approved Bills—Negotiation of.]—See *Horncastle* v. *Farren*, infra, col. 439.

iii. *Other Cases.*

According to Bill of Lading or Charterparty.]—A charterparty stipulated that the ship should load a cargo of coal at Cardiff and proceed to Pernambuco, and there deliver the same and afterwards receive a full cargo of sugar and other merchandise, and therewith proceed to a safe port in the United Kingdom, and deliver the same on being paid freight at the rate of 60*s.* per ton of twenty cwt. net for sugar, and for other produce at a rate proportionate thereto, being in full for the round. "The freight to be paid in the following manner: 150*l.* on signing bills of lading at Cardiff, cash for the disbursements abroad at the current rate of exchange, and the remainder on the delivery of the cargo. The master to sign bills for each cargo at any rate of freight that might be tendered. The owners to have a lien on the homeward cargo for all freight and demurrage that might accrue thereon, to the extent of the bill of lading freight, but the difference, if any, to be paid at the port of loading by captain's draft on charterer's, at usance, which they agreed to accept and pay on consignee at loading port agreeing to the amount":—Held, that the two clauses were not inconsistent, their meaning being, that if the bill of lading freight was less than the charter freight, the difference was to be paid at the port of loading by the captain's draft on the charterers, at usance, if the consignee settled the amount, otherwise at the port of delivery. *Santos* v. *Brice*, 6 H. & N. 290; 30 L. J., Ex. 108.

By a charterparty between the defendant and H., a ship was chartered to proceed to Madras, and load a cargo there from the agents of H., and being so loaded, proceed to London, and deliver the same, on being paid freight, at 3*l.* 15*s.* a ton, the captain to sign bills of lading for his cargo for any rate of freight required; without prejudice to this charterparty. S., who acted as agent to H. at Madras, in respect of the charterparty, by his directions purchased sugars and loaded them on board, and the captain, at the

request of S., signed a bill of lading deliverable to the order of S., at 1*l.* per ton freight. H. stopped payment, and never paid for the sugar. The sugar having arrived in London:—Held, that S. or the parties in London who represented him were entitled to the sugar on payment of the bill of lading freight. *Shand* v. *Sanderson*, 4 H. & N. 381; 28 L. J., Ex. 278; 7 W. R. 416.

Paid into Court—Jurisdiction of Admiralty Court.]—In an action by a shipowner against the charterers for freight, they pleaded, that after the freight had been earned, and after the commencement of the action, the obligee of a bottomry bond, by which the ship and freight were hypothecated, instituted in the court of admiralty a suit against the ship and freight, wherein a munition issued, commanding the plaintiff to bring into court the proceeds of the wreck and stores of the ship, and the defendants to bring into court the money due for freight, to abide the judgment of the court, and that they had done so:—Held, that, as the court of admiralty has jurisdiction to decide all questions as to freight in such a case, the plea was a good plea in bar of the action. *Place* v. *Potts*, 5 H. L. Cas. 383; 24 L. J., Ex. 225; 3 W. R. 574—H. L. (E.)

Hypothecation by Ship's Husband—Bankruptcy—Disbursements—Owners' Liability.]—The ship's husband employed a broker to collect freight, without the owner's authority, and obtained advances on security thereof. The broker collected the freight and retained it in discharge of his advances. The ship's husband was afterwards sequestrated, and the trustees of the estate sued the owners for disbursements made by him. The owners pleaded compensation in respect of the freight collected by the broker. The trustee replied that the advances were ultra vires:—Held, that the plea of compensation was sustained, the trustee having no higher right than the bankrupt. *Macgregor's Trustee* v. *Cox*, 10 Ct. of Sess. Cas. (4th ser.) 1028.

e. Rate and Amount.

See f. DAMAGE TO CARGO—SHORT DELIVERY, supra, col. 380.

According to what Rates.]—A charterer was to load at Archangel a full and complete cargo of oats or other lawful merchandise, which the shipowners were to deliver "on being paid freight at the rate of 4*s.* 6*d.* per 320 lb. for oats, and if any other cargo be shipped in full and fair proportion thereto, according to the London Baltic printed rates." The cargo shipped, consisted of flax and other light articles (all mentioned in the London Baltic rates), as much as the ship could safely carry, which rendered the shipment of 120 tons of ballast necessary:—Held, that the cargo shipped was a full and complete cargo of articles constituting lawful merchandise within the meaning of the charterparty, and that the charterer was not liable to pay freight as on a full cargo of oats or of other merchandise ejusdem generis. *Southampton Steam Collier Co.* v. *Clarke*, 40 L. J., Ex. 8; L. R. 6 Ex. 53; 19 W. R. 214—Ex. Ch.

By the terms of a charterparty a ship was to proceed to Port Philip, and there load a full and complete cargo of wool, tallow, bark, or other legal merchandise, the bark not to exceed 180 tons, the tallow and hides not to exceed 80 tons, and being so loaded, to proceed therewith to London, and deliver the same on being paid freight as follows: for wool pressed, twelve-eighths of a penny per pound; unpressed, thirteen-eighths of a penny per pound; tallow, 3*l.* per ton; bark, 4*l.* per ton; hides, 2*l.* per ton; one-third to be paid in cash on unloading, the remainder by bills at two months. The ship took on board a few goods at Port Philip, and obtained leave, without prejudice to the charter, to go to Sydney, where she was loaded full, and returned to London with 61 tons of wool only, and a large quantity of dead weight. In an action for not loading at Port Philip, according to the tenor of the charter:—Held, that the terms of the charterparty meant that the shipowners should be paid freight for a full homeward cargo, consisting of 180 tons of bark, tallow, and hides, and the residue of wool, and that damages were to be calculated on that basis. *Cockburn* v. *Alexander*, 6 C. B. 791; 18 L. J., C. P. 74.

Held, also, that under the words "other legal merchandise," the charterer was at liberty to ship any lawful article he pleased, due regard being paid to the safety of the vessel, but was bound to pay the same amount of freight as the vessel would have earned if loaded within the terms of the charterparty. *Ib.*

Where a ship is chartered to bring home a cargo of enumerated articles, at rates of freight specified, and such articles are not provided by the charter, the freight must be paid upon average quantities of such articles; and this, whether the ship returns empty or laden with a cargo of articles of a different nature and quality from those enumerated in the charter. *Capper* v. *Forster*, 3 Bing. (N.C.) 938; 3 Scott, 129; 3 Hodges, 177; 6 L. J., C. P. 332.

Charterparty or Bill of Lading Freight.]—A factor hired a ship of the plaintiff at 48*l.* per month, and by the charterparty goods put on board were made liable to the plaintiff for the ship's hire. Merchants in the West Indies, his principals, put goods on board, paying the factor 9*l.* per ton freight. The factor became bankrupt:—Held, that the plaintiff was entitled to be paid freight by the merchants at 9*l.* per ton in preference to the assignees. Held, also, that the factor had no power to bind the goods by charterparty to answer charterparty freight. *Paul* v. *Birch*, 2 Atk. 621.

Alternative Rate.]—A. undertook to smuggle goods belonging to B. into Russia; a regular bill of lading was made out of the goods, in which the freight charged was the usual freight according to the bulk of the goods; but a second contract was made between the parties, by which B. undertook to pay A. a larger sum of money if the goods should be safely landed in the foreign port. The goods were landed, B. paid the freight under the bill of lading, and likewise part of the money under the agreement, but refused to pay the remainder:—Held, that, notwithstanding the bill of lading, he was liable to pay the residue, as extra freight. *Hedley* v. *Lapage*, Holt, 392; 17 R. R. 649.

The plaintiffs agreed with the defendants to convey a cargo to O., and if the river was in possession of an enemy, to unload at F., outside the harbour. The freight was to be 475*l.*, or if the vessel could enter O., discharge and reload

there, 300*l.* only; twenty-five days were allowed for unloading. The plaintiff arrived at F. June the 2nd, and, an enemy being in possession of the river, commenced unloading there. The vessel was detained at F., partly for the convenience of the defendants, and partly by bad weather, till August 25th, and by that time had discharged seven-eighths of her cargo. The enemy then having quitted the river, she entered O., where she discharged the remaining eighth of her cargo. In July the defendants' agent at O. gave the plaintiff a bill for the larger freight. In September, the vessel obtained, at O., a full cargo for England:—Held, that the plaintiffs were entitled to the larger freight, and to demurrage from the 28th of June. *Gibbens* v. *Buisson*, 1 Bing. (N.C.) 283; 1 Scott, 133; 4 L. J., C. P. 11.

A charterparty provided that a ship should sail to any safe island or islands on the south-west coast of Africa, agreeably to instructions which were to be given to the captain in due time by the charterers or their agents, and there load from the factors of the charterers a full cargo of guano or other lawful produce, which the charterers bound themselves to provide, and being so loaded, to proceed therewith to a safe port in the United Kingdom, and deliver the same, on being paid freight at 3*l.* 18*s.* per ton, the freight to be paid on unloading and right delivery of the cargo, one-third in cash on arrival at port of destination, and the remainder by approved acceptances of three months, or cash equal thereto. And it was also agreed, that in case the charterers' agents should be unable to furnish a cargo of guano at the ports or places therein provided, they should have power to send the ship to any other safe port or ports, place or places, for obtaining a cargo of guano in the manner aforesaid, or of other goods, in which case they were to pay for such service as hire for the ship after the rate of 15*s.* 6*d.* per ton per month, such pay or hire to commence from the day of the ship's clearing outwards at the Custom-house, London, and to terminate upon the ship's return to her port of delivery as thereinbefore provided for, and the discharge of the cargo. If the freighters' agents intended so to employ the ship they were to give the master written notice of such their intention, on production whereof the freighters engaged to pay the owner in cash on account three months' pay for the hire of the ship, and the balance to be paid on the ship's return. The charterers instructed their agent on the south-west coast of Africa that the ship should proceed according to his instructions, and that in case she could not find a cargo, she should proceed where he deemed it likely to procure one. The ship sailed pursuant to the charterers' directions to an island on the south-west coast of Africa, where the agent met her, and informed the captain that there was no guano to be had there, and that she must procure a cargo in Saldanha Bay (another place on the same coast), and must proceed to the Cape for a licence to load a cargo there. The ship accordingly sailed for the Cape, but being there required to enter into an engagement to sign and hand over bills of lading for the cargo as a security for the charges of the licence, the captain refused to do so unless the agent would make the freight payable according to the time employed, instead of according to the weight of the cargo, and the latter accordingly gave the captain notice that he engaged him upon time, according to the latter clause of the charterparty:—Held, that this clause had come into operation, and that the time freight was recoverable. *Fenwick* v. *Boyd*, 15 M. & W. 632.

Sub-charter at higher Rate.]—The plaintiff by charterparty agreed with G. to convey corn at 4*s.* 6*d.* a quarter; G. made a sub-charter with S., who consigned corn to the defendants under bills of lading, by which they were to pay 6*s.* a quarter freight, and gave them notice to retain 1*s.* 6*d.* a quarter for him. The plaintiff having sued for freight at 6*s.* per quarter:—Held, that he was entitled to recover only 4*s.* 6*d.* *Michenson* v. *Begbie*, 6 Bing. 190; 3 M. & P. 442.

Alteration.] — A ship was chartered from London to Bombay, addressed to G. & Co., the charterer's agents at the latter place; and it was stipulated by another charterparty of the same date, that the ship should discharge her cargo at Bombay, and then take in a homeward cargo, the charterer agreeing to pay freight, as to one-half of the cargo at 3*l.* per ton, and as to the rest, at the current rate of freight when the ship should be loading. It was also agreed, that the master of the ship and the agents at Bombay should be at liberty to make such alterations in the charterparty as they might mutually think proper, without prejudice to the agreement. Shortly after the arrival of the ship at Bombay, G. & Co. agreed, by a memorandum indorsed on the charterparty, that, before loading her homeward cargo, the ship might proceed to Aden with government coals and stores, and return to Bombay with all possible despatch. The plaintiff accordingly entered into a charterparty with the East India Company, and the ship proceeded to Aden, and returned thence, having earned freight, which was paid to the plaintiff:—Held, that G. & Co. had authority to permit the voyage to Aden, and that the charterer was bound by the alteration in the charterparty; and, therefore, that he was bound to pay the charter rate of 3*l.* per ton for half the cargo, although that exceeded the current rate of freight at the time of loading, and although the alteration might be prejudicial to him; and that he was not entitled to bring into the account the freight earned by the owners of the Aden voyage. *Wiggins* v. *Johnston*, 14 M. & W. 609; 15 L. J., Ex. 202.

"In full for the Voyage" — Subordinate Cargoes.]—By a charterparty it was agreed that a ship should proceed to Pernambuco, and there load from the factors of the freighters—having first discharged her cargo, if any—any legal merchandise, to the extent of a full cargo, that the freighters might have for shipment, and should proceed therewith to Valparaiso, a legal port between Valparaiso and Guayaquil, and Guayaquil, all or any, and there discharge the cargo laden on board at Pernambuco, and at the port between Valparaiso and Guayaquil (and Guayaquil) inclusive; also discharge any goods taken on board at Valparaiso for that purpose, and at any and all the aforesaid ports should receive and take on board a full and complete cargo of legal merchandise, and therewith proceed to Cork or Falmouth for orders to discharge, and deliver the same agreeably to bills of lading, on being paid freight at and after the rate of 5*l.* 5*s.* per ton, such freight to be paid in full for the voyage, the cargo from Pernambuco being

freight free, as well as those goods shipped at Valparaiso, if any, for the ports at which the vessel should load her homeward cargo. The ship took in cargo at Pernambuco, which was discharged at Valparaiso. At Valparaiso she took on board goods belonging to the freighters, and also to other merchants, for Paita (a port between Valparaiso and Guayaquil) and Guayaquil, part of which was to be discharged there and the rest to be carried to England. No part of the homeward cargo was put on board at Paita:—Held, that the stipulated freight of 5*l.* 5*s.* covered the whole voyage, the general words of the charterparty "in full for the voyage" not being controlled by the clause following, and that the owner was not entitled to freight for the goods carried from Valparaiso to Paita, although no part of the homeward cargo was loaded at the last-mentioned place. *Sweeting* v. *Darthez*, 14 C. B. 538; 23 L. J., C. P. 131; 18 Jur. 958; 2 W. R. 414.

Passengers taken instead of Goods.]—A., a shipbroker, engaged with B., a shipowner, to have a full cargo for the ship, the rates of freight for which would average 40*s.* per ton, and at least nine cabin passengers, passage-money to average 75*l.* The contract was fulfilled as to the passengers, but the average rate of freight for goods put on board by A. amounted to 32*s.* only per ton. He shipped on board, however, steerage passengers for the voyage, the passage-money paid by whom, after deducting the expenses of their diet, &c., when added to the freight of the cargo properly so called, made the average earnings of the whole ship per ton amount to more than 40*s.*:—Held, that this was not a performance of the stipulations of the contract, "cargo" and "freight" being terms applicable to goods only. *Lewis* v. *Marshall*, 7 Man. & G. 729; 8 Scott (N.R.) 729; 13 L. J., C. P. 193; 8 Jur. 848.

"The Highest Freight Paid" on same Voyage.]—By a charterparty for a voyage from Sandswall to Southampton, it was stipulated that the owner should receive the highest freight which he could prove by evidence to have been paid for ships on the same voyage or passage by water, when the vessel passed Elsinore, but not less than 90*s.* per St. Petersburg standard hundred:—Held, that the charterparty did not contemplate strict legal proof of the actual agreement of the higher rate of freight, but reasonable evidence that such higher freight had been paid or contracted to be paid; and that the owner could not entitle himself to a higher rate of freight than 90*s.* by proving that other vessels had been chartered at such higher rate for a voyage to London, that not being within the fair intendment of the charterparty for the same voyage. *Gether* v. *Capper*, 18 C. B. 866; 25 L. J., C. P. 260; 2 Jur. (N.S.) 789; 4 W. R. 644—Ex. Ch.

On Goods Shipped or Delivered—Authority of Captain.]—The "Oriente," a vessel from the Chincha islands, having on board a cargo of guano, chartered to the plaintiffs in London, put into Valparaiso in a disabled state, and discharged the cargo into a hulk, and it became necessary to tranship and forward the cargo to its destination by another vessel; and the captain, on behalf of the owners of the cargo, accordingly entered into a charterparty with the master of the defendant's ship "to take on board from the hulk the cargo put on board of her, forming the cargo brought to Valparaiso by the 'Oriente,' being 470 tons of guano, more or less," and proceed with the same to its destination, agreeing to pay 5*l.* 2*s.* 6*d.* freight for every ton delivered. A dispute arose as to the quantity of guano put on board, the defendant's master alleging it was much less than 470 tons, and the captain of the disabled ship saying it was that quantity. Ultimately the latter signed a bill of lading, describing the guano shipped as part of the original cargo, the consignees "paying freight for the guano on 470 tons, as per charterparty." It turned out that only 344 tons of guano had been shipped:—Held, that the captain had no authority to bind the owners of the cargo to pay freight for more than the quantity of guano actually shipped, and consequently that the indorsees of the bill of lading were entitled to have the cargo delivered on payment of the freight of 344 tons. *Gibbs* v. *Grey*, 2 H. & N. 22; 26 L. J., Ex. 286; 3 Jur. (N.S.) 543; 5 W. R. 608.

—— **Measurement.**]—By a charterparty it was agreed that a ship should sail to Bombay and there load a full cargo of cotton, and proceed with it to Liverpool and deliver the same on being paid freight at the rate of "75*s.* per ton of fifty cubic feet delivered." The ship received at Bombay, and carried to Liverpool, a full cargo of cotton; the cargo was packed at Bombay, as is customary, in compressed bales, and expanded greatly on being unloaded at Liverpool:—Held, that the freight was payable on the measurement of the goods when shipped, and not when delivered. *Buckle* v. *Knoop*, 36 L. J., Ex. 223; L. R. 2 Ex. 333; 16 L. T. 571; 15 W. R. 999—Ex. Ch.

By a charterparty it was agreed that "a ship should load a cargo and proceed to a port in Great Britain, and deliver the same on being paid freight at and after the rate of 35*s.* per 180 cubic feet (English) taken on board, as per Gothenburg custom":—Held, that the freight was to be ascertained by measuring the cargo, according to the method used at Gothenburg, and not according to the method used at the port of discharge. *The Skandinav*, 51 L. J., Adm. 93—C. A.

By a charterparty made at Liverpool for a voyage from Liverpool to Sydney, the charterer agreed to pay for the hire and use of the ship in respect of the voyage, 1,550*l.* in full, on condition of her taking a cargo of not less than 1,000 tons weight and measurement:—Held, that 1,000 tons of weight and measurement meant 1,000 tons of a cargo of goods in the ordinary proportion of the port of lading, viz. one-third weight and two-thirds measurement, and not as for the Sydney market, in which the proportion is two-thirds weight and one-third measurement. *Pust* v. *Dowie*, 5 B. & S. 20; 34 L. J., Q. B. 127; 13 W. R. 459—Ex. Ch.

The bill of lading of a cargo, shipped at Dantzic on board a Prussian vessel, expressed it to be 100 lasts in 2,092 bags. The consignee had purchased it for that quantity, English measure, but it did not amount to that quantity by the Dantzic measure, which is larger:—Held, that the master was entitled to freight according to the measure in the bill of lading, although exceeding the freight computed by Dantzic measure. *Moller* v. *Living*, 4 Taunt. 102.

Goods shipped from abroad, and consigned to a merchant in this country, are to be paid for (upon a demand for freight) according to their net weight, as ascertained at the king's landing scales, and not according to the weights expressed in the bill of lading, unless there is a special contract so to pay for them. *Geraldes* v. *Donison*, Holt, 346; 17 R. R. 645.

Upon a charterparty engaging to pay 4*l.* 15*s.* per ton for goods shipped at Bombay for London, cotton to be calculated at 50 cubic feet per ton:—Held, that evidence was admissible of a usage to pay according to the measurement taken at Bombay before the goods were loaded: also, that the plaintiff was entitled to shew in reply, that his captain objected to receive the goods at the Bombay measurement, measured them when on board, and delivered an account of that measurement to the shippers. *Bottomley* v. *Forbes*, 5 Bing. (N.C.) 121; 6 Scott, 866; 8 L. J., C. P. 85.

Timber was consigned to the Surrey Commercial Docks under a charterparty, by which freight was made payable "for deals and battens, per St. Petersburg standard hundred":—Held, that freight was payable only upon the number of such hundreds as ascertained by the customary mode of measurement adopted by the dock company for timber cargoes. *Neilsen* v. *Neame*, 1 Cab. & E. 288.

—— **"Quantity and Quality Unknown."**]—A vessel was chartered to carry a cargo of corn from Odessa to Gloucester, for freight payable at a certain rate per quarter. 2,664 quarters were shipped at Odessa, and the master signed bills of lading in the usual form, and which contained a memorandum, "quantity and quality unknown." The vessel arrived at Gloucester with the cargo of corn, when it was measured at the Queen's beam, and found to contain 2,785½ quarters, being an increase of 121 quarters. In the course of the voyage a portion of the corn, from some unknown cause, had become heated and damaged, whereby its bulk was increased:—Held, that freight was payable on the quantity of corn shipped, and not on its measurement at the port of discharge. *Gibson* v. *Sturge*, 10 Ex. 622; 3 C. L. R. 421; 24 L. J., Ex. 121; 1 Jur. (N.S.) 259; 3 W. R. 165.

A charterparty, under which a ship was chartered for a grain cargo from the Danube to the United Kingdom for freight "per imperial quarter delivered," contained a provision that in the event of the cargo, or any part, being delivered in a damaged or heated condition, the freight should be payable on the invoice quantity taken on board, as per bill of lading, or half-freight upon the damaged or heated portion, at the captain's option. The bill of lading stated that 1,021 kilos were shipped on board; but the master added at the end of the bill of lading, before signing it, the words, "quantity and quality unknown." The cargo having become heated on the voyage, the master claimed to exercise his option, and to be paid freight upon the invoice quantity, as per bill of lading:—Held, that the addition of the words "quantity and quality unknown" to the bill of lading by the master did not take away his right to be paid freight upon the invoice quantity in the bill of lading, and that the object and effect of that memorandum were merely to protect the captain against any mistake that might occur in the invoice quantity in the bill of lading, in case of alleged short delivery or deterioration not caused by his default. *Tully* v. *Terry*, 42 L. J., C. P. 240; L. R. 8 C. P. 679; 29 L. T. 36.

—— **Mistake and Misdescription.**]—In an action for freight, the master is at liberty, notwithstanding the terms of the 18 & 19 Vict. c. 111, s. 3 (the Bills of Lading Act), to shew that the cargo actually received by him differs in weight from that signed in the bill of lading; at all events where the weight mentioned in the bill of lading is a mere matter of measurement. *Blanchet* v. *Powell's Llantivit Collieries Co.*, 43 L. J., Ex. 50; L. R. 9 Ex. 74; 30 L. T. 28; 22 W. R. 490; 2 Asp. M. C. 224.

A shipowner is not estopped by the signature of the bill of lading by the master from shewing that the goods or some of them were never actually put on board. *Brown* v. *Powell Duffryn Steam Coal Co.*, 44 L. J., C. P. 289; L. R. 10 C. P. 562; 32 L. T. 621; 23 W. R. 549; 2 Asp. M. C. 578.

Bills of lading signed by the master are primâ facie evidence that the quantities named therein were received by him; the onus of rebutting this presumption, and of shewing that a less quantity than that specified was received, lies on the shipowner. *M'Lean* v. *Fleming*, L. R. 2 H. L. (Sc.) 128; 25 L. T. 317; 1 Asp. M. C. 160.

Freight Payable "on Intake Measure of Quantity Delivered."]—A cargo of deals and battens consigned to the defendants was shipped on board the plaintiff's vessel under a charterparty by which freight was to be paid on deals, battens, &c., at the rate of 3*l.* 5*s.* per St. Petersburg standard hundred of 1,980 superficial feet and on deal ends at the rate of 2*l.* 1*s.* 1*d.* per the like hundred, eight feet and under. "Freight payable on deals and sawn lumber on the intake measure of quantity delivered." A bill of lading was signed for a specified number of pieces, deals, battens, and scantling, making freight payable "as per charterparty." The various pieces were, in the ordinary course of business, measured by the shipper at the port of shipment and their dimensions entered in a specification; the figures representing such dimensions being, before shipment, chalked on each piece respectively. During the voyage a number of the pieces were lost. The remainder was delivered at the port of destination, but the measurement figures put on some of the pieces delivered had become obliterated. The dimensions of the pieces lost were unknown; but there was some evidence that they were of average size compared with the rest of the cargo:—Held, that under the charterparty, freight was payable on the measurement figures as ascertained at the port of shipment, and not on the quantity delivered measured at the port of discharge, according to the intake mode of measurement; and that, having regard to the particular circumstances, the amount might be calculated by assuming that the pieces lost were of average size as compared with the remainder, and making a proportionate reduction from the sum total of the measurements in the specification. *Speight* v. *Farnworth*, 49 L. J., Q. B. 346; 5 Q. B. D. 115; 42 L. T. 296; 28 W. R. 508; 4 Asp. M. C. 251.

Goods were shipped from Wilmington in the United States for Liverpool under a charterparty, which provided that freight was to be paid on the "Wilmington gross intake weight":—Held,

method of weighing adopted at Wilmington. *Fallagsen* v. *Walford*, 1 Cab. & E. 198.

Dead Freight.]—Dead freight means not freight, but an unliquidated compensation for the loss of freight recoverable in the absence and place of freight. *M'Lean* v. *Fleming*, L. R. 2 H. L. (Sc.) 128; 25 L. T. 317.

The shipowner therefore is entitled to be paid for a deficiency of cargo, not at the rate assigned per ton in the charterparty for actual cargo, but a reasonable sum, deductions being made for charges saved to the shipowner in consequence of the deficiency. *Ib.*

No Covenant to Supply full Cargo.]—If the whole ship is hired and the burden stated in the charterparty, and the merchant covenants to pay so much for every ton of goods loaded, but does not covenant to supply a full cargo, freight upon the goods shipped and no more is payable. *James (Lady)* v. *East India Co.*, cited Abbott on Shipping, 13th ed. 553.

"Full and Complete Cargo"—Failure to load—Cargo improperly stowed.]—By a charterparty made between the plaintiff, the owner of a steamship, and the defendants, her affreighters, it was provided that the ship should proceed to a specified port, and there load from the factor of the affreighters a "full and complete cargo of sugar in hogsheads and (or) bags, or other lawful merchandise," and being loaded should therewith proceed to another port and deliver the same at such place as the consignees might direct on being paid freight at the rates therein mentioned. The cargo of sugar with which the ship was loaded was not, the plaintiff said, a "full and complete" one, inasmuch as the parts of the ship known as the "lazerette" and the "alley-ways," were not filled with bags of sugar as they ought to have been. The defence was, that the master of the ship did not stow the cargo properly; that the defendants tendered more hogsheads of sugar (which were too large to go into the alley-ways); and that, if the bags had been put there, there would have been space for more hogsheads in the hold:—Held, that the defendants were not bound to send the cargo in any particular form; and that, as they sent part of it in bags and hogsheads, and the master chose to assume that the remainder would be in bags, and to leave stowage which was only suitable for bags, and not for hogsheads, which the defendants had an equal right to send, they could not be made liable for dead freight. *Furness* v. *Tennant*, 66 L. T. 635; 7 Asp. M. C. 179—C. A.

—— **Refusal of Master to sign Bills of Lading at lower Freight.**]—Where the charterer of a ship to Jamaica and back covenanted to load her there with a complete cargo of sugar and to pay freight at the rate of 10*s.* 6*d.* per cwt., and his agent in Jamaica tendered a complete cargo to the captain, but insisted on his signing bills of lading for it at 10*s.* per cwt., which the captain refused to do:—Held, that the charterer was liable for dead freight. *Hyde* v. *Willis*, 3 Camp. 202. And see *Gray* v. *Carr*, infra, col. 429.

—— **Vacant Space—Cargo putting Ship down to her Marks without filling her.**]—Ships chartered by the plaintiffs in their trade loaded nickel ore in New Caledonia and proceeded to New Zealand ports to fill up, under sub-charters, unoccupied space with cargo of a dry and perishable kind. It was contemplated that in the ordinary course of business this cargo would be wool. Under a sub-charter with the defendants the s.s. "Strathord" proceeded from New Caledonia to New Zealand to take in cargo for London. The plaintiffs guaranteed some 5,000 tons space at a freight of 30*s.* per ton of forty cubic feet. The defendants failed to secure an entire cargo of wool in New Zealand, and loaded grain instead, which brought the ship down to her mark, leaving an unoccupied space in her of 901 tons. The defendants denied their liability to pay freight for this space:—Held, that a wool cargo had been contemplated which would have filled the ship without putting her down to her marks; that it had not been contemplated that she should come home partly empty; and that the defendants were liable to pay freight for the 901 tons unoccupied space. *Potter* v. *New Zealand Shipping Co.*, 64 L. J., Q. B. 689.

—— **Goods not Specified—Vacant Space.**]—A ship was chartered to bring home a full cargo of produce, and to deliver the same on being paid freight "at and after the rate of 5*s.* 6*d.* per barrel of flour, meal and naval stores, and 11*s.* per quarter of 480 lbs. for Indian corn or other grain." The cargo was not to consist of less than 3,000 barrels of flour, meal or naval stores. The ship returned with a short cargo, consisting of only three barrels of flour, and the rest oats, tobacco, bran and staves. Indian corn or wheat weighs 480 lbs. and oats only 272 lbs. per quarter, and the latter were not a usual import from the port of lading:—Held, first, that the charterparty was intended to regulate the amount of freight to be paid on all produce that might be shipped; and that for produce not specified, and for vacant space, freight was to be calculated at a rate to be deduced from the two rates mentioned. *Warren* v. *Peabody*, 8 C. B. 800; 19 L. J., C. P. 43; 14 Jur. 150.

—— **"Other Grain."**]—Held, secondly, that the words "other grain" meant such grain as would weigh about 480 lbs. per quarter, and therefore did not include oats, which were to be treated as produce not specified, and freight to be paid for them accordingly. *Ib.*

Hire of Ship so long as Efficient—Breakdown—General Average.]—By charterparty the charterer agreed to pay hire for a steamship at a certain rate per month, the owners providing master, crew and stores;—"in the event of loss of time from deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service." On September 30th, on a voyage from Africa to Harburg, one of the engines broke down, and the ship put into Las Palmas, where she was pronounced unfit to continue her voyage. The owners and charterers agreed to send a tug to bring her to Harburg, the cost to be general average. The ship arrived at Harburg with the assistance of the tug and using her own low-pressure engine. The charterer paid 867*l.* as his share of general average. In an action by the shipowner against the charterer for hire of the ship from her leaving Las Palmas till she was discharged:—Held, that no hire was payable

from the date of the accident to the date of the commencement of her discharge; but that hire was payable during the discharge of her cargo. *Hogarth* v. *Miller*, 60 L. J., P. C. 1; [1891] App. Cas. 48; 64 L. T. 205: 7 Asp. M. C. 1—H. L. (Sc.) In court below, 16 Ct. of Sess. Cas. (4th ser.) 599.

Whether Payable for Whole Day.]—A charterparty provided that the hire of a vessel should commence at noon of a certain day, and freight was payable at so much per calendar month; and "at and after the same rates for any part of the month" until her delivery to owners. On the day the hiring terminated she was delivered to her owners at 5.30 p.m.:—Held, that the charterers were liable for freight for the whole day, commencing at noon of the day of her delivery. *Angier* v. *Stewart*, 1 Cab. & E. 357.

East India Company's Ship—Passage Money—Implied Promise to pay Extra.]—There is no implied promise by an officer in the East India Company's service to pay the captain more than the regulation passage money, though it is usual to do so. *Adderley* v. *Cookson*, 2 Camp. 15.

No Freight specified—Chancery Jurisdiction.]—Bill in chancery for relief where no freight was mentioned in the charterparty, but freight on silks at 5*l.* per ton was intended, whereas boxwood at 40*s.* per ton was carried. Application refused; plaintiff must sue at law. *Foot* v. *Salway*, Ca. in Ch., pt. 2, 142.

Deductions from Freight—Receipt of Freight payable under Contract of Doubtful Validity.]—Semble, if the owner receives freight payable under a charterparty entered into by the master, containing a provision as to payment to the master of advances of doubtful validity, he cannot object to such provisions as being invalid. *Gibbs* v. *Charleton*, 26 L. J., Ex. 321.

Freight Payable "Subject to Insurance."]—The stipulation in a charterparty that freight shall be paid "subject to insurance," means freight is to be paid subject to deductions for premiums, and not that insurance by the owner is a condition precedent to his recovery of the freight. *Jackson* v. *Isaacson*, 3 H. & N. 405; 27 L. J., Ex. 392.

Disbursements charged against the freight of a vessel, but not expressed in the charterparty, are mere loans and cannot properly be deducted. *Tanner* v. *Phillips*, 42 L. J., Ch. 125; 27 L. T. 480; 21 W. R. 68; 1 Asp. M. C. 448.

Foreign Bill of Lading—Cargo Sold—Short Delivery.]—The owners of a Danish ship sued the indorsees of a bill of lading for freight on cargo delivered to them in Scotland. The defendants had bought the cargo at a price to depend on the amount delivered. The cargo delivered was short of that specified in the bill of lading, and the defendants claimed to retain the value of the short cargo from freight, alleging that by Danish law the bill of lading is conclusive as to the amount of cargo put on board:—Held, that the defendants were liable for the full freight on cargo delivered. *Immanuel* (*Owners*) v. *Denholm*, 15 Ct. of Sess. Cas. (4th ser.) 152.

Rate Increased by Subsequent Agreement.]—Subsequent agreement with A. by a factor of a merchant for freight at 6*l.* 10*s.* per ton good though A. took no notice he had made a former agreement with the merchant at 3*l.* 10*s.* per ton, that agreement having been obstructed by an embargo. *Draddy* v. *Deacon*, 2 Vern. 242.

Charterparty and Bill of Lading Freight Differing.] — See *Zwilchenbart* v. *Henderson*, supra, col. 390.

Damages for Loss of Freight.]—See *Hick* v. *Tweedie*, infra, col. 264.

Cargo heated — Invoice Quantity or Half Freight.]—See *Tully* v. *Terry*, ante, col. 324.

Bill of Lading Weight—Custom to Weigh.]—See *Coulthurst* v. *Sweet*, ante, col. 324.

f. Over-payment, Recovery of.

In what Cases.]—If the consignee to get his goods delivered to him pays more than the net weight amounts to he may recover back the surplus. *Geraldes* v. *Donison*, Holt, 346; 17 R. R. 645.

When the charterers of a ship stipulate that they shall be entitled to insure their advances "against freight" at the owner's expense, and they fail to insure, they have, in the event of the ship perishing, no claim against the owners for repayment. *Watson* v. *Shankland*, L. R. 2 H. L. (Sc.) 304; 29 L. T. 349.

Advance Freight.]—See *Gibbs* v. *Charleton*, ante, col. 411.

Freight paid in Advance—Voyage in Stages—Part performed.]—The plaintiffs shipped goods at Liverpool on the defendants' ship to be carried viâ Colon to San Francisco by arrangement between the West India and Pacific Steamship Co. and the Panama Railway Co., and the Pacific Mail Steamship Co., freight and primage to be considered as earned, ship lost or not lost; the freight payable in Liverpool. The whole freight was paid to the defendants' agent at Liverpool, and the bill of lading was signed by him "for the service from London to Colon," and by the agent of the other two companies "for the service from Colon to San Francisco." The ship sailed and was lost before arriving at Colon. The defendants paid over to the other two companies their proportion of the freight. The plaintiffs sued the defendants for the money so paid over to the other two companies:—Held, that the bill of lading formed one contract for the carriage of the goods from Liverpool to San Francisco, and that since the consideration for which the freight was paid had not wholly failed, the plaintiffs could not recover. *Greeves* v. *West India and Pacific Steamship Co.*, 22 L. T. 615.

g. Tender.

What is.]—The custom of the Caen stone trade being to pay freight half in cash and half by a bill at two months, the agent of the owners of Caen stone, which was brought by a vessel to an English port, verbally offered the captain of a vessel which brought it half the amount of the freight in cash; and also offered to give the captain per procuration, the acceptance of the principal for the other half, if the captain would

draw a bill. This the captain refused:—Held, a sufficient tender of the freight, as it was the duty of the captain to draw the bill. *Luard* v. *Butcher*, 2 Car. & K. 29.

Waiver of.]—In an action for non-delivery of a cargo, it was proved that a larger sum was demanded for freight by the master than was due, and that the demand was so made as to amount to an announcement by the master that it was useless to tender a smaller sum, as it would be refused:—Held, that these facts amounted to a dispensation of a tender. *The Norway*, Br. & Lush. 404; 3 Moore, P. C. (N.S.) 245, nom. *Norway (Owners)* v. *Ashburner*, 11 Jur. (N.S.) 892; 13 L. T. 50; 13 W. R. 1085—P. C.

h. Payment Guaranteed.

The defendants guaranteed to the plaintiff's vessel a sum of 900*l.* gross freight, on the understanding that the vessel should be placed at once on the most profitable charter or trade procurable, and that the vessel would carry 300 tons of whatever cargo it might take on board, or should it not take 300 tons that a proportionate reduction of the guarantee should be made for any proper quantity of cargo it might take. The plaintiff was not able to procure a gross freight of 900*l.*:—Held, that the breach accrued at the place of loading, and that the plaintiff was entitled to recover on the guarantee, though the vessel was lost on the voyage. *Carr* v. *Wallachian Petroleum Co.*, 36 L. J., C. P. 236; L. R. 2 C. P. 468; 16 L. T. 460; 15 W. R. 874—Ex. Ch.

i. Pleadings.

A declaration stated that "the defendants are indebted to the plaintiff for freight, for the conveyance by the plaintiff for the defendants, at their request of goods in a ship":—Held, that the declaration was bad for omitting the words "for money payable by the defendant to the plaintiff," and for not shewing any debt due in præsenti. *Place* v. *Potts*, 8 Ex. 705; 22 L. J., Ex. 269; 1 W. R. 337.

So where a declaration since 15 & 16 Vict. c. 76, stated that "the plaintiff sues the defendant for freight, for the conveyance by the plaintiff for the defendant at his request of goods in ships":—Held, bad on demurrer, for not shewing a debt in præsenti, but that the defect was cured by pleading over. *Wilkinson* v. *Sharland*, 10 Ex. 724; 3 C. L. R. 619; 24 L. J., Ex. 116; 1 Jur. (N.S.) 144; 3 W. R. 207.

Or might be amended after error brought on payment of costs. *S. C.*, 3 C. L. R. 619; 11 Ex. 33; 1 Jur. (N.S.) 405; 3 W. R. 418.

Where a ship was let to freight by a charterparty, a clause in the deed that "it was covenanted and agreed by and between the parties, that forty days should be allowed for unloading and loading again":—Held, to raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading beyond the forty days; and if he detains her for any longer time the owner's remedy is covenant and not assumpsit, as upon an implied new contract. *Randall* v. *Lynch*, 12 East, 179; 11 R. R. 340.

Defence to action for freight that the ship did not, according to charterparty, sail with the next wind:—Held, the traverse bad, because the voyage and not sailing with next wind is the substance of the contract. *Constable* v. *Clowbury*, Noy, 75; nom. *Constable* v. *Clovery*, Latch. 12.

Admissions on Pleadings — Counter-claim—Motion for Judgment—Ord. XI. r. 11.]—Where the plaintiff's claim for freight is admitted, but the defendants set up a counter-claim for a larger amount, the plaintiff is not entitled to a judgment on the claim under Ord. XI. r. 11, as upon an admission in the pleadings. *Mersey Steamship Co.* v. *Shuttleworth*, 52 L. J., Q. B. 522; 11 Q. B. D. 531; 48 L. T. 625; 32 W. R. 245; 5 Asp. M. C. 48.

Ship not ready to Sail—Condition precedent—Pleading.]—See *Shower* v. *Cudmore*, Sir Th. Jones, 216, supra, col. 270; *Ohlsen* v. *Drummond*, supra, col. 270.

Payment—Assignment in Equity.]—In an action for freight the defendant pleaded set-off; replication upon equitable grounds that while the freight was being earned the plaintiff assigned it for value to A., of which the defendant had notice before the debt became due and before action brought, and that the plaintiff was suing as trustee for A.:—Held, no answer to the plea. *Wilson* v. *Gabriel*, 4 B. & S. 243; 8 L. T. 502; 11 W. R. 803.

4. Lien on Cargo.

a. Creation of.

By Contract.]—Where parties, instead of trusting to the general rule of law with respect to freight, make a special contract for a payment which is not freight, it must depend upon the terms of that contract whether a lien does or does not exist. When the contract made gives no lien, a court of law will not supply one by implication. *Kirchner* v. *Venus*, 12 Moore, P. C. 361; 5 Jur. (N.S.) 395; 7 W. R. 455.

D. & Co., of Liverpool, shipped goods for Sydney. The bill of lading stated the goods to be to the shipper's order or assigns, "he or they paying freight for the goods here as per margin." In the margin it was stipulated as follows: "Freight payable in Liverpool to M., one month after sailing, vessel lost or not lost." The bill of lading passed into the hands of K. & Co., as indorsees for value. On the ship's arrival at Sydney, the port of delivery, the master was advised by the shipowner that the sum agreed to be paid as freight at Liverpool had not been paid; and he refused to deliver the goods to K. & Co., the assignees of the bill of lading, unless freight was paid, claiming a lien on the goods for the unpaid freight:—Held, first, that the amount agreed to be paid by the shippers at the port of shipment, one month after sailing of the ship, did not acquire the legal incidents of freight, though described under that name in the bill of lading, it being merely money to be paid for taking goods on board and undertaking to carry, and not for carrying the goods; and that there was no right of lien on the goods by the shipowner in respect of such sum of money being unpaid. *Ib.*

No consideration of inconvenience can prevent a right of lien where a charterparty has expressly created that right. *M'Lean* v. *Fleming*, L. R. 2 H. L. (Sc.) 128; 25 L. T. 317; 1 Asp. M. C. 160.

Dead Freight.]—By a charterparty it was agreed between a shipowner and a merchant that his ship should proceed to Sulina, . . . and there load as customary from the factors of the . . . freighter a full and complete cargo of staves, &c., "which the . . . merchant bound himself to ship, . . . and . . . therewith proceed to London, and deliver the same on being paid freight at specified rates. . . . The freight to be paid in cash on . . . right delivery of cargo. . . . Fifty running days . . . to be allowed for loading . . . and ten days on demurrage, over and above the laying days . . . at 8*l.* per day. . . . The owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and the charterer's responsibilities to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge. . . ." The ship proceeded to Sulina and, after a delay of eighteen days beyond the ten demurrage days, loaded a short cargo. A printed bill of lading was then signed by the captain for 283,682 staves, to be delivered "at the port of discharge, as per charterparty, unto order or . . . assigns, he or they paying freight and all other conditions (these words being inserted in writing) or demurrage (if any should be incurred) for the said goods as per charterparty." Upon the arrival of the ship in London the shipowner claimed from the consignees of the bill of lading a lien on the goods mentioned in the bill of lading for cargo short shipped (claimed as dead freight), for demurrage proper, in respect of the ship being detained ten days at the port of loading, and for damages in the nature of demurrage for a detention beyond the demurrage days. The consignees had no notice, until the arrival of the ship in London, of this claim, but they had received a copy of the charterparty with the bill of lading:—Held, that the shipowner had no lien for "dead freight," as the claim was not "dead freight," within the meaning of the charterparty and bill of lading. *Gray* v. *Carr*, 40 L. J., Q. B. 257; L. R. 6 Q. B. 522; 25 L. T. 215; 19 W. R. 1173—Ex. Ch.

Where the freighter of a ship covenanted, that, if she should not be fully laden, he would not only pay for the goods on board, but also for so much in addition as the ship would have carried, for which he had before stipulated to pay freight according to different rates for three descriptions of goods:—Held, that the shipowner had no lien upon the goods actually on board for the amount of dead freight; in other words, for the compensation in damages which he was entitled to for the freighter's breach of contract in not putting a full loading on board, which damages were unliquidated; there being no lien in such a case, either by usage of trade or the express contract of the parties. *Phillips* v. *Rodie*, 15 East, 547; 13 R. R. 528.

Waiver of Lien—Retaking Possession.]—If the shipowner waives his right to lien as to part of the cargo which is landed, he cannot afterwards reclaim possession of it to enforce his lien. *Hammond* v. *M'Crie*, 3 C. L. R. 1198.

Unpaid Vendor—Amount.]—The plaintiff, being the owner of a ship called the "K.," loaded her with wheat at P.; as the cargo was taken on the ship's account, freight at the nominal rate of 1*s.* per ton was inserted in the bill of lading, which contained the usual exceptions of perils of the seas. He sold the cargo whilst afloat to H. upon the terms that "freight" should be paid at the rate of 60*s.* per ton. H. sold his interest in the cargo, and it ultimately vested in the defendant, who bought the cargo on the same terms on which it had been sold to H. The "K." on her arrival was ordered to Y., where she commenced to discharge her cargo; the defendant received it and paid large sums on account. The quantity delivered was less than that mentioned in the bill of lading by about seventy quarters. The plaintiff claimed "freight" at the rate of 60*s.* per ton upon all the cargo delivered; the defendant claimed to deduct 193*l.* on account of short delivery. At the trial the jury were of opinion that the short delivery arose from the excepted perils, and found for the plaintiff for the total sum claimed by him:—Held, that although the plaintiff might not have a lien as shipowner, the cargo being taken on ship's account, nevertheless he had a lien as unpaid vendor; that from the defendant's conduct a contract by him might be implied to pay freight at the rate of 60*s.* per ton upon all cargo delivered, and that the finding of the jury for the plaintiff was right. *Swann* v. *Barber*, 49 L. J., Ex. 253; 5 Ex. D. 130; 42 L. T. 490; 28 W. R. 563; 4 Asp. M. C. 264—C. A.

Non-performance of Voyage.]—It was provided by a charterparty that 250*l.*, part of the freight, should be advanced in cash on signing bills of lading and clearing at the custom-house, and that for the security and payment of all freight, dead freight, demurrage and other charges, the master or owners should have an absolute lien and charge on the cargo. The ship was loaded and cleared at the custom-house, but the 250*l.* was not paid, and consequently the captain did not sign bills of lading, and the ship never started on her voyage. The charterer having become insolvent, his trustee in liquidation gave notice to the owner that he disclaimed all interest under the charterparty. The owner claimed a lien on the cargo for the 250*l.* as freight:—Held, the ship never having earned or commenced to earn freight, no lien arose. *Nyholm, Ex parte, Child, In re*, 43 L. J., Bk. 21; 29 L. T. 634; 22 W. R. 174; 2 Asp. M. C. 165.

Incorporation of Conditions of Charterparty.]—A charterparty contained a stipulation in the usual form for payment of freight at the rate of 1*l.* 11*s.* 3*d.* per ton; it also contained a clause that the shipowner should have an "absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge and average;" and a further clause that the captain was to sign bills of lading at any rate of freight; "but should the total freight as per bills of lading be under the amount estimated to be earned by this charter, the captain to demand payment of any difference in advance." Certain goods were put on board the chartered ship, and were made deliverable to the plaintiffs (who were not the charterers) by a bill of lading, whereby freight was made payable at 22*s.* 6*d.* per ton; the bill of lading contained also a clause, whereby it was provided that extra expenses should be borne by the receivers and "other conditions as per charterparty." Upon the arrival of the ship at the port of discharge, the defendant, who was the shipowner, claimed and compelled payment of freight at the rate mentioned in the charterparty. The plaintiffs having sued to recover back the difference between the freight as specified in the charter-

party and the freight as specified in the bill of lading:—Held, that the bill of lading did not incorporate the stipulation in the charterparty as to the payment of freight, that no right of lien existed for the freight mentioned in the charterparty, and that the plaintiffs were entitled to delivery of the goods upon payment of the freight specified in the bill of lading. *Gardner* v. *Trechmann*, 54 L. J., Q. B. 515; 15 Q. B. D. 154; 53 L. T. 518; 5 Asp. M. C. 558—C. A.

Collision—Re-shipment.]—The "K.," which was on a voyage under charter from Cardiff to Bombay with coals, was run into by the "B.," shortly after leaving Penarth Docks. The "K.," which was considerably damaged, returned to Cardiff, where her cargo was taken out of her in order that she might be repaired. The owners of the cargo proposed that the coals, which were also damaged, should be sold and a fresh cargo shipped. The shipowner, however, refused to ship a fresh cargo except "on fresh terms as to freight, &c.," and the charterer, without inquiring what the fresh terms would be, reshipped the damaged cargo, which was carried to Bombay:—Held, that the shipowner, having a lien on the cargo for freight, was entitled to insist on the original cargo being reshipped if it was capable of being carried to its destination, and that the cargo-owner was not entitled to insist on its delivery without payment of freight. *The Blenheim*, 54 L. J., Adm. 81; 10 P. D. 167; 53 L. T. 916; 34 W. R. 154; 5 Asp. M. C. 522.

Against Shipper without Notice of Charterparty.]—A firm of brokers, having chartered a ship, advertised her as about to sail, and invited shippers to send their goods by her. Under the charterparty, the captain was to have an absolute lien on the cargo for freight, dead freight, and demurrage. The plaintiff, who had no notice of the charterparty, dealing with the charterers only, sent some tea on board, to be carried at a rate of freight agreed upon between himself and the charterers. Afterwards, the charterers were unable to fill the ship, and so to carry out their contract with the owner, and the ship accordingly did not sail. No bills of lading for the tea had been signed, and the captain refused to sign them unless they were expressly made subject to the charterparty. The shipowner claimed a lien on the tea for the expenses incurred by him through his dealings with the charterers:—Held, that he had no such lien, the plaintiff having had no notice of the charterparty, and there being nothing to put him on inquiry; and the tea was ordered to be given up to the plaintiff, the intended carriage thereof having failed. *Peek* v. *Larsen*, 40 L. J., Ch. 763; L. R. 12 Eq. 378; 25 L. T. 580; 19 W. R. 1045; 1 Asp. M. C. 163.

Freight expressed by Bill of Lading to be Paid.]—Plaintiff, a shipowner, by charterparty, agreed with G. to take a cargo to Calcutta, and deliver a return cargo in London, for a freight of 14*l.* per ton of the ship's tonnage; the last payment to be made by bills at four months on arrival of the ship in the Thames. G., by his agent, put goods on board in Calcutta, and consigned them to the defendant, who knew of the charterparty. The captain signed a bill of lading according to which freight on these goods was expressed to have been paid by bills on London:—Held, that notwithstanding the bill of lading, the plaintiff had, as against the defendant, a lien on the goods for the money due under the charterparty. *Campion* v. *Colvin*, 3 Bing. (N.C.) 17; 3 Scott, 338; 2 Hodges, 116; 5 L. J., C. P. 317.

Lien on part of Cargo for whole Freight.]—The loss of part cargo having been occasioned by perils of the seas:—Held, that under the bills of lading and charterparty the master's lien on the residue for freight extended to the entire lump freight without deduction. *The Norway*, 1 Br. & Lush. 404; 3 Moore, P. C. (N.S.) 246; 11 Jur. (N.S.) 892; 13 L. T. 50; 13 W. R. 1085.

A master may detain any part of the merchandise for the freight of all that is consigned to the same person. *Lodergreen* v. *Flight*, 6 East, 622, n.; 8 R. R. 578. And see *Ward* v. *Felton*, 1 East, 512.

Though some part has been removed into a lighter alongside of the ship which was sent by the consignee. *Ib.*

The shipowner's lien for freight extends to all the cargo belonging to the same person under the same consignment, and is for the whole freight on every part of the cargo. *Lodergreen* v. *Flight*, cited, 6 East, 622. See also *Lamb* v. *Kaselack*, post, col. 491.

Priority of Lien for Freight—Respondentia—Right of Underwriters.]—W., a London merchant, shipped on board a French ship (the "Galam") at Hayti, a cargo of wood, to Europe. The "Galam" became unseaworthy at Terceira, was there condemned, and the cargo discharged and stored, and the captain then raised 1,000*l.* from M., on a respondentia bond on the cargo, payable on arrival at Falmouth, but did nothing to forward the cargo. W., hearing of the accident, chartered the "Mary Jane" to go to Terceira and bring home the cargo, and to call at Scilly for orders, which was done; but on reaching Scilly she ran ashore, and expenses were incurred in saving ship and cargo. W., in order to defeat the respondentia bond, ordered the cargo to proceed to Hamburg, instead of Falmouth, and discharge the cargo; but before the "Mary Jane" started, M., the respondentia bondholder, instituted a suit and arrested the cargo at Scilly, by warrant out of the Admiralty Court. The cargo was afterwards removed to London for sale, and fetched 808*l.*:—Held, that the master of the "Mary Jane," not having known of the respondentia bond, and being prevented by the orders of the court of admiralty, occasioned by the default of the owner of the cargo, from carrying the cargo on to Hamburg, had a lien for freight on such cargo. *Galam* (*Cargo ex*), *Cleary* v. *Macandrew*, Br. & Lush. 167; 2 Moore, P. C. (N.S.) 216; 3 N. R. 254; 33 L. J., Adm. 97; 10 Jur. (N.S.) 477; 9 L. T. 550; 12 W. R. 495.

Held, secondly, that the master having complained and obtained a settlement from his underwriters for a total loss, they were entitled in his right to such lien. *Ib.*

Held, thirdly, that the master's lien for freight was preferable to the claim on the respondentia bond, for the carrying on of the cargo was essential for making the bond available, and the bondholder had done nothing towards forwarding the cargo. *Ib.*

Held, fourthly, that the master's claim for general average was also preferable to the respondentia bond, for he had a possessory lien for such average at common law, and the sale at London did not displace this lien. *Ib.*

Payment by Approved Bill—Negotiation of Bill—Lien Discharged.]—Where the shipowner, having a lien on the cargo for freight until the delivery of good and approved bills in payment, took a bill which he objected to, but afterwards negotiated:—Held, that by negotiating the bill he approved of it, and his lien was thereupon gone. *Horncastle* v. *Farran*, 3 B. & Ald. 497; 2 Stark. 590; 22 R. R. 461.

Transfer of Lien on Transhipment.]—See *Matthews* v. *Gibbs*, supra, col. 373.

Capture does not determine Lien.]—Master being turned out of possession upon the vessel's being captured does not deprive him of his lien for the freight in case of her re-capture. *Checsman, Ex parte*, 2 Eden, 181.

Wharfinger—Interpleader—25 & 26 Vict. c. 63.]—A cargo of timber consigned to A. was discharged at the wharf of B., and the landing of the goods was completed on the 12th October. On the 15th October following, C., who claimed to be owner of the ship, served a notice on B. of his claim for freight, and required him to hold the goods until his claim was discharged. B. having retained the goods in pursuance of that notice, an action of detinue was brought against him by A. On an application by B. for an interpleader order, on the ground that he could not proceed under the 25 & 26 Vict. c. 63, s. 68, as the notice of the 15th October was not served in time:—Held, per Christian, J., that as the act imposed on the wharfinger the duty of resorting to prescribed course of procedure in all cases coming within it, the question whether any particular case comes within the act must be decided by the wharfinger on his own responsibility, and is not the proper subject for an interpleader between the consignee of the goods and the shipowners. Per Monahan, C.J., that unless the case was one so clearly within the act that the court would on motion stay the action by A. against B., the latter was entitled to an interpleader order; and that, as the court was not prepared to do so in the present instance, the order should be granted. *Lawther* v. *Belfast Harbour Co.*, 16 Ir. Ch. R. 34; 17 Ir. Ch. R. 54.

—— **Does not apply where Owner of Goods lands them.**]—When an owner of a ship lands goods on a wharf in his own name, the lien which he has on the goods until the freight is paid is outside any statutory enactment, the lien given to the ship by the 25 & 26 Vict. c. 63, on such goods, merely applying where the owner of the goods takes them himself out of the ship and lands them on the wharf in his own name, and this because the lien for freight would be gone when the owner of the goods landed them if the statute did not make provision to preserve it. *The Edward Cardwell*, 16 Ir. Ch. R. 34; 12 L. T. 677.

Charterparty construed—Penalty for Non-performance.]—Construction of a clause in a charterparty, whereby the parties "mutually bound themselves, especially the owners, the ship and tackle, and the freighter, the goods to be taken on board," in a penal sum "to the true and punctual performance of every article therein contained":—Held, not to give to the shipowners any lien in equity on the goods brought home either for dead freight or demurrage. Only one construction of the clause at law and in equity. *Gladstone* v. *Birley*, 2 Mer. 401; 3 M. & S. 205.

Contract inconsistent with Lien.]—A bill of lading contained this form, "Freight for the same goods to be paid by the shippers"; and in the margin of the bill, "Freight payable one month after sailing, ship lost or not lost." The owner of the ship, on the arrival at her destination, claimed a lien on the goods for the freight, and refused to deliver the goods to the consignees until the freight had been paid:—Held, that the shipowner had no lien on the goods consigned, as the sum claimed was not freight, properly so called, and was concluded by the contract which stipulated for a payment to be made in lieu of freight, and to be made at a fixed period, having no reference to the delivery of the goods. *Walker* or *How* v. *Kirchner*, 11 Moore, P. C. 21; 6 W. R. 198.

When Ship Lost.]—When money for the carriage of goods by sea is payable at the port of destination, "ship lost or not lost," and the ship is wrecked upon the voyage, the shipowner has no lien upon the goods, although the money to be paid for the carriage is described as freight in the bills of lading. *Nelson* v. *Association for Protection of Wrecked Property*, 43 L. J., C. P. 218.

On Transhipment.]—Where a vessel had been sea damaged, and the agents of the charterers refused to undertake the transhipment, the master entered into a fraudulent contract with a shipowner for the transhipment and conveyance of the cargo. By the contract while the same freight was reserved as had been payable on the original voyage, it was agreed between the master and the owner that a very large portion should be paid over to the master:—Held, that the contract must be taken to have been made on behalf of the owners, and that they had not a lien which they could transfer to the owner of the second vessel so as to entitle him to withhold the goods until the whole freight was paid. *Matthews* v. *Gibbs*, 30 L. J., Q. B. 55; 7 Jur. (N.S.) 186; 3 L. T. 551; 9 W. R. 200.

Unnecessary Detention — Ascertainment of General Average.]—When, by a charterparty and bill of lading, freight is "to be paid on unloading and right delivery of the cargo," the master having a lien by common law for freight and general average, and a lien by contract for demurrage, the payment of the freight and the delivery of the goods are concurrent acts in which all that is required from the owner of the cargo is readiness and willingness to pay at the time of delivery; and before paying any sum for general average, the owner of cargo is entitled to be satisfied that the amount claimed is the result of a proper adjustment; and if the owner of cargo on arrival of the ship in port, and before discharge, refuses to pay the amount claimed for freight and general average before the amount due is finally ascertained, but offers to pay a large proportion of the freight, and, there being no doubt as to his solvency, to sign an average bond for the payment of the general average when ascertained, but the master, nevertheless, insists upon retaining the cargo on board ship until his lien for freight and general average is satisfied, detention by the master is not wrongful. *The Energie, Miedbrodt* v. *Fitzsimon*, 44 L. J., Adm. 25; L. R. 6 P. C. 306; 32 L. T. 579; 23 W. R. 932; 2 Asp. M. C. 555.

Discharge against Payments.]—By a charterparty it was provided that freight should be paid at the rate therein specified, the cargo to be taken alongside and to be taken from the ship's tackle at the port of discharge, free of risk and expense to the ship. Disputes having arisen during the delivery of the cargo, the master required payment of the freight for the amount of cargo delivered each day over the ship's side into the consignee's boats, and refused to deliver any more cargo, on the consignees refusing to pay on delivery as required :—Held, that by the terms of the charterparty, it was clear that the intention of these parties was, that the master should, on the arrival at the port of destination, deliver, and the consignees receive, at the ship's side ; and that as on such delivery and receipt the master ceased to be responsible and to have any lien on the goods, he was justified in refusing to discharge the cargo without payment at the ship's side of the freight each day, on the quantity delivered, for his lien would be given up by delivery of the goods. *Black* v. *Rose*, 2 Moore, P. C. (N.S.) 277 ; 10 Jur. (N.S.) 1009 ; 11 L. T. 31 ; 12 W. R. 1123.

Wharfage.]—But the master has no right to detain goods for wharfage, if the consignee tenders the freight, and requires them to be delivered over the ship's side. *Bishop* v. *Ware*, 3 Camp. 360 ; 14 R. R. 755.

Damages for Detention of Ship at Port of Loading.]—By a charterparty it was agreed that the ship should go to a certain port and there load from the charterer a cargo "in the customary manner," and proceed with the same to another port and deliver. . . . "The cargo to be discharged in ten working days, commencing from the day after the ship has got into her proper discharging berth. Demurrage at 2*l.* per 100 tons register per day. . . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in the charter ceasing when he has delivered the cargo alongside ship" :—Held, that the demurrage and the lien and exemption clauses did not apply to damages for undue detention of the vessel at the port of loading. *Lockhart* v. *Falk*, 44 L. J., Ex. 105 ; L. R. 10 Ex. 132 ; 33 L. T. 96 ; 23 W. R. 753 ; 3 Asp. M. C. 8. S. P., *Gray* v. *Carr*, 40 L. J., Q. B. 257 ; L. R. 6 Q. B. 522 ; 25 L. T. 215 ; 19 W. R. 1173 ; 1 Asp. M. C. 115—Ex. Ch.

Port Charges.]—In a charterparty the freighters promised to pay and defray two-thirds of the port charges ; the owner having paid the whole :—Held, that he had no lien on the goods shipped for those charges. *Faith* v. *East India Co.*, 4 B. & Ald. 430 ; 23 R. R. 423.

Evidence of Custom of English Port against Foreign Indorsees.]—Evidence was admitted of a custom in Liverpool, that a lien on goods for a sum agreed to be paid there as freight continued : —Held, that as the assignees of the bill of lading were resident in Sydney, in New South Wales, and there was no evidence that they were acquainted with the local usage in Liverpool, such evidence of custom was not admissible for the purpose of explaining the effect of the memorandum in the bill of lading, or shewing the terms on which the goods were shipped, in the construction of such bill of lading. *Kirchner* v. *Venus*, 12 Moore, P. C. 361 ; 5 Jur. (N.S.) 395 ; 7 W. R. 455.

Payment at Two Months after Inward Report.]—A charterparty stipulated that a ship should proceed from London to Bombay, and being there loaded, should proceed to London, and discharge in any dock the freighters might appoint, and deliver her cargo, on being paid freight, at and after the rate of 4*l.* per ton. By a subsequent clause it was stipulated that the freight was to be paid on unloading and right delivery of the cargo in cash two months after the ship's inward report at the custom-house :—Held, that upon construction of these stipulations taken together, the freight was not payable until two months after the inward report, and the shipowner had not, after the cargo was discharged, pursuant to the charterparty, any lien thereon for the freight. *Alsager* v. *St. Katharine's Dock Co.*, 14 M. & W. 794 : 15 L. J., Ex. 34.

Where a charterparty provided for payment of part of the freight, and for "the remainder in cash, two months after the vessel's report inwards" :—Held, that no lien was created in respect of the remainder. *Foster* v. *Colby*, 3 H. & N. 705 ; 28 L. J., Ex. 81.

Passage Money—Lien on Luggage.]—The master of a ship has a lien on the luggage of a passenger for his passage-money. *Wolf* v. *Summers*, 2 Camp. 631 ; 12 R. R. 764.

b. Against Charterer or Agent with Notice.

Express Stipulations.]—A shipowner may expressly stipulate to retain his lien by the charterparty, and this will be effective between him and the charterer or his agent with notice. *Kern* v. *Deslandes*, 10 C. B. (N.S.) 205 ; 30 L. J., C. P. 297 ; 8 Jur. (N.S.) 194 ; 5 L. T. 349.

A lien on the lading of a ship having been expressly reserved to the owner by a charterparty : —Held that goods which the charterer purchased and put on board, and then transferred with a stipulation to convey them to their destination for a certain amount of freight, were, even against an indorsee of the bill of lading, subject not only to that freight, but to the shipowner's lien for a balance due to him under the charterparty, whether possession of the ship was by the charterparty, completely out of the shipowner and vested in the charterer or not. *Small* v. *Moates*, 9 Bing. 579 ; 2 M. & Scott, 674.

Notice to Agents—Bill of Lading Differing from Charterparty.]—A shipowner having agreed with G. by charterparty to convey a cargo to Calcutta, and to deliver a return cargo at the East India Docks in London, for a freight of 14*l.* a ton on the ship's tonnage, the last payment to be made by bills at four months, on the arrival of the ship in the Thames. G. by his agents put goods on board at Calcutta, and consigned them to the defendants, who were aware of the existence of the charterparty : the captain signed a bill of lading, according to which freight for these goods was expressed to have been paid by bills in London :—Held, that, notwithstanding this bill of lading, the shipowner had, even as against the defendants, a lien on these goods for the hire of the ship due under the charterparty. *Campion* v. *Colvin*, 3 Bing. (N.C.) 17 ; 3 Scott, 338 ; 2 Hodges, 116 ; 5 L. J., C. P. 317.

Failure of Charterers—New Contract.]—The agents of M. & Co., of Porto Rico, chartered a ship for a voyage for the round from Glasgow to Porto Rico, and back to the United Kingdom ;

freight 4*l.* 10*s.* per ton upon homeward cargo. The charterer on the vessel's arrival at San Juan, directed the captain to proceed to P., where L. & Co., their agents there, would provide him with homeward cargo, and they accordingly supplied 498 hogsheads of sugar towards the cargo, and for which a bill of lading was given by the captain; but having heard of M. & Co.'s failure, they refused to provide the remainder, and demanded either a return of the goods already on board, or that the captain should enter into a new charter. The captain, under protest, entered into a new contract at 30*s.* a ton, for a voyage from P. to Falmouth, and 180 hogsheads were put on board in addition, and a bill of lading was signed for the whole quantity at that rate:—Held, that the 498 hogsheads were virtually shipped by the charterers themselves, and that the captain had no authority to vary the contract as to the goods actually on board when the failure of the charterers was heard of, and that the shipowner was therefore entitled to a lien on those goods for freight at the rate of 4*l.* 10*s.* per ton; but that with respect to the 180 hogsheads afterwards shipped, the captain was entitled to enter into the new contract, the agents of the charterers having refused to complete the loading on the original charterparty, and for these goods the owners were entitled to a lien at the rate of 30*s.* *Pearson* v. *Göschen*, 17 C. B. (N.S.) 352; 33 L. J., C. P. 265; 10 Jur. (N.S.) 903; 10 L. T. 758; 12 W. R. 1116.

Where Goods Re-landed.]—Where by a charterparty the shipowners covenanted to receive a full cargo, and the freighter to load the same, and to pay so much for every ton of flax which should be delivered at the king's beams at L., and so much per diem for demurrage, and the parties mutually bound themselves, especially the shipowners, the ship, her tackle, and appurtenances, and the freighter, the goods to be laden and put on board, in a penal sum, for the performance of every article contained in the charterparty:—Held, that the shipowners had not a lien upon the goods actually brought home to L., for a sum of money claimed to be due in respect of goods which were put on board at the loading port, but afterwards re-landed, and restored to the agent of the freighter, under process of the law at the loading port; nor for a sum claimed for dead freight; nor for a sum claimed for demurrage. *Birley* v. *Gladstone*, 3 M. & S. 205; 15 R. R. 465.

When Holders of Bills of Lading are Charterers' Correspondents.]—By a charterparty it was stipulated that the ship should proceed to Penang, and there load a full and complete cargo of legal merchandise from the charterers' factors, and proceed therewith to London, and there deliver the same on being paid freight, "lump sum of 2,800*l.*, in full of all charges." At the end of the charterparty was the following clause: "The captain to sign bills of lading at any rate of freight, without prejudice to this charter. In the event of a less freight, the bills of lading of part of the cargo to be filled up for loss, if any." Under this charterparty, the charterers shipped at Penang goods of their own, for which the captain signed bills of lading at a certain specified rate of freight. The goods so shipped were consigned for sale to the correspondent of the charterers in London, who was under a general engagement to honour bills drawn upon him by the charterers, upon the faith of consignments to be made to meet them, and who were largely in advance at the time of the shipment:—Held, that the owners had a lien upon the goods for the entire lump freight. *Gledstanes* v. *Allen*, 12 C. B. 202.

Bills of Exchange—Dishonour of.]—By a memorandum of charter, made at Liverpool, it was agreed that a ship should load a cargo there, and proceed to China, and there deliver the same agreeably to bills of lading, and afterwards load a full cargo of tea or other lawful merchandise for Liverpool or London, and deliver the same to the charterers or their assigns, they paying freight for the same at the rate of 7*l.* 10*s.* per ton of fifty cubic feet for tea delivered, for the round out and home; other goods, if shipped, to pay in customary proportion; in consideration whereof the outward cargo to be carried freight free; payment to become due, and to be made as follows: 800*l.* on sailing, by charterers' acceptance at three months' date, and the balance on the unloading and delivering of the cargo, by approved bills on London at two months' date, or cash; "the master to sign bills of lading at such rates of freight as may be required by the agents of the charterers, without prejudice to this charterparty; and the owners to have an absolute lien upon the cargo for the recovery of all freight, dead freight, demurrage, &c., due to the ship under this charterparty." By another memorandum, indorsed on the above, Singapore was substituted for China; and it was agreed that, on delivery of the cargo in Singapore, the freighters' agent there should have the option of loading the ship for London or Liverpool, or for China; that, in the event of the vessel returning from Singapore, the freight for the round should be 3,375*l.* in full; that should the vessel proceed to China, the freighters should pay an additional freight of 31*s.* per ton on the homeward cargo from thence, for the privilege of carrying intermediate freight from Singapore to China, and an acceptance at three months for 900*l.*, on the ship's sailing from Liverpool, was substituted for 800*l.* The ship was laden by the charterers chiefly as a general ship, but they shipped on their own account goods for which the master signed bills of lading, making the goods deliverable at Singapore to M. & Co., or assigns, paying freight as per margin. In the margin, the freight (in the aggregate 196*l.* 12*s.*) was declared to be "payable in Liverpool one month after sailing of vessel lost or not lost." The vessel sailed from Liverpool on the 21st of February, 1856, and the charterers gave their acceptance at three months for 900*l.*, which became due on the 23rd of May, and was dishonoured:—Held, that the owners had a lien upon the goods so shipped by the charterers, for the amount of the bill of lading freight, as against the consignees (M. & Co.), who had advanced money to the consignors upon the shipment, but not for the 900*l.* *Gilkison* v. *Middleton*, 2 C. B. (N.S.) 134; 26 L. J., C. P. 209.

By a charterparty between De M. and the shipowner, coals were shipped from a home port to Alexandria, and made deliverable to order or assigns; and it was stipulated that the freight should be paid "on loading and right delivery of the cargo, less advances in cash at current rates of exchange; one-half of the freight to be advanced by freighter's acceptance at three months, on signing bills of lading; owner to insure the amount, and deposit with the charterer the club policy, and to guarantee the same." The acceptance having been given, the shipowner's agent

indorsed the bill of lading thus: "Received on account of the within freight, 301*l.* 17*s.* 6*d.*, as per charterparty." On the ship's arrival at Alexandria, the purchaser of the coal, and to whom De M. had indorsed the bills of lading, intimated that he was prepared to pay the balance of the freight remaining unpaid after deducting 301*l.* 17*s.* 6*d.*, and applied for delivery of the cargo; but the master having heard that De M. had suspended payment, refused. The demand was made on the 6th of January, 1864, but the bill was not due till the 3rd of February:—Held, that the shipowner had no lien on the cargo in respect of the amount represented by the bill of exchange: and that the damages were the amount of the bills, and such further sum as represented the loss sustained by the detention of the goods. *Tamvaco* v. *Simpson*, 1 H. & R. 374; 35 L. J., C. P. 196; L. R. 1 C. P. 363; 11 Jur. (N.S.) 926; 14 L. T. 893; 14 W. R. 376—Ex. Ch.

And see cases supra, col. 414, as to dishonoured bills.

—— **Approved Bills.**]—A shipowner having a lien on goods until the delivery of approved bills for freight, took a bill of exchange in payment, and objected to it at the time, but afterwards negotiated it:— Held, that such negotiation amounted to an approval of the bill, and that he thereby lost his lien on the goods. *Horncastle* v. *Farran*, 3 B. & Ald. 497; 2 Stark. 590; 22 R. R. 461.

—— **Until Delivery of.**]—Where the owner of a ship covenanted to let her to freight, and deliver the cargo in good order and condition, and the freighters covenanted to pay freight on safe delivery of the cargo, one-third in cash, and the remaining two-thirds by approved bills of exchange at four months' date:—Held, that the delivery of the cargo and payment of freight were concomitant acts, and that the owner had a lien on the cargo till he was satisfied for the amount of freight remaining due. *Yates* v. *Railston*, 2 Moore, 294; 19 R. R. 524.

And where the owner covenanted to deliver the cargo agreeably to bills of lading, and the freighters covenanted to pay one-third in cash on arrival, and the remainder on delivery of the cargo, by good bills of exchange at four months' date; and the captain landed the goods in his own name, and offered them to the freighter at one delivery, on receiving the stipulated freight:—Held, that the owner had a lien on them until such bills of exchange were produced by the freighter. *Yates* v. *Mennell*, 2 Moore, 297; 19 R. R. 527.

A., as owner of a ship, covenanted with B., the freighter, for a voyage from London to Bahia, there to receive a full cargo, and to proceed to the first port in the English channel, where, on her arrival, notice should be given to the freighters, from whom orders should be received, at what port the cargo should be delivered according to bills of lading. B. covenanted to put a full cargo on board, and to pay freight at certain rates per ton, viz. 300*l.* in cash on the day the vessel should be reported inward at the custom-house, and the remainder by good bills, payable in London, at two months after date, from the day on which the delivery should be completed. A. bound the vessel and freight, and B. the merchandise to be taken on board her, for due performance. The vessel shipped a cargo for the freighter at Bahia, together with other merchandise consigned to other persons in London. By the bill of lading, the freighter's goods were to be delivered, on his paying freight for the same, as per charterparty. The vessel having arrived in London, the owner delivered the goods to the different consignees, on their paying freight reserved by bills of lading, at a less rate than that stipulated by the charterparty. The owner refused to deliver the freighter's cargo, without payment of the freight due under the charterparty:—Held, that he was entitled to detain it for the hire of the vessel, as the delivery of the goods and the payment of freight were concomitant acts, and that if the master unshipped the whole of the cargo, the delivery would be complete, and that the freighter should then pay for and deliver bills for the amount of the freight, as stipulated by the charterparty. *Tate* v. *Meek*, 2 Moore, 278; 19 R. R. 518.

c. Against Indorsee or Assignee of Bill of Lading.

Time of Payment.]—Where freight is made payable by a bill of lading, according to the terms of a charterparty, which stipulates for payment of freight ten days after delivery of the cargo, the owner has no lien on the cargo for the freight. *Lucas* v. *Nockells*, 4 Bing. 729; 2 Y. & J. 304; 1 M. & P. 783—Ex. Ch.

Reference to Charterparty—Effect of.]—In a bill of lading, where freight is made payable "as per charterparty," this reference incorporates into the bill of lading all the clauses in the charterparty which relate to the amount of freight, but only for the purpose of computing the amount of freight, not for the purpose of transferring to the holder of the bill of lading the benefit of covenants found in the same clauses of the charterparty, but not affecting the amount of freight. *The Norway*, Br. & Lush. 226. See *S. C.* in P. C., ante, cols. 427, 432.

Where a charterparty stipulated for lump freight, "the master guaranteeing the ship to carry 3,000 tons on a draught of twenty-six feet water, or to forfeit freight in proportion to the deficiency," and the ship could not, and, in fact, did not, carry a cargo of 3,000 tons:—Held, that an assignee of a bill of lading for such cargo making freight payable as "per charterparty," had no cause of action against the ship in respect of the master fraudulently guaranteeing, &c. *Ib.*

By the terms of a charterparty the cargo was made deliverable on freight being paid as follows: "The ship to have a lien on cargo for freight; 3*l.* 10*s.* per ton of fifty cubic feet to be paid to captain or his agents on right and true delivery at port of discharge." The charterer shipped a portion of the cargo under a bill of lading, which stated freight to be payable as per charterparty:—Held, that the rate of freight only was, and not the terms as to the lien mentioned in the charterparty were, incorporated in the bill of lading, and that, therefore, the shipowner had no lien as against a bonâ fide indorsee for value of such bill of lading for the whole chartered freight, but only for the freight due on the goods mentioned in the bill of lading. *Fry* v. *Chartered Mercantile Bank of India, London, and China*, 35 L. J., C. P. 306; L. R. 1 C. P. 689; 14 L. T. 709; 14 W. R. 920.

Notice of Terms of Charterparty.]—Where freight was agreed to be paid for the use or hire

of the ship at a certain rate per ton for a voyage out and home, in manner following, viz. a certain sum in advance on the ship's clearing outwards, and the residue, half in cash, and half in approved bills, upon the delivery of the homeward cargo; and the owner appointed a master at the request of the charterer, who executed a bond, conditioned for the faithful performance of the master's duty; and also instructed the master to be careful to sign all bills of lading with the clause "freight payable as per charterparty"; and the ship was consigned to C. & Co. in Calcutta, by whom she was put up for her homeward voyage as a general ship, and different merchants shipped goods by her; C. & Co. taking for homeward freight bills payable sixty days after the delivery of the cargo, and, a new master having been appointed by them, in conjunction with the former master, signed bills of lading with the clause "paying freight agreeably to freight bill"; and the freight bills were made payable in London to B. & Co., to whom the charterer was indebted for advances on the outward cargo, and who, as well as C. & Co., were cognizant of the terms of the charterparty:—Held, that the owner of the ship had a lien on these goods to the extent of the homeward freight. *Faith* v. *East India Co.*, 4 B. & Ald. 630; 23 R. R. 423.

C. & Co. also put on board the ship goods purchased by them on account of the charterer; but he being indebted to them and B. & Co., their agents, those goods were, by the bill of lading, consigned to B. & Co.:—Held, that as between the owner of the ship and B. & Co., the goods were to be considered as the goods of the charterer, and liable to the owner's lien on them for the freight due by the charterparty. *Ib.*

Where indorsees of a bill of lading are also the charterers of a ship, they are bound by a stipulation as to lien in the charterparty. *M'Lean* v. *Fleming*, L. R. 2 H. L. (Sc.) 128; 25 L. T. 317; 1 Asp. M. C. 160.

The goods of a shipper in a general ship are not affected by a clause in a charterparty of which he has no notice or knowledge, giving the shipowner lien on all cargo and freight for arrears of hire due under the charterparty. *The Stornoway*, 51 L. J., Adm. 27; 40 L. T. 773; 4 Asp. M. C. 529.

By a charterparty which was negotiated by A., as agent of B., the charterer (B.) engaged to pay a lump freight of 735*l.* for a voyage to the coast of Africa and back to London, in cash, on the correct delivery of the return cargo, and the charterparty contained the following clause: "The master to sign bills of lading at any rate of freight, without prejudice to the charter." B. shipped oil on his own account for London, for which the master signed a bill of lading making the oil deliverable to A., or assigns, "he or they paying freight for the goods as usual." This bill of lading B. indorsed to A. in part payment of advances made by him on the purchase of the outward cargo:—Held, that A., having notice of the terms of the charterparty, the owner was entitled to a lien on the oil for the entire charter freight. *Kern* v. *Deslandes*, 10 C. B. (N.S.) 205; 30 L. J., C. P. 297; 8 Jur. (N.S.) 194; 5 L. T. 349.

Complete Delivery.]—Where several goods belonging to one owner are carried the same voyage, a delivery of part does not defeat the lien upon the remainder for the whole freight. But if there are two contracts to carry with different termini to the voyage in each contract, no lien attaches for freight under the one contract upon goods shipped under the other and improperly detained on board by the carrier. Goods are divested of a lien by a complete delivery. *Bernal* v. *Pim*, 1 Gale, 17.

Taking Bills of Exchange.]—*See cases* ante, cols. 414, 439.

No Notice of Terms of Charterparty—Bill of Lading Freight.]—As against assignees or consignees, who have purchased or made advances on the faith of the bill of lading without notice, the shipowner can only retain for the freight mentioned in the bill of lading. *Gilkison* v. *Middleton*, 2 C. B. (N.S.) 134; 26 L. J., C. P. 209.

A ship was chartered for a particular voyage for a gross sum, by way of freight. The captain signed bills of lading for the cargo (which was the property of and consigned to a third person), specifying a rate of freight amounting to a less sum than that mentioned in the charterparty:—Held, that the shipowner had no lien on the cargo beyond the freight specified in the bills of lading. *Mitchell* v. *Scaife*, 4 Camp. 298; 16 R. R. 795.

S. and W. chartered a ship from Liverpool to Calcutta and home for 7,000*l.* "The freight to be paid 1,250*l.* on vessel clearing from Liverpool, and 1,000*l.* on delivery of the outward cargo at Calcutta, the remainder in cash two months from the vessel's report inwards, and after right delivery of the cargo, or under discount at 5 per cent. per annum at freighter's option. The master to sign bills of lading at any rate of freight required without prejudice to this charterparty. The owners of the ship to have an absolute lien on the cargo for all freight, dead freight and demurrage." There were provisions for payment of the freight in cash on delivery of the cargo, if the cargo was delivered abroad. S. and C., who were the charterers' agents at Calcutta, having made advances to disburse the vessel, shipped a quantity of linseed, for which the captain signed bills of lading deliverable to their order or assigns on payment of freight at 5*s.* per ton, the current rate being 5*l.* 10*s.* Against this shipment S. and C. drew a bill of exchange, and indorsed and delivered it together with the bill of lading for value:—Held, that assuming the charterparty to have created a lien for the charterparty freight as against the charterers, a bonâ fide indorsee of the bill of lading, without notice of the charterparty, was entitled to the linseed on payment of the bill of lading freight. *Foster* v. *Colby*, 3 H. & N. 705; 28 L. J., Ex. 81.

Freight Payable One Month after Sailing.]—Goods were shipped by S. & Co. from Glasgow to Lima, under a bill of lading, by which freight was to be paid by the shippers "one month after sailing, ship lost or not lost." The goods were consigned by S. & Co. to the defendant for sale, and the bill of lading was handed by S. & Co. to him for value. S. & Co. made default in paying the freight, and the master, under instructions from the shipowners, refused to deliver up the goods to the agents of the defendant at Lima without payment of the freight, claiming a lien upon them:—Held, that the shipowners had a lien upon the goods for the freight payable by the bill of lading as against the defendant. *Neish* v. *Graham*, 8 El. & Bl. 505; 27 L. J., Q. B. 15; 4 Jur. (N.S.) 49.

Custom—Payment at Port of Shipment.]—Goods were shipped at Liverpool for Sydney. By a bill of lading the goods were made deliverable to the shipper's order or assigns, "he or they paying freight for the goods here, as per margin"; and in the margin the stated amount for freight was made payable in Liverpool to M. (who was not the shipowner) one month after the sailing of the vessel:—Held, that, as against an indorsee for value of the bill of lading the master could not detain the goods at the port of delivery on the ground of nonpayment of the freight, although the jury found that, by the usage of Liverpool, the shipowner does not lose his lien for the freight by making it payable at the port of shipment. *Kirchner* v. *Venus*, 12 Moore, P. C. 361; 5 Jur. (N.S.) 395; 7 W. R. 455.

Such a local usage cannot bind a bonâ fide holder for value without notice. *Ib.*

d. Waived, Suspended or Lost.

Delivery—Landing.]—Where consignees do not appear to claim goods at the port of discharge and there is no suitable warehouse:—Semble, that the master may still land the cargo without losing his possession and control over it (placing the goods in a warehouse belonging to, or hired for, his owners), and so preserve his lien. *Morsle-Blanch* v. *Wilson*, 42 L. J., C. P. 70: L. R. 8 C. P. 227; 28 L. T. 415; 1 Asp. M. C. 605.

Contract at Variance with.]—A shipowner has a lien upon a cargo for freight (i.e. for the carriage, conveyance and delivery of goods), but such lien is destroyed by his entering into a contract at variance with that lien; as where he, by contract, agrees to be paid after delivery of the cargo, and not at the time of delivery. *Walker* v. *Kirchner*, 11 Moore, P. C. 21.

A bill of lading contained this form, "Freight for the same goods to be paid by the shippers;" and in the margin of the bill, "Freight payable one month after sailing, ship lost or not lost." The owner of the ship, on her arrival at her destination, claimed a lien on the goods for the freight, and refused to deliver the goods to the consignees until the freight had been paid:—Held, that the shipowner had no lien on the goods consigned, as the sum claimed was not freight, properly so called, and was concluded by the contract which stipulated for a payment to be made in lieu of freight, and to be made at a fixed period, having no reference to the delivery of the goods. *Ib.* *See also cases*, ante, col. 237.

Part Taken on Part Payment.]—The lien of a shipholder for freight being entire, is not lost or waived by allowing part of the goods to be taken away on payment of a portion only of the freight, without some express contract with the express or implied authority of the shipowner. *Perez* v. *Alsop*, 3 F. & F. 188.

5. Assignment.

Freight to be Earned.]—An assignment by the owners of a ship of freight to be earned is good. *Douglas* v. *Russell*, 1 Myl. & K. 488.

A shipowner assigned to B. the freight earned and to be earned by one of his ships, and afterwards chartered her to C., for a voyage to S. The outward freight was paid to A., before the ship sailed. The charterparty afterwards was delivered to B., by A.'s direction, and B. gave notice of the assignment to C. Afterwards, but before the ship returned, A. became bankrupt:—Held, that the homeward freight was not in A.'s order and disposition at his bankruptcy; and, therefore, that B. was entitled to it. *Ib.*

Order and Disposition.]—Under a charterparty, entered into by a broker, on behalf of the owner of a vessel, whose name did not appear on the charterparty, the freight was to be paid to the broker, on behalf of the owner. The owner assigned the freight to A., who gave notice of the assignment to the broker, but not to the lords of the treasury, by whom the freight was to be paid:—Held, that after such assignment and notice, the freight was no longer in the order and disposition of the owner, and consequently did not, on his subsequently becoming bankrupt, pass to his assignees:—Held, that the money due to the charterparty was not in his order and disposition at his bankruptcy. *Gardner* v. *Lachlan*, 4 Myl. & C. 129; 8 L. J., Ch. 82; 2 Jur. 412, 1056. And see *S. C.*, 6 Sim. 407, on motion for an injunction.

Sub-charter—Notice.]—A shipowner on the 20th March, 1857, chartered his ship to A. for a voyage to Hong Kong. The freight was payable "by approved bills on London, at three months' date, or cash under discount, following the delivery of a certificate to the charterers, signed by the consignees," of the delivery of the cargo. On the 24th March the shipowners assigned the freight to C., who gave no notice to A. until November following. It turned out that on the 23rd March A. had sub-chartered the ship to B., whose agent at Hong Kong had paid the freight to the agent there of the shipowner:—Held, that A. was liable to C. for the freight, and that C.'s laches in giving notice had not deprived him of his rights. *Young* v. *Lindsay*, 27 Beav. 405.

Priorities—General and Particular Assignee.]—The assignee of a particular freight who gives to the charterers notice of his security, is entitled in priority to the general assignee of all freight to be earned by the same ship, who is prior in date, but gives no notice, and takes no steps to enforce his mortgage until after the particular assignee has given notice to the charterers, and the cargo has been in part discharged. *Brown* v. *Tanner*, L. R. 2 Eq. 806; 12 Jur. (N.S.) 791; 14 L. T. 825; 14 W. R. 911.

Sale of Ship.]—The right to freight is incidental to the ownership of the vessel which earns it, and therefore a transfer of a share in a ship passes the corresponding share in the freight, under an existing charterparty, without the mention of the word "freight." *Lindsay* v. *Gibbs*, 22 Beav. 522; 2 Jur. (N.S.) 1039; 4 W. R. 788.

In equity an assignment of freight to be earned is valid. *Ib.*

A ship was chartered by her owner. Afterwards, in June, 1854, he sold twenty-four shares of the ship to A., and the remaining forty shares to B., and in December he assigned the freight to C. A. registered before, and B. after C.'s assignment; but C. gave the first notice to the charterers:—Held, that C.'s right to the freight had priority over B., but not over A. *Ib.*

One who is interested in the freight alone saved from the ship held liable to contribute his proportion of the expenses incurred by the ship in earning the freight. *Ib.*

Right to Freight earned after Sale.]—See *Hill, Ex parte*, ante, col. 153.

Fraud — Partnership — Taking Accounts.]—Equitable assignment by A., shipowner, to C. of charterparty freight payable by B., the charterer; not disclosing an agreement by which A. was a partner with B. for the voyage and liable in account for losses. The adventure turned out a loss. B. claimed, as against C., to balance the accounts of profit and loss, as he would have been entitled to do with A. had the charterparty not been assigned:—Held, that in equity he was entitled to do so. *Mangles* v. *Dixon*, 3 H. L. Cas. 702.

By Managing Owner.]—Managing owner has no power to assign freight to secure private debt. *Guion* v. *Trask*, supra, col. 57.

By Master.]—The master has no power to assign freight. *The Sir Henry Webb*, 13 Jur. 639.

Co-owners—Assignment of Share of Freight by some—Deduction of Expense of Earning.]—The wages of the captain and seamen of a ship, being the expenses which produce the income thereof, are proper deductions to be made from the gross freight, as between the part owners of the ship and the assignees of the freight belonging to the other co-owners. *Lindsay* v. *Gibbs*, 28 L. J., Ch. 692; 5 Jur. (N.S.) 376; 7 W. R. 320—L.JJ.

Direction to Agent to pay out of Freight a Specific Bill—Subsequent Direction to pay other Bills—Priorities.]—Where the purchaser of a ship gave three bills in payment, and instructed his agent to pay the amount of the first out of the freight of the ship, and afterwards sent a written order to satisfy out of the freight the amount of any current bill given in payment for the vessel:—Held, that the latter should not supersede the former direction, which created a priority over the holders of the other bills. *Miln* v. *Walton*, 2 Y. & C. C. C. 354; 7 Jur. 892.

Payment of Freight on Assignment.]—*See* 3. PAYMENT; ii. ON ASSIGNMENT, supra, col. 392.

Payment of Bottomry Debt out of Proceeds of Ship—Freight not being brought in.]—See *The Percy*, ante, col. 218.

Hypothecation of Freight.]—*See* X. BOTTOMRY.

XIV. DEMURRAGE.

1. *Liability under Contract.*
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   b. Consignees and Indorsees of Bill of Lading, 451.
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3. *Time and Calculation of Days*, 457.
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   a. Weather, 476.
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See also XI. CHARTERPARTY; XII. BILL OF LADING.

1. LIABILITY UNDER CONTRACT.

a. Charterer—Cesser Clause.

Delay in Loading.]—By a charterparty it was agreed that a ship should, with all convenient speed, proceed to Sunderland, and that the charterer should there load the ship in regular turn with a full cargo of coals, and the ship should proceed with it to Kiel, and deliver to freighter or assigns, on payment of freight; "and, that the charter being concluded by the charterer on behalf of another party resident abroad, all his liability should cease as soon as he had shipped the cargo":—Held, that this clause only exempted the charterer from liability accruing after the loading of the cargo; and that he, therefore, remained liable for delay in loading, although he had ultimately loaded a full cargo. *Christofferson* v. *Hansen*, 41 L. J., Q. B. 217; L. R. 7 Q. B. 509; 26 L. T. 547; 20 W. R. 626; 1 Asp. M. C. 305.

By a charterparty it was agreed that the ship should go to a certain port and there load from the charterer a cargo "in the customary manner," and proceed therewith to another port and deliver the same. . . . "The cargo to be discharged in ten working days, commencing from the day after the ship had got into her proper discharging berth. Demurrage at 2*l.* per 100 tons register per day. . . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in the charter ceasing when he has delivered the cargo alongside ship":—Held, that the demurrage and the lien and exemption clauses did not apply to damages by undue detention of the vessel at the port of loading. *Lockhart* v. *Falk*, 44 L. J., Ex. 105; L. R. 10 Ex. 132; 33 L. T. 96; 23 W. R. 753; 3 Asp. M. C. 8.

"Loading Excepted."]—A charterparty contained the following clause: "This charter being concluded by the charterers on behalf of another party, it is agreed that all liability of the former shall cease as soon as the cargo is shipped, loading excepted, the owners and master of the vessel agreeing to rest solely on their lien on the cargo for freight, demurrage and all other claims, and which lien it is hereby agreed that they shall have":—Held, that "loading excepted" extended to delay in loading, and was not confined to the loading a full and complete cargo; and the charterers, therefore, remained liable for the delay, though they had shipped a complete cargo. *Lister* v. *Van Haansbergen*, 45 L. J., Q. B. 495; 1 Q. B. D. 269; 34 L. T. 446; 24 W. R. 395; 3 Asp. M. C. 145.

No Orders given as to Port of Discharge—Not safe Port.]—By a charterparty the ship was, after loading a full cargo, to proceed to a port of call for orders, to be forwarded within forty-eight hours after notice of arrival given to the charterers, to discharge at a good and safe port. Twelve working lay days to be allowed the freighters for loading the ship at the port of loading, and waiting for orders at the port of call, and fifteen days over and above the laying days at 4*d.* per ton per day. Charterers' liability to cease when the ship was loaded, the owners of

the ship to have an absolute lien on the cargo for all freight, dead freight and demurrage. In an action by the shipowners against the charterers for not giving orders as to the port of discharge, and for giving orders that the ship should proceed and discharge at a port which was not a safe port within the meaning of the charterparty:—Held, that inasmuch as delay at the port of call was provided for by the stipulation in respect of demurrage, the charterers were discharged, whether the actual damages claimed were covered by the owners' lien or not. *French* v. *Gerber*, 46 L. J., C. P. 320; 2 C. P. D. 247; 36 L. T. 350; 25 W. R. 355; 3 Asp. M. C. 574—C. A.

Reading Bill of Lading and Charterparty Together.]—A vessel was chartered to carry a cargo of coals from Cardiff to Rouen. The charterparty provided that the liability of the charterers should cease "when the ship is loaded and advance of freight with demurrage at Cardiff paid." "Ship to have a lien on cargo for freight, dead freight and demurrage." The bill of lading contained no restriction on the liability of the charterers. In an action for balance of freight:—Held, that the charterparty and bill of lading must be read together, and construed according to the plain meaning on the face of them, and that the charterers' liability ceased on performance of the conditions in the charterparty. *Barwick* v. *Burnyeat*, 36 L. T. 250; 25 W. R. 395; 3 Asp. M. C. 376.

Securing Berth.]—Where the charterer refused to name a substituted dock where the ship could lie in safety afloat according to the terms of the charterparty, and delay ensued in discharging the cargo:—Held, that he became liable to demurrage and charges for unloading. *Dahl* v. *Donkin* or *Nelson*, 50 L. J., Ch. 411; 6 App. Cas. 38; 44 L. T. 381; 29 W. R. 543; 4 Asp. M. C. 392—H. L. (E.)

Cesser Clause—Detention at Port of Loading—Lien.]—By a charterparty it was stipulated that the ship should proceed to a loading-berth at the port of loading, and there receive on board a full and complete cargo, and, being so loaded, should proceed to the port of discharge, "All liability of charterers to cease on completion of loading, provided the value of the cargo is sufficient to satisfy the lien which is hereby given for all freight, dead freight, demurrage and average (if any) under this charterparty"—"To be loaded as customary . . . and to be discharged as customary at the average rate of not less than 100 tons per working day from the time the ship is in berth and ready to be discharged, and notice thereof has been given by the master in writing. Demurrage to be at the rate of 20*l.* per day":—Held, in an action by the shipowners to recover damages for undue detention of the ship at the port of loading, that the stipulation as to the cesser of the charterers' liability did not apply to liability for damages for detention at the port of loading, for the cesser of the charterers' liability must be taken to be co-extensive with the lien created by the charterparty; and, upon the true construction of the charterparty, the shipowners had no lien in respect of such damages, "demurrage" under the charterparty not being applicable to the port of loading. *Lockhart* v. *Falk* (L. R. 10 Ex. 132) followed and approved. *Dunlop* v. *Balfour*, 61 L. J., Q. B. 354; [1892] 1 Q. B. 507; 66 L. T. 455; 40 W. R. 371; 7 Asp. M. C. 181—C. A.

Charterer Protected.]—A charterparty, by which it was agreed that the cargo should be loaded and discharged with all despatch, contained the following clause: "The charterers' liability on this charter to cease when the cargo is shipped (provided the same is worth the freight on arrival at the port of discharge), the captain having an absolute lien on it for freight, dead freight and demurrage, which he or owners shall be bound to exercise." The charterers having shipped a cargo worth the freight on arrival at the port of discharge:—Held, that they were protected by the clause from liability to the shipowner for not loading the ship in due time according to the charter. *Bannister* v. *Breslauer*, 36 L. J., C. P. 195; L. R. 2 C. P. 497; 16 L. T. 418; 15 W. R. 840. But see *Clink* v. *Radford*, infra.

By a charterparty it was stipulated that the ship should proceed to a loading-place at the port of loading, and load "in the usual and customary manner" a full and complete cargo, and therewith proceed to a port of discharge, "the cargo to be unloaded at the average rate of not less than 100 tons per working day—or charterers to pay demurrage at the rate of 4*d.* per ton register per diem—the charterers' liability under this charterparty to cease on the cargo being loaded, the owners having a lien on the cargo for the freight and demurrage":—Held, that the stipulation as to the cesser of the charterers' liability did not apply to liability for damages for undue detention at the port of loading; for, in the absence of anything in the charterparty to the contrary, the cesser of the charterers' liability must be taken to be co-extensive with the lien created by the charterparty, and upon the true construction of the charterparty, the shipowner had no lien in respect of such damages. *Bannister* v. *Breslauer* (supra) questioned. *Clink* v. *Radford*, 60 L. J., Q. B. 388; [1891] 1 Q. B. 625; 64 L. T. 491; 39 W. R. 355; 7 Asp. M. C. 10—C. A.

—— **Delay in Loading—Lien.**]—A charterparty contained the following clause: "Charterers' liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage." In an action for demurrage at the port of loading:—Held, first, that the lien extended to demurrage at the port of loading, as well as at the port of discharge. *Francesco* v. *Massey*, 42 L. J., Ex. 75; L. R. 8 Ex. 101; 21 W. R. 440.

Held, secondly, that the ship having been loaded, the charterer could not be sued for demurrage incurred during the loading. *Ib.*

A vessel was chartered to carry a cargo of coals to Callao, to be delivered to the order of the charterer's agent. The charterparty provided that the ship should be loaded at the rate of seventy-five tons per clear working day, "stiffening coal to be, if required, supplied at the expense of the ship, and at the rate of forty tons per clear working day . . ." but all days on which stiffening coal is to be taken on board, or the ship is detained for the same, are to be excluded from the computation of the working days allowed for loading; the vessel to be discharged at the rate of forty tons per clear

working day. . . . Demurrage to be paid for each day beyond the days allowed for loading and discharging respectively at the rate of 3*d.* per registered ton per day. The master to have a lien upon the cargo for all freight, dead freight and demurrage. All liability of the charterer under this agreement should cease as soon as the cargo is on board. . . . All questions, whether of short delivery, demurrage or otherwise, are to be settled by the charterer's agent at the port of destination." The vessel arrived at Callao, where the captain, at the request of the charterer's agent, delivered the cargo to him without insisting on his lien for freight and demurrage. In an action on the charterparty for undue detention of the vessel in putting stiffening coal on board:—Held, that the shipowner had no cause of action on the charterparty; the clause providing for the cesser of the charterer's liability operating as an absolute discharge, notwithstanding that the charterer and consignee were the same person. *Sanguinetti* v. *Pacific Steam Navigation Co.*, 46 L. J., Q. B. 105; 2 Q. B. D. 238; 35 L. T. 658; 25 W. R. 150; 3 Asp. M. C. 300—C. A.

Held, also, that the demurrage clause extended to detention of the vessel in putting stiffening coal on board, and that damages for such detention were covered by the owner's lien. *Ib.*

By a charterparty cargo was to be loaded in thirteen working days, and to be discharged at not less than thirty tons per working day. Ten days' demurrage to be allowed above the said days. The charterer's liability to cease when ship is loaded, the captain or owner having a lien on cargo for freight and demurrage:—Held, that the charterer upon loading the cargo was discharged from liability for demurrage incurred at the port of loading. *Kish* v. *Cory*, 44 L. J., Q. B. 205; L. R. 10 Q. B. 553; 32 L. T. 670; 23 W. R. 880; 2 Asp. M. C. 593—Ex. Ch. See *Petrococchino* v. *Bott*, post, col. 534.

A charterparty contained stipulations in the usual form for payment of freight and demurrage, and also a stipulation that "as this charterparty is entered into by the charterers for account of another party, their liability ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage." The charterers having placed the cargo on board at the port of lading, a bill of lading was signed whereby the goods were made deliverable to themselves at the port of discharge, "they paying freight and all other conditions as per charterparty." In an action by the shipowner against them as consignees of the cargo, for demurrage in respect of delay at the port of discharge:—Held, that the cesser clause in the charterparty must be rejected as inapplicable in reading the bill of lading, which incorporated all the conditions of the charterparty applicable to the reception of the goods at the port of discharge, and therefore that the plaintiff was entitled to maintain the action. *Gullichsen* v. *Stewart*, 53 L. J., Q. B. 173; 13 Q. B. D. 317; 50 L. T. 47; 32 W. R. 763; 5 Asp. M. C. 200—C. A. See also *The San Roman*, ante, col. 277.

A memorandum for a charterparty made between shipowners and Y., "as agent for the freighter" (no principal being named), after providing for "demurrage over and above the laying days at 7*l.* per day," stated that "it is further agreed, that, this charterparty being concluded by" Y. "for another party, the liability of the former in every respect, and as to all matters and things, as well before as after the shipping of the cargo, shall cease as soon as they have shipped the cargo":— Held, that Y. was not liable upon this memorandum for demurrage at the port of discharge. *Oglesby* v. *Yglesias*, El. Bl. & El. 930; 27 L. J., Q. B. 356; 6 W. R. 690.

Colliery Guarantee—Incorporation.]—A cesser clause in a charterparty applies not merely to liability for demurrage, but to liability incurred through detention in the nature of demurrage. It was agreed by charterparty between the plaintiffs, the owners of a steamship, and the defendants, as charterers, that the ship should proceed to C., and there "load in the usual and customary manner a cargo of coals," and proceed to T. "The vessel to be loaded as customary, but subject in all respects to the colliery guarantee, in 108 colliery working hours." The cargo was to be loaded at a specified rate per day, "or charterers to pay demurrage at the rate of 30*s.* per hour." The master was to sign "clean bills of lading without alteration as presented by the charterers." "The charterers' liability to cease on the cargo being landed and the advance freight paid, the owners having a lien on the cargo for the balance of freight and demurrage." By a colliery guarantee, colliery proprietors undertook to load the ship for the defendants in 108 hours. "Demurrage (if any) to be at the rate of 20*s.* per hour." The ship was not loaded in 108 colliery working hours. In an action for demurrage or for detaining the vessel an unreasonable time:—Held, that the defendants were not liable, as the cesser clause covered the plaintiff's claim. Semble, that the plaintiffs had no right of action against the defendants under the colliery guarantee unless the guarantee was incorporated with the charterparty; but that, by the custom of the trade, the shipowners have such a right of action against the colliery proprietors. *Restitution Steamship Co.* v. *Pirie*, 64 L. T. 491, n.; 7 Asp. M. C. 11, n.—C. A. Affirming 61 L. T. 330; 6 Asp. M. C. 428.

Demurrage at Port of Shipment or of Discharge.]—A charterparty entered into by a broker for a foreign charterer contained the words "fourteen days for loading in the Tyne or the captain to receive 5*l.* per day, day by day," and at the port of discharge "demurrage over and above the said lying days at 5*l.* per day." "This charter being concluded by N. (the broker) on behalf of another party, it is agreed that all liability of the former shall cease as soon as he has shipped the cargo, the owners and master agreeing to rest solely on their lien on the cargo for freight and demurrage":—Held, that demurrage in the last clause meant demurrage at the port of discharge, and that the brokers' liability for demurrage at the port of loading did not cease on shipment of the cargo. *Pedersen* v. *Lotinga*, 5 W. R. 290.

A charterparty provided: "Charterers' liability to cease as soon as the cargo is shipped in terms of this charter, captain having an absolute lien for all freight, dead freight and demurrage":— Held, that the charterers were not liable for demurrage incurred before loading completed, the cargo having been all shipped. *Salvesen* v. *Guy*, 13 Ct. of Sess. Cas. (4th ser.) 85.

A charterparty provided: "Charterers' respon-

sibility to cease on cargo being loaded, provided the cargo is worth the freight at port of discharge. To be loaded as customary at Sydney; to be discharged as customary at . . . at the rate of not less than 100 tons of coals per working day . . . and ten days on demurrage over and above the said laying days at 4*d.* per registered ton per day." In an action brought by the owners against the charterers for detention at the port of loading:—Held, that "demurrage" in the lien clause did not cover detention at the loading port, and that the charterers were liable. *Gardiner* v. *Macfarlane*, 16 Ct. of Sess. Cas. (4th ser.) 658.

Exception of Hindrance beyond Charterers' Control.]—*Gardiner* v. *Macfarlane*, 20 Ct. of Sess. Cas. (4th ser.) 414.

Salt Cargo—Lighters Beneaped.]—See *Allerton Sailing Ship Co.* v. *Falk*, supra, col. 278.

Effect of Clause empowering Master to Land Cargo if not Applied for in Given Time.]—The common stipulation in a bill of lading, that if the goods are not applied for within twenty-four hours of the ship's arrival, the master or agent is to be at liberty to land the same at the risk and expense of the owner of the goods, and retain a lien for his charges on that account, gives the shipowner an alternative remedy. It does not supersede his right to have the cargo unloaded by the consignee and hold him liable for delay; nor does it apply to the case where the goods are applied for in due time, but the unloading by the consignee is afterwards interrupted. *Hick* v. *Rodocanachi*, 61 L. J., Q. B. 42; [1891] 2 Q. B. 626; 40 W. R. 161; 7 Asp. M. C. 97; 56 J. P. 54—C. A. Affirmed, nom. *Hick* v. *Raymond*, 62 L. J., Q. B. 98; [1893] A. C. 22; 1 R. 125; 68 L. T. 175; 41 W. R. 384; 7 Asp. M. C. 233—H. L. (E.)

Contract at an End.]—See *Hick* v. *Tweedie*, supra, col. 264.

b. Consignee and Indorsee of Bill of Lading.

See also XII. BILL OF LADING.

Consignees—Memorandum on Bill of Lading.]—If a consignee accepts goods under a bill of lading, at the bottom of which is a memorandum that the ship is to be cleared in sixteeen days, and 8*l.* demurrage to be paid after that time, the master upon delivery of the goods may recover demurrage against the consignee. *Jesson* v. *Solly*, 4 Taunt. 52; 13 R. R. 557.

Implied Contract.]—The master who by a bill of lading has undertaken to deliver goods to the consignee on payment of freight, cannot maintain an action against the consignee on an implied contract to pay demurrage. *Evans* v. *Forster*, 1 B. & Ad. 118; 8 L. J. (O.S.) K. B. 348.

"Paying for Goods as per Charterparty"—Effect of.]—The consignee of a bill of lading which makes the goods deliverable to him or assigns, "paying for the goods as per charterparty," does not, by taking the goods at the destination, make himself liable to pay for demurrage in the port of loading according to the rate stipulated in the charterparty, though there is an express stipulation for a lien on the goods for such demurrage. *Smith* v. *Sieveking*, 5 El. & Bl. 589; 1 Jur. (N.S.) 1135; 4 W. R. 25—Ex. Ch.

Consideration.]—Where in an action on an agreement for payment of demurrage on delivery of a cargo of coals the defendant pleaded that the plaintiff had previously contracted with another party for the delivery of the coals to the defendant by the plaintiff, and that there was no consideration for the promise of the defendant to the plaintiff:—Held, that the plea was bad, and that the performance of an existing contract by one of the parties thereto may be a good consideration for a promise to him by a third party. *Scotson* v. *Pegg*, 6 H. & N. 295; 30 L. J., Ex. 225; 3 L. T. 753; 9 W. R. 280.

Indorsees—Express Stipulation.]—Where a bill of lading stipulates on the face of it for payment of demurrage, an indorsee taking goods under it is liable for demurrage. *Stindt* v. *Roberts*, 5 D. & L. 460; 2 B. C. Rep. 212; 17 L. J., Q. B. 166; 12 Jur. 518.

The acceptance of a cargo by the indorsee of a bill of lading, whereby the goods were deliverable to order against payment of the agreed freight and other conditions, as per charterparty, is a circumstance from which a jury may imply a contract on his part to pay demurrage stipulated for by the charterparty, notwithstanding his refusal at the time of receiving the goods to pay the demurrage. *Wegener* v. *Smith*, 15 C. B. 285; 24 L. J., C. P. 25; 3 C. L. R. 47.

An assignee of a bill of lading, by the terms of which he is to receive a cargo from a ship, paying freight according to the charterparty, is not liable for demurrage, although that is stipulated for in the charterparty, and although in the margin of the bill there is written, "There are eight working days for unloading in London," there being no stipulation in the bill for the payment of demurrage. *Chappell* v. *Comfort*, 10 C. B. (N.S.) 802; 31 L. J., C. P. 58; 8 Jur. (N.S.) 177; 4 L. T. 448; 9 W. R. 694.

Holder by Way of Security.]—Liability for demurrage under a bill of lading imposed, by way of security only, on the holder who presented the bill and demanded the delivery. *Allen* v. *Coltart*, 52 L. J., Q. B. 686; 11 Q. B. D. 782; 48 L. T. 944; 31 W. R. 841; 5 Asp. M. C. 104.

Undertaking to Pay for Unreasonable Delay by Receivers of Cargo.]—A charterparty stipulated that the agreed freight should be paid on right and true delivery of cargo, and that the discharge at the port of delivery should be made in accordance with the usage of the discharging port. The defendants were indorsees of the bills of lading, which were expressed to be subject to the conditions of the charterparty, and contained the following clause: "The goods to be taken from the ship by the consignee immediately they come to hand in discharging the ship, otherwise they will be landed or put into craft by the master or ship's agent (at the merchant's risk and expense), and either or both to have a lien on such goods until the payment of all costs and charges so incurred." In an action by the plaintiff for damages for detention of the ship by default of the defendants, the jury found that the ship was detained for two days beyond a reasonable time for unloading, and that 30*l.* a day was a fair charge for the detention, and that the

defendants held themselves out to the plaintiff as receivers of the cargo under the bill of lading, so as to lead the plaintiff to look to them as such. There was evidence that the defendants told the plaintiff's agent, before the ship arrived, that they had the cargo, and would pay the freight; and that during the unloading the plaintiff's agent complained daily to the defendants of their delay, telling them that there would be a claim for demurrage, without a repudiation by them of liability:—Held, that there was evidence that the defendants undertook to pay for any unreasonable delay, and that they took delivery under the provisions of the bill of lading. *Palmer* v. *Zarifi*, 37 L. T. 790; 3 Asp. M. C. 540.

No Reference to Demurrage in Bill of Lading.]—The charterparty provided for the payment of freight, and allowed thirty days for loading and unloading; the bill of lading provided for the payment of freight as per charter, and made no reference to demurrage:—Held, that an indorsee of the bill of lading was not liable for demurrage. *Oliver* v. *Muggeridge*, 7 W. R. 164. *And see* post, col. 461.

Liability of Consignee acting as Agent—Bill of Lading incorporating Charterparty.]—Consignees under a bill of lading which made the goods deliverable to them, "paying freight and all other conditions as per charterparty," refused to pay demurrage incurred at the port of loading and due under the terms of the charterparty, but accepted delivery of the goods. The consignees were, and were known to the shipowners to be, acting only as agents. In an action by the shipowners for demurrage:—Held, that the consignees were not liable. *County of Lancaster Steamship* v. *Sharpe*, 59 L. J., Q. B. 22; 24 Q. B. D. 158; 61 L. T. 692; 6 Asp. M. C. 448.

Power of Master to Fill in—Demurrage.]—See *Allan* v. *Johnstone*, ante, col. 317.

c. Other Cases.

Receivers of Goods.]—If a person receives goods from on board ship, which are shipped to the shipper's order or his assignees, paying freight, with a certain allowance for demurrage, he makes himself, by acceptance of the goods, liable to all the terms of the bill of lading, and of course to demurrage. *Dobbin* v. *Thornton*, 6 Esp. 16. And see *Palmer* v. *Zarifi*, supra.

Liability of Consignor.]—A bill of lading contained these words: "The vessel to take her regular turn in unloading":—Held, that the consignor was liable for her detention beyond her regular turn, although there was no express contract for demurrage in the bill of lading. *Cawthron* v. *Trickett*, 15 C. B. (N.S.) 754; 33 L. J., C. P. 182; 9 L. T. 609; 12 W. R. 311.

A party hired sacks from a railway company for the conveyance of grain on their railway subject to certain regulations, amongst which were the following: "2. The charges for the use of sacks will be a halfpenny per sack per journey when discharged at any of the company's stations on the company's line, or at their warehouses, or at warehouses or mills connected by rail with the company's line, and 1*d.* per sack when sent to foreign stations. 3. Demurrage of a halfpenny per sack per week will be charged after the expiration of fourteen days, the time to commence from the time the sacks leave the station to be filled; the time allowed for filling and returning to the station to be seven days. 10. None of the company's sacks containing grain will be allowed to leave any station, local or foreign, unless a guarantee is first obtained by the clerk in charge from the consignee, that the grain will be immediately discharged, and the sacks returned the same day, and to the station":—Held, that the company's claim for demurrage arose at the expiration of fourteen days from the hire of the sacks, and that the only person with whom there was any contract for demurrage was the consignor, by virtue of the third regulation; but that by the operation of the tenth regulation his liability ceased upon the company's permitting the sacks to get into the hands of the consignee, whether with or without a guarantee. *G. N. Ry.* v. *Wyles*, 2 C. B. (N.S.) 344.

Agent—Consideration.]—The agent of the consignees of a cargo wrote to the owner, agreeing to pay freight, demurrage, &c., and to place himself in every respect in the place of the charterer. The ship was detained beyond the time allowed by the charterparty in loading and unloading, and the demurrage days and several days besides elapsed after the date of the agent's agreement:—Held, that he was liable for the detention beyond the demurrage days, as well as for the demurrage on his agreement, as there was a sufficient consideration moving from the owner to the agent, since he could not sell the cargo without the owner's consent. *Benson* v. *Hippins*, 4 Bing. 455; 1 M. & P. 246; 3 Car. & P. 186; 6 L. J. (O.S.) C. P. 64.

Partnership in Part of Agreement between Charterer and Freighter.—A. having chartered a steamer, agreed with B. to take out some engines in her to Barcelona, it being known to both parties that the engines could not be shipped unless some alterations were made in her hatchways. The agreement contained the following conditions:—First, that A. should lay the steamer on her berth at Liverpool for Barcelona. Secondly, that she should not be required to lie on her berth longer than ten days. Thirdly, that she should make the voyage from there to Barcelona for the lump sum of 650*l.*, A. to pay all charges. Fourthly, that B. should load in the steamer two engines and tenders complete, for 240*l.*; freight to be paid at Liverpool on delivery of bills of lading, without any deduction for interest or insurance. Fifthly, that such of these goods as weighed above twenty cwt. should be put in the steamer, stowed, taken out, and landed at shipper's risk and expense. Sixthly, that the goods should be taken out of the steamer as soon as the captain was ready to deliver them, in five days, Sunday excepted; and 20*l.* demurrage to be paid by the shipper or receiver of the goods, for every day that she was detained over and above five days. Seventhly, that the steamer should be entered in the joint names of A. and B., so that the latter might assist to get cargo. Eighthly, that any surplus of freight above 650*l.* should be divided between them, and also any loss which might result. Ninthly, that the steamer should guarantee to carry 480 tons dead weight, besides forty tons of coal in the bunkers. Tenthly, that bills of lading for the whole cargo of the steamer

should be signed at the office of A. And eleventhly, that the steamer should be consigned at Barcelona to the friends of B., paying 2*l.* commission on the above freight. The steamer was put on her berth at Liverpool, and, by consent of her owner, the beams in her hatchways were removed for the stowage of the engines, at the joint expense of A. and B. The engines, which exceeded twenty cwt. in weight, were then brought alongside, and it was found, before ten days had expired, that they would not go down the hatchways, notwithstanding the removal of the beams. The consent of the shipowner to the further widening of the hatchways was thereupon obtained, on condition that the ship should, before sailing, be made right, to the satisfaction of Lloyd's surveyor. In consequence of the necessary delay for widening the hatchways and making the ship thus right, she lay on her berth thirteen days beyond the stipulated ten. A. having brought an action on the second clause of the agreement, for the demurrage in respect of the detention of the ship on her berth beyond ten days:—Held, that B. was liable on that clause, it being collateral to, and independent of, any partnership in the freight; assuming that the agreement constituted a partnership to some extent between the parties in that respect. *Blech* v. *Balleras*, 3 El. & El. 203; 29 L. J., Q. B. 261; 6 Jur. (N.S.) 1243; 2 L. T. 599.

Contract to Pay—Undertaking to Captain Personally to Load in Limited Time.]—B., W. & Co., who had contracted with a colliery company for 10,000 tons of coal to be delivered over a period of three months at a spout on the Tyne, "the turn to be mutually agreed upon," proposed to charter a foreign ship for the conveyance of twenty-nine keels to Elsinore, and tendered to the captain a charterparty which stipulated for demurrage in unloading the ship, but made no provision for detention in loading her. The captain declined to sign such a charter, without an assurance that there should be no undue detention of his ship; and thereupon B., W. & Co. obtained from the defendant (who was a clerk employed by several colliery companies to arrange the turns for loading) the following undertaking: "I undertake to load the ship 'Der Versuch,' twenty-nine keels, with Bebside coals in ten colliery working days. On account of Bebside Colliery, W. S. Hoggett." This memorandum (which made no mention of the person contracted with) was communicated by the charterers to the captain of the "Der Versuch," who thereupon accepted the charter. The vessel being detained in loading beyond the stipulated ten days, the captain called upon the defendant to pay him 45*l.* for demurrage. The defendant repudiated all liability, but ultimately offered to pay the captain 20*l.* The defendant had no notice of the charter. In an action by the captain to recover 45*l.* for demurrage from the defendant:—Held, that, upon these facts, a jury was warranted in finding that the undertaking to load within ten days was a contract between the captain and the defendant; that there was a sufficient consideration for it; and that the contract was with the defendant personally, and not as agent. *Weidner* v. *Hoggett*, 1 C. P. D. 533; 35 L. T. 368.

Mutual Obligation of Charterer and Shipowner.]—Where a charterparty contained the following clause: "The owner agrees, that the ship shall be ready to sail at the expiration of the laying days, or sooner if required by the charterers. If the ship is not ready either on the owner's or the charterer's part at the above-named dates, then demurrage to be paid by the party in default at the rate of 7*l.* per diem":—Held, that the effect of this stipulation was to make the owner liable for demurrage, at 7*l.* a day, for delay caused by any unreadiness of the ship to sail, due to him; and the charterers were liable in like manner, for delay caused by unreadiness of the ship, due to their backwardness as to the cargo, though that might have been occasioned by the previous default of the owner. *Seeger* v. *Duthie*, 8 C. B. (N.S.) 72; 30 L. J., C. P. 65; 7 Jur. (N.S.) 239; 3 L. T. 478; 9 W. R. 166—Ex. Ch.

Outward and Homeward Voyages—Time of Payment.]—By a charterparty the vessel was to sail from London with a cargo for Kingston, or any other port in Jamaica, and having discharged the same, receive on board a cargo from thence, or from a port on the Spanish Main, if required, and deliver the same at a port in the United Kingdom; freight to be paid, 250*l.* in ten days after sailing from Gravesend, 750*l.* more in two months after a right delivery of the homeward cargo at her port of discharge in the United Kingdom, provided she should be required to proceed to one port only in Jamaica, and 25*l.* more should she be required to go to two or more ports in that island; and in case the vessel should be ordered to the Spanish Main, 4*l.* per day was to be paid for every day after the 25th day after her arrival at Jamaica, until despatched from her loading port; demurrage 100*l.* per month, or in proportion for a less period, payable on settlement of the hire of the vessel. The vessel sailed from London, and discharged a portion of her outward cargo at Kingston, and the residue at another port in Jamaica, and sailed thence to a port in the Spanish Main to receive a homeward cargo, and there remained 139 days beyond the stipulated twenty-five days:—Held, that the 4*l.* per day was not payable until two months after the delivery of the homeward cargo at the ship's port of discharge in the United Kingdom. *Crozier* v. *Smith*, 1 Scott (N.R.) 338; 1 Man. & G. 407.

2. Notice of Arrival.

Not Necessary.]—Although by a bill of lading the goods are deliverable to merchants in London, whose residence is well known, no notice to them of the ship's arrival is necessary to render them liable for demurrage. *Harman* v. *Munt*, 4 Camp. 161; 16 R. R. 770.

When a bill of lading of goods by a general ship deliverable to order contains a stipulation that the goods are to be taken out in a certain number of days after arrival, or to pay demurrage, the indorsee of the bill of lading who takes out the goods is liable for demurrage, from the expiration of the days calculated from the arrival of the ship, without receiving any notice of that event. *Harman* v. *Clarke*, 4 Camp. 159; 16 R. R. 768.

Inaccuracy in Entry of Name at Custom House.]—Where there is such a bill of lading, if there is any inaccuracy in the entry of the ship's name at the custom house, whereby the owner of the goods, notwithstanding proper inquiries for that purpose, was deprived of the usual

means of being informed of the ship's arrival, demurrage cannot be recovered. *Ib.*

Unless Special Contract or Custom.]—Apart from custom or special contract, a shipowner is not bound to give notice to the consignee of the arrival of the ship, but the consignee is bound, within a reasonable time after the arrival, to be ready to remove and receive his goods, and in default of his so doing the shipowner may land them, and demand wharfage or other proper charges for landing. *Houlder* v. *General Steam Navigation Co.*, 3 F. & F. 170.

When a ship is by the charter to be addressed, at the port of discharge, to the charterer's agents, the charterer is entitled to recover from the shipowner excess of freight received by other agents, to whom he has addressed the ship; and if it appears that the charterer's broker, if allowed to have the ship, would have sent to the consignees to come and take their goods, and thus have prevented delay, the shipowner cannot claim demurrage for delay caused by the absence of such notice to the consignees. *Bradley* v. *Goddard*, 3 F. & F. 638.

3. Time and Calculation of Days.

Four persons agreed to purchase a cargo of coals in certain proportions, to be severally taken and received out of the ship by them at the rate of forty chaldrons per day, and to settle their turns among themselves; and in case of any loss or demurrage, by not fixing on their respective turns, or by subsequent detention in working out the cargo, to hold themselves severally and respectively liable for their several and respective defaults. Had there been no default, the whole cargo would have been cleared in nine days; but, in consequence of one of the days being wet, only five chaldrons were taken out on that day, and on the tenth day some coals remained on board belonging to one of the parties:—Held, that working days only were meant by the contract, and that as one day was wet, he was bound to pay demurrage for the tenth day. *Harper* v. *M'Carthy*, 2 Bos. & P. (N.R.) 258.

By a charterparty fifteen days were to be allowed to the freighter of a ship for discharging at her destined port. The freighter ordered the ship to Hull. She was got into the Hull docks on the 1st of February, and was on that day put in the charge of the docks' officers, but from the crowded state of the docks she was not put in her berth, and did not begin discharging till the 4th:—Held, that the fifteen days were to be computed from the first. *Brown* v. *Johnson*, Car. & M. 440; 10 M. & W. 331; 11 L. J., Ex. 373. See *Nielsen* v. *Wait*, infra.

In such a case the days count from the time of the vessel's arriving in the dock, and being put under the management of the dock company's officers. *Ib.*

Despatch Money—Day of Twenty-four Hours.]—A charterparty contained the following clause: "Demurrage, if any, at the rate of 20*s.* per hour, except in case of any hands striking work, frosts or floods, revolution or wars, which may hinder the loading or discharge of the vessel. Despatch money 10*s.* per hour on any time saved in loading or discharging." Four days were saved in loading and five days in discharging cargo, making together nine days, which if calculated at twenty-four hours a day would make 216 hours, or at twelve hours a day 108 hours:—Held, that "despatch money" was payable under the charterparty at the rate of 10*s.* per hour per day of twenty-four hours. *Laing* v. *Hollway*, 47 L. J., Q. B. 512; 3 Q. B. D. 437; 26 W. R. 769—C. A.

Meaning of "Days"—Sundays—Holidays.]—In reckoning the "fifteen days," the days are to be reckoned consecutively, and the Sundays not deducted, unless there is a custom to that effect; and in the absence of any custom, the word "days," and the words "running days," mean consecutive days. *Ib.*

A charterparty contained the following clause: "The vessel to be loaded in Liverpool in fourteen days, and to be discharged, weather permitting, at not less than twenty-five tons per working day (holidays excepted), the days to commence on the ship being in turn, and ready to deliver; all days above the said days to be paid demurrage at the rate of 5*l.* sterling per day." The cargo was to be delivered at Constantinople:—Held, that Sundays were to be included in the calculation of the lay days allowed for loading. *Niemann* v. *Moss*, 29 L. J., Q. B. 206; 6 Jur. (N.S.) 775.

Under a charterparty from Riga to London the charterers were to "load and discharge as fast as the ship can work, but a minimum of seven days to be allowed merchants, and ten days on demurrage over and above the said laying days at 25*l.* per day":—Held, that the laying days from the context meant "working" and not "running" days, and consequently that Sunday was not to be counted. *Commercial Steam Ship Co.* v. *Boulton*, 44 L. J., Q. B. 219; L. R. 10 Q. B. 346; 33 L. T. 707; 23 W. R. 854; 3 Asp. M. C. 111.

Fractions of Day count as a Day.]—When by a charterparty a specified sum is to be paid for each day over and above the laying days, that sum is payable in respect of a fraction of a day during which the ship is detained. *Ib.*

A ship got into dock in London on a Tuesday evening at 5 p.m. She could not get to her berth till 8 a.m. on the Wednesday, when she began unloading, and continued till 8 p.m. She began again at 4 a.m. on Thursday, and finished at 8 a.m. All the lay days had been consumed at the port of loading:—Held, that in the case of demurrage a fraction of a day counted as a day, and consequently that the charterers were liable for two days' demurrage. *Ib.*

Half-days and less.]—Where a charterparty provides for the loading of a ship at the rate of a specified number of tons "per weather working day," the rule to be observed in reckoning portions of days, when used for the purpose of loading, is to charge against the charterer half a day when substantially half a day's work is done, and a whole day when substantially a full day's work is done. Any smaller fraction than half a day should be disregarded in calculating the number of lay days consumed in loading. *Branckelow Steamship Co.* v. *Lamport*, 66 L. J., Q. B. 382; [1897] 1 Q. B. 570.

Working or Running Days—Usage.]—Where under a bill of lading the cargo was to be discharged in London in a certain number of days, it was held, upon proof of the usage, that working

days, exclusive of Sundays and holidays, not running days, were intended. *Cochran* v. *Retberg*, 3 Esp. 121.

Lay Days — Computed by Days and not by Hours.]—In a charterparty lay days are to be computed as days or parts of days, and not by hours. *Hough* v. *Athya*, 6 Ct. of Sess. Cas. (4th ser.) 961.

Despatch Money — "Sundays and Fête-days excepted."] — A charterparty contained the following provision: "The steamer to be discharged at the rate of 200 tons per day, weather permitting (Sundays and fête-days excepted), according to the custom of the port of discharge, and, if sooner discharged, to pay at the rate of 8*s.* 4*d.* for every hour saved" :—Held, that in calculating the amount of despatch money, the charterers were not entitled to include the hours of Sundays and fête-days. *The Glendevon*, 62 L. J., Adm. 123 ; [1893] P. 269 ; 1 R. 662 ; 70 L. T. 416 ; 7 Asp. M. C. 439.

Calendar Days.]—Where by a charterparty a specified number of running days are provided as lay days, the days mentioned, unless controlled by the context, are calendar days, extending, that is, from midnight to midnight, and not periods of twenty-four hours ; the consignee is entitled to have as lay days whole days to the number specified in the charterparty, but where the ship is ready to discharge in the middle of a day, it is competent for him to regard the remaining portion as a lay day, and to commence the discharge at once, the portion of the day occupied being counted as one of the lay days to which he is entitled. A ship being ready to discharge her cargo, consisting of grain in bulk, the captain asked the consignee at 10.30 a.m. to begin the discharge. The latter refused, but at 1 p.m. reconsidered his decision and began the discharge :—Held, that the court ought to draw the inference of fact that the consignee agreed to regard the day on which the discharge was begun as one of the lay days, although there were only a few hours of it available for work. *The Katy, Gordon* v. *Walmsley*, 64 L. J., Adm. 49 ; [1895] P. 56 ; 11 R. 683 ; 71 L. T. 709 ; 43 W. R. 290 ; 7 Asp. M. C. 527—C. A.

Demurrage Ceases when Ship Sails.]—Demurrage ceases on the day the ship sails ; loss by delay (ice or bad weather) afterwards falls on the shipowner. *Jamieson* v. *Laurie*, 6 Bro. P. C. 474 ; 3 R. R. 725.

Convoy.]—Covenant in charterparty to take in cargo and sail from O. with the first convoy for England fourteen days after the vessel was ready to load ; the freighter covenanting to load within fourteen days after notice that she was ready to load ; the freighter to be at liberty to detain the ship fifteen days on demurrage at four guineas per day. The freighter kept the ship fifteen days on demurrage, during which a convoy sailed for England, and completed the loading two days before the next convoy sailed after the expiration of the fifteen days, and thirty-eight days after that date:—Held, that on paying for the fifteen days' demurrage the freighter was in the same position with regard to the ship sailing as he would otherwise have been in at the end of the fourteen days, and that he was liable for fifteen days' demurrage, and not thirty-eight additional days as claimed. *Connor* v. *Smythe*, 5 Taunt. 654.

—— **"Wait for Convoy"—Meaning.**]—Where demurrage was to be paid for every day beyond a stated number that the ship should "wait for convoy" :—Held, that the sailing, and not the arrival, of convoy was intended. *Lannoy* v. *Werry*, 4 Bro. P. C. 630.

Days saved in Loading used for Unloading.]—The time occupied in loading is not, in the absence of agreement, to be lumped with the time for discharging, so that by extra despatch in one operation demurrage incurred for delay in the other may be worked off. *Avon Steamship Co.* v. *Leask*, 18 Ct. of Sess. Cas. (4th ser.) 280.

Construction—"At Expiration of," equivalent to "Within a Reasonable Time after."]—A declaration was for money due in respect of the demurrage of a ship. The defendant pleaded that the charterparty contained the following stipulation : "That the said merchants (meaning the defendant) are to be allowed (a certain number) of clear working days for loading and discharging the vessel each voyage, and in the event of that number being exceeded, a statement shall be furnished to the merchants at the expiration of this charter, in which they shall be credited with the above number of clear working days for each voyage performed by the vessel, and debited with those actually occupied in loading and discharging as aforesaid, and all the days so occupied in excess (if any) shall be paid for by the merchants at the rate of 2*l.* per clear working day as demurrage," and that no statement was furnished to the defendant at the expiration of the charter as required by its terms. The plaintiff replied that a statement was furnished to the defendant in accordance with the charter within a reasonable time in that behalf and before the commencement of this suit. To this replication the defendant demurred on the ground that the replication alleged a performance in terms other than those of the contract set out in the plea :—Held, that the replication was good, for that the words "at the expiration of " were synonymous with the words "a reasonable time after." *Beard* v. *Rhodes*, 28 L. T. 168 ; 1 Asp. M. C. 537.

What Days—Right to include whole Time occupied in Loading and Unloading.]—By charterparty between the plaintiff and the defendants it was agreed that the plaintiff's ship should proceed to Bilbao and there load a full and complete, or part, cargo of iron ore, and deliver the same at Middlesborough. "400/500 tons per working day (Sundays and holidays excepted) to be allowed the charterers for loading, and 300 discharging, all demurrage over and above the said days at the rate of 2*s.* per hour for every 100 tons cargo. The lay days to commence day after arrival, and being ready to load or discharge respectively. The captain to have a lien on the cargo for freight or demurrage." "If the ship is loaded at other than Portugalette or Lucana shipping staithes, the loading and discharging to be at the rate of 300 tons per working day." The vessel having loaded at a place other than those last mentioned at a rate less than 300 tons per working day, proceeded to Middlesborough, where she discharged her cargo at a higher rate per day :—Held, that in calculating the demurrage

the days for loading and unloading must be kept separate, and that the charterers had no right to add together the whole number of days occupied in loading and unloading for the purpose of ascertaining the average amount of work done on each day. *Marshall* v. *Bolckow*, 6 Q. B. D. 231 ; 29 W. R. 792.

Where no Time Expressed.]—When a charter-party is silent as to the time within which the cargo is to be unloaded at the port of destination, the law implies that reasonable despatch shall be used by both merchant and shipowner. *Ford* v. *Cotesworth*, 10 B. & S. 991 ; 39 L. J., Q. B. 188 ; L. R. 5 Q. B. 544 ; 23 L. T. 165 ; 18 W. R. 1169—Ex. Ch. And see *Sweeting* v. *Darthez*, post, col. 469 ; *Oliver* v. *Muggeridge*, supra, col. 453.

If, by a bill of lading of a cargo of brandy brought into the London docks, no time is stipulated within which it shall be unloaded, the implied contract on the part of the consignee is to discharge the ship in the usual and customary time for unloading such cargo, which is the time within which the brandies can be unloaded in the docks into the bonded warehouses. *Burmester* v. *Hodgson*, 2 Camp. 488 ; 11 R. R. 776.

If there is no fixed time, the law implies an agreement, on the part of the charterer, to discharge the cargo within a reasonable time. *Postlethwaite* v. *Freeland*, 49 L. J., Ex. 630 ; 5 App. Cas. 599 ; 42 L. T. 845 ; 28 W. R. 833 ; 4 Asp. M. C. 302—H. L. (E.)

Fixed Time.]—If, by the terms of the charter-party, the charterer has agreed to discharge the ship within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it. *Ib.*

Cargo not Ready.]—See *Little* v. *Stevenson*, infra, col. 465.

Arrival of Ship.]—*See* 4. PLACE, infra.

4. PLACE.

Entering Docks.]—A charterparty for a ship to sail to "London, Surrey Commercial Docks," is not satisfied by the ship arriving at the gate of the docks, but not entering the docks. *Dahl* v. *Donkin* or *Nelson*, 50 L. J., Ch. 411 ; 6 App. Cas. 38 ; 44 L. T. 381 ; 29 W. R. 543 ; 4 Asp. M. C. 392—H. L. (E.)

Commencement of Entry into Dock—Turn to Load.]—By a charterparty it was agreed that the vessel should "proceed direct to any Liverpool or Birkenhead dock as ordered by charterers, and there load in the usual and customary manner a full and complete cargo of coals" ; that the vessel should be "loaded at the rate of 100 tons per working day," and that loading should not commence before the 1st of July. On the 3rd of July the vessel was ready to go to the Wellington Dock, which was the Liverpool dock ordered by the charterers, but she was not admitted into such dock until the 11th of July, because the coal agent employed by the charterers to supply the cargo had then three vessels in that dock and two others booked to come in, and the dock regulations did not allow a coal supplier to have more than three vessels in dock at the same time. Coal agents were usually employed to supply cargoes, and it did not appear that the charterers had made an unreasonable selection of the coal agent they so employed. The vessel entered the dock on the 11th of July, but her turn to go to the spout to receive the coals did not arrive sooner than the 23rd of July, and her loading was not begun until after that day. It was the usual practice to load coal at the spout, but it was also not unusual to load from lighters :—Held, that the lay days did not begin until the vessel had entered the dock to which she had been so ordered by the charterers, but that they began at that time and were not postponed until the vessel's turn had arrived to go to the spout. *Tapscott* v. *Balfour*, 42 L. J., C. P. 16 ; L. R. 8 C. P. 46 ; 27 L. T. 710 ; 21 W. R. 245 ; 1 Asp. M. C. 501.

Arrival at Port of Discharge—Port used in Legal, not Geographical Sense.]—A charterparty provided for payment of demurrage by the charterer for every day's detention of the vessel by his default, and that she should be ordered to a port where she could discharge always afloat ; by the bill of lading she was ordered to the port of Newry ; from the weight of the cargo, the depth of water, and the draught of the vessel, it was necessary to discharge part of her cargo at the Pool in Carlingford Roads, about ten miles from Newry :—Held, that the Pool being within the port of Newry for custom-house purposes, and taking the port of Newry in its legal sense, and not as a a geographical expression, the lay days began to run from the date of the commencement of the discharge at the Pool. *Caffarini* v. *Walker*, Ir. R. 10 C. L. 250—Ex. Ch.

Arrival at Place of Discharge.]—The computation of the time during which lay days are to run begins, in the absence of anything to the contrary in the contract, with the arrival of the ship at the usual or designated place of discharge in the port of destination. *M'Intosh* v. *Sinclair*, Ir. R. 11 C. L. 456.

Usage as to Place of Discharge.]—When the place of the removal of the cargo is within the ambit of the port, and that removal is so common as to be the foundation of a binding usage to put out at that place and there deliver into the custody of the merchant so considerable a quantity of the cargo of a particular ship as upwards of two-thirds of the whole, a jury may, notwithstanding an attempt by merchants to establish an inconsistent usage as to lay days, hold that the operation is in substance a part discharge, and that the place where that operation is usual is a usual place for the commencement of the discharge. *Ib.*

Mooring of Vessel—Custom of the Port.]—Timber was consigned, under a charterparty made at Riga, to the Canada Dock in the port of Liverpool, a given number of days being allowed for unloading there :—Held, that, by the general law, the lay days commenced from the time the ship arrived in the dock ; but that it was competent to the consigeee to shew, notwithstanding the shipowner was a foreigner, that there was a custom in the port of Liverpool, that, in the case of timber ships, the lay days commenced only from the mooring of the vessel at the quay where by the regulations of the dock she was alone allowed to discharge. "*Norden*" *Steamship Co.* v. *Dempsey*, 45 L. J., C. P. 764 ; 1 C. P. D. 654 ; 24 W. R. 984.

The lay days allowed by a charterparty for discharging a cargo are to be reckoned from the time of the ship's arrival at the usual place of discharge, and not at the entrance of the port to which she is chartered, and this although part of the cargo was taken out for the purpose of lightening the vessel after she had entered the port, and before her arrival at the quay, which, by the custom of the port, was the usual place of delivery. *Brereton* v. *Chapman*, 5 M. & P. 526; 7 Bing. 559.

At or Alongside Wharf.]—On a charterparty, by which a ship was to unload "at a certain wharf, or as near thereto as she can safely get," the ship not being able for some days to get there, owing to the state of the tides:—Held, that "at" meant "alongside," and that the charterer was not liable to demurrage for the delay, though it was not usual in the particular port for ships to be unloaded into lighters. *Bastifell* v. *Lloyd*, 1 H. & C. 388; 31 L. J., Ex. 413; 10 W. R. 721.

Agreement to Alter Place.]—Under a charterparty to load coals and iron at C., and proceed with them to A., the running days to commence on the 16th December, 1834, the plaintiff having, with the defendant's consent, laden coals at P., in ten days ensuing the 16th December, and not having sailed from C. till the 27th:—Held, that the running days were still to be reckoned from the 16th December, and that no proof of the defendant's consent satisfied an allegation in the declaration that the coals had been laden at P. at his request. *Jackson* v. *Galloway*, 5 Bing. (N.C.) 71; 6 Scott, 786; 8 L. J., C. P. 29.

Naming Port.]—By a charterparty a ship was to proceed "to Plymouth, not higher than S. or N., or as near thereunto as she can safely get and deliver" her cargo, with certain lay days and demurrage days. The port of Plymouth is a tidal estuary. On the ship's arrival in Plymouth, the consignee ordered her to discharge at B., an ordinary landing-place in the port of Plymouth, lower down than S. or N. At this time the tides were neap; the vessel went as near B. as she could in that state of the tide, and lay on the sand for some days, till, the tides being higher, she got to B.:—Held, that the consignee had the option of naming any ordinary loading place in the port of Plymouth, within the limits assigned, and that the lay days did not commence till the vessel reached the place so named, the delay in getting to it being occasioned only in the ordinary course of navigation in a tidal harbour. *Parker* v. *Winlow*, 7 El. & Bl. 942; 27 L. J., Q. B. 49; 4 Jur. (N.S.) 84.

Refusal of Freighter to Name.]—A ship was chartered to deliver coals "at a good and safe wharf" at London at a certain freight. She came into collision in the Thames and was sunk with the cargo on board, but was afterwards got up, and arrived at a pier at Wapping. Notice of her arrival was given on the same day to the agents of the freighter, and they were required to name a wharf; but they declined to do so. Next day the ship and freight were arrested by process out of the admiralty court in a suit instituted by the owners of the vessel with whom she had been in collision:—Held, that the shipowner was entitled to recover, as damages for the refusal to name a wharf, the amount which he would have received as freight if the cargo had been duly delivered, there having been a complete breach before the arrest; but that he was not entitled to demurrage. *Stewart* v. *Rogerson*, L. R. 6 C. P. 424.

Neglect by Charterer to Name Ready Quay Berth.]—By a charterparty it was agreed that the plaintiff's vessel after loading a certain cargo should proceed "to London or Tyne Dock to such ready quay berth as ordered by the charterers," "demurrage to be at the rate of 30*l.* per running day," in no case unless in berth before noon were the lay days to count before the day following that on which the vessel was in berth, and the captain or owners were to have an absolute lien on the cargo for all freight and demurrage in respect thereof. The vessel was ordered by the charterers to a certain London dock, but when the vessel arrived at such dock, there was no quay berth ready for her, and she was consequently detained one day beyond the time required for discharging her, had she been able to have got alongside a quay berth on her arrival in the dock:—Held, on the construction of this charterparty, that the charterers were bound to name such quay berth as was ready, and that for the detention caused by the charterers neglecting to do so the plaintiffs were entitled to a lien on the cargo for demurrage, the damage for the detention being sufficiently in the nature of demurrage to come within the demurrage clause. *Harris* v. *Jacobs*, 54 L. J., Q. B. 492; 15 Q. B. D. 247; 54 L. T. 61; 5 Asp. M. C. 530—C. A.

Crane Berth or Loading Berth—Lay Days.]—A charterparty stipulated that the ship should proceed to "a loading berth in Leith docks, as ordered, and there load, in ten working days, as customary, a full and complete cargo of coals." On April 16th the master gave notice to the charterers that the ship was ready to load at a loading berth. The charterers had entered her for a crane berth, for which she had to wait until 3rd May:—Held, that the charterers had the choice of a loading berth, but that the lay days began to run from April 17. *Dall' Orso* v. *Mason*, 3 Ct. of Sess. Cas. (4th ser.) 419.

Lay Days—Usual Place of Discharge—Custom to Lighten Vessel.]—By a charterparty it was agreed that the plaintiff's steamship should proceed to Cronstadt and load a cargo of wheat, and therewith proceed to a port in the English or Bristol Channel as ordered, "or so near thereto as she may safely get at all times of tide and always afloat, and deliver the same. Eight running days, Sunday excepted, to be allowed the merchants, if the ship be not sooner despatched, for loading and discharging the steamer, and ten days on demurrage if required over and above the laying days at 25*l.* per day." The steamer arrived at Cronstadt, occupied six running days in loading a cargo of 4,325 quarters of wheat, and was ordered to Gloucester, Bristol Channel, for discharge. She arrived at Sharpness Dock in the Bristol Channel on the 13th of November. Sharpness Dock is within the port of Gloucester, and about seventeen miles from the basin within the city of Gloucester where grain cargoes are usually discharged if the burthen of the ship will admit. The steamer was ready to commence the discharge of her cargo on the 13th, but could not get nearer to Gloucester than Sharpness,

until part of her cargo was first discharged at Sharpness. On the 14th and 15th of November the consignees discharged into lighters 1,585 quarters of the cargo, and then required the master to take the steamer through the canal to a place of discharge within the basin at Gloucester. The master proceeded, and arrived in the basin on the 17th. On the 18th the residue of the cargo was discharged and the vessel returned to Sharpness, where she arrived on the 19th. In an action for demurrage, evidence was given of a custom of the port of Gloucester, according to which the usual place of discharging grain-cargoes was at the basin within the city, and when vessels with grain-cargoes destined for Gloucester were of too heavy a burthen to come up the canal they were lightened at Sharpness, and during the discharge at Sharpness of so much of the cargo as it was necessary to discharge in order to enable the vessel to proceed by the canal to Gloucester basin, the lay days counted, but the time occupied by coming up the canal to discharge at Gloucester basin and by returning to Sharpness was not counted:—Held, first, that the custom was reasonable; secondly, that it was not inconsistent with the express provision in the charterparty as to "running days," and that the time occupied by the vessel in going from Sharpness to the basin and in returning to Sharpness ought to be excluded from the lay days, and the plaintiffs were entitled to one day's demurrage only. *Brown* v. *Johnson*, (supra, col. 281) discussed. *Nielsen* v. *Wait*, 55 L. J., Q. B. 87; 16 Q. B. D. 67; 54 L. T. 344; 34 W. R. 33; 5 Asp. M. C. 553—C. A.

Loading Berth not Ready.] — Although a shipper or charterer is bound to do whatever is reasonable on his part with a view of getting the ship berthed as soon as possible, it is not his duty in all circumstances to have the cargo ready for loading on the bare chance that a berth may be vacant. *Little* v. *Stevenson*, 65 L. J., P. C. 69; [1896] A. C. 108; 74 L. T. 529; 8 Asp. M.C. 162—H. L. (Sc.)

By a charterparty a ship was to go to a certain port to receive a cargo supplied by the charterers and brought alongside within sixty running hours. Demurrage to be paid at a specified rate and "lay days to count from the time the master has got ship reported, berthed, and ready to receive cargo, and given notice of the same in writing to the charterers." When the ship arrived, of which due notice was given to the charterers, the docks were too crowded to admit of her entering. Two days afterwards a berth became vacant in consequence of the non-arrival of the cargo of an earlier vessel, and the appellant's ship might have entered if her cargo had been ready. She was not in fact docked until five days later:—Held, that the appellant was not entitled to any damages by way of demurrage. *Ib.*

—— **Incorporation of Colliery Guarantee.**]—By a charterparty made between the plaintiff, the owner of the ship "F.," and the defendants, it was provided that the ship should proceed to "a customary loading place in the Royal Dock, Grimsby," and there receive on board from the defendants' agents a full cargo of coal, "to be loaded as customary at Grimsby as per colliery guarantee in fifteen colliery working days." The colliery guarantee referred to, made between a colliery company and the defendants, provided that the company should load the ship in fifteen colliery working days after she was ready in dock at Grimsby to receive her cargo, "time to count from the day following that on which notice of readiness is received." On September 3 the captain of the "F." gave notice that he was ready to load, and the ship was entered in the turn-book as ready. There was only one staith at which she could load, and her turn arrived on September 17, but the colliery company did not give notice that they were ready to deliver coal until October 9. The ship then proceeded to the staith, and the loading was completed on October 13. In an action by the plaintiff against the defendants to recover demurrage:—Held (Kay, L.J., dissenting), that the colliery guarantee was incorporated in the charterparty; that the lay days commenced to run from September 4, the day after that on which the notice of readiness was given; and that the defendants were therefore liable for demurrage from September 20. *Monsen* v. *Macfarlane*, 65 L. J., Q. B. 57; [1895] 2 Q. B. 562; 73 L. T. 548; 8 Asp. M. C. 93—C. A.

—— **Commencement of—Receipt of Orders.**]—A charterparty provided that the vessel should proceed to Malta for orders; which were to be given from London within twenty-four hours after receipt of notice, or lay-days to count:—Held, that orders not having been given within the prescribed time, the lay-days did not begin to count till the expiration of the twenty-four hours. *Bryden* v. *Niebuhr*, 1 Cab. & E. 241.

—— **Completion of Voyages—Option to order Ship to one of several Places in Dock.**]—By the terms of a charterparty the ship was to load from the charterer's agents at Cardiff a cargo of coals, "and therewith proceed to Dieppe and deliver the same alongside consignee's or railway wharf, or into lighters, or any vessel or wharf where she may safely deliver, as ordered, cargo to be loaded and discharged in forty-eight running hours, &c. Demurrage over and above the said lying time at 10*s.* per hour. The ship arrived in the dock at Dieppe, and was ordered to discharge at the railway wharf, but in consequence of all the discharging berths being occupied, she was not berthed at the railway wharf until twenty-four hours after her arrival in the dock. In an action by shipowner against charterers for demurrage:—Held, that the voyage was not completed, and the lay-days did not commence under the charterparty until the ship was berthed at the railway wharf, and therefore that the defendants were not liable to pay demurrage for delay in respect of the period which elapsed between the ship's arrival in the dock at Dieppe and her being berthed at the railway wharf. *Murphy* v. *Coffin*, 12 Q. B. D. 87; 32 W. R. 616.

A charterparty provided that the ship should proceed to Odessa, or as near thereto as she could safely get, and there load. Twelve running days (Sundays excepted) were allowed for loading and unloading, and ten days on demurrage. The ship arrived in Odessa outer harbour on the 22nd of December, but was not allowed to go alongside a loading quay berth, as the docks were crowded. It was possible to load vessels at Odessa at a loading quay berth either in the inner or outer harbour. On the 8th of January she was ordered to a berth in the inner harbour, and proceeded to take in cargo. In arbitration

proceedings between the shipowners and charterers, the arbitrator found that the lay days expired on the 5th of January, and that the charterers were liable for demurrage and detention. On motion to set aside the award:—Held, that the arbitrator was right, as the voyage was completed as soon as the ship had arrived in the outer harbour at Odessa, and as near as she could get to a loading quay berth. *Pyman and Dreyfus, In re*, 59 L. J., Q. B. 13; 24 Q. B. D. 152; 61 L. T. 724; 38 W. R. 447; 6 Asp. M. C. 444—D. And see *Little* v. *Stevenson*, supra, col. 465.

Option of Ordering Ship to Discharge in one of several Ways.]—By the terms of a charterparty it was provided that the "C." should load at Glasgow a cargo of coals, and "therewith proceed to Odessa, or as near thereto as she may safely get, and deliver the same to the freighters, or assigns alongside any safe wharf, store, craft, steamer, depot, ship, or arsenal, as ordered by receiver. . . . Cargo to be discharged at the average rate of not less than 300 tons per working day, Sundays and holidays excepted, and ten days on demurrage over and above the said lay days at 16*s.* 8*d.* per hour, except in the case of strikes, lock-outs, &c., or any other causes beyond the control of the charterers or receivers or their respective agents, delaying the due loading and unloading. Time for loading and unloading to commence from the time the steamer is ready and intimation has been given in writing." The "C." arrived inside the mole at Odessa on the 16th of November, and, on the same day, due notice in writing of the ship's readiness to discharge was given, and she was ordered to proceed alongside the quay to discharge. In consequence of all the berths at the quay being occupied, the "C." could not get alongside the quay till the morning of the 20th, and the discharge of her cargo was not completed until the 25th. In an action brought by owners of the ship against the agents of the charterers for demurrage:—Held, that the plaintiffs were entitled to recover. *Murphy* v. *Coffin* (supra), considered. *The Carisbrook*, 59 L. J., Adm. 37: 15 P. D. 98; 62 L. T. 843; 38 W. R. 543; 6 Asp. M. C. 507.

Lightening Ship.]—A ship was chartered to "proceed to a safe port in the United Kingdom or as near thereunto as she may safely get always afloat at any time of the tide." She was ordered to Glasgow, but owing to her draught had to discharge part of her cargo at Greenock. In an action for demurrage:—Held, that the voyage was completed at Greenock, as regards the cargo there discharged, and that the time spent in lightening at Greenock was to be included in the lay-days. *Dickinson* v. *Martini*, 1 Ct. of Sess. Cas. (4th ser.) 1185.

Ship Arrived — Customary Place of Discharge.]—Under a charterparty requiring a ship to proceed to a port named, "and, as usual and customary, to deliver the cargo to the order of the merchants or their agents, alongside any store, wharf, &c.," the ship is not an arrived ship until she reaches the customary place of discharge in that port, and the lay days will only begin to run from the time when she is ready to discharge at the customary place of discharge. *Sanders* v. *Jenkins*, 66 L. J., Q. B. 40; [1897] 1 Q. B. 93.

Delivery at Safe Berth as ordered.]—By a charterparty the vessel was to proceed to the Mersey and deliver her cargo at any safe berth as ordered on arrival in the dock at Garston. On arrival a berth was ordered, but, owing to the crowded state of the dock, delay occurred which prevented the vessel being berthed for some time after arrival. On a claim by the shipowners for demurrage arising from the delay:—Held, that the obligation of the charterers to unload did not commence till the vessel was berthed. *Tharsis Sulphur Co.* v. *Morel*, 61 L. J., Q. B. 11; [1891] 2 Q. B. 647; 65 L. T. 659; 40 W. R. 58; 7 Asp. M. C. 106—C. A.

Ship admitted into Dock as Special Favour.]—By a charterparty it was agreed that the plaintiff should at L. load on the defendant's vessel, the "P.," a cargo of coal, and that she should proceed therewith to D., "the vessel to be loaded and discharged in nineteen running days, or if longer detained, to pay 4*l.* per day demurrage." At the foot of the charterparty was a memorandum, "Vessel to load in B. M. dock or W. dock, high level." On the day following the execution of the charterparty, the "P." was, as a matter of favour, admitted into the W. dock, and was then ready to receive her cargo, but owing to the regulations of the dock authorities she did not begin to load until about a fortnight later. Upon her arrival at D. disputes arose between her captain and the plaintiff as to the form of the bill of lading, and in consequence thereof her cargo was not unloaded until twenty days had elapsed after the expiration of the nineteen running days, if calculated from the time of her admission into the W. dock. In order to obtain delivery of the cargo, the plaintiff was obliged to pay 80*l.* claimed as demurrage in respect of the twenty days, which he now sued to recover back:—Held, that the nineteen running days were to be calculated from the time when the "P." was admitted into the W. dock, that the plaintiff was liable for demurrage, and that the action would not lie. *Davies* v. *McVeagh*, 48 L. J., Ex. 686; 4 Ex. D. 265; 41 L. T. 308; 28 W. R. 143; 4 Asp. M. C. 149—C. A.

At what Ports—Loading and Discharge.]—By charterparty between the plaintiff and the defendants it was agreed that the plaintiff's ship should proceed to Bilbao, and there load a full and complete, or part, cargo of iron ore, and deliver the same at Middlesborough. "400/500 tons per working day (Sundays and holidays excepted) to be allowed the charterers for loading, and 300 discharging, all demurrage over and above the said days at the rate of 2*s.* per hour for every 100 tons of cargo. The lay days to commence day after arrival, and being ready to load or discharge respectively. The captain to have a lien for freight or demurrage." "If the ship is loaded at other than Portugalette or Lucana shipping staithes, the loading and discharging to be at the rate of 300 tons per working day." The vessel having loaded at a place other than those last mentioned at a rate less than 300 tons per working day, proceeded to Middlesborough, where she discharged her cargo at a higher rate per day:—Held, that, in calculating the demurrage, the days for loading and unloading must be kept separate, and that the charterers had no right to add together the whole number of days occupied in loading and unloading for the purpose of ascertaining the amount of work done on each day. *Marshall* v. *Bolckow*, 6 Q. B. D. 231; 29 W. R. 792.

Upon the following clause in a charterparty, "the vessel to lie her regular time for loading her cargo, and one day per keel running days, demurrage 3*l.* per day for every working day's detention, over and above the days allowed as aforesaid," demurrage can be claimed only in respect of loading, and not of the time spent in the delivery of the cargo. *Alcock* v. *Taylor*, 2 H. & W. 58; 6 N. & M. 296.

—— **Intermediate Port.**]—In an action for demurrage on a charterparty, given "while waiting at Portsmouth for convoy, and discharging her cargo at Barcelona," the plaintiff can only claim demurrage at those two places, not for any delays at any other intervening places. *Marshal* v. *De la Torre*, 1 Esp. 367.

By a charterparty under seal, the freighter was at liberty "to keep the ship on demurrage, at her loading and delivery ports, ten days each, besides a certain number of days limited for her stay at the same, or as many of them as need should require." The ship having been compelled to put into an intermediate port between her ports of loading and discharge, and the freighter having detained the vessel ten days there, and also fourteen days more than ten days at the port of delivery:—Held, that the master could not recover on this covenant for more than the ten days' demurrage at 5*l.* per day, at the port of discharge, the covenant not extending to the payment of demurrage beyond ten days at each of the ports of loading and discharge. *Stevenson* v. *York*, 2 Chit. 570.

—— **Not at Port of Discharge—Reasonable Time.**]—By a charterparty it was agreed that a ship should proceed to Pernambuco and there load from the factors of the freighter, having first discharged her cargo, if any, a full cargo, and proceed therewith to Valparaiso, a legal port between Valparaiso and Guayaquil, and Guayaquil, all or any, and there discharge the cargo and goods taken on board at Valparaiso, and at any and all the aforesaid ports should take on board a full cargo, and therewith proceed to England for orders to discharge. Seventy running days were to be allowed the merchant, if the ship was not sooner despatched, for loading, discharging and reloading the ship at the several ports, to be computed from the several periods of the vessel being clear and ready. She took in cargo at Pernambuco, and discharged at Valparaiso. At Valparaiso, she took in goods belonging to the freighter and also to other merchants for Paita (a port between Valparaiso and Guayaquil) and Guayaquil, part of which was to be discharged there and the rest to be carried to England. The seventy running days were all consumed at Pernambuco, Valparaiso, Paita, and Guayaquil: plus three days, for which demurrage was paid to the master:—Held, that the seventy running days "for loading, discharging, and reloading," only applied to the ports of loading, intermediate discharge and reloading, such lay days not applying to the ultimate discharge at the end of the voyage, and, consequently, that the charterers were entitled to a reasonable time for unloading the homeward cargo in London, without paying demurrage. *Sweeting* v. *Darthez*, 14 C. B. 538; 2 C. L. R. 1375; 23 L. J., C. P. 131; 18 Jur. 958; 2 W. R. 414.

During Voyage.]—By a charterparty it was agreed that a ship then lying at Genoa should sail on or before the 30th July, 1859, to Monte Video and Lima (with goods for third parties), and thence proceed with all convenient despatch to Callao, where the master was to report his arrival to the agents of the charterers, by whom he was to be sent to the Chincha Islands for a cargo of guano, for a port in the United Kingdom. Thirty days were to be allowed to the charterers for loading the ship and to the owners for taking in certain specified light freight, and thirty days over and above the lay-days, at 7*l.* per day; and then came the following provision: "Should the vessel be unnecessarily detained at any other period of the voyage, such detention to be paid for by the party delinquent to the party observant, at the above-named rate of demurrage or compensation." The vessel did not leave Genoa until the 8th of September:—Held, that this was not a detention during the voyage within the meaning of the penalty clause. *Valente* v. *Gibbs*, 6 C. B. (N.S.) 270; 28 L. J., C. P. 229; 5 Jur. (N.S.) 1213; 7 W. R. 500.

Discharge in Separate Parcels.]—As soon as the period arrives at which the owner of the cargo is bound to accept part delivery, the voyage is at an end, and so, where, by the usage of a port, a cargo is to be discharged within the port in two separate parcels at two different places, both places taken together constitute the usual place of discharge, and the lay-days commence to run from arrival at the first. *McIntosh* v. *Sinclair*, Ir. R. 11 C. L. 456.

Different Loading Places—Ship Ordered to Crowded Berth.]—A charterparty stipulated that the ship should "proceed to Portugalette or any other usual ore-loading place in the river Nervion not above Lucana, as ordered by the merchants' agents on arrival" and there load a cargo of iron ore, "after being berthed in turn." There were different loading places for different classes of ore; and the ship, on arrival, was ordered to a place at which, owing to the number of ships arrived before her, she could not be berthed until June 27. At another loading place she would have been berthed on June 21:—Held, that the charterers were liable for four days' demurrage. *Stephens* v. *Macleod*, 19 Ct. of Sess. Cas. (4th ser.) 38.

5. Loading and Discharging; Rules of Port.

Contract to Load with usual Despatch—Delay caused by Rule of Port.]—By a charterparty the master of a vessel, the "D.," engaged to receive on board and load a cargo of coal at the port of Liverpool, "to be loaded with the usual despatch of the port, or if longer detained to be paid 40*s.* per day demurrage," and the defendants engaged to load upon the above terms. The loading was to take place at the Bramley Moore docks, and by one of the regulations of the docks no coal agent was to be allowed to have more than three vessels in those docks loading and to load at the cranes at one time. The defendants acted as their own coal agents, and when the charterparty was entered into they had three ships loading in the docks, and ten other charters in their books having priority over the plaintiff. In consequence of these engagements the "D." was not allowed to go into the docks until thirty days after she was ready to do so:—Held, that the contract by the defendants was absolute to

load with the usual despatch of the port of Liverpool; that the "D." had not been so loaded; and that the defendants were therefore liable to pay for the delay. *Ashcroft* v. *Crow Orchard Colliery Co.*, 43 L. J., Q. B. 194; L. R. 9 Q. B. 540; 31 L. T. 266; 22 W. R. 825; 2 Asp. M. C. 397.

Ship to Load in Turn—Charterer's Default.]—A ship was chartered upon the terms that she should go to a foreign port for a cargo, and "there, in the usual and accustomed manner, load in her regular turn." The ship went to the port, but, owing to the charterer's default, was not ready when her turn came, and was consequently detained eleven days. When her turn came round again, she was ready, but the wind coming on to blow, and the harbour being crowded, the harbour-master refused to allow the ship to go up to load, and she was consequently detained three days. The shipowner having sued on the charterparty claiming damages for the detention:—Held, that the detention for the three days was the legal and natural consequence of the charterer's default in not having the ship ready for the first turn, and that the shipowner was entitled to damages in respect of the three days as well as the eleven days. *Jones* v. *Adamson*, 45 L. J., Ex. 64; 1 Ex. D. 60; 35 L. T. 287; 3 Asp. M. C. 253.

—— **Shipowner Ignorant of Custom.**]—The plaintiff's sailing vessel was chartered by the defendant to proceed to Whitehaven for a cargo of coals. The charterparty provided that "regular turn should be allowed for loading. By the custom of the port of Whitehaven, steam vessels, though they arrive in port after sailing vessels, are loaded with coals before the sailing vessels; but as between sailing vessels themselves, sailing vessels are loaded in the order of their arrival in port. The plaintiffs were ignorant that this was the usage of the port. The plaintiffs' vessel, though she arrived before several steam vessels, was delayed until they were first loaded, but she was loaded in the order of her arrival as regarded the other sailing vessels in harbour. The plaintiffs claimed demurrage:—Held, that the expression, "regular turn," in the charterparty, should, in the absence of exclusive words, be constructed as "regular turn" according to the usage of the port of Whitehaven; that it was not material that the plaintiffs were ignorant of such usage, and that, accordingly, the plaintiffs could not recover. *King* v. *Hinde*, 12 L. R., Ir. 113.

Port Crowded — Lighters Engaged.] — The defendants chartered the plaintiff's vessel, the "C.," for a voyage to the port of L. The charterparty provided that the cargo was to be brought to and taken alongside free of expense and risk to the ship; but it contained no other clause as to discharging the cargo. The number of lighters at L. was small, and when the "C." arrived the port was crowded with vessels, about half of which belonged to the defendants or had been consigned to them. Seventy-two days elapsed after the arrival of the "C." before her discharge was completed by the defendants' agents; but the number of days upon which the cargo was unloaded was only thirty-four. The delay arose from the lighters being engaged in discharging other vessels lying at the port:—Held, that in determining whether the terms of the charterparty had been broken by the defendants, the delay occasioned by the lighters being engaged in discharging other vessels was not to be taken into account. *Wright* v. *New Zealand Shipping Co.*, 4 Ex. D. 165; 40 L. T. 413; 4 Asp. M. C. 118—C. A.

"Cargo to be Discharged with all Despatch, according to Custom of the Port."]—The defendants chartered the plaintiff's vessel, the "C.," to carry a cargo of rails to the port of L. The charterparty provided that the cargo should be "discharged with all despatch, according to the custom of the port." By the custom of L. vessels were discharged by lighters worked along a warp, and upon the arrival of a vessel she was reported at the port office, and in her turn, with respect to the vessels that had arrived previously, one lighter was sent to her every working day until she was discharged. Upon the arrival of the "C." at L., in consequence of the scarcity of lighters, and the number of vessels lying there, the defendants were unable to begin to discharge until twenty-four working days had elapsed. In an action to recover damages for detention, the judge directed the jury that there was no obligation upon the defendants to provide one lighter for unloading the cargo of the "C." for every working day after she was ready to unload, and that if the defendants used the existing appliances at L. with due dispatch, according to the custom of the port, the jury ought to find for them:—Held, that the direction was correct. *Postlethwaite* v. *Freeland*, 49 L. J., Ex. 630; 5 App. Cas. 599; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C. 302—H. L. (E.)

Obligation where no Custom.]—By a charterparty entered into between the plaintiff and G., it was agreed that the plaintiff's vessel should at the port of discharge be unloaded as fast as the custom of the port would allow. By the bill of lading, signed by the master, the cargo was stated to have been shipped by G., and was to be delivered to the defendant or his assigns, he or they paying freight for the goods as per charterparty. No time for the discharge of the cargo was mentioned in the bill of lading. At the port of discharge there was no custom as to unloading vessels, but a delay occurred in unloading the ship:—Held, in an action for not discharging within a reasonable time, that, as there was no custom of the port of discharge as to unloading vessels, the charterparty did not, by its terms, vary the implied contract contained in the bill of lading to deliver the cargo within a reasonable time. *Fowler* v. *Knoop*, 48 L. J., Q. B. 333; 4 Q. B. D. 229; 40 L. T. 180; 27 W. R. 299; 4 Asp. M. C. 68—C. A.

Wrongful Interference with Turn.]—Goods were consigned under a bill of lading by which it was stipulated that the vessel should take her regular turn in unloading. The vessel having been prevented from unloading within a reasonable time, in consequence of not being allowed to take her regular turn in unloading:—Held, that the master could sue the consignor for damages for such detention, the above stipulation in the bill of lading amounting to a contract by the consignor with the master that the vessel should take her regular turn in unloading. *Cawthron* v. *Trichett*, 15 C. B. (N.S.) 754; 33 L. J., C. P. 182; 9 L. T. 609; 12 W. R. 311.

"To be Discharged at usual Fruit Berth as fast as Steamer can deliver, as customary."]—By the terms of a charterparty, a steamer was to take a cargo to Hamburg "to be discharged at usual fruit berth as fast as steamer can deliver, as customary." On the 6th of March she arrived, and was moored at the usual fruit berth, but without the sanction of the authorities, who had her removed till the 8th, when she returned to the berth. Owing to various causes, unloading did not commence till the 11th of March. The shipowners brought an action for demurrage:—Held, that the steamer did not arrive at her place of discharge, so as to impose any obligation on the charterers to unload, until the 8th of March; that the words "as customary" referred to the speed of delivery as well as to the mode of delivery, so that the cargo had to be unloaded as fast as the custom of the port would allow; that the delays were caused by the custom of the port; and that the claim for demurrage ought not to be allowed. *Good* v. *Isaacs*, 61 L. J., Q. B. 649; [1892] 2 Q. B. 555; 67 L. T. 450; 40 W. R. 629; 7 Asp. M. C. 212—C. A.

Customary Mode—Discharge by Dock Company.]—A charterparty provided that the vessel should proceed to a named dock and should there be discharged as fast as she could deliver. On the ship's arrival, the master authorised the dock company to discharge the cargo. The custom at the dock was for the company to discharge the cargo, acting for the shipowner and the charterer or consignee:—Held, that the customary mode of discharge was implied, and that the charterers were not liable for demurrage by reason of the dock company's delay in discharging the cargo. *The Jaederen*, 61 L. J., Adm. 89; [1892] P. 351; 1 R. 545; 68 L. T. 266; 7 Asp. M. C. 260.

Timber Cargo — Delivery in Rafts.] — By a charterparty, it was agreed that a steamship, after loading with sleepers, should proceed to a named port, or as near thereunto as she may safely get, and that the cargo should be brought to and taken from alongside, at the merchant's risk and expense. The steamer to be loaded and discharged as fast as she can load and deliver. Demurrage at a rate named. The port was a tidal river, with a quay on the bank. The ship could not get a berth at the quay, because they were all occupied; and also because she drew too much water. The custom of the port was to discharge sleepers on the quay or on rafts. The charterers refused to take delivery on rafts, except of deck cargo, to lighten the ship. The ship was moored as near the quay as she could get. *La Cour* v. *Donaldson*, 1 Ct. of Sess. Cas. (4th ser.) 912.

Meaning of "Regular Turn."]—By charterparty it was agreed between the plaintiff, owner of a ship, and the defendant, that the ship should proceed to a certain dock and there load in the customary manner a cargo of Marley Hill coke, "to be loaded in regular turn." The Marley Hill Company kept a book in which they entered ships to be loaded, and it was their practice to enter ships, not only before they were ready to load, but before their arrival at the dock, or even at the port; and if a ship was not ready to load when her turn came, the ship next in turn was loaded, and the other took its turn, when ready, before others which had been ready before it. On the 29th November the plaintiff's ship arrived at the dock, and on the 8th December his agent told the manager that he was ready to load, but several ships which had not arrived, and were not ready until after the plaintiff's ship, were loaded before it, in consequence of the order in which they were entered in the book; and the loading of the ship did not commence until the 23rd of January. The judge left it to the jury to say what was the meaning of "regular turn," and they found that the ship was loaded according to the practice of the Marley Hill Colliery, but that it was not an established or a known custom, and that "regular turn" was the order of readiness, not the order of entry in the book:—Held, that the defendant was liable for demurrage. *Lawson* v. *Burness*, 1 H. & C. 396; 10 W. R. 733. *S. C.*, at Nisi Prius, 2 F. & F. 793.

—— **Evidence — Regulations of Foreign Government.**]—By the terms of a charterparty the charterers agreed to unload the vessel at a certain rate per diem; and payment for any detention beyond that time was "to reckon from the time of the vessel being ready to unload, and in turn to deliver." At the port to which the vessel was bound regulations of the French Government were in force, by which vessels arriving to discharge their cargo might have to wait a certain number of days before their turn to deliver arrived. In an action brought upon the charterparty for demurrage:—Held, that evidence was receivable to shew what was the general understood meaning of the words "in turn to deliver" amongst shipowners and merchants entering into charterparties, with respect to the commerce and business under investigation. *Robertson* v. *Jackson*, 2 C. B. 412; 15 L. J., C. P. 28; 10 Jur. 98.

Held, also, that the regulation as to the unloading for the French marine department was to be considered one of the regulations of the port, binding upon all vessels entering the port. *Ib.*

"Turn-paper"—Evidence as to Place.]—The defendants having purchased a cargo of coals on board a ship in the Thames belonging to the plaintiff, signed and sent to a coalmeter a document called a "turn-paper," which, after reciting that they had bought the cargo of coals, to be worked at the rate of forty-nine tons per working day, required him to work the same. The paper mentioned that the coals were to be unloaded at Dudman's Dock, in the Thames. The plaintiff took his ship to the moorings off Dudman's Dock, but a delay of six days occurred before the vessel could begin to unload at the dock, owing to the turns of other vessels for unloading coming first:—Held, that if the turn-paper was evidence of any contract between the plaintiff and the defendant, it was evidence only of a contract to unload after the vessel had got into the dock at the place for unloading; consequently that the plaintiff was not entitled to damages in the nature of demurrage for the six days' delay from the time the ship was off the dock ready to unload. *Shadforth* v. *Cory*, 32 L. J., Q. B. 379; 8 L. T. 736; 11 W. R. 918—Ex. Ch.

Different Order—Metage.]—A ship was to take in a cargo of coals for Newcastle, and pro-

ceed therewith to London, or as near thereto as she could safely get, and deliver the same to the freighters, or their assigns, to be delivered in five working days; demurrage over and above the laying days 2*l.* per day. The ship arrived in the port of London off Gravesend, on the 9th March, and on the 10th the cargo was sold, and the vessel entered by the freighters for a meter. On the 20th she received an order from the harbour-master to proceed to the Pool. On Monday, the 22nd, she commenced working out her cargo, and was cleared on the 27th. It appeared that, in consequence of the factor's certificate that she was a metered vessel, the harbour-master had detained her at Gravesend till the 20th, when her turn arrived for her to proceed to the Pool and discharge her cargo; that, if she had not been on the meter's list, this regulation would not have applied, and she might have proceeded to the Pool at once: and that it was occasionally the practice for factors not to enter such vessel in the meter's list, but that it was desirable that the cargo should be sold, subject to metage, by a sworn meter:—Held, that the ship was not to be considered as having arrived at her place of discharge until the 20th, and therefore that the laying days did not begin to count till then, and the owner was not entitled to demurrage. *Kell* v. *Anderson*, 10 M. & W. 498; 12 L. J., Ex. 101.

Customary Time.]—If a freighter of a ship employed to bring a cargo of wine into the port of London covenants to unload her in the usual and customary time at her port of discharge, he is not liable for the detention of the ship in the London Docks, if she is there unloaded in her turn. *Rodgers* v. *Forresters*, 2 Camp. 483; 11 R. R. 773.

Express Time.]—But if, by reason of the crowded state of the London Docks, a ship is detained there before she can be unloaded a longer time than is allowed for that purpose by the terms of the charterparty, the freighter is liable for this detention of the ship. *Randall* v. *Lynch*, 2 Camp. 352; 11 East, 179; 11 R. R. 727.

Delivery of Cargo—Joint Operation—Consignee and Shipowner—Cargo of Poles.]—See *Peterson* v. *Freebody*, infra, col. 535.

Ship Arrived—Discharge into Lighters.]—A ship was chartered to load scrap iron and "therewith to proceed to Grangemouth or as near thereunto as she may safely get." The cargo was to be brought to and taken from the ship's side at the merchant's expense. The ship arrived in the roads off the Carron River on September 10th, but she could not get a berth in the docks. On September 12th the ship was moored off one of the docks in the river. Next day the master told the charterers that she was ready to discharge. Ships often discharged into lighters in the river, but there was no custom as to scrap iron cargoes:—Held, that demurrage ran on from September 14th, on which day the discharging should have begun. *Bremner* v. *Burrell*, 4 Ct. of Sess. Cas. (4th ser.) 934; and see *The Alne Holme*, infra, col. 480.

Custom to Employ Dock Company to Discharge—Strike.]—See *Castlegate Steamship Company* v. *Dempsey*, infra, col. 481.

Discharge of Mixed Cargo—Custom of Port.]—A ship chartered to carry to the United Kingdom ash and bones, to be discharged according to the custom of the port of discharge, received from the charterers and loaded 33 tons of ash, 397 tons of bones, and 20 tons of horns, hoofs, and piths, partly mixed in the bones and partly on the top of them. The master gave bills of lading for 33 tons of ash and 417 tons of bones. The ship was ordered to Aberdeen. The master, at the direction of the consignees, under protest, separated the horns, &c., from the bones before giving delivery; and sued for demurrage. The bone trade at Aberdeen was only 30 years old, and almost entirely in the defendants' hands:—Held, that no custom to separate the cargo was proved, and that the defendants were liable. *Clacevich* v. *Hutchinson*, 15 Ct. of Sess. Cas. (4th ser.) 11.

Lightening Ship.]—A ship was chartered to take a cargo to a safe port in the United Kingdom "or so near thereto as she can safely get and lay afloat at all times of tide, and deliver the same and so end the voyage." She was ordered to Glasgow, and on her arrival at the Tail of the Bank, 22 miles from Glasgow, she had to be lightened to enable her to lie afloat at Glasgow at low water. According to custom the shippers took delivery of part of the cargo discharged to lighten her, and ordered the master to discharge the rest at Glasgow. The shipowners claimed demurrage:—Held, none due, the discharge of cargo being made to enable her to complete the voyage. *Hillstrom* v. *Gibson*, 8 Ct. of Sess. Cas. (3rd ser.) 463.

Ice—River Bar — Dantzic.] — A ship was chartered to sail from Liverpool to Dantzic or as near thereto as she could get, and back to England. Thirty days were allowed for loading and unloading. The ship was compelled by ice to bring up about four miles from Dantzic. On March 16th, the merchant received notice that she was ready to load, and her cargo having been sent over the ice was all on board by April 5th. It was then found that the ship could not pass the bar, and 60 tons were taken out of her and put on board again by April 14th. Six days were taken in unloading the cargo in England. In an action for demurrage the judge directed the jury that the question whether the days from April 5th to April 14th were to be computed or not in reckoning the running days depended upon the custom at Dantzic as to loading part of the cargo inside and part outside the bar:—Held, that the direction was right. *Herring* v. *Ward*, 8 L. J., Q. B. 218.

Ice—Customary Manner of loading.]—See *Kay* v. *Field*, infra, col. 479.

6. Causes of Delay.

a. Weather.

Preventing Departure of Ship.]—After a ship has finished her loading, the freighter is not liable for any delay that may arise in despatching her, occasioned by the accidental impossibility of her obtaining clearance. *Barret* v. *Dutton*, infra.

A charterer, for the conveyance of a cargo from a foreign port, is not liable to the owner for the unavoidable detention of the ship by the frost

after the completion of the loading. *Pringle* v. *Mollett*, 6 M. & W. 80; 9 L. J., Ex. 148.

Preventing Conveyance of Cargo to Ship.]—The exception in a charterparty, whereby a certain number of laying days is allowed to the charterer, but detention by ice is not to be reckoned as such, applies where the ice not only renders access to the ship impracticable in the port itself, but blocks up a river by means of which alone the intended cargo can be conveyed to the port. *Hudson* v. *Ede*, 8 B. & S. 640; 37 L. J. Q. B. 166; L. R. 3 Q. B. 412; 18 L. T. 764; 16 W. R. 940—Ex. Ch. Followed in *Smith* v. *Rosario Nitrate Co.*, infra, col. 485.

Where there is a stipulation in a charterparty, that a certain number of running days shall be allowed for loading the ship, the freighter is liable for her subsequent detention for that purpose, although the loading of her within the specified time was rendered impossible by ice in the river where she lay. *Barret* v. *Dutton*, 4 Camp. 333; 16 R. R. 798.

A. by charterparty engaged to load on board B.'s ships a cargo of coals "with due despatch"; the goods had to be brought by A. along a canal to the dock, and frost prevented the completion of the loading:—Held, that A. was responsible for the delay consequent thereon. *Kearon* v. *Pearson*, 7 H. & N. 386; 31 L. J., Ex. 1; 10 W. R. 12.

By a charterparty the ship was to proceed to Bilbao, and there load in the customary manner in regular steamer turn, where and as ordered by the agent of the freighter, a cargo of iron ore; 400 tons per working day, weather permitting, to be allowed for loading, and all demurrage over and above the said days at the rate of 12*s.* 6*d.* per hour, no demurrage to be paid in case of any hands striking work, frosts, or floods, which might hinder the loading of the vessel. The port of Bilbao was on a river where there were a number of wharves, and the iron ore was brought down to the wharves by railways from storing places five miles off, and loaded direct from the railway trucks into the ship by means of shoots, there being no storing-places at the wharves. Ships, however, were sometimes loaded while lying out in the river from barges which brought the ore from storing places higher up the river. The ship was ordered to San Nicholas wharf to load, and she was there loaded under a shoot with ore brought down by rail as above-mentioned. In consequence of heavy rains at the storing places, and in consequence of the men who were loading the ore into the railway trucks there refusing to work from fear of the cholera, delay occurred, and the ship was detained waiting for her cargo:—Held, without deciding whether the refusal of the men to work came within the exception in the demurrage clause of "hands striking work," that neither the state of the weather nor the refusal of the men to work hindered the "loading" inasmuch as both those causes of delay operated before the ore arrived at the place of loading, and the nature of the port was not such that the only possible mode of loading the ship was by bringing the ore by railway from the storing-places five miles off, so as to bring the case within the decision in *Hudson* v. *Ede* (supra). *Stephens* v. *Harris*, 57 L. J., Q. B. 203—C. A.

"Frost preventing Loading."]—By a charterparty a ship was to proceed to Cardiff, East Bute dock, and there load in the customary manner from the agents of the freighters a cargo of iron. "Cargo to be supplied as fast as steamer can receive. . . . Time to commence from the vessel being ready to load and unload and ten days, on demurrage, over and above the said lay days, at 40*l.* per day. (Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading . . .; in which case owners to have the option of employing the steamer in some short voyage trade until receipt of written notice from charterers that they are ready to resume employment without delay to the ship.)" The ship arrived at the East Bute Dock, and loaded part of her cargo. A frost then set in, and made a canal which communicated with the dock impassable, so that the remainder of the cargo which was ready at a wharf on the canal could not for several days be brought in lighters to the dock. The cargo could not have been brought into the dock by carting or otherwise at any reasonable expense. The dock itself was not frozen over, and if the cargo had been in the dock the loading might have proceeded:—Held, that the frost did not prevent the "loading" within the meaning of the exception. *Allerton Sailing Ship Co.* v. *Falk*, ante, col. 278, distinguished. *Grant* v. *Coverdale*, 53 L. J., Q. B. 462; 9 App. Cas. 470; 51 L. T. 472; 32 W. R. 831; 5 Asp. M. C. 353—H. L. (E.)

No Implied Exemption for Bad Weather.]—By a charterparty for a voyage with a cargo of timber from Pensacola to a safe port in the United Kingdom, "sixteen working days were to be allowed the merchants for loading the ship at Pensacola, and to be discharged at such wharf or dock as the charterers may direct, always afloat, in fourteen like days, and ten days on demurrage over and above the laying days at 10*l.* per day." The ship was ordered to Middlesborough, and arrived at the usual place of discharge in the river and began unloading. It was the duty of the master to put the timber over the ship's side, and form it into rafts, and the charterer was to send tugs and take the rafts away. During the unloading bad weather came on, and though the ship did not leave her anchorage, the rafts could not be formed, and the charterer therefore could not do his part in taking the timber away. The bad weather caused a delay of four days in discharging the ship. An action having been brought by the shipowner against the charterer for the four days' demurrage:—Held, that, where a given number of days is allowed to the charterer for unloading, a contract is implied on his part that, from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent his releasing the ship at the expiration of the lay days; and the charterer, therefore, was liable for the four days' demurrage. *Tiis*, or *Thiis*, v. *Byers*, 45 L. J., Q. B. 511; 1 Q. B. D. 244; 34 L. T. 526; 24 W. R. 611; 3 Asp. M. C. 147. And see *Budgett* v. *Binnington*, infra, col. 482.

—— **Customary Manner of Loading—Ice.**]—By the terms of the charterparty the ship was to proceed to Cardiff, East Bute Dock, and there load in the customary manner from the agents of the freighters a cargo of rail iron; the cargo to be loaded as fast as steamer could take on board and stow within the customary working hours of

the port, commencing when the steamer was in berth and ready to load; and if longer detained merchants to pay 30*l.* per day demurrage. "Detention by frost, floods, &c., not to be reckoned as lay days." The shipowner, when the charterparty was made, did not know who were the freighter's agents at Cardiff. There were about six shippers of rail iron there, all of them (with the exception of the freighters' agents) having wharves in the West or East Bute Dock. The agents' wharf was at a distance from the docks upon a canal communicating with the West Bute Dock, and their rail iron was loaded on ships berthed in the East Bute Dock by means of lighters passing down this canal through the West Bute Dock, and from thence down a smaller canal connecting the two docks. The other shippers loaded in the East Bute Dock, either from the quay or by lighters coming alongside the ship from the wharves in the East Bute Dock, or by lighters from West Bute Dock, passing down the connecting canal. The ship, on arrival, was berthed in the East Bute Dock, and the loading was commenced, but shortly afterwards was stopped for sixteen days by frost, which covered the canal from the agents' wharf to the West Bute Dock with ice and prevented the passage of the lighters, though the water in the docks was not frozen:—Held that the exception in the charterparty with respect to detention by frost did not apply to relieve the freighters from liability to demurrage. *Kay* v. *Field*, 52 L. J., Q. B. 17; 10 Q. B. D. 241; 47 L. T. 423; 31 W. R. 332; 4 Asp. M. C. 558—C. A.

Snowstorm "Accident."]—A charterer agreed to load a ship with coal, in regular and customary turn, "except in cases of riots, strikes, or any other accidents beyond his control" which might prevent or delay her loading. To an action for breach of the above covenant in the charterparty, he pleaded that he was prevented loading the vessel by a snowstorm, which rendered it impossible to bring the cargo to the agreed place of shipment:—Held, that a snowstorm was not an "accident" within the meaning of the exception, and that the plea was bad. *Fenwick* v. *Schmalz*, 37 L. J., C. P. 78; L. R. 3 C. P. 313; 18 L. T. 27; 16 W. R. 481.

Ice—Delay after Sailing.]—See *Herring* v. *Ward*, supra, col. 476.

Surf Preventing Loading—Custom—Working Days—Power of Master.]—In an outward and homeward charterparty, a certain number of days were allowed for discharging the outward and loading the homeward cargo. In an action for demurrage:—Held, that days on which the loading and discharging could not be carried on at the foreign port because of the surf were working days. *Holman* v. *Peruvian Nitrate Co.*, 5 Ct. of Sess. Cas. (4th ser.) 657.

Held, also, that it was within the master's power to grant the charterers additional lay days in consideration of their giving up an option to load at certain by-ports; but that he had no power to give a discharge of any demurrage money payable to the shipowners except on payment. *Ib.*

b. Not Producing Bill of Lading.

Although as a general rule the master has no right to detain the cargo until the bill of lading is produced, yet if the holder of the bill of lading does not claim the cargo in a reasonable time after notice of the arrival of the vessel, and the charterer offers to unload on behalf of whom it may concern, and to pay the freight, and the captain refuses, the shipowner cannot claim demurrage from the charterers if the cargo might have been unshipped within the laying days. *Erichsen* v. *Barkworth*, 3 H. & N. 601; 27 L. J., Ex. 472.

Merchants at Hull chartered a ship to sail to Bactouche, and there load a cargo of timber, and proceed to Gloucester and deliver the same on being paid freight; thirty-five running days to be allowed for loading and discharging the cargo, and ten days on demurrage above the laying days at 5*l.* per day. The ship arrived at Bactouche, and the loading was completed at the expiration of twenty-seven of the running days. The master signed bills of lading by which the cargo was deliverable "unto order or to assigns, he or they paying freight for the goods as per charterparty." The charterers, to whom the cargo was sold, refused to accept the bill or receive the cargo, on the ground that the shipment was not according to the contract. They offered to land the cargo and take care of it for whom it might concern. The shipper's agent gave notice to the master not to part with the cargo without production of the bill of lading. The vessel was ready to discharge her cargo, according to the charterparty, on the 5th September. The lay days expired on the 13th September. The vessel might have been discharged in five days. The bill of lading was not produced to the master until the 22nd September, and the delivery was completed on the 30th:—Held, that the charterers were liable for demurrage and detention of the vessel. *S. C.*, on appeal, 3 H. & N. 894: 28 L. J., Ex. 95; 5 Jur. (N.S.) 517; 7 W. R. 97—Ex. Ch.

c. Strikes.

Strike Clause—Customary Mode of Discharge—Lighters.]—The plaintiffs' ship was chartered to carry a cargo of timber to Sharpness and there deliver the same under a charterparty which provided that the cargo should be discharged "with the customary steamer despatch of the port, any time lost by reason of strikes, lock-outs, or combinations of workmen, whether partial or general, not to count as part of the discharging time," and that if, through any default of the merchants or charterers, who were to observe the usual custom of the wood trade, the vessel be longer detained, demurrage to be paid at the agreed rate. The vessel arrived at Sharpness when there was a strike amongst the labourers in the shipping trade, and owing to the continuance of such strike all the timber lighters which would otherwise have been available to take on board the cargo were still laden with previous consignments on board them, so that nothing could have been done to discharge the plaintiffs' ship until the strike had come to an end. The customary mode was by lighters. After the strike had come to an end the discharge of the plaintiffs' ship duly commenced, and was completed with all reasonable despatch:—Held, that the strike clause exempted the charterers from liability. *The Alne Holme*, 62 L. J., Adm. 51; [1893] P. 173; 1 R. 607; 68 L. T. 862; 41 W. R. 572; 7 Asp. M. C. 344.

Cargo "to be discharged with all despatch as customary"—Custom to employ Dock Company

to discharge.]—By a charterparty the plaintiffs' ship was to proceed to a port named with a cargo, and there "be discharged with all despatch as customary, and ten days on demurrage over and above said lying days at 6*d.* per net register ton per day." The discharge of the cargo was delayed for four days owing to a strike of dock labourers employed by a dock company, who, by the custom of the port, did the work of discharge both for the shipowners and the charterers:—Held, that the charterers were not liable for the delay, the words "to be discharged with all despatch as customary" meaning that the cargo was to be discharged with all reasonable despatch, having regard to the actual circumstances and manner of discharging cargo customary at the port of discharge, and that no definite time was fixed by the charterparty within which the cargo was to be discharged. *Castlegate Steamship Co.* v. *Dempsey*, 61 L. J., Q. B. 620; [1892] 1 Q. B. 854; 66 L. T. 742; 40 W. R. 533; 7 Asp. M. C. 186—C. A.

"Strike" — "Hands striking work."]—The term "strike" in a charterparty must be used in the ordinary sense of strike against employers. The abandonment of their work by miners through dread of cholera does not bring the charter of a ship within the exception in a charterparty against "hands striking work" so as to relieve him from payment of demurrage. *Stephens* v. *Harris*, 56 L. J., Q. B. 516; 57 L. T. 618; 6 Asp. M. C. 192. Affirmed on other grounds, 57 L. J., Q. B. 203—C. A., supra, col. 477.

Strike at Colliery.]—See *Granite City Steamship Co.* v. *Ireland*, infra, col. 490.

Delay in Unloading by Reason of Strike—"Reasonable Time."]—Where the terms of a bill of lading contain no stipulation as to the time within which the consignee is to discharge the ship's cargo, the obligation on him is to discharge within a reasonable time under the circumstances existing at the time of unloading. Should the existing circumstances be extraordinary, owing to a strike preventing the obtaining of necessary labour, the consignee (provided the delay was not due to any act or default on his part) under such a bill of lading is not liable to the shipowner for damages for detention of the ship. *Hick* v. *Raymond*, 62 L. J., Q. B. 98; [1893] A. C. 22; 1 R. 125; 68 L. T. 175; 41 W. R. 384; 7 Asp. M. C. 233—H. L. (E.)

Delay occasioned by a Strike — Shipowner unable to perform Ship's part of Unloading.]—A cargo was shipped under a bill of lading incorporating a clause in a charterparty which fixed the number of lay days for unloading and allowed other days for demurrage. Neither the bill of lading nor the charterparty contained any exception of strikes. By the custom of the port of discharge cargoes were unloaded by the joint act of the shipowner and the consignees. During the lay days a strike took place, both among the labourers employed on behalf of the ship and those employed by the consignees, with the result that the unloading ceased, and could not be resumed till some days after the expiration of the lay days:—Held, that as the number of lay days allowed for the discharge was fixed, the consignees were liable to pay demurrage, notwithstanding the inability of the shipowners owing to the strike to do their part in the unloading. *Tiis* or *Thiis* v. *Byers* (supra, col. 478) considered. *Budgett* v. *Binnington*, 60 L. J., Q. B. 1; [1891] 1 Q. B. 35; 39 W. R. 131; 6 Asp. M. C. 592—C. A.

Port of Discharge at Option of Charterers—Strike at Place named.]—Where a charterparty provides that the ship shall proceed to one of certain named places as ordered, and there deliver the cargo to the order of the charterers, the charterers being exempted from liability for delay caused by strikes; the charterers having named the place of discharge are not bound to alter their orders on obtaining knowledge of a strike at the place named that will interfere with the unloading, in cases where they could have stopped the ship proceeding to the named place. The charterers in such a case are, therefore, not liable for demurrage. *Bulman* v. *Fenwick*, 63 L. J., Q. B. 123; [1894] 1 Q. B. 179; 9 R. 227; 69 L. T. 651; 42 W. R. 326; 7 Asp. M. C. 388—C. A.

Demurrage not running during Strike.]—*Lilly* v. *Stevenson*, infra, col. 489.

Loaded as Customary — Exception of Hindrances beyond Charterers' Control.]—A charterparty provided that the ship (a sailing ship), should at Sydney load coals to be brought alongside at merchants' risk; the coals to be loaded as customary at Sydney with an exception of charterers' liability in case of strikes "or any other hindrances of what nature soever beyond the charterers' or their agents' control." There was a strike at another colliery which threw a pressure of work on the loading colliery and the ship was delayed:—Held, that the delay was not due to a "hindrance," and that the charterers were liable for demurrage. *The Lismore, Gardiner* v. *Macfarlane*, 20 Ct. of Sess. Cas. (4th ser.) 414.

"Strikes, Lock-outs, Accidents to Railway"—Discharge of Workmen because of Accident to Roadway.]—See *Richardsons and Samuel & Co., In re*, infra, col. 490.

"Strikes and Lock-outs of Pitmen."]—The defendants chartered the plaintiff's ship to proceed to Ardrossan, the charterparty providing that the ship should there load "in the customary manner, say in twelve colliery working days," a cargo of coals, "to be loaded according to the custom of the port," "strikes and lock-outs of pitmen and others" being excepted perils. The following written clause was added: "It is understood that the vessel is to be loaded at once, and lay days to count when vessel ready and notice given." The ship arrived at Ardrossan, and gave notice that she was ready to load; but before twelve working days had elapsed a strike broke out at the pit, in consequence of which the ship did not load the cargo of coal till twenty-three ordinary working days had elapsed. By the charterparty demurrage was to be paid at the rate of 4*d.* per registered ton per day. The plaintiff claimed for fifteen days' demurrage:—Held, that the written clause only fixed the time when the lay days began, and that the delay was caused by an excepted peril. *Peterson* v. *Dunn*, 43 W. R. 349.

d. Other Causes.

No Time Mentioned—Unavoidable Delay.]—When a charterparty is silent as to the time within which the cargo is to be unloaded at the

port of destination, the law implies that the merchant and the shipowner shall each use reasonable despatch in performing his part of the contract; and where the landing of the cargo by the merchant is rendered impossible by a cause over which he has no control, he is not liable to pay damages for the delay. *Ford* v. *Cotesworth*, 10 B. & S. 291; 39 L. J., Q. B. 188; L. R. 5 Q. B. 544; 23 L. T. 165; 18 W. R. 1169—Ex. Ch.

—— **Refusal of Authorities to allow Unloading.**]—A ship sailing under a charterparty, which was silent as to the number of days to be allowed for unloading, arrived at a foreign port, and was detained beyond the usual time, owing to the refusal of the authorities to allow the cargo to be landed:—Held, that the merchant was not liable to pay damages for the delay, as he had not contracted that there should be none, and it had happened without fault on his part. *Ib.*

Contract not made with Intention to Violate Law.]—By a charterparty made by the charterer's agent in France, a ship was chartered, and it was stipulated that the ship should load a cargo of pressed hay at Trouville, in France, and proceed direct to London; and all cargo was to be brought and taken from ship alongside. The agent verbally told the master that the consignees would require the hay to be delivered at a particular wharf in the port of London, to which the master assented. On arriving in that port the master was unable to land the hay at the wharf by reason of an order in council under the Contagious Diseases (Animals) Act, 1869, forbidding hay from a French port to be landed in the United Kingdom. The order had been made before the charterparty was entered into, but neither party knew of it. After some delay the charterer received the hay from alongside the ship into another vessel, and exported it. There was no legal obstacle to doing this, but eighteen days were allowed by the charterer to elapse beyond the lay days. The shipowner having brought an action for this detention of his ship, the charterer contended that the contract was for an illegal purpose, and therefore void:—Held, that although it was the intention of the parties when the charterparty was entered into, to land the hay at London, yet as the contract was not made knowingly with the intention to violate the law, and as it could be carried out (as it ultimately was) without violating the law, it was not void and the charterer was, therefore, liable for the demurrage. *Waugh* v. *Morris*, 42 L. J., Q. B. 57; L. R. 8 Q. B. 202; 28 L. T. 265; 21 W. R. 438; 1 Asp. M. C. 573.

Petroleum — Port Regulations — Cargo not allowed to be Landed.]—A ship with a general cargo sailed from London for Havre with some petroleum on board. Under the bill of lading the shipowner was to deliver the petroleum at Havre, and it was to be taken out by the defendant within twenty-four hours after arriving at Havre, or ten guineas a day was to be paid for demurrage. On the ship's arriving at Havre, the authorities of the port made the captain take her away in consequence of the petroleum being on board. Thereupon he went to neighbouring ports, but was not allowed to stay. Returning to Havre, he discharging his general cargo, and no bill of lading having been presented to him and no application having been made to him for the delivery of the petroleum, he brought it back to London:—Held, that the shipowner was entitled to freight, back freight and expenses. The demurrage and the expenses incurred in the ineffectual attempt to land at the neighbouring ports were not allowed, but were looked on as part of the expenses of the voyage. *Argos* (*Cargo ex*), *Gaudet* v. *Brown*, L. R. 5 P. C. 134; 28 L. T. 745; 21 W. R. 707; 2 Asp. M. C. 6—P. C.

Exportation not Permitted.]—Where there was a contract to fetch corn, and demurrage allowed, and upon the ship's arrival it was found that the government had prohibited the exportation of corn, which fact the captain knew before he entered the port, but still did so, and having stayed his demurrage days, returned in ballast:—Held, that no demurrage was payable. *Blight* v. *Page*, 3 Bos. & P. 295, n.; 6 R. R. 795.

Unlawful Seizure.]—It is no defence to an action for demurrage, that the delay in unloading the ship arose from the act of custom house officers in unlawfully seizing a part of the cargo. *Bessey* v. *Evans*, 4 Camp. 131.

Wrongful Detention by Owner.]—The plaintiffs, owners of a ship, agreed by charterparty, that the ship should have eighty-five running days for loading and unloading her cargo; and that the freighter might keep her on demurrage, for fourteen additional running days, at a stipulated rate per diem. The ship arrived in port, with five running days due to her. On her arrival, and subsequently on another occasion, the plaintiffs refused to permit her to be unloaded. Afterwards, but not till after the expiration of the running days, she was permitted to unload, but the cargo was not discharged until after the expiration of fourteen days beyond the running days. In an action against the freighter on the charterparty, the declaration charged a detention on demurrage for fourteen days, and a general detention beyond. Plea, that he did not keep or detain the ship, and that at the time she was unloading, the plaintiffs wrongfully stopped the unloading, and prevented the defendant from unloading. The jury found, that the plaintiffs' refusal was wrongful:—Held, that the plea, denying the detention of the ship, was sufficiently made out by the finding of the jury, and that the plaintiffs could not, under this declaration of the charterparty, recover for the use of the ship during so much of the actual unloading as exceeded five days. *Benson* v. *Blunt*, 1 G. & D. 449; 1 Q. B. 870; 10 L. J., Q. B. 333.

But held, that the last plea was bad, as such an interference by the plaintiffs, to prevent an unloading, as was stated in the general terms of the allegations of that plea, would not put an end to the obligation of the charterparty. *Ib.*

Insufficient Supply of Cargo.]—A charterparty provided that the ship should proceed to a port, and there load from the factors of the charterers a cargo of "coal, taking her turn with other steamers," and receive "prompt despatch in loading." The charterers employed the persons at the port of loading, who were employed to load other ships, and the ship was loaded in her turn, but, by reason of an insufficient supply of coal, the ship was delayed:—Held, that the charterers

were responsible for the delay. *Elliott* v. *Lord*, 52 L. J., P. C. 23; 48 L. T. 542; 5 Asp. M. C. 63—P. C.

Procuring Necessary Papers.]—The consignee of a particular parcel of goods by a general ship is liable to the owner for not taking them from the ship in a reasonable time, although the delay arose from the necessity for an order from the treasury to land these goods, which the consignee used the utmost diligence to obtain. *Hill* v. *Idle*, 4 Camp. 327; 16 R. R. 797.

It is no defence to an action by the owner of a ship for demurrage, that the owner has omitted to procure the necessary papers for the discharge of the cargo, if he omitted to do so at the request of the defendant. *Furnell* v. *Thomas*, 5 Bing. 188; 30 R. R. 568. *S. C.*, nom. *Palmer* v. *Thomas*, 7 L. J. (o.s.) C. P. 73; 2 M. & P. 296. And see *Barret* v. *Dutton*, 4 Camp. 333; 16 R. R. 798, supra, col. 476.

Exception of "Political Disturbances"—Delay caused during Transit to Quay—Customary Mode of Loading.]—When a ship is chartered to load at a particular port, the charterparty is to be taken to have reference to the customary mode of loading at that port; and where, by the custom of the port, the mode of loading minerals is by bringing them from the mines by rail direct to the ship's side, as the bringing of the cargo from the mines is part of the loading, any exception in the charterparty to the charterer's liability for demurrage will commence to be applicable as soon as the cargo has left the mines. *Hudson* v. *Ede* (supra, col. 477) followed. *Smith* v. *Rosario Nitrate Co.*, [1894] 1 Q. B. 174; 9 R. 776; 70 L. T. 68; 7 Asp. M. C. 417—C. A.

Default of Stevedore—"Stevedore to be appointed by Charterers, but employed and paid by Shipowners"—Damaged Cargo.]—A charterparty provided that the plaintiff's ship should load at Leith and London, and proceed to certain ports and there deliver, the "stevedore to be appointed by the charterers in London only, but employed and paid by the shipowners," the cargo to be taken to and from alongside the ship at merchants' risk and expense, but to be taken on board by the shipowners, ten clear working days to be allowed the charterers for loading, and all working days on demurrage over the lay days in port of loading to be paid for at the rate of 20*l.* per working day. Certain cargo was loaded at Leith. In consequence of bad weather on the voyage to London part of the cargo was damaged, and at London part had to be landed and requisitioned, and part had to be shifted in order to stow the London cargo properly. In consequence the loading was not completed within the stipulated time. In an action by the shipowners to recover demurrage:—Held, that the charterers were not liable for the delay, as it arose from the operation of stowing the cargo, which it was the duty of the shipowners to do, and from the default of the stevedore who, under the provisions of the charterparty, was the servant of the shipowners. *Harris* v. *Best-Ryley*, 4 R. 222; 68 L. T. 76; 7 Asp. M. C. 272—C. A.

Position of Goods in Ship.]—A charterparty entered into between the plaintiffs and B. & Co., for the conveyance of grain from C. to L., stipulated that fourteen working days were to be allowed for loading and unloading at the port of discharge, and ten days on demurrage at 35*l.* a day. The vessel having been loaded, one of the bills of lading was indorsed to the defendants. The defendants' grain was stowed at the bottom of the mainhold, and that of the other shippers on the top of it. The bill of lading, indorsed to the defendants, contained the words "paying freight for the same goods and all other conditions as per charterparty." Owing to the consignees, whose grain was placed on the top of the defendants', having failed to take away their goods within the lay days, the defendants were unable to obtain delivery of their grain, and three days' demurrage was incurred:—Held, that the defendants were liable for the demurrage, although they were prevented from getting their goods by the delay of other consignees. *Porteus* v. *Watney*, 47 L. J., Q. B. 643; 3 Q. B. D. 534; 39 L. T. 195; 27 W. R. 30; 4 Asp. M. C. 34—C. A.

The defendant was indorsee of one of eight bills of lading covering a cargo of wheat, in each of which the following clause occurred: "Three working days to discharge the whole cargo or 30*l.* sterling per day demurrage." The portion of the cargo consigned to the defendant was loaded in the bottom of the ship, and owing to delay in unloading on the part of the other consignees, and from no default of the defendant, who was ready and willing to receive his portion, as was the master to discharge it, as soon as it could be reached, two days' demurrage was incurred:—Held, that the defendant was liable for demurrage, for that by the stipulation in the bill of lading he contracted to run the risk of incurring demurrage through the default of his fellow-consignees. *Straker* v. *Kidd*, 47 L. J., Q. B. 365; 3 Q. B. D. 223; 26 W. R. 511; 4 Asp. M. C. 34, n.

If A. has goods consigned to him, and there is on board the same ship goods consigned to other consignees, and those goods are so placed on board that A. after the ship arrives, cannot obtain his goods within the time limited by the bill of lading, he is not liable for demurrage. *Dobson* v. *Droop*, 4 Car. & P. 112; M. & M. 441.

If a freighter is to discharge within twelve running days after the vessel's arrival, and he is prevented from discharging at first by reason of other goods being placed above his, he must, when that obstruction is removed, discharge with all reasonable diligence; and he is not, as matter of right, entitled to the whole original number of days from the time when he is able to commence discharging. *Rogers* v. *Hunter*, 2 Car. & P. 601.

A general ship took brandies on board under bills of lading, which allowed twenty lay days for delivery of the goods in London, and stipulated for 4*l.* per day demurrage; afterwards, certain of the consignees choosing to have their goods bonded, the vessel could not make her delivery at the London docks until forty-six days after the twenty days; and some of the goods which were undermost could not, though demanded, be taken out till the upper tiers were cleared:—Held, that each of these consignees was liable to pay the 4*l.* per day for the forty-six days. *Leer* v. *Yates*, 3 Taunt. 387; 12 R. R. 671.

A general ship took some silk on board to carry from Rotterdam to London on the defendant's account. On the margin of the bill of lading was written, "The consignee to clear the

goods in fourteen running days after her arrival in port or to pay 4*l.* per diem for demurrage." The vessel was ready to deliver on the 3rd of October. The defendant applied for and was ready to receive his goods within the running days ; but being undermost in the vessel delivery could not be made until the 22nd :—Held, that the plaintiff was entitled to recover the demurrage, though he did not deliver the goods within the time allowed, being prevented by other goods, belonging to other consignees, which overlaid them. *Harman* v. *Gandolph*, Holt, 35 ; 17 R. R. 598.

Refusal of Master to take Goods on Board.]—Demurrage clause held not applicable in case of delay caused by the master refusing to take on board goods which he erroneously thought he was not bound to take. *Seeger* v. *Duthie*, 8 C. B. (N.S.) 45.

State of Tides.]—By charterparty B. and L. agreed that B.'s ship "Bebec" should proceed to Llanelly and take on board a cargo of culm, and, being so loaded, should "therewith proceed with all convenient speed to Cole's Wharf, Rochester, or as near thereto as she might safely get, and deliver the same on being paid freight. The regular turn to be allowed for loading, and fifty tons per working day, if required, for delivery at Rochester, and demurrage over and above the said days at the rate of 4*l.* per day." The ship arrived with her cargo at Rochester on the 24th October and was moored at the Buoys, about 500 yards from and opposite to Cole's Wharf. On the 25th October the master gave L.'s agent notice that the vessel was ready to discharge her cargo, and he desired the master to come alongside Cole's Wharf. At that time there was not sufficient water for the vessel to come alongside the wharf, and the agent refused to send lighters to receive part of the cargo so as to lighten the vessel and enable her to come alongside the wharf. The state of the tide did not allow the vessel to be removed to Cole's Wharf until the 4th November, and on the following day she commenced discharging her cargo :—Held, that the master was bound to take the vessel alongside Cole's Wharf, unless prevented by some impediment which endangered her safety ; and as the inability to bring the vessel alongside the wharf was occasioned by the ordinary course of navigation, the lay days did not commence until the vessel had arrived there. *Bastifell* v. *Lloyd*, 1 H. & C. 388 ; 31 L. J., Ex. 413 ; 10 W. R. 721.

—— **Discharge of Cargo.**]—By the terms of a charterparty a steam vessel was to proceed to H., to be there ready to load by a given day, or so near thereunto as she might safely get, and there load from the factors of the merchant such quantity of oxen, sheep and (or) other lawful produce which the merchant might find it convenient to ship, not exceeding what she could reasonably stow and carry over and above her tackle, &c., and being so loaded was to proceed therewith to London and deliver the same on being paid freight a lump sum of 450*l.* Two working days were allowed for loading and discharging and three days on demurrage. The cargo to be taken to and from alongside at the merchant's risk and expense. Arrived at H., the vessel went alongside the jetty and received on board a number of barrels of hams and 300 head of live stock, for which the captain signed bills of lading. Being thus laden, the vessel was found to draw too much water to get over the bar, and the captain was consequently obliged to take out all the stock. He then proposed to the charterer's agent to stow on board so many of the cattle as would enable him to pass over the bar, and to remain outside and there take in the remainder at the charterer's expense and risk. The agent declined to accede to this, and refused to put any of the cattle again on board unless the captain would take all. Being unable to come to terms the captain proceeded on his voyage with only the hams on board :—Held, that the owners were not entitled either to the stipulated freight or to damages for the refusal to ship the cargo ; for that although the captain was not obliged to go within the bar at all, yet, having chosen to do so, and having received the cargo on board and signed bills of lading, he was bound to find his way to his destination. *General Steam Navigation Co.* v. *Slipper*, 11 C. B. (N.S.) 493 ; 31 L. J., C. P. 185 ; 8 Jur. (N.S.) 821 ; 5 L. T. 641 ; 10 W. R. 316.

Whether a partial putting out of the cargo is a part discharge or a mere lightening is to be determined in each case by the jury, having regard to the terms of the contract and the usage of the port. *McIntosh* v. *Sinclair*, Ir. R. 11 C. L. 456.

Neglect of Consignee to pay Harbour Dues.]—Demurrage cannot be claimed for detention of a ship for harbour dues payable by the consignee, the master having delayed to pay them ; his duty being to pay them without delay and recover from the consignee. *Moller* v. *Jecks*, 10 C. B. (N.S.) 332.

Quarantine.]—See *The Austen Friars*, col. 265 ; *Whites* v. *Steamship Winchester Co.*, col. 265.

Dispute between Brokers as to Right to collect Freight.]—A dispute arose between the shipowner's broker abroad and the charterer's broker as to who was entitled to collect freight. The former, contrary to the provisions of the charterparty, insisted upon his claim and put a stop upon the cargo ; whereby the charterer became liable to the cargo owner for demurrage :—Held, that the charterer was entitled to recover damages in respect of the demurrage against the shipowner. *Bradley* v. *Goddard*, cited Maclachlan on Shipping, 4th ed., p. 197.

Nonpayment of Freight—Refusal to deliver Goods.]—By charterparty, the plaintiff, a shipowner, agreed with the freighter to deliver cargo on payment of freight as by bills of lading ; certain lay days were allowed and demurrage afterwards at a given rate. The bills of lading provided for delivery to the freighter or his assigns on payment of freight as by charterparty. Defendant, an assignee of the bill of lading, sent his lighters for the goods and received part. Plaintiff demanded payment of freight for the part delivered, and defendant refused it. Plaintiff refused to deliver more cargo and the running days expired. Soon after the plaintiff delivered the rest of the cargo and was paid freight :—Held, that the defendant was not liable for demurrage, or for not receiving the goods within a reasonable time by reason of his nonpayment of freight demanded. *Moeller* v. *Young*, 5 El. & Bl. 755 ; 25 L. J., Q. B. 94 ; 2 Jur. (N.S.) 393—Ex. Ch.

Convoy Recalled—Ship brought back to Port of Sailing—Demurrage.]—See *Liddard* v. *Lopes*, 10 East, 526; 10 R. R. 368; ante, col. 378.

Ship unable to find Berth—Obligation to Discharge within Time stipulated.]—The discharge of cargo occupied more than the lay days. The crew worked properly, but could not without assistance discharge within the stipulated time. In an action for demurrage:—Held, that the consignees were liable for two days' delay in finding a quay berth, and that they were not liable for subsequent delay, the master being bound to give delivery in the time stipulated. *Hansen* v. *Donaldson*, 1 Ct. of Sess. Cas. (4th ser.) 1066.

Cargo not Ready—Strike.]—By charterparty a ship was to go to a port as ordered and load coals at a berth to be pointed out by charterers' agents, with a stipulation as to demurrage, "unless detention arises from a strike . . . at any works, mine or mines . . . or any cause beyond merchants' control . . ." On November 14th notice was given by the master that the ship was ready to load; but owing to a dispute between the charterers and the colliery owners no cargo was ready for her, and in consequence she was refused a berth. On November 22nd she got a berth; on November 23rd a strike began, and no coals were loaded until it ended on December 11th. On December 23rd the loading was completed. In an action for demurrage:—Held, that it began to run on November 16th at six p.m., when the lay days expired; but that it ceased to run during the strike. *Lilly* v. *Stevenson*, 22 Ct. of Sess. Cas. (4th ser.) 278.

Stopping Discharge to get Security for Freight.]—Freight was by charterparty payable partly on arrival and partly on "unloading and right delivery of the cargo," and the shipowners were to have a lien for all freight, dead freight and demurrage. Whilst delivering the cargo at Glasgow, the master suspended delivery for two days until the consignee should find security for the freight. In an action for demurrage:—Held, that the shipowners could not recover, because they might have delivered the cargo and retained their lien. *Thorsen* v. *McDowall*, 19 Ct. of Sess. Cas. (4th ser.) 743.

Delay through want of Trucks.]—By charterparty the cargo was to be discharged "as fast as the steamer can deliver after being berthed as customary." Delay was caused in discharging through the railway company not providing sufficient trucks to carry off the cargo of pig iron, none being allowed to be landed on the quay:—Held, that the consignees were not liable for demurrage. *Wyllie* v. *Harrison*, 13 Ct. of Sess. Cas. (4th ser.) 92.

Want of Trucks—Exception of "Detention by Railways."]—A charterparty provided for delivery of the coal cargo into trucks, and excepted liability for "detention by railways." There was delay in unloading caused by the railway not supplying trucks in consequence of the charterers detaining too many trucks unloaded:—Held, that demurrage was not payable. *Letricheux* v. *Dunlop*, 19 Ct. of Sess. Cas. (4th ser.) 209.

—— **Strike—Failure to Discharge on Quay.**]—By charterparty the ship was to deliver her coal cargo "alongside any safe wharves, crafts or depots," to be taken from alongside at merchants' risk and expense "according to the usual custom at loading and discharging ports." A certain time was allowed for discharge, after which demurrage was to be paid, "except in case of strikes . . . detention by railway, or cranes . . . or any other cause beyond the control of the charterers which may impede the ordinary lading and discharging of the vessel." On arrival, railway trucks could not be supplied because of a strike of the railway men. There was no rule of the port requiring the coal to be discharged into trucks, or forbidding discharge on the quay:—Held, that the charterers were liable for demurrage. *Granite City Steamship Co.* v. *Ireland*, 19 Ct. of Sess. Cas. (4th ser.) 124.

—— **Delivery on Quay.**]—Delay in taking delivery, caused by the railway company not providing trucks, causes the consignee to be liable for demurrage; and not the less so because the ship is berthed in a place where by the rules of the port her cargo may not be discharged on the quay. *Krunse* v. *Drynan*, 18 Ct. of Sess. Cas. (4th ser.) 1110. Distinguishing *Wyllie* v. *Harrison*, 13 Ct. of Sess. Cas. (4th ser.) 92.

Towage Contract.]—Tug owners agreed to tow a ship from one port to another, demurrage payable to them at 10*l.* per day unless detained by stress of weather—"no extra charge to be made in case of accident, unless for detention arising therefrom, to be paid for as per rate mentioned above." The tow-rope parted in a gale, and the tug and tow put into a port of refuge, where they were detained seven days by weather. No fault was proved on either side:—Held, that demurrage for seven days was payable. *New Steam Tug Co.* v. *McClew*, 7 Ct. of Sess. Cas. (3rd ser.) 733.

"Strikes, Lock-outs, Accidents to Railway"—"Other Causes beyond Charterers' Control"—Discharge of Workmen in consequence of Accident to Railway.]—By charterparty it was agreed that the ship should load from charterers' agents a cargo of petroleum in cases, lay days for loading to commence twenty-four hours after the receipt by the charterers' agents of written notice of steamer's readiness in berth to receive, strikes, lock-outs, accidents to railway . . . or other causes beyond charterers' control, excepted. The railway which brought the oil in tanks to the port of loading being partially destroyed by floods, the charterers' agents dismissed the men employed at their factory in packing the oil in cases. On the re-opening of the railway, sufficient supplies of oil were received at the factory, but owing to the absence of men the production of filled cases was delayed. The charterers' agents also, in accordance with the practice of shippers at the port, deferred the loading of the ship until they had loaded other ships which had arrived previously, and been delayed in loading by the same causes. The lay days having been exceeded:—Held, that the lay days commenced to run as soon as sufficient oil had arrived to enable the work of filling cases to be resumed; that the failure to load the ship within the lay days was not owing to "strikes, lock-outs, accidents to railway . . . or other causes beyond the charterers' control," within the meaning of the charterparty; and that the shipowners were entitled to damages for detention. *Richardsons*

and Samuel & Co., In re, 66 L. J., Q. B. 868; 77 L. T. 479—C. A.

Delay caused partly by Consignees of other Cargo — Lien for Demurrage and Freight.]—A charterparty provided that the shipowners should have an absolute lien for the cargo for all freight, dead freight and demurrage; there being no stipulation for demurrage at the port of discharge. After a partial cargo of guano had been loaded for the charterer, the bills of lading for which, in favour of consignees, referred to the charterparty, the master with the charterers' concurrence shipped other goods for a third party. At the port of discharge no one claimed these goods, which were not worth their freight, and on this account and also partly by the fault of the consignees of the guano, delay was incurred at the port of discharge:—Held, that the guano was subject to a lien for the whole freight, but not for unliquidated damages in respect of the detention of the ship; and that the consignees were liable for the detention only so far as it was by their fault. *Lamb* v. *Kaselack*, 9 Ct. of Sess. Cas. (4th ser.) 482.

7. Rate of Payment.

Stipulated Sum—Deductions.]—If a ship is detained beyond the days of demurrage allowed by the charterparty, the stipulated demurrage is primâ facie the measure of compensation for the further time, but it is competent to the owner or the freighter to shew that this would be more or less than a fair compensation for the detention. *Moorsom* v. *Bell*, 2 Camp. 616; 12 R. R. 755.

In fixing the amount of demurrage to be paid for detention of a vessel during repairs, a deduction must be made from the gross freight of so much as would in ordinary cases be disbursed on account of the ship's expenses in the earning of the freight. *The Gazelle*, 2 W. Rob. 279.

8. Lien for.

What Delays.]—By a charterparty cargo was to be loaded in thirteen working days, and to be discharged at not less than thirty tons per working day. Ten days' demurrage to be allowed above the said days. The charterer's liability to cease when ship is loaded, the captain or owner having a lien on cargo for freight and demurrage:—Held, that the charterer upon loading the cargo was discharged from liability for demurrage incurred at the port of loading. *Kish* v. *Cory*, 44 L. J., Q. B. 205; L. R. 10 Q. B. 553; 32 L. T. 670; 23 W. R. 880; 2 Asp. M. C. 593—Ex. Ch.

By a charterparty it was agreed that the ship should go to a certain port and there load from the charterer a cargo "in the customary manner," and proceed therewith to another port and deliver the same. . . . "The cargo to be discharged in ten working days, commencing from the day after the ship has got into her proper discharging berth. Demurrage at 2*l.* per 100 tons register per day. . . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in the charter ceasing when he has delivered the cargo alongside ship":—Held, that the demurrage and the lien and exemption clauses did not apply to damages by undue detention of the vessel at the port of loading. *Lockhart* v. *Falk*, 44 L. J., Ex. 105; L. R. 10 Ex. 132; 33 L. T. 96; 23 W. R. 753; 3 Asp. M. C. 8.

The shipowner has a lien for demurrage proper where the lien is given by the charterparty and incorporated in the bill of lading, but not for damages in the nature of demurrage. *Gray* v. *Carr*, 40 L. J., Q. B., 257; L. R. 6 Q. B. 522; 25 L. T. 215; 19 W. R. 1173; 1 Asp. M. C. 115—Ex. Ch.

Where the charterparty gave the master a lien on the cargo for all freight, dead freight and demurrage:—Held, that the clause extended to detention of the vessel in putting stiffening coal on board and that damages for such detention were covered by the owner's lien. *Sanguinetti* v. *Pacific Steam Navigation Co.*, 46 L. J., Q. B. 105; 2 Q. B. D. 238; 35 L. T. 658; 25 W. R. 150; 3 Asp. M. C. 300—C. A.

Under a charterparty containing this clause: "Charterer's liability to cease when the ship is loaded," the captain having a lien on the cargo for freight and demurrage:—Held, that the lien extended to demurrage at the port of lading. *Francesco* v. *Massey*, 42 L. J., Ex. 75; L. R. 8 Ex. 101; 21 W. R. 440.

No Lien in Equity.]—The parties to a charterparty "mutually bound themselves, especially the owners the ship and tackle, and the freighter the goods to be taken on board"—in a penal sum—"to the true and punctual performance of every article therein contained":—Held, the shipowners had no lien in equity (as they had none at law) on the cargo for dead freight or demurrage. *Gladstone* v. *Birley*, 2 Mer. 401; 15 R. R. 465. And see *S. C.*, 3 M. & S. 205.

Lien on Goods of A. for Demurrage in respect of Goods of B. — Charterparty and Bill of Lading.]—See *Lamb* v. *Kaselack*, ante, col. 491.

9. Practice.

a. Jurisdiction.

Of Admiralty Court.]—The court of admiralty may, by transfer from a county court, acquire jurisdiction in a cause upon a question of demurrage, as to which the court has no original jurisdiction. *The Swan*, 40 L. J., Adm. 8; L. R. 3 A. & E. 314; 23 L. T. 633; 19 W. R. 424.

Superior Court.]—If in an action in a superior court, on a charterparty, for freight or demurrage, the plaintiff claims and recovers a sum greater than 20*l.* and less than 300*l.* he is entitled to costs; for over such causes 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, s. 2, confer no jurisdiction on a county court appointed to have admiralty jurisdiction. *Gunnestad* v. *Price*, 44 L. J., Ex. 44; L. R. 10 Ex. 65; 32 L. T. 499; 23 W. R. 470; 2 Asp. M. C. 543. Disapproving of *Argos, Cargo ex*, infra.

County Court.]—Held, by the privy council, that by 32 & 33 Vict. c. 51, s. 2, the county courts have jurisdiction in cases of claims arising out of charterparties or other agreements for the use or hire of ships, although the court of admiralty may have no jurisdiction in such cases. *Argos, Cargo ex, Gaudet* v. *Brown*, 42 L. J., Adm. 1; L. R. 5 P. C. 134; 28 L. T. 77; 21 W. R. 420.

This case followed and *Gunnested* v. *Price* (supra) disapproved in *The Alina*, 49 L. J., Adm. 40; 5 Ex. D. 227; 42 L. T. 517; 29 W. R. 94; 4 Asp. M. C. 256—C. A.

b. Pleading.

A count on a charterparty for demurrage and detention of a ship, and a count for demurrage, ought not to be allowed. *Mathewson* v. *Ray*, 16 M. & W. 329; 16 L. J., Ex. 288. S. P., *Temperley* v. *Brown*, 1 D. (N.S.) 310; 6 Jur. 150.

Where a charterparty stipulates for seventy-five running days and twenty days on demurrage, if the ship is detained for extra days, the remedy is not by a count for demurrage, but by action on the charterparty. *Cropton* v. *Pickernell*, 16 M. & W. 829.

On a count for demurrage generally, the plaintiff cannot recover when the demurrage or detention has arisen ex delicto. *Harrison* v. *Wilson*, 2 Esp. 709.

If there is no contract as to demurrage, a shipowner cannot, on a common count for demurrage, recover for the detaining of the ship for an unreasonable time in loading and unloading, but must declare specially. *Horn* v. *Bensusan*, 9 Car. & P. 709; 2 M. & Rob. 326.

If a contract of freight and demurrage is entered into by deed, the plaintiff ought to declare upon the deed. *Atty* v. *Parish*, 1 Bos. & P. (N.R.) 104.

Right of Master to Sue.]—The master cannot maintain an action in his own name upon an implied promise to pay demurrage. *Brouncker* v. *Scott*, 4 Taunt. 1.

Implied Covenant to Pay.]—Where a ship was let to freight by charterparty from the plaintiff to the defendant, a clause—"and it is hereby covenanted and agreed by and between the said parties that forty days shall be allowed for unloading and loading again, &c."—was held to raise an implied covenant by the freighter not to detain the ship beyond the forty days; and if he detain her for longer the owner's remedy is on the covenant and not in assumpsit upon an implied new contract. *Randall* v. *Lynch*, 12 East, 179; 2 Camp. 352; 11 R. R. 340, 727.

XV. CARGO.

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Matters touching Cargo will also be found sub tit. IV. OWNERS; XI. CHARTERPARTY; XII. BILL OF LADING; XIII. FREIGHT; XIV. DEMURRAGE; XVII. AVERAGE.

1. SUFFICIENCY OF CARGO.

a. Meaning of "Cargo."

Equivalent to Shipload.]—In a contract to deliver at a port to be named by the purchaser "a small cargo of about sixty fathoms of lathwood," the word "cargo" means an entire shipload; and therefore the purchaser is not bound to accept sixty fathoms, measured and set apart for him by the seller's agent at the port named, out of a shipload containing eighty-three fathoms of lathwood. *Kreuger* v. *Blanck*, 39 L. J., Ex. 160; L. R. 5 Ex. 179; 23 L. T. 128; 18 W. R. 813.

Where a defendant contracted to buy of the plaintiff "a cargo of from 2,500 to 3,000 barrels (seller's option)" petroleum at one shilling and three farthings per gallon weighed 8 lbs. delivered, to be shipped from New York, within a certain time, and the terms of the contract shewed that the defendant was to have complete control over the destination of the vessel:—Held, that "cargo" meant an entire shipload and not a shipment, and that it was a condition precedent that the 2,500 to 3,000 barrels tendered should be the whole cargo of the vessel, although the additional quantity shipped was kept distinct, and the defendant was not, in fact, deprived of the control of the vessel's destination. *Borrowman* v. *Drayton*, 46 L. J., Ex. 273; 2 Ex. D. 15; 35 L. T. 727; 25 W. R. 194; 3 Asp. M. C. 303—C. A.

b. Full and Complete Cargo.

What is.]—By a charterparty a ship was described to be of the burden of 261 tons, and the freighter covenanted to load a full and complete cargo:—Held, that the loading of goods equal in number of tons to the tonnage described in the charterparty was not a performance of this covenant; but that the freighter was bound to put on board as much cargo as the ship was

capable of carrying with safety. *Hunter* v. *Fry*, 2 B. & Ald. 421 ; 21 R. R. 340.

A charterparty provided that the ship should proceed to the port of loading and there load "a full and complete cargo of iron ore, say about 1,100 tons." The charterer provided a cargo of 1,080 tons, the actual capacity of the ship being 1,210 tons :—Held, that the words, "say about 1,100 tons," were not mere words of expectation, but words of contract, and that the charterer's undertaking was not to load the ship up to her actual capacity ; but that 3 per cent. was a fair amount of excess over 1,100 tons, to allow in estimating what was a full and complete cargo of about 1,100 tons, and consequently that the cargo actually provided fell short of the charterer's obligation by fifty-three tons. *Morris* v. *Levison*, 45 L. J., C. P. 409 ; 1 C. P. D. 155 ; 34 L. T. 576 ; 24 W. R. 517 ; 3 Asp. M. C. 171.

And see *Caffin* v. *Aldridge*, supra, col. 290.

Covenant as to Survey.]—A covenant in a charterparty, "that no claim shall be admitted or allowance made for short tonnage, unless such short tonnage be found and made to appear on her arrival, on a survey by four shipwrights to be indifferently chosen by both parties," is not a condition precedent to the right of recovering for short tonnage ; but is a matter of defence to be taken advantage of. *Hotham* v. *East India Co.*, 1 Term Rep. 638 ; 1 R. R. 333.

Accident in Course of Loading.]—By a charterparty between the owner and the charterer of a ship, it was agreed that the ship should proceed to P., and there load a full and complete cargo of cotton with a certain amount of sugar as ballast. The ship proceeded to P., and after a portion of the cargo had been loaded, and while another portion was in a lighter lying alongside ready for loading, the ship caught fire accidentally, and the portion of cargo on board was so injured that the master necessarily sold it. He forwarded the portion alongside to its destination by a different ship. After the ship had been repaired, the shipowner tendered it to the charterer's agents and required them to load the residue of the cargo, which they refused to do :—Held, that the charterer was not exonerated by the circumstances from his obligation to complete the loading of a full and complete cargo. *Jones* v. *Holme*, 36 L. J., Ex. 192 ; L. R. 2 Ex. 335 ; 16 L. T. 794 ; 16 W. R. 62.

—— **Goods Despatched by other Vessels.**]—A ship was chartered on the 12th of September, 1861, for the conveyance of a cargo of wheat from Harwich to St. Malo ; ten days to be allowed for loading. The usual course was to load a portion of the cargo at a quay in the river Orwell, and to proceed lower down the river to take in the residue. The vessel having arrived on the 14th of September, and taken in 900 quarters (which were about three-fourths of the whole cargo), was proceeding down the river in charge of a pilot, when she got aground. The master, finding it necessary to take out the cargo in order to examine and repair the ship, gave notice to the charterers' agent, who accordingly, at the request of the master, and at the expense of the charterers, unloaded the 900 quarters, and despatched the whole quantity to its destination by other vessels. On the 4th of October the master gave notice that he was ready to receive the cargo and demanded it. The agent had none to ship :—Held, that the owners could not maintain an action against the charterers for not supplying a cargo. *Strugnell* v. *Friedrichsen*, 12 C. B. (N.S.) 452 ; 9 Jur. (N.S.) 77.

Unforeseen Cause—Impossibility of supplying Goods.]—An owner of a ship agreed that she should proceed direct to Ichaboe, and there load a full and complete cargo of guano by the ship's boats' tackle, and by the labour of the crew, and being so loaded, should proceed therewith to Cork or Falmouth, and deliver the same, on being paid freight at 4*l.* 15*s.* per ton ; restraint of princes and rulers, the acts of God and the Queen's enemies, fire and perils of navigation, always excepted ; twenty-one working days to be allowed to the charterer if the ship was not sooner discharged at the port of unloading. The charterer to ship bags and other materials requisite for loading the ship, and to supply the stores for the ship, at cash prices, for the voyage, and to deduct the amount from the balance of freight ; but in the event of the vessel being lost, or any other unforeseen causes preventing the completion of the charterparty, the owner agreed to pay the charterer the amount of his disbursements for such stores. To a declaration of this charterparty, alleging as a breach that the shipowner did not land a full and complete cargo of guano on board the ship at Ichaboe, he pleaded that he was prevented from doing so from an unforeseen cause, namely, that on the arrival of the ship at Ichaboe, and within a reasonable time afterwards, no guano was to be found there, and that he had paid to the charterer the amount of his disbursements for stores for the ship :—Held, that the plea was bad in substance, for that the fact of no guano being to be found was not such an unforeseen cause, preventing the completion of the charterparty, as entitled the shipowner to pay the amount of the disbursements, and treat the charterparty as at an end, but that he was nevertheless bound by his positive contract to load a full cargo. *Hills* v. *Sughrue*, 15 M. & W. 253.

Ballast.]—Where the freighter covenanted to provide for the ship a full and complete cargo, consisting of copper, tallow and hides, or other goods, on which separate rates of freight were to be paid :—Held, that having supplied her with as large a quantity of tallow and hides as the master chose to take on board, he was not bound to provide any copper, although for the want of it the ship was obliged to keep in her ballast, and did not make so advantageous a freight as she might have done. *Moorsom* v. *Page*, 4 Camp. 103 ; 15 R. R. 731.

Merchandise for Ballast.]—A shipowner is entitled to take merchandise on board as ballast, provided it occupies no more space than the ballast would have done, and leaves to the charterer the full space of the vessel for his cargo. *Towse* v. *Henderson*, 4 Ex. 890 ; 19 L. J., Ex. 163.

—— **Light Cargo—Duty of Shipowner to provide Ballast.**]—A charterer agreed to load at Archangel a full and complete cargo of oats or other lawful merchandise, which the shipowners were to deliver "on being paid freight at the rate of 4*s.* 6*d.* per 320 lbs. for oats, and if any other cargo be shipped, in full and fair proportion thereto, according to London Baltic printed rates." The cargo shipped consisted of flax and

other light articles (all mentioned in the London Baltic rates), i.e. of as much as the ship could safely carry of such light articles, which rendered the shipment of 120 tons of ballast necessary:—Held, that the charterer had a right, in the absence of any stipulation to the contrary expressed or implied, to ship a full and complete cargo of any one or more of the articles constituting lawful merchandise within the meaning of the charterparty, and that when he had supplied a full and complete cargo, it was the shipowner's duty to procure the ballast necessary for that cargo; that in this case no stipulation to the contrary was expressed by the words "in full and fair proportion" in the charterparty, nor was any such stipulation implied by law; so that the shipowner not being protected from the extreme use by the charterer of his privilege, could not recover from him more than the freight payable according to the London Baltic rates on the quantities of the several articles actually shipped. *Southampton Steam Collier Co.* v. *Clarke*, 40 L. J., Ex. 8; L. R. 6 Ex. 53; 19 W. R. 214—Ex. Ch.

Under an agreement to proceed to the East Indies, and there load a full and complete cargo; the fore-cabin to be filled with light goods; freight 4*l.* 15*s.* per ton of twenty cwt. for sugar, coffee, and rice, and for pepper for eighteen cwt. to the ton; 100 tons of rice or sugar to be shipped, previously to any other part of the loading, to ballast the vessel:—Held, that the owner was obliged to furnish what further ballast was necessary, and that the freighter, after shipping the 100 tons of rice or sugar, was at liberty to complete the cargo with light goods. *Irving* v. *Clegg*, 1 Bing. (N.C.) 53; 4 M. & Scott, 572; 3 L. J., C. P. 265.

Broken Stowage.]—By a charterparty the charterer bound himself to load at Havana "a full and complete cargo of sugar and other lawful produce." Certain goods were enumerated, including timber, and certain rates of freight were mentioned; and the charterparty proceeded; "other goods, if any should be shipped, to pay in proportion to the foregoing rates, except what might be shipped for broken stowage, which should pay as customary" (half freight). A full cargo of mahogany logs was shipped, but no broken stowage was supplied to fill up the interstices, and the vessel was in consequence obliged to retain thirty tons of ballast:—Held, that it being impossible to ship a "full and complete cargo" without broken stowage, the charterer was bound by his contract to furnish it. *Cole* v. *Meek*, 15 C. B. (N.S.) 795; 33 L. J., C. P. 183; 9 L. T. 653; 12 W. R. 349.

By a charterparty the charterers were to load "a full and complete cargo of sugar in cases or other lawful merchandise, with sufficient bags for stowage," and the freight was to be at a certain rate if the cargo "should be sugar in cases, with sufficient bags for broken stowage," "and for other produce at a rate proportionate to sugar in cases, with sufficient bags for broken stowage":—Held, that the obligation on the charterers to load bags of sugar for broken stowage did not attach to any other cargo than sugar in cases. *Duckett* v. *Satterfield*, 37 L. J., C. P. 144; L. R. 3 C. P. 227.

Full and Complete Cargo—Dead Freight.]—See *Furness* v. *Tennant*, supra, col. 423.

Cargo not Provided.]—See *Staniforth* v. *Lyall*, supra, col. 302.

What Goods.]—A ship was chartered to proceed to Port Phillip and there load from the freighter's factors "a full and complete cargo of wool, tallow, bark, and other legal merchandise," the quantity of bark not to exceed 100 tons, and the quantity of tallow and hides not to exceed 80 tons, and was to proceed therewith to London, and deliver the same "on being paid freight as follows:—For wool, 1½*d.* per lb., pressed, and 1½*d.* and one-eighth of a penny per lb. unpressed gross weight; tallow 3*l.* per ton; bark 4*l.* per ton; and hides 2*l.* per ton; the latter not to exceed 20 tons, without the consent of the captain; one-third of the freight to be paid in cash, on unloading and right delivery of the cargo, and the remainder in cash or by approved bills at two months following":—Held, that the freighter was entitled to load the ship with an assorted cargo of any legal merchandise, but that the owners were entitled to be paid freight, upon the supposition that the loading consisted of the stipulated quantities of the enumerated goods, viz. 100 tons of bark, 60 tons of tallow, and 20 tons of hides, and the residue of wool, pressed or unpressed. *Cockburn* v. *Alexander*, 6 C. B. 791; 18 L. J., C. P. 74.

By a charterparty it was agreed that the ship should sail to Baltimore, and there load a full cargo of produce, and proceed therewith to the United Kingdom, and deliver the same, on being paid freight, "at and after the rate of 5*s.* 6*d.* per barrel of flour, meal and naval stores, and 11*s.* per quarter of 480 lbs. for Indian corn or other grain; that the cargo was not to consist of less than 3,000 barrels of flour, meal, or naval stores, and that not less flour or meal than naval stores, was to be shipped. The vessel arrived with a cargo consisting of 769 cwts. of tobacco, 6,047 bushels of bran, 2,000 bushels of oats, 5,000 oak-staves, and three barrels of flour. The evidence shewed that a quarter of Indian corn or wheat would occupy a space of 10½ cubic feet, and that a quarter of American oats, which weighed upon an average 272 lbs., would occupy a space of sixteen cubic feet. It also appeared that oats were not a usual shipment from America:—Held, that "other grain" in this charterparty must be taken to mean such description of grain as would average 480 lbs. to the quarter, and therefore to exclude oats; and that the shipowner was entitled to receive freight, upon the supposition that 3,000 barrels of flour, meal and naval stores had been shipped; and for the rest of the space, at the rate of 11*s.* per quarter of Indian corn, or other grain, of the average weight of 480 lbs. to the quarter. *Warren* v. *Peabody*, 8 C. B. 800; 19 L. J., C. P. 43; 14 Jur. 150. See also *Southampton Steam Collier Co.* v. *Clarke*, ante, col. 415.

Goods in Cabin—Freight.]—The defendant, a merchant in London, chartered a vessel of the plaintiff's, to bring from Bombay a full and complete cargo at 3*l.* 5*s.* per ton. The defendant's agents at Bombay filled the carrying part of the vessel, and also the cabin, with their own goods, and consigned them to the defendant, as their factor, for sale. There was contradictory evidence as to the terms upon which the cabin was filled. The bill of lading was annexed to a bill of exchange, drawn by the agents upon the defendant, which bill of exchange was sold to a third party. On the arrival of the ship in

London, the plaintiff claimed freight for the cabin at the then current rate of 7*l.* per ton. The defendant insisted that he was entitled to the use of the cabin as well as the other part of the ship, at the rate of 3*l.* 5*s.* per ton, but he charged his agents for freight at the rate of 7*l.* per ton, and allowed them commission at that rate. The goods were stopped, the bill of exchange not having arrived at maturity, when the action was brought to recover the above rate of freight for the use of the cabin. The defendant, after action brought, paid the bill, and obtained possession of the goods :—Held, first, that the defendant was not, under the terms of the charterparty, entitled to load the cabin. *Mitcheson* v. *Nicol*, 7 Ex. 929 ; 21 L. J., Ex. 323.

Held, secondly, that the judge properly directed the jury, that, although the defendant's agents at Bombay had no authority from the defendant to put goods in the cabin, yet, as the defendant adopted their act by accepting the goods, and charging his agent freight in respect of them, he was bound to pay the plaintiff the current rate of freight at the time of loading. *Ib.*

Held, thirdly, that the action was not brought too soon, since the taking to the goods for the purpose of obtaining freight, rendered the defendant liable irrespectively of his actual possession after action brought. *Ib.*

Passengers instead of Goods.]—A., a shipbroker, engaged with B., a shipowner, to have a full cargo for the ship, the rates of freight for which would average 40*s.* per ton, and at least nine cabin passengers, passage money to average 75*l.* The contract was fulfilled as to the passengers, but the average rate of freight for goods put on board by A. amounted to 32*s.* only per ton. He shipped on board, however, steerage passengers for the voyage, the passage-money paid by whom, after deducting the expense of their diet, &c., when added to the freight of the cargo properly so called, made the average earnings of the whole ship per ton amount to more than 40*s.* :—Held, that this was not a performance of the stipulations of the contract, cargo and freight being terms applicable to goods only. *Lewis* v. *Marshall*, 7 Man. & G. 729 ; 8 Scott (N.R.) 729 ; 13 L. J., C. P. 193 ; 8 Jur. 848.

Passengers—Right to Carry—Custom.]—A charterparty, not amounting to a demise of the ship, provided for the carriage of a full and complete cargo of lawful produce and merchandise for payment of a lump freight, but was silent as to the use to which the passengers' cabins might be put :—Held, that the charterers were not entitled to carry passengers in the cabins. *Shaw* v. *Aitken*, 1 Cab. & E. 195.

No custom exists entitling the charterer under the above circumstances to carry passengers, or entitling the shipowner to have passengers carried for his benefit. *Ib.*

Cargo Procured by Master—Right of Charterers.]—A ship was chartered to proceed to such places on the west coast of Africa, as the charterers should direct, and there load from their factor a full cargo of guano, and proceed to a port of the United Kingdom, to be paid at a certain freight per ton. The ship was directed to Ichaboe. The factor there, one of the charterers, endeavoured to provide a full cargo, but failed to procure more than a small quantity. The master of the ship, who was also a part owner, after waiting thirty-one days, seeing no probability of obtaining a full cargo from the factor, applied himself to complete the cargo by his own exertions and at his own expense, and finally succeeded in doing so, after having been ninety-three days at Ichaboe :—Held, on motion for an injunction, that the charterers were not entitled to that part of the cargo which had been procured by the exertions of the master without the assistance of the factor, and which the master claimed to hold as the property of the owners, and not of the charterers. *Lidgett* v. *Williams*, 4 Hare, 464 ; 14 L. J., Ch. 459.

Refusal to Load complete Cargo—Ship filled up by Owners—Freight—Damages.]—A charterparty provided that the charterers should load a full cargo at 1*l.* 17*s.* 6*d.* per ton, fire being excepted, and that bills of lading were to be signed at any rate of freight without prejudice to the charterparty, but so that the bills of lading freight in the aggregate should amount to the total freight due under the charterparty. A fire occurred when part of the cargo had been shipped and a large amount was burnt. On the charterers refusing to load any more cargo :—Held, that the freight on the bales that had been burnt must be taken at the actual bill of lading rate, and that the remainder of the cargo which the defendants had failed to ship must for the purpose of assessing the damages be taken at a rate higher than the charterparty rate by the amount necessary to make the bill of lading freight in the aggregate equal to the total charterparty freight : — Held, also, that the charterers were not entitled to credit for the freight on any bales which had been shipped by the shipowners in the place of the burnt cargo, but only for freight on the bales which had been shipped to make good the charterers' breach of contract. *Aitken* v. *Ernsthausen*, 63 L. J., Q. B. 559 ; [1894] 1 Q. B. 773 ; 9 R. 758 ; 70 L. T. 822 ; 7 Asp. M. C. 462—C. A.

Full Cargo of Specified Goods—Option of Shipper as to Character of Goods to be Loaded.]—Where by the charterparty a full cargo of copper, tallow, hides or other goods was to be provided by the charterer :—Held, that the freighter was entitled to put on board a full cargo of tallow only, although for want of copper to ballast the ship other ballast had to be provided. *Moorsom* v. *Page*, 4 Camp. 103 ; 15 R. R. 731.

Short Cargo—Freight.]—Covenant to carry as many men to Jamaica as the defendant should bring, not exceeding 180, at 5*l.* per head. The plaintiff said he carried 160 and that the defendant brought no more ; the defendant said he brought 180 and none were ready to receive them on board. Judgment for plaintiff. *Anon.* v. *Noell*, 1 Keb. 100.

Bar Harbour—Waiting for Higher Tide.]—A ship was chartered to load at a foreign port a full cargo of barley in bulk, not exceeding what she could safely carry, and to carry the same to a home port for discharge. The port of loading was known to both parties to have a bar. The charterers had 1,800 quarters of barley for shipment, and the shipowners stated that the ship could carry the whole. After shipment of 1,175 quarters the master refused to take more, on the

ground that the ship could not safely cross the bar. By waiting for a higher tide for a few days, more cargo, and perhaps the whole, could have been safely carried :—Held, that the shipowners were liable for damages for not loading the whole. *Gifford* v. *Dishington*, 9 Ct. of Sess. Cas. (3rd ser.) 1045.

Description of Cargo—Weight or Measurement.]—By charterparty it was agreed that the ship should load from defendant's factor at Calcutta a full cargo of produce, one half to be weight, if linseed not to exceed 100 tons, or if paddy, or linseed and paddy together, not to exceed 200 tons ; freight, five guineas per ton delivered ; paddy and linseed 20 cwt. to the ton as usual, and other articles according to the East India Company's scale of tonnage. The jury found that "weight" referred to goods charged per ton weight as distinguished from measurement. The judge ruled that "one half of which is to be weight," meant that one half the cargo was to be goods charged by weight, and the rest by measurement :—Held, that the case should be sent to a new trial, in order that, if necessary, upon the same ruling, the case might go to a court of error. *Ridgway* v. *Ewbank*, 10 L. J., Q. B. 109.

2. Fitness for Shipment.

Where Warranty cannot be Implied.]—When the owner of a vessel has an opportunity of examining goods shipped on board of her, no warranty on the part of the owner of the goods can be implied that they are fit to be carried on the voyage. *Acatos* v. *Burns*, 47 L. J., Ex. 566 ; 3 Ex. D. 282 ; 26 W. R. 624—C. A.

In a voyage policy on goods there is no implied warranty that the goods are seaworthy for such voyage. *Koebel* v. *Saunders*, 17 C. B. (N.S.) 71 ; 33 L. J., C. P. 310 ; 10 Jur. (N.S.) 920 ; 10 L. T. 695 ; 12 W. R. 1106.

Goods Unfit for Carriage in ordinary Ship.]—A ship was chartered to sail to Manilla for orders to load there, or at Yloilo, a full and complete cargo of sugar in bags, hemp in compressed bales, and/or measurement goods, and therewith to sail to Cork, &c., the freight to be at the rate of 4*l.* 2*s.* 6*d.* for dry sugar, 4*l.* 5*s.* for wet sugar, and 4*l.* 15*s.* for hemp or measurement goods ; the master engaging that the vessel before and when receiving cargo should be a good risk for insurance, and that during the voyage he would take all proper means of keeping the vessel tight, staunch and strong, and in every way fitted and provided for the voyage. At Yloilo the charterer provided a full cargo of wet sugar in bags. In the course of lading it was found that the quantity of molasses which had drained, and which might have been expected to drain, from the wet sugar was so great as to render the ship unseaworthy unless removed, and that the ship's pumps were unable to remove it. The ship was in all other respects seaworthy, but could not have been rendered seaworthy for that cargo without a delay which would have frustrated the objects of the voyage :—Held, that the charterer was entitled under the charterparty to supply a full cargo of wet sugar, and to have a ship provided which was fit for such a cargo. *Stanton* v. *Richardson*, 45 L. J., C. P. 78 ; 33 L. T. 193 ; 24 W. R. 324 ; 3 Asp. M. C. 23.

Dangerous Goods.]—Under 17 & 18 Vict. c. 104, s. 329, and 25 & 26 Vict. c. 63, s. 38, the shippers of goods in a general ship undertake that they will not deliver, to be carried on the voyage, packages of goods of a dangerous nature, which those employed on behalf of the shipowner may not, on inspection, be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature. By Lord Campbell, C.J., and Wightman, J. *Brass* v. *Maitland*, 6 El. & Bl. 471 ; 26 L. J., Q. B. 49 ; 2 Jur. (N.S.) 710 ; 4 W. R. 647.

But, semble, by Crompton, J., the undertaking by the shippers that the goods are safe, and fit to be carried on the voyage, does not extend beyond the cases where they have knowledge, or the means of knowledge, of the dangerous nature of the goods when shipped. *Ib.*

If a shipper, knowing an article to have corrosive properties, desires it to be shipped on board a general ship, and stowed in bulk, without communicating the character of the article to the shipowner, and it is shipped accordingly ; and being placed in the ship, in contact with certain casks, it corrodes their hoops, so that liquids contained in them flow out of them, and into the above-mentioned article, and spoil it ; the shipowner, being unaware of the character of the article, is not liable to the shipper, as for negligence in carrying and conveying, although the article is well known in commerce. *Hutchinson* v. *Guion*, 5 C. B. (N.S.) 149 ; 28 L. J., C. P. 63 ; 4 Jur. (N.S.) 1149 ; 6 W. R. 757.

But in such case it is not an answer to the action that the shipper directed the articles to be stowed in bulk. *Ib.* *See also* 36 & 37 Vict. c. 85, s. 23.

A merchant shipped sulphuric acid and cambric goods without giving notice required by the charterparty, that the casks contained acid. The casks leaked, and the cambric was damaged :—Held, that the merchant could recover, because the stowing of the casks near the cambric, and not the absence of notice, was the proximate cause of the damage ; and that there was no defence upon the ground of avoiding circuity of action. *Alston* v. *Herring*, 11 Ex. 822.

The plaintiff declared that the defendants, who had chartered his ship, put on board a dangerous commodity, whereby a loss happened, without due notice to the captain or any other person employed in the navigation :—Held, that it lay upon the plaintiff to prove such negative averment. *Williams* v. *East India Co.*, 3 East, 192 ; 6 R. R. 589.

Representation as to size of Pieces of Machinery to be carried—Machinery and Coal Cargo.]—See *Mackill* v. *Wright*, supra, col. 273.

3. Deck Cargo.

"At Merchant's Risk."]—It was stipulated in a charterparty that the "ship should be provided with a deck cargo, if required, at full freight, but at merchant's risk" :—Held, that the words, "at merchant's risk," did not exclude the right of the charterers to general average contribution from the shipowners in respect of deck cargo shipped by the charterers and jettison. *Burton* v. *English*, 53 L. J., Q. B. 133 ; 12 Q. B. D. 218 ; 49 L. T. 768 ; 32 W. R. 655 ; 5 Asp. M. C. 187—C. A.

By a charterparty it was agreed, that the ship

should proceed to Quebec, and there load, from the factors of the plaintiffs, a full and complete cargo of pine timber and deals, not exceeding what she could reasonably stow and carry over and above her tackle. In an action upon this charterparty, the declaration assigned for breach, that the defendants did not nor would load in and on board the ship a full and complete cargo, not exceeding what she could reasonably stow and carry over and above her tackle, but, on the contrary, loaded on board the ship a cargo much exceeding what the vessel could reasonably stow and carry over and above her tackle. The judge, in the summing up, told the jury, that, primâ facie, the deck was not the proper place for the stowage of the cargo, or any part of it; that, in some cases, custom might sanction the practice, but that, without reference to any custom, if it increased the perils of the navigation, if it increased the danger of the ship, or increased the danger of that part of the cargo, in either case it was an improper stowage:—Held, that this direction was correct, in the absence of any evidence of a general custom to load deck cargo at the risk of the shipper. *Gould* v. *Oliver*, 2 Scott (N.R.) 241; 2 Man. & G. 208.

The proprietor of goods laden on the deck of a ship, according to the custom of a particular trade, is entitled to contribution from the shipowner for a loss by jettison. *S. C.*, 4 Bing. (N.C.) 134; 5 Scott, 445; 3 Hodges, 307; 7 L. J., C. P. 68.

Deck Cargo carried Illegally—Validity of Policy.]—See *Cunard* v. *Hyde*, infra, col. 1207 (*bis*).

Deck Cargo—Insurable Interest.]—A deck cargo of cotton intended to be carried at the shipper's risk, but for which, by mistake, clean bills of lading were given, was jettisoned. The shipowners having insured it:—Held, that they had an insurable interest. See *Stephens* v. *Australasian Insurance Co.*, infra, col. 1130.

Excessive Deck Cargo—"Timber"—Merchant Shipping Act, 1894, s. 451.]—Pieces of spruce firwood varying from 15 to 27½ feet in length, and with a mean girth of 2 ft. 9 in., are "timber" falling within s. 451, sub-s. 3 (*a*), of the Merchant Shipping Act, 1894. *Morris* v. *Thormodsen*, 60 J. P. 644.

Deck Cargo—Jettison of—Proximate Cause of Damage.]—On a ship carrying a general cargo from New Orleans to Liverpool cotton was shipped on deck, under a practice by which owners of vessels trading between those ports were in the habit of stowing goods on deck in violation of their contract with the shipper, the shipowners accepting full responsibility for the consequences. The bills of lading for part of the cotton contained the words "under deck." All the bills of lading contained exceptions (inter alia) in favour of "jettison." On the voyage the ship took ground, and in order to get her off the master properly jettisoned the cotton. The indorsees of the bills of lading having brought an action against the shipowners to recover the value of the cotton:—Held, that (whether the bills of lading did or did not contain the words "under deck") the cotton was carried in breach of the contract and was not within the exceptions specified in the bills of lading, which had exclusive reference to goods safely stowed under hatches; that the shipowners had therefore no legal excuse for their failure to deliver; that the cause of damage was not too remote, and that the shipowners were liable to the indorsees for the value of the cotton. *Royal Exchange Shipping Co.* v. *Dixon*, 56 L. J., Q. B. 266; 12 App. Cas. 11; 56 L. T. 206; 35 W. R. 461; 6 Asp. M. C. 92—H. L. (E.)

4. Notice of Arrival of Ship—Ready to Load.

Notice of Arrival.]—In an action by a shipowner against the charterers for not loading a cargo of coals pursuant to a charterparty, by the terms of which the owner engaged that the vessel then in the port of Sunderland, should with all possible despatch proceed direct to the South dock, Sunderland, and there load, in the usual and customary manner, at any one of the collieries the freighters might name, a full cargo of coals, which the freighters bound themselves to ship by a given day for Calcutta, they pleaded that they had not any notice of the ship having proceeded to and having arrived at the South dock, and of her being ready to receive cargo, wherefore they did not nor could load:—Held, that the allegation in the plea must be treated as an allegation of fact, meaning that, by reason of want of notice of the ship's arrival at the dock and being ready to load, the charterers were prevented loading her; and that so read, the plea was an answer to the action. *Stanton* v. *Austin*, 41 L. J., C. P. 218; L. R. 7 C. P. 651.

—— **On Return Voyage.**]—Where a ship is to proceed to a port, and there to load a full cargo for the agents of the freighter, but the freighter has no interest in the outward cargo, his agents are entitled to notice from the captain that the vessel is ready to receive her homeward cargo; and if no such notice is given, the freighter is not liable for not providing such cargo. *Fairbridge* v. *Pace*, 1 Car. & K. 317.

Readiness to Receive.]—Action on a charterparty in these terms:—"It is this day agreed between the agent for the owner of the 'Lydia,' new ship, now on the stocks, of 1,100 tons, or thereabouts, now at Quebec, to be launched and ready to receive cargo in all May, guaranteed to sail in all June, and the charterer, that the ship shall proceed to, &c., and there load a full cargo of timber":—Held, that the readiness to receive a cargo in all May was a condition precedent to the shipowner's right to recover against the charterer for not loading a full cargo, and that a plea stating the ship was not ready to receive cargo in all May was good. *Oliver* v. *Fielden*, 4 Ex. 135; 18 L. J., Ex. 353. *And see* ante, col. 364.

5. Loading.

a. Generally.

Light Cargo—Duty of Shipowner to provide Ballast.]—A charterer agreed to load at Archangel a full and complete cargo of oats or other lawful merchandise, which the shipowners were to deliver "on being paid freight at the rate of 4*s.* 6*d.* per 320 lbs. for oats, and if any other cargo be shipped in full and fair proportion thereto, according to the London Baltic printed rates." The cargo shipped consisted of flax and other light articles (all mentioned in the London

Baltic rates), i.e. of as much as the ship could safely carry of such light articles, which rendered the shipment of 120 tons of ballast necessary :—Held, that the charterer had a right, in the absence of any stipulation to the contrary expressed or implied, to ship a full and complete cargo of any one or more of the articles constituting lawful merchandise within the meaning of the charterparty, and that when he had supplied a full and complete cargo, it was the shipowner's duty to procure the ballast necessary for that cargo; that in this case no stipulation to the contrary was expressed by the words "in full and fair proportion" in the charterparty, nor was any such stipulation implied by law, so that the shipowner, not being protected from the extreme use by the charterer of his privilege, could not recover from him more than the freight payable according to the London Baltic rates on the quantities of the several articles actually shipped. *Southampton Steam Collier Co.* v. *Clarke*, 40 L. J., Ex. 8; L. R. 6 Ex. 53; 19 W. R. 214—Ex. Ch.

The shipowner is bound to furnish whatever ballast is necessary, and the freighter, under a contract to ship a full and complete cargo, part heavy goods for ballast, is entitled to complete the cargo with light goods. *Irving* v. *Clegg*, 1 Bing. (N.C.) 53; 4 M. & Scott, 572; 3 L. J., C. P. 265.

Duty to Load—Delay in Proceeding to Destination "forthwith"—Perils of Sea.] — By a charterparty dated the 28th of December, a ship was to forthwith proceed from England to Barbadoes in the West Indies, and having there loaded a cargo of sugar for the defendants, to return to England. The vessel was to be allowed to take an outward cargo of coals to specified places, and the charterparty contained a clause excusing performance if it could not be complied with owing to perils of the sea. Delay on her voyage outwards was occasioned by unfavourable winds, and she was injured by a collision with a steamer, which rendered necessary further repairs. She finally sailed for Rio on the 9th of March, and reached Rio on the 26th of May. Having there discharged the cargo of coals, she started on the 1st of July, and reached Barbadoes on the 28th of July, too late for the season for exporting sugar thence. The defendants' agent offered to provide a cargo of sugar, if the vessel would go under protest to St. Vincent, an island ninety miles off. The captain refused this offer, and remained at Barbadoes, insisting upon the performance of the charterparty by the defendants' agent. The plaintiffs having sued for a breach of the charterparty in refusing to load a cargo at Barbadoes, the judge directed the jury that, if the vessel sailed without unreasonable delay, she proceeded "forthwith" within the meaning of the charterparty; that the clause excusing performance, on the ground of perils of the sea, applied to the preliminary voyage to Rio, and that the captain might reasonably think that if he shipped a cargo elsewhere than at Barbadoes, he might put an end to the original charterparty:—Held, a right direction. *Hudson* v. *Hill*, 43 L. J., C. P. 273; 30 L. T. 555; 2 Asp. M. C. 278.

Cargo to be loaded from Shore "at Ship's Risk"—Loss after delivery and before loading.] —By a charterparty a vessel was to proceed to a port, and there to load a cargo from the shore by the ship's boats and crew, at ship's risk and expense. A part of the cargo was lost, after delivery from the shore and before it was loaded on board, through one of the perils enumerated in the exceptions in the charterparty. In an action by the charterer for the non-delivery of this part of the cargo:—Held, that the expression "at ship's risk" did not mean at the absolute risk of the shipowner, but at such risk as would attach if the goods were loaded on board, and that consequently the exceptions applied, and the shipowner was not liable for the non-delivery. *Nottebohm* v. *Richter*, 56 L. J., Q. B. 33; 18 Q. B. D. 63; 35 W. R. 300—C. A.

Prompt Despatch.]—A charterparty provided that the ship should proceed to a port, and there load from the factors of the charterers a cargo of "coal, taking her turn with other steamers," and receive "prompt despatch in loading." The charterers employed the persons at the port of loading who were employed to load other ships, and the ship was loaded in her turn, but, by reason of an insufficient supply of coal, the ship was delayed:—Held, that the charterers were responsible for the delay. *Elliott* v. *Lord*, 52 L. J., P. C. 23; 48 L. T. 542; 5 Asp. M. C. 63.

Usual Despatch.] — A., by charterparty, engaged to load on board B.'s ship a cargo of coals, "to be loaded with usual despatch." A. commenced loading by bringing the coal in boats along a canal to the dock where the ship was; but before the cargo was completed a severe frost rendered the canal unnavigable, and the ship was detained thirty-four days:—Held, that the expression "usual despatch" meant "usual despatch of persons who have a cargo ready for loading," and that A. was responsible for the delay. *Kearon* v. *Pearson*, 7 H. & N. 386; 31 L. J., Ex. 1; 10 W. R. 12. *See also cases* ante, cols. 245, 477.

Ship Detained as Unseaworthy.]—A. agreed to charter a ship for twelve months after the completion of her then present voyage. After the completion of her voyage, and when he was ready to load the ship, she was detained as unseaworthy; and the repairs were not finished until more than two months after the completion of the voyage:—Held, that the charterer was entitled to throw up the charterparty. *Tully* v. *Howling*, 46 L. J., Q. B. 388; 2 Q. B. D. 182; 36 L. T. 163; 25 W. R. 290—C. A.

Loading of Cargo prevented by Superior Force.]—By a charterparty it was agreed that the ship, the "R.," should, after loading "dead weight" at Malta, proceed to V., a Spanish port, and there load a cargo of fruit for the plaintiff. At the time of entering into the charterparty the plaintiff knew that the "dead weight" intended to be put on board the "R." at Malta would consist of military stores, and he knew that by the ordinary law of Spain, a vessel with warlike stores on board would not be allowed to load at a Spanish port. Upon application being made to the Spanish government to relax the prohibition, permission to load was refused. The "R." arrived at V. with the warlike stores on board, but otherwise ready and fit to load the agreed cargo: she left immediately on learning that permission to load would not be granted:—Held, that the plaintiff could not sue the owners of the ship for

not having the "R." ready to load, for, through the act of a superior power, the parties were unable to perform their respective duties under the contract, the plaintiff being unable to load the cargo and the defendants to receive it. *Cunningham* v. *Dunn*, 48 L. J., C. P. 62; 3 C. P. D. 443; 38 L. T. 631; 3 Asp. M. C. 595—C. A.

Where the master covenanted to go to a port of America, and receive a loading from the freighter alongside the ship, and bring home the same, with an exception of the restraints of rulers, &c.; but the freighter covenanted absolutely to provide the loading without any such exception; it seems that an embargo in the American port, which prevented the freighter from loading the ship, did not discharge him from his covenant. *Sjoerds* v. *Luscombe*, 16 East, 201.

The master and the freighter of a vessel of 400 tons, having actually agreed in writing that the ship, being fitted for the voyage, should proceed to St. Petersburg, and there load from the freighter's factor a complete cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight:—Held that the master, after taking in at St. Petersburg about half a cargo, having sailed away upon a general rumour of a hostile embargo being laid on British ships by the Russian government, was liable to the freighter for the short delivery of the cargo, though the jury found that he acted bonâ fide, and under a reasonable and well-grounded apprehension at the time, and a hostile embargo and seizure were in fact laid on six weeks afterwards. *Atkinson* v. *Ritchie*, 10 East, 530; 10 R. R. 372.

If goods put on board a ship to be carried from one place to another are wrongfully seized by the officers of government, so that they cannot be delivered to the consignee, the owner of the goods has a right of action for the non-delivery against the owner of the ship, who must seek his remedy against the officers of government. *Gosling* v. *Higgins*, 1 Camp. 451; 10 R. R. 726. *See also cases*, cols. 285, 527.

Fear of Infection.]—A charterer, who covenanted to send a cargo alongside at a foreign port, is not excused from sending it alongside, though, in consequence of the prevalence of an infectious disorder at the port, all public intercourse is prohibited by the law at the port, and though he could not have communication without danger of contracting and communicating the disorder. *Barker* v. *Hodgson*, 3 M. & S. 267; 15 R. R. 485.

Conversion of Cargo—Refusal to give Clean Receipt.]—N. & Co. agreed with the defendants for the shipment of oil to Montreal, and it was agreed that defendants should give a clean receipt for all goods shipped. A. sold fifty barrels of oil to N. & Co., and delivered them to the defendants, who received them but refused to give a clean receipt. A. demanded redelivery, which the defendants refused. N. &. Co., not getting a mate's receipt for the goods, refused to pay A. for them. A. brought an action against the defendants for conversion, joining N. & Co. as co-plaintiffs by amendment of the writ. The consignees at Montreal, on receiving the oil, paid N. & Co. for it, and they paid A.:—Held, that A. having waived the right of saying that the property in the oil had not passed to N. & Co., could not recover for conversion; and that he could not recover for loss of interest through delay in payment. *Armstrong* v. *Allan*, 4 R. 107; 67 L. T. 417; 7 Asp. M. C. 293—C. A.

b. Custom and Manner.

Effect of Custom.]—Where freighters covenanted to provide for the ship a full cargo, consisting of cotton, wool, rice, or other goods, on which separate rates of freight were to be paid:—Held, that it was the duty of such freighters to have shipped goods according to the custom of the country whence they were imported, although the shippers were put to an expense by so doing, and such shipment would exceed the stipulations contained in the charterparty. *Benson* v. *Schneider*, 1 Moore, 21, 76; 7 Taunt. 272; Holt, 416.

Where a full cargo was not taken in, in consequence of arrangements in the stowage varying from those contemplated by the charterparty:—Held, that the freighters were not entitled to recover, as it appeared that one of them and the broker who managed the business were present from time to time during the loading and cognisant of the arrangements, but did not make any objection. *Hovill* v. *Stephenson*, 4 Car. & P. 469.

By a charterparty the defendant agreed to load on board a vessel at Trinidad "a full and complete cargo of sugar, molasses and other produce":—Held, first, that evidence was admissible of a custom at Trinidad to load sugar in hogsheads and molasses in puncheons; and therefore that a full and complete cargo of sugar and molasses so packed was a compliance with the contract. *Cuthbert* v. *Cumming*, 11 Ex. 405; 24 L. J., Ex. 310; 1 Jur. (N.S.) 686; 3 W. R. 553—Ex. Ch.

Held, secondly, that the custom was reasonable and good in law. *Ib.*

Evidence of Custom.]—A. agreed by charterparty to load B.'s vessel at Sunderland with coke, with all possible despatch, in the customary manner, in regular turn. In an action for delay in loading according to the terms of the charterparty:—Held, that evidence was not admissible to shew that, according to the custom of the port of Sunderland, under such a contract, the shipowner was bound to wait until a manufacturer of coke not named in the contract, had supplied all ships, whose names were put down in a turn-book, kept by the manufacturer, which he had previously contracted to load with coke in the port, provided he used reasonable despatch, and that the manufacturer's name was mentioned at the time the contract was made. *Hudson* v. *Clementson*, 18 C. B. 213; 25 L. J., C. P. 234.

Turn for Loading—Evidence of Negligence.]—By a charterparty the freighters agreed with the owner that the ship, being fit for the voyage, should proceed to Port Talbot, and there load a cargo, the ship to be loaded in turn, certain working days to be allowed, and a further number of days for demurrage. The owner brought an action on this agreement, alleging that the defendants did not, within a reasonable time after her arrival at Port Talbot, load a cargo: and, secondly, that the defendants did not load the ship in turn. Plea—that the plaintiff was master, and had the care, direction, and management of the ship; and that the plaintiff, and the crew, took such bad care of the ship, and governed and navigated her so improperly, that

the ship became damaged and unfit to receive a cargo, and so remained for a long time, by reason whereof the defendants could not load. By a local act, regulating the port, the master of every ship coming in was bound, under a penalty, to moor, anchor, and place the same in such situation as the harbour-master should direct. The ship's master was also bound to take on board a pilot, who, by the by-laws of the port, was to obey the orders of the harbour-master. It was proved on the trial that the ship, with a pilot, arrived at the port, and received directions from the harbour-master as to entering, but the master and crew worked the ship in a manner contrary to his directions, and in consequence she received injury, lost her then turn of loading, and was unable to load till the expiration of some days, when she loaded without further delay :—Held, that the judge rightly directed the jury to find for the plaintiffs, if they thought the accident was the fault of the master and crew. *Taylor* v. *Clay*, 9 Q. B. 713 ; 16 L. J., Q. B. 44 ; 11 Jur. 277.

—— **Ignorance of Contracting Party as to the Port Custom.**]—The plaintiffs' sailing vessel was chartered by the defendant to proceed to Whitehaven for a cargo of coals. The charterparty provided that "regular turn" should be allowed for loading. By the custom of the port of Whitehaven, steam vessels, though they arrive in port after sailing vessels, are loaded with coals before the sailing vessels ; but as between sailing vessels themselves sailing vessels are loaded in the order of their arrival in port. The plaintiffs were ignorant that this was the usage of the port. The plaintiffs' vessel, though she arrived before several steam vessels, was delayed until they were first loaded, but she was loaded in the order of her arrival as regarded the other sailing vessels in harbour. The plaintiffs claimed demurrage : —Held, that the expression "regular turn" in the charterparty should, in the absence of exclusive words, be construed as "regular turn" according to the usage of the port of Whitehaven; that it was not material that the plaintiffs were ignorant of such usage, and that, accordingly, the plaintiffs could not recover. *King* v. *Hinde*, 12 L. R., Ir. 113.

The defendant chartered the plaintiff's vessel to proceed to Newcastle-on-Tyne, and there be ready forthwith, "in regular turns of loading," to take on board, by spout or keel, as directed, a complete cargo of four keels of coal, and the remainder coke. In an action for not loading the vessel with coke within a reasonable time :—Held, that evidence was admissible to explain the meaning of the expression in the charterparty, "in regular turns of loading," by shewing that there was a usage at the port of Newcastle that vessels should take in their cargoes of coke in a certain regular order or turn, and that the question whether the vessel was loaded within a reasonable time ought not to be decided without reference to such usage, if proved. *Leidemann* v. *Schultz*, 14 C. B. 38 ; 2 C. L. R. 87 ; 23 L. J., C. P. 17 ; 18 Jur. 42.

—— **Delay caused by Negligence of Third Party.**]—By a charterparty, a vessel was to proceed with all convenient speed to Cardiff, and there load from the factors of the freighters a full cargo of coals, in the customary manner, no time being mentioned :—Held, that this meant a loading, according to the usage of the port, and within a reasonable time, without reference to unforeseen casualties ; and consequently, the loading having been delayed for an unreasonable time, the freighters were not excused by reason of the delay having arisen from difficulties connected with the railway and the collieries, which were beyond their control. *Adams* v. *Royal Mail Steam Packet Co.*, 5 C. B. (N.S.) 492 ; 28 L. J., C. P. 33 ; 7 W. R. 9.

By a charterparty the master engaged to proceed with his vessel to a particular colliery, and there take on board for the freighters a cargo of coal. Before the charterparty was signed both parties knew that the colliery was not at work, an accident having happened to the steam-engine, and both were told it would be repaired in a short time, and that the vessel would be loaded in her turn within a few days after the colliery got to work again, according to the practice of the port, which was, that the ships were loaded in their regular turns as they were entered on the colliery books. The freighters had no control over the colliery. The ship was loaded in her turn, but not until several days later than the colliery agents had led the parties to expect :—Held, that if the steam-engine was repaired and the colliery got to work in a reasonable time after the execution of the charterparty, and if the vessel was loaded within a reasonable time after the colliery got to work, the freighters were not liable to compensate the master of the vessel for the delay in the loading. *Harris* v. *Dreesman*, 23 L. J., Ex. 210. *And see cases* infra, 9. DELIVERY AND DISCHARGE OF CARGO.

c. Lighters.

The master is not bound by usage in London to take care of a lighter employed in unloading his ship, after it is fully laden, until the time when it could be properly removed from the ship to the wharf. *Robinson* v. *Turpin*, Peake, 203, n. ; 3 R. R. 671.

By the custom of the river Thames, the master is bound to guard goods laden into a lighter sent for them by the consignee until the loading is complete, and cannot discharge himself from that obligation by telling the lighterman he has not sufficient hands on board to take care of them. *Catley* v. *Wintringham*, Peake, 202 ; 3 R. R. 670.

A party executed a charterparty, under which a cargo was to be sent alongside the ship at the merchant's expense ; the captain rendered the usual and customary assistance with his boats and crew. Some of the cargo lying about thirty yards from the edge of the wharf, the captain applied to the charterer's factor for the labourers to remove it into the boats. The factor having refused, saying he would abide by the charterparty, the captain hired labourers for the purpose :—Held, that the expense so incurred might, notwithstanding the charterparty, be recovered. *Fletcher* v. *Gillespie*, 3 Bing. 635 ; 11 Moore, 547 ; 4 L. J. (O.S.) C. P. 202.

On a charter to receive a cargo alongside a ship, at a port where the ship cannot safely load inside a bar, if she is loaded outside, the freighter cannot throw extra expense of lighterage on the shipowner. *Trindale* v. *Levy*, 2 F. & F. 441.

Goods were delivered to the owners of a ship to be conveyed by their ship. The goods were destroyed by a casual fire on board a lighter employed by the owners to convey them to the ship : — Held, that the 26 Geo. 2, c. 86, s. 2, did not protect the owners. *Morewood* v. *Pollok*,

1 El. & Bl. 743; 1 C. L. R. 78; 22 L. J., Q. B. 250; 17 Jur. 881; 1 W. R. 304.

Timber Cargo.]—See *Peterson* v. *Freebody*, infra, col. 535.

Cargo to be taken from alongside at Merchants' Expense and Risk — Custom of Port — Construction of Charterparty.]—See *Aktieselkab Helios* v. *Ekman*, supra, col. 239.

d. Place of.

Option.]—The plaintiff by charterparty, dated the 26th of May, 1871, agreed with the defendant that his ship should sail to Bullo, and there load from the plaintiffs' factors a cargo of coals and proceed therewith to Highbridge or Dunball and deliver same on being paid freight at the rate of 2*s.* 9*d.* per ton in cash on unloading and right delivery. The ship was to be loaded and discharged with all possible despatch, and to load with G. or H. till the end of September, at captain's option, but after September with H.; and was to continue at the above rate until March, 1872. In September the captain exercised his option in favour of loading with G., but the plaintiff refused to load him from G.; whereupon the defendant declined further to perform the charterparty:—Held, that the breach of the charterparty which the plaintiff had committed went to the root of the contract between the parties, and justified the defendant in his refusal. *Bradford* v. *Williams*, 41 L. J., Ex. 164; L. R. 7 Ex. 259; 26 L. T. 641; 20 W. R. 782.

Proper loading Berth.]—Direction by judge to jury that, upon the construction of the charterparty, a berth where she could load coals was a proper loading berth. New trial ordered because, under the charterparty, the merchant was entitled to load a general cargo, and the berth was not a proper loading berth for general cargo. *Jennett* v. *Meek*, 3 L. T. 817.

Always afloat—No Water except at Spring Tides.]—See *Carlton Steamship Co.* v. *Castle Mail Packets Co.*, supra, col. 242.

And see further as to Place of Loading, XIV. DEMURRAGE, supra, cols. 461, seq.

e. Return Cargo.

Condition precedent—Discharge of Outward Bound.]—The discharge of an outward-bound cargo at a particular place is not in general a condition precedent to the providing a return cargo; therefore a freighter, who covenants to load a return cargo, must, if he objects to the ship's delay in proceeding to take it on board, make the objection before he loads the cargo, and within a reasonable time, and must not by any act take to the ship. *Olhsen* v. *Drummond*, 2 Chit. 705; 4 Dougl. 356.

—— **Seizure of Outward Cargo.**]—Where a shipowner covenanted to proceed from L. to N., and there make a right and true delivery of the outward cargo, and having so done receive on board a certain cargo, restraint of princes, &c., excepted; and the freighters covenanted, in consideration of the premises, that at N. they would find and provide, as they did warrant and assure to the shipowner, a full and complete return cargo, and that 1,750*l.* should be paid on delivery of the outward cargo, which should be considered as earned for outward freight:—Held, that, in an action against the freighters for not providing a return cargo at N., they could not plead in excuse of performance that the outward cargo was seized by the government at N., and never delivered to them; for the delivery of the outward cargo was not a condition precedent to the providing a return cargo; but the delivery of the outward cargo was a condition precedent to the payment of the 1,750*l.*; and therefore a breach assigned for nonpayment thereof was under these circumstances not sustainable. *Storer* v. *Gordon*, 3 M. & S. 308; 15 R. R. 499.

—— **Non-arrival of Vessel.**]—Where, in a charterparty on the ship "St. P.," for a voyage from G. to bring home a cargo to Europe, it was provided, that in the event of the non-arrival at the same port of another ship, called the "G." (which had been chartered by the same parties, and was then at sea), then the charter on the "G." should be void to all intents and purposes whatsoever:—Held, that the word "non-arrival" could not be construed so as to defeat the purposes of the voyage for which the "G." had been chartered; and her non-arrival for these purposes not being attributable to the fault of the charterers, the charter on the "St. P." became void, and the charterers were not bound to provide her with a homeward cargo. *Soames* v. *Lonergan*, 4 D. & R. 74; 2 B. & C. 564; 2 L. J. (O.S.) K. B. 106; 26 R. R. 460.

—— **Delay.**]—A charterparty provided that the ship "E.," being tight, staunch, and strong, and every way fitted for the voyage, should, with all convenient speed (on being ready) having liberty to take an outward cargo for owners' benefit, direct or on the way, proceed to A. The ship was not completed when the charterparty was made. As soon as she was ready for her trial trip she went to sea, and (in order to avoid the danger of crossing the bar at the mouth of the Tyne a second time) went on to L. Whilst her repairs were being completed in L., she took on board a cargo of goods for C., at which place she stopped to unload her cargo on the voyage to A., arriving at the latter place a few days later than she otherwise would have done. The charterer's agent at A. refused to provide cargo in consequence of the delay:—Held, that there was no condition precedent, the non-fulfilment of which by the shipowner would exonerate the charterer from providing a cargo, but that there was merely a stipulation, for the breach of which an action for damages would lie against the shipowner. *Mac Andrew* v. *Chapple*, 35 L. J., C. P. 281; L. R. 1 C. P. 643; 12 Jur. (N.S.) 567; 14 L. T. 556; 14 W. R. 891.

Obligation to accept.]—A charterparty made between the charterers through the agency of G. & Co. and the captain of the "Elvezia," provided that the ship should proceed with a cargo to San Francisco, "where the ship shall be consigned to charterers' agents inwards and outwards, paying the usual commissions . . . and deliver the same . . . and so end the voyage"; and that "on her return to her port of discharge in the United Kingdom" she should be reported to the custom-house by G. & Co.:—Held, that these provisions did not impose on the captain an obligation to accept a homeward cargo for the United Kingdom from the agents of the charterers at San

Francisco, but merely bound him, if he had determined upon taking a return cargo on board there, to employ them to procure and ship it. *Cross* v. *Pagliano*, 40 L. J., Ex. 18; L. R. 6 Ex. 9; 23 L. T. 420; 19 W. R. 159.

Under a charterparty a ship was to proceed from London to Bombay, and there discharge her cargo, and then load a cargo, with which she was to proceed direct to London, the merchant to have the privilege of sending the ship to Calcutta from Bombay, upon paying for the extra time occupied. If the ship returned from Bombay direct to London, the merchant was to have the power of sending her to one port on the Malabar coast, to receive cargo, paying for the extra time:—Held, that the shipowner, after discharging at Bombay, was not bound to take on board a cargo there for Calcutta. *Cockburn* v. *Wright*, 6 Bing. (N.C.) 223; 8 Scott, 489; 9 L. J., C. P. 166.

Notice of Arrival.]—*See* ante, col. 504.

f. Refusal or Neglect to Load.

Measure of Damages.]—In an action against a charterer of a ship for not loading a cargo, the measure of damage is the amount of freight which would have been earned after deducting the expenses, and also any profit which the ship may have earned during the period over which the charter extended. *Smith* v. *M'Guire*, 3 H. & N. 54; 27 L. J., Ex. 465; 6 W. R. 726. *S. C.*, nisi prius, 1 F. & F. 199.

In an action on a charterparty for not loading a cargo, the loading ports being Rangoon or Bassein, and the captain having been to Rangoon, and there received orders to go to Bassein (three days' sail), where no cargo could be obtained, and he was requested to go back to Rangoon or elsewhere, in hopes of obtaining a cargo, which he declined to do, and remained inactive at Rangoon until the time for loading had elapsed, the judge having told the jury that they were not bound to give the plaintiff the full amount of freight, 3,000*l.*, but that if they deemed the master's conduct unreasonable they might diminish the damages on that account, and left it to them to say whether the plaintiff should recover the full amount, or any other amount they might deem reasonable; and they having found for the plaintiff damages 500*l.*, the court held that there had been no misdirection, but granted a new trial on the ground that the verdict was against the evidence and the amount of damages considerably too low, making it, however, a condition that the plaintiff should relinquish the costs of the first trial. *Wilson* v. *Hicks*, 26 L. J., Ex. 242.

—— **Duty of Captain.**]—By a charterparty it was stipulated that a ship should proceed to Limerick with her then present cargo, and there take a cargo of oats for London, at a freight of 2*s.* 8*d.* a quarter; six days being allowed for loading at Limerick. Before the expiration of the six days, the freighter's agent offered the captain a cargo at 2*s.* 6*d.*, and said that the freighter's brother would pay the difference. The captain refused to take anything not according to the terms of the charterparty:—Held, that as the contract had not then been broken by the freighter, the captain was not bound to accept this offer; but that, if the contract had been broken by the freighter not putting any cargo on board within the six days, it would have been the captain's duty to have taken a cargo at the most he could get, so that the damages to be paid by the freighter should be reduced as much as possible. *Harries* v. *Edmonds*, 1 Car. & K. 686.

Cargo to be Loaded in Time for Convoy.]—The charterer of a ship for a voyage to Tobago and back covenanted to load and despatch her in time to join the convoy home sailing from the West Indies on August 1. The ship arrived at Tobago on July 14, and the convoy passed Tobago on July 22:—Held, that the charterer was liable for not supplying a cargo by that day. *Thompson* v. *Inglis*, 3 Camp. 428.

Cargo Discharged to Examine Ship—Refusal of Shipper to Reload.]—A ship was chartered on September 12 to carry wheat from Harwich to St. Malo; ten days allowed for loading. The usual course was for the ships to take in part of the cargo at Mistley and the rest lower down the river. The ship took in 900 quarters at Mistley, but got ashore as she was going down the river to take in the rest. The master gave notice to the charterers' agent that the cargo must be unloaded to examine the ship. The agent unloaded it, and sent it on in other ships. On October 4 the master gave notice that he was ready to receive the cargo, and demanded it:—Held, that the owner could not recover against the charterers for not supplying cargo. *Strugnell* v. *Friedrichsen*, 12 C. B. (N.S.) 452; 5 Jur. (N.S.) 77.

—— **Other Cargo taken in — Damages — Penalty.**]—Ship chartered to New Zealand to load there or receive 500*l.* She sailed, and found no cargo or charterers' agent there. She sailed to Batavia, and brought home a cargo, earning more than she would have upon her original voyage:—Held, that the owners could not recover 500*l.* and also retain the profits of the homeward voyage. *Staniforth* v. *Lyall*, 7 Bing. 169; 4 M. & P. 329; 9 L. J. (O.S.) C. P. 23.

Delay in Loading—Not Sufficient Workmen.]—See *Richardsons and Samuel & Co., In re*, supra, col. 490.

Action for not Providing Cargo—Plea that the Ship was afterwards Lost.]—In an action on a charterparty whereby the defendants covenanted to unload and receive the cargo at Charlestown, and there put on board 100 tons of goods, the plaintiffs assigned as a breach that no goods were put on board. The defendants pleaded that the vessel never arrived in London on the homeward voyage, and was lost; the charterparty provided for payment of freight on delivery in London:—On demurrer, the plea held to be bad. *Stephenson* v. *Price*, 3 Dougl. 353.

—— **Fault of Shipowner—Damages.**]—A ship's husband covenanted that his ship should at A. take in brandy and convey it to B., and there take in fruit, which the freighters covenanted to supply. He did not take in the brandy, and the freighters did not furnish a full homeward cargo, for which he recovered damages against them. They were prevented from supplying the fruit

by reason of the neglect of the ship's husband in not shipping the brandy. They afterwards sued his representatives for breach of his covenant:—Held, that they could not recover the damages they had paid him, or the costs of defending the previous action. *Walton* v. *Fothergill*, 7 Car. & P. 392.

—— **Damages—Different Rates of Freight for Different Goods.**]—In an action for not supplying a cargo, where by the charterparty the freighter is to pay different rates of freight for different articles put on board, and is at liberty to supply which articles he pleases, the measure of damages is the average freight calculated for the usual quantity of goods carried in such voyages. *Thomas* v. *Clarke*, 2 Stark. 450; 20 R. R. 714.

6. Stowage.

a. Employment of Stevedore.

Who Liable to Pay for Services of.]—The owner of a ship had chartered her to A. for the purpose of being loaded; the charterparty provided that the stevedore was to be nominated by the charterer, and be under the control of the captain, and was to be paid by the owner. A. sub-chartered the ship to B., entering into a charterparty with a similar clause. B. employed the plaintiff, who was a stevedore, to load the ship, and introduced him to the defendant as a person who was to load the ship. The defendant frequently came on board while the ship was being loaded, and superintended and gave instructions relative to the stowage of the cargo. In an action by the plaintiff against the defendant for nonpayment of his charges:—Held, that there was evidence of a contract between the plaintiff and defendant. *Eastman* v. *Harry*, 33 L. T. 800; 3 Asp. M. C. 117—C. A.

On completion of the loading the plaintiff sent in his account to B., headed "To captain and owners," and pressed B. for payment. B. had sent in his account to A., and A. had sent in his account to the defendant, with the item "Stevedore's account" charged. The defendant had paid A.'s account, and A. had paid B.'s account. B. became bankrupt, and did not pay the plaintiff:—Held, that the defendant was liable to pay his account. *Ib.*

Liability for Acts of.]—K., a master stevedore, having contracted to unload a ship, employed D., one of the ship's crew, at the owner's request, to assist in the work. K. could have refused to so employ D. if he thought him incompetent; and during the time K. employed him D. could not have been employed by the master of the ship on the ship's work, and, though D. was paid by the owner, such pay was deducted from what K. received for the unloading. In the course of such employment D. so negligently worked a winch used in the unloading as to injure one of K.'s men, with whom D. was put to work by K.'s foreman:—Held, that the owner was not responsible for such injury, as at the time of the accident D. was not working for him but for K. *Murray* v. *Currie*, 40 L. J., C. P. 26; L. R. 6 C. P. 24; 23 L. T. 557; 19 W. R. 104.

A stevedore employed to ship iron rails had a foreman whose duty it was (assisted by labourers) to carry the rails from the quay to the ship after the carman had brought them to the quay and unloaded them there. The carman not unloading the rails to the foreman's satisfaction, the latter got into the cart and threw out some of them so negligently that one fell upon and injured a person who was passing by:—Held (per Grove and Denman, JJ., Brett, J., dissentiente), that there was evidence for a jury that the foreman was acting within the scope of his employment, so as to render the stevedore responsible for his acts. *Burns* v. *Paulson* or *Poulson*, 42 L. J., C. P. 302; L. R. 8 C. P. 563; 29 L. T. 329; 22 W. R. 20.

When a stevedore is appointed by the shipper, and acts in the stowage, the master is not responsible for damage done to the goods in the course of taking on board or of stowage. Custom or agreement may vary the above rule, but a mere stipulation that a stevedore shall act under the orders of the master, does not throw on the latter the responsibility for acts of the former not shewn to be done under orders from the master. *Blaikie* v. *Stembridge*, and cases, infra.

The owner, and not the charterer, is primâ facie liable to the consignees for damage to goods by bad stowage; aliter, if the shipper stows himself. *Swainston* v. *Garrick*, 2 L. J., Ex. 255.

b. Duty of Master and Owner.

Duty of Master as to.]—If a cask is accidentally staved in, in letting it down into the hold of a ship, the master must answer for the loss. *Goff* v. *Clinkard*, cited 1 Wils. 288.

By the maritime law it is the duty of the master, on behalf of the owner, to receive and properly stow on board goods delivered to him alongside. For any damage to the goods, arising from his negligence, either in taking them on board or in stowing them, he is responsible to the shipper of the goods. If the damage happens from his misconduct, he is responsible to the owner; if from the misconduct of the mate or other of the crew, and not from any fault of his own, he is not responsible to the owner. *Blaikie* v. *Stembridge*, 6 C. B. (N.S.) 911; 29 L. J., C. P. 212; 6 Jur. (N.S.) 825; 2 L. T. 570; 8 W. R. 239—Ex. Ch.

Duty of Owners as to.]—The owners of a general ship are liable to a shipper for damage done to his goods from other goods stowed in the hold without proof of any wilful or negligent default on their part. *Gillespy* v. *Thompson*, 6 El. & Bl. 477, n., 483; 2 Jur. (N.S.) 712.

It is the duty of the owner of a vessel to stow the cargo with as much skill as a competent stevedore can do. *Anglo-African Co.* v. *Lamzed*, 1 H. & R. 216; 35 L. J., C. P. 145; L. R. 1 C. P. 226; 12 Jur. (N.S.) 294; 13 L. T. 796; 14 W. R. 477.

In an action by charterers against shipowners, for not loading as much as the vessel could reasonably carry, the charterparty containing the words "charterers' stevedore to be employed by ship," it is no answer that the charterers had not appointed a stevedore, and that the cargo was stowed to the best of the master's skill and ability. *Ib.*

The owner, and not the charterer, of a ship is primâ facie liable to the consignees for damage done to goods on the voyage, by reason of improper stowage. *Swainston* v. *Garrick*, 2 L. J., Ex. 255.

The master is primâ facie liable for the safe stowage of the cargo, but he is exonerated by the special appointment of his own stower by the freighter; and if the freighter, by a verbal agreement with the owner, undertakes to appoint his own, and he acts as such, the mere silence of a charterparty, subsequently entered into, does not subject the master to his original liability. *Ib.*

—— **Question for Jury.**]—In an action by a shipper against a shipowner, for nondelivery of goods, not arising from any of the excepted causes, and also for bad stowage; the evidence was that the goods had been in the course of the voyage, and in bad weather, stowed in the tank upon coals, and that they arrived damaged by sea water and coal dust. The judge told the jury that they must find for the shipowner, if they thought that, under the circumstances, what had been done was the best that could be done. And the court could not agree to set aside this direction. *Zipsey* v. *Hill*, 1 F. & F. 570.

Exceptions as to Injuries.]—Under a charterparty the shippers put a cargo, consisting of casks of oil, wool and rags, on board the chartered vessel, and personally superintended the stowage of the cargo in the hold of the vessel. In the margin of the bill of lading of the casks of oil there was this memorandum: "Weight, measurement and contents unknown, and not accountable for leakage." The bill of lading was indorsed in blank by the shippers, and assigned to B. & Co. In the course of the voyage the oil casks became heated by the action and contiguity of the wool and rags, and a very large portion of the oil was lost:—Held, first, that ignorance of the shipowners as to the latent effect of heat, in storing the casks of oil with wool and rags, did not, under the circumstances of the shippers superintending the stowage, amount to such negligence as to make them liable to the holders of the bill of lading for the loss occasioned by the leakage of the oil. *Ohrloff* v. *Briscall*, 4 Moore, P. C. (N.S.) 70; 35 L. J., P. C. 63; L. R. 1 P. C. 231; 12 Jur. (N.S.) 675; 14 L. T. 873; 15 W. R. 202. *S. C.*, nom. *The Helene*, Br. & Lush. 429.

Held, secondly, that the limitation by the memorandum in the bill of lading, that the shipowners were not to be accountable for leakage, was not restricted as to the quantity of leakage, and protected the shipowners, in the absence of proof that the leakage was occasioned by their negligence. *Ib.*

A bill of lading excepted liability in respect of "all accidents, loss and damage of whatsoever nature . . . . occasioned by any act, neglect or default whatsoever of the pilot, master or mariners, in navigating the ship . . . . it being agreed that the captain, officers and crew of the vessel in the transmission of the goods . . . . be considered the servants of the shipper, owner or consignee" of the goods:—Held, that the owners were liable for negligent stowage. *Hayn* v. *Culliford*, 48 L. J., C. P. 372; 4 C. P. D. 182; 40 L. T. 536; 27 W. R. 541; 4 Asp. M. C. 128—C. A.

On an allegation that damage to cargo originated from defective stowage, and heat and fermentation arising from the cargo being stowed in too close conjunction with other cargo, the parties must establish affirmatively that the cargo on its arrival at its port of destination was in a damaged condition; and the onus then falls on the ship to prove that the original stowage was good, and that the perils of the sea subsequently occurring created the damage. *The Alexandra*, 14 L. T. 742; 14 W. R. 466.

Damage to cargo caused by the oozing of wine from casks through straining in bad weather is damage occasioned by perils of the sea, and the shipowners are, under the usual exceptions, exempt from liability therefor, where the cargo is properly stowed, or is stowed in such a manner that the master is not responsible for bad stowage. *The Catherine Chalmers*, 32 L. T. 847; 2 Asp. M. C. 598.

Where a charterparty stipulates that a vessel is "to be stowed by charterers' stevedore, at risk and expense of vessel," and a cargo is supplied by the charterers and is stowed by their stevedore, the shipowner is not responsible for damage occasioned by bad stowage. *Ib.*

Damage to cargo occasioned by salt water does not come within the excepted perils when by reason of the place in which it is stowed it is exceptionally liable to such damage in severe weather. *The Oquendo*, 38 L. T. 151; 3 Asp. M. C. 558.

Where Ship Chartered.]—A ship was chartered for a voyage from Oporto to the United Kingdom to load from the factors of the affreighter a full cargo of wine or other merchandise at 18*s.* per ton; the captain to sign bills of lading at any rate of freight without prejudice to the charter; the ship to be addressed to charterer's agents at Oporto on usual terms. The ship was accordingly consigned to the charterer's agents at Oporto, and was put up by them as a general ship, without any intimation that she was under charter; a party shipped some casks of wine, and received bills of lading in the usual form signed by the master. The wine was stowed by a stevedore appointed by the charterer's agents and paid by them, the money being ultimately repaid them by the master. The wine having leaked from improper stowage:—Held, that as the charter did not amount to a demise of the ship, and the owners remained in possession by their servants, the master and crew, the shipper was entitled to look to the owners as responsible for the safe carriage of the wine: inasmuch as he had delivered it to be carried in the ship in ignorance that she was chartered, and had dealt with the master, who was still the owner's master, as clothed with the ordinary authority of a master to receive goods and give bills of lading by which his owners would be bound. *Sandeman* v. *Scurr*, 8 B. & S. 50; 36 L. J., Q. B. 58; L. R. 2 Q. B. 86; 15 L. T. 608; 15 W. R. 277.

Held, also, that the employment of the stevedore made no difference, at all events as regarded the shipper, as he was no party to the employment, and had a right to look to the owners for the safe stowage of the goods, as part of the carriers' duty, in the absence of any special agreement. *Ib.*

A shipowner who charters his vessel to another, but not so as to give up possession, is liable for a breach of the contract contained in a bill of lading signed by the master, such as injury to the goods by improper stowage, if it is not proved that at the time of shipment the shipper had notice of the charter. *The St. Cloud*, Br. & Lush. 4; 8 L. T. 54.

So, under similar circumstances, the owner not being domiciled in England or Wales, the ship is liable under 24 & 25 Vict. c. 10, ss. 6, 35. *Ib.*

If a person ships goods on board a vessel,

knowing that she is chartered, the consignee of the goods can maintain no action against the owner of the ship if the goods are injured by bad stowage. *Major* v. *White*, 7 Car. & P. 41.

If the shipper of goods was warned as to the way in which the goods were to be stowed, the consignee cannot maintain any action for damage occasioned by such stowage, even if the stowage was bad. *Ib.*

By a charterparty an owner agreed to let, and a charterer to hire, a ship for a certain period, the ship being in good and working order, and her master, officers and crew being duly shipped, to be placed at the disposal of the charterer in the port of London on a given day, and the hire to commence from and after the time that she should have been placed at the disposal of the charterer, with a clean and clear hold, and ready to load. The owner was to appoint, victual and pay the master, officers and crew, and to provide and pay for the necessary equipment for the working of the ship, and to pay all other charges whatsoever, save and except for coals, pilotages, port charges and labour, which were to be paid by the charterer; the cargoes were to be taken on board, and discharged by the charterer, the crew of the vessel rendering customary assistance, so far as they might be under the orders of the master; and the charterer was to have liberty to employ stevedores and labourers, to assist in the loading, stowage and discharge thereof; but such stevedores and labourers being under the control and direction of the master, the charterer was not in any case to be responsible to the owners for damage or improper stowage; and "the master and owner of the ship should devote the same attention to the cargo, should use the same endeavours to promote despatch, and should in every respect be and remain responsible to all whom it might concern, as if the ship was loading and discharging her cargoes and performing her voyages for account of the owner, and independently of that charterparty": — Held, that there was nothing in this charterparty to exonerate the owner from responsibility for negligent and improper stowage by the stevedores employed by the charterer, under the above stipulation. *Sach* v. *Ford*, 13 C. B. (N.S.) 90; 32 L. J., C. P. 12; 9 Jur. (N.S.) 750.

Expenses of Preparing Cargo.]—Where a ship was chartered to proceed to a port and there load from the freighter's factors "a full and complete cargo of wool, tallow, bark and other legal merchandise," at a specified rate of freight for each kind:—Held, that parol evidence was not admissible to shew that by the custom of the place of loading the cost of pressing wool was to be borne by the shipowner. *Cockburn* v. *Alexander*, 6 C. B. 791; 18 L. J., C. P. 74.

c. Damages.

Amount Recoverable.]—In the ca of injury to goods by improper stowage, loss upon a contract of resale entered into before delivery, and of which the shipowners had no notice at the time of making the original contract, is not to be allowed. *The St. Cloud*, Br. & Lush. 4; 8 L. T. 54.

7. Demand by Shipper of Redelivery.

After Accident.]—An owner of goods shipped to proceed to a foreign port has a right to have them redelivered to him when the vessel, having commenced her voyage, meets with a disaster whereby the goods are damaged so much that they cannot be profitably carried to their destination. *Blasco* v. *Fletcher*, 14 C. B. (N.S.) 147; 32 L. J., C. P. 284; 9 Jur. (N.S.) 1105; 9 L. T. 169; 11 W. R. 997.

Without Payment of Freight.]—But after goods have been taken on board a general ship to be conveyed on freight, and bills of lading have been signed by the captain, the owner of the goods cannot, before the sailing of the ship, insist on the goods being redelivered to him without paying the freight that might be earned, and indemnifying the master against the consequences of the bills of lading signed by him. *Tindall* v. *Taylor*, 4 El. & Bl. 219; 3 C. L. R. 199; 24 L. J., Q. B. 12; 1 Jur. (N.S.) 112.

A ship was chartered for a voyage from London to Sydney, the charterer to have the entire use of the ship, and to pay the owner 1,600*l.* in London in two months. The ship cleared at the custom-house. The charterer bought goods, to be paid for before the ship left London; and the vendor delivered the goods on board, and took the mate's receipt for them. Before the ship was ready to sail, the charterer was unable to pay for the goods (though not bankrupt nor taking the benefit of the Insolvent Debtors Act), and the vendor thereupon gave notice to the captain to redeliver them, and, on his refusal, made an arrangement with the charterer, and again applied to the captain in the charterer's name for the redelivery, offering to pay all reasonable charges. The captain having refused to redeliver: —Held, that the shipowner had no lien upon the goods, but that the charterer had a right, as between himself and the shipowner, to take the goods out of the ship, at all events, until the stipulated sum had become due, and that the captain was therefore liable in trover. *Thompson* v. *Small*, 1 C. B. 328; 14 L. J., C. P. 157.

8. Duty of Master to Preserve, Tranship, or Sell Cargo.

a. To Preserve and Reship.

There is a duty on the master, as representing the shipowner, to take reasonable care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking active measures, when reasonably practicable under all the circumstances, to check and arrest the loss or deterioration resulting from accidents, for the necessary and immediate consequences of which the shipowner is not liable by reason of exceptions in the bill of lading. And for neglect of this duty by the master the shipowner is responsible to the shipper. *Notara* v. *Henderson*, 41 L. J., Q. B. 158; L. R. 7 Q. B. 225; 26 L. T. 442; 20 W. R. 442; 1 Asp. M. C. 278—Ex. Ch.

In an action by a shipper against a shipowner it appeared that beans were shipped under a bill of lading, containing the usual exception of perils of the sea (including collision). The vessel sustained damage by a collision, and put into a port for repairs. The beans having become wetted by salt water, the shippers, through their agent, offered to receive the cargo and pay pro rata freight. The master refused to deliver the cargo except upon receipt of the whole freight, and proceeded with his vessel to the port of discharge.

Upon its arrival it was found that the damage to the beans by the collision had been materially enhanced by their detention on board after they had been saturated with salt water. The increased damage would have been avoided if the beans had been unshipped, dried and reshipped at the port of refuge, the cost of which might have been charged to the cargo as particular average:—Held, that, assuming that the precautions above mentioned would not have unreasonably delayed the voyage, the shipowner was liable for the additional damage. *Ib.*

Expense of Preserving Perishable Cargo—Liability of Cargo Owner.]—Cargo owner held liable for the expense of unloading cargo for its preservation, he being present and giving no instructions. *Garriock* v. *Walker*, 1 Ct. of Sess. Cas. (4th ser.) 100.

Damage by Excepted Perils—Duty of Master to Minimise.]—It is the duty of the master to take reasonable precautions that cargo damaged by excepted perils is not greater than necessary. *Adam* v. *Morris*, 18 Ct. of Sess. Cas. (4th ser.) 153.

And see infra, col. 538, 9. DELIVERY AND DISCHARGE, *c.* WAREHOUSING.

b. To Tranship.

Duty of Master.]—When a question is raised as to the duty of the master in a port of distress to have transhipped the cargo, it must be considered that his first duty is to carry his cargo to its port of destination in the same bottom. *The Hamburg*, 2 Moore, P. C. (N.S.) 289; Br. & Lush. 253; 33 L. J., Adm. 116; 10 Jur. (N.S.) 600; 10 L. T. 206; 12 W. R. 628.

Where a master has a reasonable opportunity, according to the circumstances of the case, of communicating from the port of distress with the owners of the cargo and receiving directions from them, it is his first duty to endeavour to obtain such directions. *Ib.*

The master only becomes agent for the owners of the cargo ex necessitate rei. *Ib.*

Where a ship is by perils of the sea so much damaged as to be incapable of repair so as to prosecute the adventure, except at an expense exceeding her value, together with the freight, when repaired, the master is justified in abandoning the voyage, and is not bound as agent of his owner to send the goods on in another bottom. *De Cuadra* v. *Swann*, 16 C. B. (N.S.) 772.

—— **Ascertained by what Law.**]—The duty of a master to carry on, tranship or deliver the cargo at an intermediate port of refuge, implied in a bill of lading given by the master of a foreign vessel, will be ascertained by reference to the law of the flag which the vessel carries, not by reference to the lex loci contractûs or the lex fori, or the law of the place where the alleged breach of contract by the master is committed. *The Bahia*, Br. & Lush. 292; 11 Jur. (N.S.) 90; 12 L. T. 145.

If a vessel, during her voyage, is injured, and is compelled to put into a port of refuge, then, by English law, the master is not bound to tranship. He is allowed a reasonable time, either to repair and carry on or to tranship. If he declines to do either, he may be called upon to deliver, without payment of any freight; but before a reasonable time has elapsed he cannot be required to deliver, except on payment of full freight, or waiver thereof. In estimating what is reasonable time, the court will take all circumstances into consideration, including any delay caused by the vis major of competent authorities, administrative or judicial. *Ib.*

A bill of lading in English was given by the master of a French vessel lying in New York, by which the goods were made deliverable in a French port. The vessel during her voyage suffered injury, and put into a port in England. The assignees of the bill of lading and owners of the cargo being British subjects, instituted an action in the court of admiralty for a breach of duty by the master in respect of his obligation to carry on, tranship or deliver. The court ascertained the duty of the master by reference to the law of France. *Ib.*

Vessel Liable to Capture.]—By German law, if a vessel is liable to risk of capture, either party may withdraw from the contract of affreightment, but the master is not obliged to part with the cargo or to tranship it, unless distance freight, as well as all other claims of the shipowner and the contributions due from the cargo for general average, have been paid or secured:—Held, that a demand upon the master to tranship at his own risk and expense was not such a compliance with the German law as obliged him to tranship. *The Express*, 41 L. J., Adm. 79; L. R. 3 A. & E. 597; 26 L. T. 956; 1 Asp. M. C. 355.

Repairing instead of.]—If in the course of a voyage a ship carrying cargo is damaged by perils of the sea, the shipowner intending to carry the cargo to its destination is entitled to a reasonable time for repairing his ship or for transhipping, and for this purpose to retain the cargo. *Galam, Cargo ex*, Br. & Lush. 167; 2 Moore, P. C. (N.S.) 216; 3 N. R. 254; 33 L. J., Adm. 97; 10 Jur. (N.S.) 477; 9 L. T. 550; 12 W. R. 495.

Negligent Reshipping of Cargo by Third Parties—Consent of Captain.]—Gunpowder was shipped for Valparaiso on board a vessel chartered on a voyage to that port, with liberty to touch and stay at the Falkland Islands. On the arrival of the vessel at Port Stanley, where the captain had goods to unload for the defendants, it was found that by the regulations of the port it would be necessary to land and store the powder before the vessel could enter the harbour. To avoid the inconvenience and expense of this, the captain accepted the offer of the agent of the defendants of the use of a vessel belonging to them, called the "Fairy," in which to place the powder during his stay at Port Stanley. The defendants' agent afterwards requiring the "Fairy" for another purpose, without the consent of the captain transhipped the powder to a half-decked vessel called the "Lily," which was an unsafe and improper vessel for the purpose. Whilst the "Lily" was anchored outside the harbour a storm arose, and she was sunk, and the powder lost:—Held, that the defendants were responsible for the value, for that they were either trespassers in removing the powder without the captain's consent, or bailees who had been guilty of want of reasonable care. *Ronneberg* v. *Falkland Islands Co.*, 17 C. B. (N.S.) 1; 34 L. J., C. P. 34; 10 Jur. (N.S.) 940; 10 L. T. 530; 12 W. R. 914.

—— **Costs of Unsuccessful Defence.**]—On the arrival of the ship at Valparaiso, the consignees of the powder demanded it from the captain, and, not obtaining it, took proceedings against the ship, which the captain unsuccessfully resisted, being ultimately compelled to pay the consignees the value of the powder and the costs:—Held, that the owners of the ship could not claim these costs from the defendants, they not being a necessary consequence of their wrongful act. *Ib.*

c. To Sell—Power of Master.

At Intermediate Port without Owner's Consent.]—A master of a vessel cannot at an intermediate port sell goods which are damaged, and cannot be carried to the port of discharge, without communicating with their owner. *Acatos* v. *Burns*, 47 L. J., Ex. 566; 3 Ex. D. 282; 26 W. R. 624—C. A.

Possibility of Communication with Owner.]—The possibility of communicating with the owner depends on the circumstances of each case, involving the consideration of the facts which create the urgency for an early sale, the distance of the port from the owner, the means of communication which may exist, and the general position of the master in the particular emergency. *Australasian Steam Navigation Co.* v. *Morse*, infra, col. 524.

Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it can be obtained, before the sale. *Ib.*

When, however, there is ground for such an expectation, every endeavour, so far as the position in which he is placed will allow, should be made by the master to obtain the owner's instructions. *Ib.*

The master is bound to employ the telegraph as a means of communication, where it can usefully be done; but the state of the particular telegraph, the way in which it is managed, and the possibility of transmitting explanatory messages, are proper subjects to be considered in determining the question of the practicability of communication. *Ib.*

Necessity for Sale must be Shewn.]—On the 19th of April an Austrian ship, with a valuable cargo on board, ran upon a rock on the eastern side of Algoa Bay, distant fifty miles by sea and about eighty by land from Port Elizabeth. The Austrian consul at Port Elizabeth came to the spot, and, there being no hope of getting the vessel off, he advised the master to sell her with the cargo. The master accordingly advertised the ship and cargo for sale, and they were sold in one lot by auction on the 30th of April for 9,500*l.*, after a brisk competition. The purchaser got some part of the cargo out of the wreck, but on the 19th of June the ship went to pieces with the rest of the cargo on board. The owners of the cargo having abandoned it to the underwriters as a total loss, the underwriters filed their bill to have the goods which had been brought to land delivered to them as not having been effectually sold. The master had not gone to Port Elizabeth, nor endeavoured to procure funds to enable him to save the cargo; nor had he made any effort to induce any persons to undertake the salvage of the cargo. Several witnesses at Port Elizabeth deposed that in their opinion no person could have been induced to undertake the salvage; others gave their opinion that offers to save the cargo could have been obtained if a large percentage of the net proceeds had been offered. There was a good deal of evidence to shew that, in the opinion of persons on the spot, the course which had been adopted of selling the wreck and cargo was the most advisable one in the interest of all parties concerned:—Held, that no such necessity was proved to have existed as would make the master the agent of the owners of the cargo to effect a sale; that the sale was void; and that the plaintiffs were entitled to the cargo saved, subject to a proper allowance for salvage and other expenses. *Atlantic Mutual Marine Insurance Co.* v. *Huth*, 16 Ch. D. 474; 44 L. T. 67; 29 W. R. 387—C. A.

The authority of the master to sell the goods of an absent owner is derived from the necessity of the situation in which he is placed; and, consequently, to justify his selling, he must establish a necessity for the sale; and an inability to communicate with the owner. *Australasian Steam Navigation Co.* v. *Morse*, 8 Moore, P. C. (N.S.) 482; L. R. 4 P. C. 222; 27 L. T. 357; 20 W. R. 728.

Under these conditions, and by force of them, the master becomes the agent of the owner, not only with the power, but under the obligation (within certain limits) of acting for him; but he is not, in any case, entitled to substitute his own judgment for the will of the owner, in selling the goods, where it is possible to communicate with the owner. *Ib.*

In cases of necessity affecting the interest of the shipper, and where the sale of the cargo is directly or indirectly for his benefit, the master of the vessel becomes his agent for the purpose of selling the cargo. *Duncan* v. *Benson*, 3 Ex. 644; 18 L. J., Ex. 169; 12 Jur. 218—Ex. Ch.

Sufficiency of Evidence of Authority.]—B. chartered a ship warranted tight and seaworthy, and took on board the goods of several persons. The ship proved unseaworthy, the goods were damaged, and the master sold them at a foreign port. The owners brought an action against the charterer for the loss of the cargo; a correspondence then ensued between him and the owner, and it was ultimately settled that a jury should assess damages, which they did at 5,000*l.*, and costs 1,000*l.* The charterer then sued the owner of the vessel for this decree, on the breach of the conditions of the charterparty, and allowed him the amount received by the master for the sale of the sugar:—Held, that very slight evidence would be sufficient to prove the master's authority to sell the damaged cargo. *Blyth* v. *Smith*, 6 Scott (N.R.) 360; 5 Man. & G. 405; 12 L. J., C. P. 203; 7 Jur. 948.

Mere Deterioration of Cargo.]—A cargo of opium, shipped at Calcutta, was, by the bill of lading, to be delivered at Hong Kong. The ship came in collision at sea with another vessel, and received so much injury as to compel her to put in at Singapore, where the cargo was found to be partially damaged by the salt water. The master, who acted bonâ fide, and to the best of his judgment, selected the damaged chests of opium, and sold them by auction, and forwarded the remainder to Hong Kong. The master might have had the damaged opium redried and repacked while the vessel was refitting, and have

forwarded it, though deteriorated in value, with the other opium:—Held, that it was the duty of the master to carry the cargo to its place of destination, as the goods could have been delivered in a merchantable, although in a damaged state. *Tronson* v. *Dent*, 8 Moore, P. C. 419.

Port of Distress—Law of the Flag.]—The plaintiffs, who were British subjects, shipped pepper at Singapore, on board the German ship "August," to be carried with other cargo to London. The ship met with bad weather, and was obliged to put into Cape Town, the ship and portions of her cargo having sustained damage. The master, acting on the advice of surveyors, sold a portion of the plaintiff's pepper, with other cargo. In an action for breach of contract and for conversion:—Held, that the conduct of the master in selling the pepper in question was to be determined by German law, that being the law of the flag. *The August*, 60 L. J., Adm. 57; [1891] P. 328; 66 L. T. 32; 7 Asp. M. C. 110.

Perishing Cargo—Duty to Sell.]—If a cargo in a port of distress is in a perishing condition, and the ship in need of repairs, the master must decide whether to tranship or sell the cargo; if he cannot tranship, he is bound to sell the cargo and not to let it perish; if acting according to his reasonable judgment he sells for the benefit of all concerned, the purchaser is safe, even though the master acts unwisely. *The Gratitudine*, 3 C. Rob. 240, 259.

Ship Damaged, Cargo Uninjured—Duty of Master.]—Where the ship is damaged and unable to proceed, the master is not justified in selling the cargo, it being uninjured, notwithstanding an exception in the bill of lading of "dangers and accidents of the seas and navigation." *Cannan* v. *Meaburn*, 1 Bing. 243, 465; 1 L. J. (o.s.) C. P. 84; 2 L. J. (o.s.) C. P. 60; 8 Moore, 127.

Sale of Cargo by Order of Vice-Admiralty Court.]—Sale of cargo by master under order of vice-admiralty court at Mauritius without necessity, treated as void in action by cargo owner against purchaser. *Morris* v. *Robinson*, 5 D. & R. 35; 3 B. & C. 196; 27 R. R. 322. S. P., *Freeman* v. *East India Co.*, 5 B. & Ald. 621; 1 D. & R. 234; 24 R. R. 497.

Master no Authority to Sell.]—A master has no authority to sell cargo in a foreign port to which he is driven, although it is impossible for him to carry it to its destination. If he does so, though acting bonâ fide and for the benefit of all parties, he is guilty of conversion, for which the shipowner is liable. *Van Omeron* v. *Dowick*, 2 Camp. 42; 11 R. R. 656.

Sale Abroad—Effect of Foreign Law.]—The agent in Russia of an English merchant, resident in England, shipped in Russia a cargo of deals on board a Prussian vessel, owned by a Prussian captain, to be carried to Hull, consigned to the English merchant under an ordinary bill of lading. The vessel was wrecked on the coast of Norway, but the cargo was brought safely on shore there, and could have been reshipped and sent on to England. By the law of Norway, a captain of a vessel placed in this position, though responsible to the owners if he sells improperly, has power to sell the cargo so as to convey a good title to a bonâ fide purchaser. The captain, in the exercise of his discretion, and without any absolute necessity, sold the cargo to a bonâ fide purchaser, who resold the cargo to the defendant, who sent it to England, when the plaintiff, representing the English merchant, the original owner, claimed the cargo and brought an action for it:—Held, that the action could not be maintained, on the ground that the property in the cargo passed to the purchaser by the sale in Norway, according to the law of that country; that the courts of this country will recognise the Norwegian law in this respect, and that the property could not be divested by the cargo being afterwards brought to England. *Cammell* v. *Sewell*, 5 H. & N. 728; 29 L. J., Ex. 350; 6 Jur. (N.S.) 918; 2 L. T. 799; 8 W. R. 639—Ex. Ch.

Liability of Shipowner.]—The plaintiffs wishing to send cement and stone from London to Callao, the defendants on the 24th of June wrote offering them "room" for it in the ship "F. K. Dumas," and on the 25th of June the defendants chartered the ship of the owners for a voyage from London to Callao by a charterparty, providing, inter alia, that the whole ship should be at the disposal of the charterers, except the space necessary for the crew and stores; that the master and owners should give the same attention to the cargo, and in every respect be responsible to all whom it might concern, as if the ship were loaded in her berth by and for the owners independently of the charter; that the master was to sign bills of lading at any rate of freight the charterers might require without prejudice to the charterparty; that the ship should be addressed to the charterers' nominees at the port of discharge: and the charterers' responsibility, except for freight, was to cease on the vessel being loaded. On the 26th of June an agreement was made between the defendants "acting for the owners" of the ship, and the plaintiffs, that the former should receive on board cement and stone at a certain freight from London to Callao and sail on a certain date; freight to be paid one-half on signing bills of lading and the remainder on final discharge at Callao. The cement and stone were shipped, half freight was paid, and the master signed bills of lading making the other half payable at Callao, and the ship sailed, but being damaged by bad weather put into an intermediate port, where she was condemned, and the captain sold the plaintiffs' goods, believing that he was unable to forward them. The plaintiffs having sued the defendants for the value, the jury found that the sale was not justified:—Held, that the captain, in selling the goods, was not acting as the servant or agent of the defendants, and they were therefore not liable for the conversion. *Wagstaff* v. *Anderson*, 49 L. J., C. P. 485; 5 C. P. D. 171; 44 L. T. 720; 28 W. R. 856—C. A.

Trover lies against a shipowner for a sale by the master, of goods at a place short of the port of destination, under circumstances not inconsistent with the general scope of the authority conferred upon the master by the owner. *Ewbank* v. *Nutting*, 7 C. B. 797.

A cargo of salt was shipped at Liverpool for Calcutta, under a bill of lading making the same deliverable to A. & Co. on payment of freight there as per charterparty. The ship sustained damage in quitting the harbour at Liverpool, and ultimately became so leaky, that the master was

compelled to run for Bahia, where, finding the state of the ship such as to render her incapable of continuing the voyage, and being unable to forward the salt to its destination, he sold it by public auction, remitting the proceeds to his owner, who tendered the amount, after making deductions for general average and expenses, to the shipper of the salt:—Held, that the master and owner were jointly liable for the conversion, that it was not necessary to give the charterparty in evidence, and that the jury was warranted in estimating the damages at the cost price of the salt, and the sum the shipper had paid on account of the freight. *Ib.*

Sale of Part—Measure of Damages.]—Where a master sells part of a shipper's goods at an intermediate port, in order to raise money to provide for the repairs or other expenses of the vessel which are necessary to enable him to prosecute and complete the voyage, and the ship does not arrive at her port of destination, the shipper is not entitled to receive the clear value for which the goods would have sold at that port. *Atkinson* v. *Stephens*, 7 Ex. 567; 21 L. J., Ex. 329.

Sale for Repairs.]—Terms on which master restrained from selling for repairs. See *Rayne* v. *Benedict*, supra, col. 88.

See further as to power of master to sell cargo, *Cobequid Marine Insurance Co.* v. *Huth*, and cases, supra, col. 87.

9. Delivery and Discharge.

a. Time.

Delay caused by Vis Major.]—When a charterparty is silent as to the time within which the cargo is to be unloaded at the port of destination, the contract implied by law is that the shipowner and the charterer shall each perform his part, and neither is answerable for delay caused by vis major. *Ford* v. *Cotesworth*, 10 B. & S. 991; 39 L. J., Q. B. 188; L. R. 5 Q. B. 544; 23 L. T. 165; 18 W. R. 1169—Ex. Ch.

A charterparty for a voyage from Liverpool to Lima or Valparaiso provided that the vessel should proceed to the port of discharge, or as near thereto as she could safely get, and there deliver her cargo in the usual and customary manner. A specified number of days was agreed upon for loading the vessel at Liverpool, but there was no such agreement as to the discharge at her port of destination. The vessel arrived at the port of discharge, and remained discharging till, owing to apprehension of a bombardment by a hostile fleet, the authorities suspended all landing of goods for seven days, after which she returned, and her discharge was completed:—Held, that the discharge of the cargo being an act to be done by the shipowner and freighter, the shipowner could not maintain an action against the freighter for the loss from the delay occasioned by the vis major. *Ib.* See *Cunningham* v. *Dunn*, 48 L. J., C. P. 62; 3 C. P. D. 443; 38 L. T. 631—C. A. *And cases* ante, cols. 285, 507.

Refusal of Authorities to allow Cargo to be Landed — Freight.] — A cargo of petroleum belonging to an English owner was shipped on board an English ship in London, under a bill of lading whereby the goods were to be delivered in the port of Havre, subject to the usual exceptions. It was stipulated that demurrage was to be paid if the goods were not taken out within twenty-four hours after arrival. The local authorities refused to allow the petroleum to be landed at Havre, and compelled the ship to leave the port without unloading any of her cargo. The master, having made unsuccessful attempts to land the petroleum at other ports, returned to Havre and transhipped it into a lighter in the roads while he went into dock, unloaded the rest of his cargo, and reloaded for his return voyage. He was then compelled by the authorities to reship the petroleum, and brought it back to London. No bill of lading was presented to him, nor any request made by the consignees for delivery:—Held, first, that the master having been ready and able to give delivery in the harbour, and having kept the goods a reasonable time there for the purpose, the freight had been earned. *Argos, Cargo ex, Gaudet* v. *Brown*, L. R. 5 P. C. 134; 28 L. T. 745; 21 W. R. 707.

Held, secondly, that all obligation on the part of a master to act for the merchant does not cease after a reasonable time for the latter to take delivery of the cargo has expired, and that therefore the master was entitled to compensation for bringing the goods back to England, as that was the best way of making them available to the owner, and also for the expenses incurred at Havre. *Ib.*

Held, thirdly, that he was not entitled to demurrage, and the expenses of attempting to enter other ports, as they were incurred before the ship was ready to deliver at all in the port of Havre. *Ib.*

Embargo.]—The defendant contracted to carry the plaintiff's goods from Liverpool to Leghorn; on the vessel's arriving at Falmouth, in the course of her voyage, an embargo was laid on her "until the further order of council":—Held, that such embargo only suspended, but did not dissolve the contract between the parties; and that, even after two years, when the embargo was taken off, the defendant was answerable to the plaintiff in damages for the non-performance of the contract. *Hadley* v. *Clarke*, 8 Term Rep. 259; 4 R. R. 641.

Obligation to Unload Ship in Reasonable Time.]—By a charterparty entered into between the plaintiff and G. it was agreed that the plaintiff's vessel should at the port of discharge be unloaded as fast as the custom of the port would allow. By the bill of lading, signed by the master, the cargo was stated to have been shipped by G. and was to be delivered to the defendant or his assigns, he or they paying freight for the goods as per charterparty. No time for the discharge of the cargo was mentioned in the bill of lading. At the port of discharge there was no custom as to unloading vessels, but a delay occurred in unloading the ship. The defendant never assigned the bill of lading, but before the arrival of the ship he sold the cargo, and the ultimate purchaser took delivery of it upon an order signed by the defendant:—Held, in an action for not discharging within a reasonable time, that, as there was no custom of the port of discharge as to unloading vessels, the charterparty did not by its terms vary the implied contract contained in the bill of lading to deliver the cargo within a reasonable time. *Fowler* v. *Knoop*, 48 L. J., Q. B. 333; 4 Q. B. D. 229; 40 L. T. 180; 27 W. R. 299; 4 Asp. M. C. 68—C. A.

Delivery—Presentation of Bill of Lading.]—See *The Stettin*, infra, col. 314.

Deviation in Course of Voyage and Delay in Delivery—Risk of War.]—The master of a Prussian vessel, a subject of the king of Prussia, having on board a cargo of nitrate of soda (contraband of war) under a charterparty, and a bill of lading from Pisagua, bound to Cork, Cowes, or Falmouth, for orders to proceed to any safe port in Great Britain or on the continent between Havre and Hamburg, both included, and there deliver the cargo, "the act of God, the Queen's enemies, fire, and all and every other risk, dangers, and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted"; arrived at Falmouth on the 10th of July, 1870, and received orders on the 11th of that month to proceed to the French port Dunkirk, and there deliver her cargo. On the ship's arrival off Dunkirk on the 16th the master was informed by a French pilot that war had broken out between France and Prussia, whereupon the master put back to the Downs to make inquiries, and anchored there on the 17th, which was Sunday. On the 18th, having telegraphed to the owner of the vessel for instructions, he was ordered not to go to Dunkirk, and on the 19th he put into Dover, where he was informed, as the fact was, that war, which had been imminent from the 10th, had been declared between France and the North German Confederation, formal declaration thereof having been given as upon the 19th of July:—Held, that the master was justified in putting back to the Downs for the purpose of ascertaining whether war had been declared, and was guilty of no improper deviation or delay in not returning to Dunkirk before the 19th of July, when war was actually declared. *The Teutonia*, *Duncan* v. *Köster*, 8 Moore, P. C. (N.S.) 411; 41 L. J., Adm. 57; L. R. 4 P. C. 171; 26 L. T. 48; 20 W. R. 421.

Held, also, that the master committed no breach of contract in refusing to deliver the cargo at Dunkirk, and as the charterparty provided what freight was to be paid if the cargo was delivered, the delivery at Dover was within the terms of the charterparty, and the master was entitled to freight for the cargo from the owners before delivery. *Ib.*

When a master receives credible information that if he continues in the direct course of his voyage his ship will be exposed to some imminent peril—as from pirates, or icebergs, or other dangers of navigation—he is justified in pausing and deviating from the direct course, and taking any step that a prudent man would take for the purpose of avoiding the danger. *Ib.*

By a charterparty in the English language entered into at Constantinople between the master of a North German vessel, and North German merchants there resident, it was agreed that the vessel should load a cargo, and proceed therewith to Falmouth, Plymouth, or Queenstown, for orders for a safe port in the United Kingdom, or on the continent between Havre and Hamburg, Queen's enemies, &c., excepted. The cargo was laden. The vessel sailed, but her master learning on his voyage that war existed between France and Germany, and fearing capture by French cruisers, put into Gibraltar. During the war there would have been great risk of capture off that port and off the ports of call if the vessel had continued her voyage; her master in consequence remained there until the end of the war (nine months). He then sailed, and arriving at a port of call was ordered to an English port. The cargo was damaged by the delay. In a claim by the consignees:—Held, that by both English and North German law the master was justified in putting into and remaining in port, and that the shipowners were not responsible for the damage caused by the delay. *The Express*, 41 L. J., Adm. 79; L. R. 3 A. & E. 597; 26 L. T. 956; 1 Asp. M. C. 355.

—— **Risk of Capture.**]—An apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, will justify delay in the prosecution of a voyage; and a ship is not answerable in a suit under the Admiralty Court Act, 1861, s. 6, for damage to cargo caused by such delay. *The San Roman*, *Anderson* v. *San Roman (Owners)*, 42 L. J., Adm. 46; L. R. 5 P. C. 301; 12 W. R. 393; 28 L. T. 381; 1 Asp. M. C. 603.

A charterparty was entered into between an English and a German firm, the owners of a vessel belonging to Hamburg. The charterparty provided that the vessel should proceed to a foreign port, and there load a cargo, and proceed to a port within certain limits mentioned. After the making of the charterparty, and the shipment of the goods, war broke out between Germany and France. On the homeward voyage the ship sustained damage, and was compelled to put into a neutral port for repairs; and finding that French cruisers were in the vicinity, she remained there for a long time after the repairs were completed, to avoid the risk of capture. The risk was such as to render it reasonable and prudent for the master to remain in port. On the departure of the cruisers the master sailed on his voyage, and delivered the cargo according to orders:—Held, that the delay was justifiable. *Ib.*

The master of a North German ship lying at Constantinople entered into a charterparty with North German subjects, there resident, to carry a cargo to a port in the United Kingdom or on the continent, to be delivered to English consignees. The charterparty and the bill of lading given under it were in the English language, and it was stipulated that the ship should call at one of three ports in the United Kingdom for orders. The ship duly called at Falmouth, and was ordered to proceed to an English port to discharge. War then existed between France and Germany. The master sailed from Falmouth, but, through a reasonable fear of capture, put into Dunkirk. The cargo was damaged by the delay:—Held, that the contract was to be construed according to English law, and that the master was justified. *The Wilhelm Schmidt*, 25 L. T. 34; 1 Asp. M. C. 82.

A North German vessel shipped goods in the Black Sea for a port in the United Kingdom or on the continent under an English charterparty, by which she was to call at Falmouth or Plymouth for orders, such orders to be given by the charterer's agent in London by return of post, on receipt of the master's announcement of his arrival. She arrived at Falmouth on August 9th. Orders were given, but not till September 3rd, to proceed to Leith; but from that date to the arrest of the ship, on September 21st, negotiations were going on for discharge of the cargo at Falmouth. Between those dates the winds were light and variable, and the

master remained in port for fear of capture by French cruisers in the channel, war then existing between France and Germany:—Held, that the delay was reasonable, and that neither by English nor German law was the master bound to proceed, and that the negotiations waived the orders to proceed. *The Heinrich*, L. R. 3 A. & E. 424; 24 L. T. 914; 1 Asp. M. C. 79.

Loss of Cargo after Deviation.]—The law implies a duty on the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation from the usual course. *Davis* v. *Garrett*, 6 Bing. 716; 4 M. & P. 540; 8 L. J. (O.S.) C. P. 253; 31 R. R. 524.

A. put on board B.'s barge, lime to be conveyed from the Medway to London. The master of the barge deviated unnecessarily from the usual course, and, during the deviation, a tempest wetted the lime, and the barge taking fire thereby, the whole was lost:—Held, that B. was liable, and the cause of loss sufficiently proximate to entitle A. to recover under a declaration alleging B.'s duty to carry the lime without unnecessary deviation, and averring a loss by unnecessary deviation, *Ib.*

A count, stating that the defendants being owners of a ship at Liverpool bound on a voyage thence to Waterford, the plaintiff shipped goods on board, to be carried upon that voyage by the defendants, and to be delivered at W. to the plaintiff's assigns, and thereupon the plaintiff insured the goods at and from L. to W.; and then averring that it was the duty of the defendants, as such owners, to cause the ship to proceed on the voyage from L. to W. without deviation; and alleging a breach of such duty by their causing the ship to deviate from the course of that voyage; after which she was lost with the goods; and the plaintiff by reason of such deviation lost his goods and the benefit of his policy—cannot be sustained for want of alleging, that the goods were delivered to or received by the defendants for the purpose of carriage, or that they had notice of the shipment, whence a promise or a duty founded upon an agreement to carry the goods might be inferred; and also for want of an allegation, that the defendants undertook to carry the goods directly to W. from L.; for, though the ship's ultimate destination might be W., yet she might have been first destined to other places on a coasting voyage. *Max* v. *Roberts*, 12 East, 89; 2 Bos. & P. (N.R.) 454.

The owners of vessels on the navigation between A. and C., having given public notice that they would not be answerable for losses in any case, except the loss was occasioned by the want of care in the master, nor even in such cases beyond 10*l.* per cent., unless extra freight was paid, the master of one of the ships took on board goods to be carried from A. to B. (an intermediate place between A. and C.) and delivered at B.: the vessel passed by B. without delivering the goods there, and sunk before her arrival at C., without any want of care in the master:—Held, that the owner of the vessel was responsible to the owner of the goods for the whole loss. *Ellis* v. *Turner*, 8 Term Rep. 531; 5 R. R. 441.

"Cargo to be brought to and taken from alongside free of Expense and Risk to the Ship."]—The defendants chartered the plaintiffs' vessel, the "C.," for a voyage to the port of L. The charterparty provided that the cargo was "to be brought to and taken alongside free of expense and risk of the ship"; but it contained no other clause as to discharging the cargo. The number of lighters at L. was small, and when the "C." arrived the port was crowded with vessels, about half of which belonged to the defendants or had been consigned to them. Seventy-two days elapsed after the arrival of the "C." before her discharge was completed by the defendants' agents; but the number of days upon which the cargo was unloaded was only thirty-four. The delay arose from the lighters being engaged in discharging the other vessels lying at the port:—Held, that in determining whether the terms of the charterparty had been broken by the defendants, the delay occasioned by the lighters being engaged in discharging other vessels was not to be taken into account. *Wright* v. *New Zealand Shipping Co.*, 4 Ex. D. 165; 40 L. T. 413; 4 Asp. M. C. 118—C. A.

"Cargo to be discharged with all Despatch according to the Custom of the Port."]—The defendants chartered the plaintiff's vessel, the "C.," to carry a cargo of rails to the port of L. The charterparty provided that the cargo should be taken from alongside at merchants' risk and expense, and should be "discharged with all despatch according to the custom of the port." By the custom of the port of L. vessels were discharged by lighters worked along a warp, and upon the arrival of a vessel she was reported at the port office, and in her turn, with respect to vessels which had previously arrived, one lighter was sent to her every working day until she was discharged. Upon the arrival of the "C." at L., in consequence of the scarcity of suitable lighters, and the number of vessels lying there, the defendants were unable to begin to discharge until twenty-four working days had elapsed. In an action to recover damages for the detention of the "C." at L. during these twenty-four days, the judge directed the jury that there was no obligation upon the defendants to provide one lighter for unloading the cargo of the "C." for every working day after she was ready to unload, and that if the defendants used the existing appliances at L. with due despatch, according to the custom of the port, the jury ought to find for them:—Held, that the direction was correct. *Postlethwaite* v. *Freeland*, 49 L. J., Ex. 630; 5 App. Cas. 599; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C. 302—H. L. (E.)

Delivery of Cargo according to Custom of Port.]—A shipowner was sued on a clause in a bill of lading, by which he was bound to forward the goods by steamer from London to a foreign port, the breach of duty being in not using due diligence to do so, whereby the season was lost:—Held, that it was not enough that he had let the discharge and sorting of the cargo take the usual course of business at the docks where the vessel discharged, if he neglected means which might well have been used to hasten the sorting, and to procure vessels for the transhipment. *Carali* v. *Xenos*, 2 F. & F. 740.

Delivery prevented by Circumstances beyond Charterer's Control—Implied Contract.]—When, by a charterparty, a given number of days is allowed to the charterer for unloading, a contract is implied on his part that, from the time

when the ship is at the usual place of discharge he will take the risk of any ordinary vicissitudes which may occur to prevent his releasing the ship at the expiration of the lay-days. *Tiis* or *Thiis* v. *Byers*, 45 L. J., Q. B. 511; 1 Q. B. D. 244; 34 L. T. 526; 24 W. R. 611.

Delayed by Stress of Weather.]—When the shipowner was prevented from unloading and the charterer from receiving by stress of weather after the arrival of the ship:—Held, that the charterer was liable under the above rule. *Ib.*

Delivery and Payment of Freight — Concurrent Acts.]—By the terms of a bill of lading freight was to be paid, one-third in cash on arrival at B. and two-thirds on right delivery of cargo, by good and approved bills or cash, at shipper's option. The vessel arrived at B., the one-third freight was paid, and the consignee elected to pay the two-thirds in cash:—Held, that the delivery of the cargo and payment of the balance of the freight were to be concurrent acts, and that the master was not bound to deliver the cargo unless the consignee paid, or was ready and willing at the same time to pay, the balance of the freight. *Paynter* v. *James*, 18 L. T. 449; 16 W. R. 768—Ex. Ch.

A master hearing that war had broken out between two powers, to one of which his vessel belonged, stopped at a neutral port for the purpose of obtaining intelligence. While he was thus justifiably engaged in inquiries the consignees demanded delivery of cargo without any payment of freight:—Held, that the master was justified in refusing to deliver the cargo. *The Teutonia*, 8 Moore, P. C. 411; 41 L. J., Adm. 57; L. R. 4 P. C. 171; 26 L. T. 48; 20 W. R. 421.

See also XII. Bill of Lading, Presentation, cols. 313, 314.

Sale of Cargo — Purchaser to Discharge—Practice — Third Party Order — Ord. XVI. rr. 17, 18.]—An action was brought against the defendants for breach of charterparty, by which they had agreed to discharge a cargo of nitrate of soda as fast as the custom of the port would allow. The defendants had sold, at Liverpool, to a company carrying on business in Scotland, the cargo to arrive, and it was shewn that by the custom of the trade, of which the company were aware, on such sale of a cargo the buyers would be bound to discharge in accordance with the custom of the port:—Held, that the defendants were entitled to a third party order against the company. *Swansea Shipping Co.* v. *Duncan, Fox & Co.*, 45 L. J., Q. B. 638; 1 Q. B. D. 644; 35 L. T. 879; 25 W. R. 233; 3 Asp. M. C. 345—C. A.

Delivery—Defects of Ship's Gear.]—Part of a cargo of salt was lost during the discharge by reason of defects in the ship's gear. By the charterparty the cargo was to be "brought to and taken from alongside":—Held, that the shipowners were liable. *Avon Steamship Co.* v. *Leask*, 18 Ct. of Sess. Cas. (4th ser.) 280.

Consignee not ready to Receive—Refusal of Shipowner to deliver Part.] — The bill of lading provided that the consignee of goods should be ready to receive them at the ship's side as soon as she was ready to deliver, and in default that the shipowner was to land them at the consignee's risk and expense. The consignee was not ready to receive the goods, and, when part had been landed by the shipowner, he claimed delivery of the rest. The shipowner refused, and landed the rest himself:—Held, that, unless prejudiced by such delivery, the shipowner was bound to deliver to the consignee the part of the goods claimed. Semble, the Merchant Shipping Act Amendment Act, 1862, 25 & 26 Vict. c. 63, s. 67, should be similarly construed. *Wilson* v. *London, Italian and Adriatic Steam Navigation Co.*, 1 H. & R. 29; L. R. 1 C. P. 61; 12 Jur. (N.S.) 522; 13 L. T. 465.

Landing Goods without Notice to Consignee —Liability for Loss by Fire after Landing.]—A carrier by sea, under a bill of lading of goods, "to be delivered in the like good order, &c., at the port of, &c., unto A. or his assigns, on paying for the goods, freight and charges, as per margin, with primage and average accustomed," is not entitled, immediately on the arrival of the vessel, and without notice to the owner, to land the goods; and if he should land them, and they should be destroyed by fire, he will be answerable to the owner for the loss. *Bourne* v. *Gatliff*, 11 Cl. & F. 45; 8 Scott (N.R.) 604; 7 Man. & G. 850.

Liability of Shipowner to cease on Delivery from Deck.] — Goods were shipped under a bill of lading which contained these words, "to be delivered from the ship's deck, where the ship's responsibility is to cease." The usage at the port required that the unloading should be done by the dock company, at the expense of the shipowner, on to a quay, and then that the consignee should send lighters into which the goods were delivered also by the dock company, and also, if not within a specific time, at the expense of the shipowner. The usage was followed, but one bale of goods was lost after delivery on to the quay, and before delivery into the lighters:—Held, that the shipowner was not responsible for the loss to the consignee. *Petrocochino* v. *Bott*, 43 L. J., C. P. 214; L. R. 9 C. P. 355; 30 L. T. 840; 2 Asp. M. C. 310.

Refusal to Deliver without Payment of Freight —Liability for Demurrage.]—By charterparty the shipowner agreed with the freighter to deliver cargo at a named port on payment of freight according to bills of lading; lay days allowed, and demurrage afterwards; the bills of lading stipulated for delivery to the freighter or his assigns paying freight as by charterparty. The defendant, assignee of the bill of lading, demanded and received delivery of part of the goods, but the plaintiff refused to deliver the rest without payment of freight. The defendant refused to pay freight and the remaining lay days expired and demurrage became payable. The plaintiff then delivered the rest of the goods and freight was paid:—Held, that the plaintiff could not recover against the defendant for not receiving the goods, whereby demurrage became payable. *Young* v. *Moeller*, 5 El. & Bl. 7, 755.

Delivery on Wharf contrary to Orders—Wharfage Dues—Trover.]—The owner of goods on board a ship directed the master not to land them on the wharf against which the ship was lying, which he promised not to do, but afterwards did, delivering to the wharfinger for the owner's use, thinking that there was a lien for wharfage dues:—Held, that the goods owner

could maintain trover against the captain unless the latter could prove the wharfinger's right. *Syeds* v. *Hay*, 4 Term Rep. 260; 2 R. R. 377.

Sufferance Wharfs.]—The acts relating to landing goods at a sufferance wharf were for the protection of the shipowner. *Barber* v. *Meyerstein*, 39 L. J., C. P. 187; L. R. 4 H. L. 317; 22 L. T. 808; 18 W. R. 1041.

Delivery, when Complete.]—Where goods are shipped for delivery at a certain port, the general rule is that delivery of each bale is complete as soon as it passes over the ship's side into the hands of the harbour porters employed by the consignees. *British Shipowners Co.* v. *Grimoud*, 3 Ct. of Sess. Cas. (4th ser.) 968.

b. Manner.

Discharge of Cargo "into Lighters"—Duties of Shipowner and Consignee.]—The plaintiff's ship was chartered for the carriage of a cargo of spars from Christiania to the Surrey Commercial Docks in the port of London. By the charterparty the ship was to discharge "over side in the river or dock into lighters or otherwise if required by consignees." In an action by the plaintiff against the consignees of the cargo for demurrage:—Held, that under the charterparty the shipowner was only bound to put the goods within the reach of the consignees' men in the lighters, and that it was then their duty to take part in the operation; that the delay had arisen from the fault of the consignees in not having a sufficient number of men upon their lighters for the purposes of taking delivery within the lay days, and that the shipowner was therefore entitled to claim demurrage. *Petersen* v. *Freebody*, 65 L. J., Q. B. 12; [1895] 2 Q. B. 294; 14 R. 493; 73 L. T. 163; 44 W. R. 5; 8 Asp. M. C. 55—C. A.

Deals—Delivery into the Water—Acquiescence by Consignees.]—By charterparty a timber cargo was to be delivered as customary at the port of discharge at a wharf or dock to be named by the consignees. The ship was ordered by the consignees to discharge at Queen's Dock, Glasgow, but the harbour-master refused a berth there and ordered the ship to a berth where the deals had to be discharged into the water. The consignees took discharge there, and sued the shipowner for damage to the deals by water:—Held, that having acquiesced in the mode of discharge, they could recover nothing. *Thorsen* v. *McDowall*, 19 Ct. of Sess. Cas. (4th ser.) 743.

See also as to discharge of timber, *La Cour* v. *Donaldson*, ante, col. 473.

c. Place.

See also ante, XIV. DEMURRAGE, col. 461.

Delivery of Cargo at Safe Port.]—A shipowner entered into a charterparty with the consignor of goods by which he was to deliver them at a good and safe port to be named by the consignor. The consignor named a port at which it was found that the ship could not safely unload, and the captain proceeded elsewhere and unloaded. The consignee brought an action against the captain for damages for delivering elsewhere; the consignor wrote to the captain, "We would recommend you to settle the matter in the best way you can." The shipowner defended the action, and was ultimately successful; but he incurred considerable costs in excess of those which the unsuccessful party had to pay:—Held, in an action by the shipowner against the consignor, that, such costs not being damages flowing from the consignor's breach of contract, and the consignor not having given authority to incur them, the shipowner could not recover them; that the amount recoverable by the shipowner in respect of port dues was only the difference between what he would have paid had the ship unloaded at the port named, and what he actually did pay; and that insurance on the voyage from the port named to a safe port must be taken to have been included in the claim for demurrage, which had been allowed in full. *Evans* v. *Bullock*, 38 L. T. 34; 3 Asp. M. C. 552.

At which Port or Dock.]—The plaintiffs were indorsees of the bill of lading of a cargo which, according to the charterparty, which contained a reference to the bill of lading, was to be unloaded at S., "at the usual place of discharge, and according to the custom of the port." On the arrival of the vessel at S. the master put into the South Dock, when the indorsees of the bill of lading ordered him to remove her to the Gill Dock, which the master refused to do until he had been paid the expenses incurred by entering the South Dock. Both docks were usual places of delivery for a similar cargo as that in the bill of lading:—Held, that, in default of a custom to the contrary being proved, the master was not bound to lie in the river waiting for instructions, and was justified in mooring in the South Dock, but that, having received directions to deliver his cargo in the Gill Dock, he was bound to obey them. *The Felix*, 37 L. J., Adm. 48; L. R. 2 A. & E. 273; 18 L. T. 587.

Under an open charterparty to deliver a cargo at a certain port, it is the duty of the master to obey the directions of the owner of the cargo as to the place of discharge in such port. *Ib.*

If before the directions of the owner of the cargo are received, the master has already incurred expenses by going to another place of discharge, he is not entitled to prepayment of those expenses as a condition of going to the place of discharge directed. *Ib.* See *The Bahia*, ante, col. 521.

Refusal of Freighter to name Wharf.]—By a charterparty the owner of a ship was to carry a cargo of coals to London, and there deliver the same "at a good and safe wharf" to the freighter or assigns, paying freight 6*s.* per ton. One market-day to be allowed for sale or 1½*d.* per ton additional freight for each market-day's detention thereafter. The vessel came into collision with a steam-tug in the Thames, and was sunk with the cargo on board, but was got up, and on the afternoon of the 23rd of April arrived at a pier at Wapping, whither she was ordered by the harbour-master. Notice of her arrival was on the same day given to the agents of the freighter, and they were required to name a wharf; but they declined to do so. On the 24th the ship and freight were arrested by process out of the admiralty court in a suit instituted by the owners of the tug:—Held, that the shipowner was entitled to recover, as damages for the refusal to name a wharf, and so refusing to accept the cargo, the amount which he would have received as freight if the cargo had been duly delivered—there having been a complete breach before the arrest; but that he was not entitled to demurrage. *Stewart* v. *Rogerson*, L. R. 6 C. P. 424.

Obtaining Pratique or Permission.]—A declaration on a charterparty stated, that "the vessel was ready to be unloaded on a certain day at W., and had received pratique," and issue thereon. It was proved that no custom-house existed at W.; that no sanitary regulations were adopted; and that a licence to unload was never granted. The jury found, that the vessel was ready to be unloaded on the said day, but that she had not received pratique, and they found a verdict for the defendant:—Held, that what took place was equivalent to pratique, and that in substance the issue was found for the plaintiff. *Balley* v. *D'Arroyare*, 3 N. & P. 114; 7 A. & E. 919; 7 L. J., Q. B. 91.

Sale of Cargo—Port of Delivery to be Named by Purchaser—Bill of Lading.]—See *Bateman* v. *Green*, col. 545.

d. Refusal to Receive.

Dispensing with Delivery.]—A declaration set forth an executory contract, by which the defendant was, on the arrival of a vessel at Belfast, to become the purchaser of a third of her cargo, at a stipulated price, which was to be paid by him to the plaintiff, after delivery of the cargo to the defendant, at Belfast, and alleged that the defendant, before the arrival of the ship at Belfast, discharged the plaintiff from delivering the cargo, and thenceforth wholly refused to perform the contract:—Held, that the defendant was not bound to answer an inquiry made by the plaintiff before the arrival of the ship, as to whether he intended to fulfil the contract. *Ripley* v. *M'Clure*, 4 Ex. 345; 18 L. J., Ex. 419.

Held, also, that a refusal by the defendant to perform the contract made before the arrival of the ship was not in itself a breach of the contract, but that a refusal at any time, unretracted up to the time of the arrival of the vessel, was evidence of a continuing refusal down to and inclusive of the time when he was bound to receive the cargo, and that a continuing refusal was a breach of the contract. *Ib.*

Held, also, that such a refusal before arrival was a waiver, at the time of the delivery of the cargo, and if unretracted, dispensed with the actual delivery of the cargo after arrival. *Ib.*

Held, also, that the defendant, by insisting that the cargo should be delivered to him at Belfast, but upon terms other than those of the contract, did not withdraw his refusal, or retract his waiver, discharging the plaintiff from delivering the cargo then under the contract. *Ib.*

It was stipulated by a charterparty, made between the plaintiffs and the defendants, that the master of the ship should sign bills of lading as presented, or pay a named penalty. He refused to sign bills of lading, and sailed without doing so. He proceeded to the port of discharge, delivered a portion of the cargo to the consignees, but ceased doing so, and warehoused the remainder, as they, acting under instructions from the charterers, claimed to deduct from the freight an amount equal to the penalty named in the charterparty:—Held, that the charterers were entitled to nominal damages against the owners for not signing the bills as presented, but that they were not entitled to recover for conversion, as the acts of the plaintiffs had prevented the delivery. *Jones* v. *Hough*, 49 L. J., Ex. 211; 5 Ex. D. 115; 42 L. T. 108; 4 Asp. M. C. 248—C. A. See *Reyner* v. *Rederiaktiebolaget Condor*, supra, col. 317; *Shirwell* v. *Shaplock*, post, col. 554, *and cases* infra.

Quay Berth—Refusal to Discharge until Alongside.]—A ship was chartered to discharge at "Dundalk quay." She arrived at the quay and moored alongside a vessel that occupied the only berth at the quay. The ship was ready and the master offered to discharge either into lighters or over the deck of the ship alongside, if the charterer would pay for labour and stages. There was evidence that ships usually discharged alongside the quay. The charterer refused to discharge until the ship was alongside the quay; and she was detained until the other ship had loaded:—Held, that the charterer's obligation to discharge did not begin until the ship was alongside the quay. *Strahan* v. *Gabriel*, 1 Maude & Pollock on Sh., 4th ed. p. 407, note *k*.

Timber Cargo—Refusal to Receive in Rafts.]—See *La Cour* v. *Donaldson*, ante, col. 473.

e. Warehousing.

And see, supra, 8. DUTY OF MASTER TO PRESERVE, &c., col. 520.

No Warehouses.]—Where consignees do not appear to claim goods at the port of discharge, and there is no statutable warehouse, semble, that the master may still land the cargo without losing his possession and control over it (placing the goods in a warehouse belonging to or hired for his owners), and so preserve his lien. *Mors-le-Blanch* v. *Wilson*, 42 L. J., C. P. 70; L. R. 8 C. P. 227; 28 L. T. 415; 1 Asp. M. C. 605.

Where no application for delivery is made, the captain may land and warehouse the cargo at the expense of the merchant; and where that is forbidden by the authorities of the port, he is not justified in destroying the cargo; but in the absence of advices, he may take it to such a place as in his judgment is most convenient, and may charge to the merchant all expenses properly incurred. *Argos, Cargo ex, Gaudet* v. *Brown*, L. R. 5 P. C. 134; 28 L. T. 745; 21 W. R. 707; 2 Asp. M. C. 6.

Late Delivery.]—Under the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 67, a shipowner may land goods whenever the delivery of them to the owner within the proper time has been prevented by the force of circumstances, whether the owner is or is not to blame. *The Energie, Miedbrodt* v. *Fitzsimon*, 44 L. J., Adm. 25; L. R. 6 P. C. 366; 32 L. T. 579; 23 W. R. 932; 2 Asp. M. C. 555.

And see XIII. FREIGHT, 4. LIEN ON CARGO.

Duty of Shipowner—Notice.]—When goods are landed under sub-s. 6, 25 & 26 Vict. c. 63, s. 67, sub-s. 7, does not apply, for the latter refers only to the discharging of cargo overside, and not to the landing of it for the purposes of assortment on the wharf, and the written notice referred to in sub-s. 7 applies, therefore, to cases arising under that sub-section only. It is the duty of the owner of goods who receives either a written or verbal notice that he can have them to take them away within a reasonable time, and that whether sub-s. 6 or 7 applies to the case. Notice to the lighterman employed by the owner of the goods is notice to the owner him-

self. A ship arrived in dock with a general cargo on the 12th of December, and began to unload on the quay on the 13th. The plaintiffs (owners of some of the goods) sent a lighterman and barge to receive their portion of the cargo on the 13th. It was not then ready. On the 14th the lighterman again attended, but could obtain no information. On the 14th the firm of lightermen wrote to the defendants (the shipowners), stating they had made application for the goods, and inclosing a notice requiring twenty-four hours' notice of the defendants' readiness to deliver the goods, and stating that they would not be responsible for any landing charges. On the 15th the landing of the cargo was completed, and the lighterman was that day verbally informed he could have the goods on the morning of the 16th. He did not attend, and the goods were not taken away till the 29th. The plaintiff paid the dock charges under protest, and brought an action to recover them back:—Held, that they could not recover them. *The Clan Macdonald*, 52 L. J., Adm. 89; 8 P. D. 178; 49 L. T. 408; 32 W. R. 154; 5 Asp. M. C. 148.

Ability of Owner to take Delivery.]—By 25 & 26 Vict. c. 63, s. 67, where the owner of goods imported fails to make entry thereof, or having made entry, to land the same or take delivery thereof within a certain time, the shipowner may make entry of, and land or unship the goods at the time and in the manner and subject to certain conditions, and, if at any time before the goods are landed or unshipped, the owner has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharged, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods, or of such wharf or warehouse as last aforesaid, twenty-four hours' notice in writing of his readiness to deliver the goods:—Held, that to entitle himself to notice under this condition, the owner of the goods must at the time of his offer be in a condition actually to take delivery thereof. *Berresford* v. *Montgomerie*, 17 C. B. (N.S.) 379; 34 L. J., C. P. 41; 10 Jur. (N.S.) 823; 10 L. T. 814; 12 W. R. 1060.

Where the shipowner, at the time of the offer to take delivery, is not able to make it, he is not excused from the duty of giving twenty-four hours' notice of his readiness to deliver, because the owner of the goods or his agent does not ask for correct information of the time at which such can be delivered. *Ib.*

Goods Landed on Wharf instead of Lighter.]—A bill of lading provided that "simultaneously with the ship being ready to unload the goods or any part thereof," the consignee should be ready to receive the same from the ship's side, either on the wharf or quay at which the ship might lie for discharge, or into lighters, and, in default, the master or agent of the ship was authorised to land the goods at the risk and expense of the consignee. Under this bill of lading, sixty-five pipes of lemon juice were loaded on board a steamer trading between the Mediterranean and London, which arrived at London on the 23rd of March, and early on the morning of the 24th was ready to deliver at the wharf, and had landed fifteen of the sixty-five pipes on the wharf before the holders of the bills of lading were ready with their lighter; they then applied for the delivery of the remainder into their lighter, which the shipowners refused, and landed them on the wharf. In an action to recover wharfage charges and demurrage for detention of the lighter:—Held, that, under the bill of lading, and 25 & 26 Vict. c. 63, s. 67 (5), the shipowners assuming that they would incur no loss or expense by unloading the remaining pipes into the lighter, instead of on the wharf, were bound to deliver them to the holders of the bill of lading; and therefore they were entitled to recover. *Wilson* v. *London, Italian and Adriatic Steam Navigation Co.*, 1 H. & R. 29; 35 L. J., C. P. 9; L. R. 1 C. P. 61; 12 Jur. (N.S.) 52; 13 L. T. 435; 14 W. R. 101.

Goods Landed—Fire.]—To a declaration on a contract by the master of a steam-vessel, to convey goods from Dublin to London, and to deliver the same at the port of London, a plea that, after the arrival of the vessel at London, the defendant caused the goods to be deposited on a wharf, there to remain until they could be delivered to the plaintiff, the wharf being a place where goods from Dublin were accustomed to be landed, and fit and proper for such purposes, and that, before a reasonable time for delivery elapsed, they were destroyed by a fire, which broke out there by accident:—Held, ill. *Gatliffe* v. *Bourne*, 4 Bing. (N.C.) 314; 5 Scott, 667; 7 L. J., C. P. 172.

—— **Dock Expenses.**]—In an action by consignees against a shipowner for non-delivery of goods according to bills of lading, in which there was a condition that the goods should be taken from the ship by the consignees immediately the ship was ready for discharge, and that otherwise they would be landed or put into craft at the merchant's risk and expense, and the goods having been landed at a dock the day after the ship was ready for discharge, but after the consignees were ready to receive on payment of freight, and the goods having been detained for some time for dock charges, payment of which was refused:—Held, that it was for the jury whether the consignees had complied with the condition, or whether, if not, the shipowner had gone beyond it in landing the goods, but that, even if the consignees were entitled to recover, yet, since they might have received the goods on payment of a small sum under protest, they would not be entitled to recover full damages for the delay, as their proper course was to have paid the disputed sum, under protest. *Alexiadi* v. *Robinson*, 2 F. & F. 679.

Custom of Port of London—Landing on the Quay.]—A bill of lading stipulated (inter alia) that "the merchandise shipped thereunder was to be received on the quay at London, and delivered therefrom by the person appointed by the steamship's agent, &c., the merchandise to be received and delivered according to the customs and usages of the respective ports." A custom was proved with regard to grain cargoes coming to London, that if the merchant does not demand delivery of the grain within twenty-four hours

after the ship's arrival, the ship is entitled to discharge the goods on the quay. The merchant did not demand delivery of the cargo within the twenty-four hours, and it was landed on the quay:—Held, that the custom was not inconsistent with the terms of the bill of lading, and that therefore the merchant was bound to pay the expenses incurred in weighing out the cargo and the quay rates. *Aste* v. *Stumore*, 1 Cab. & E. 321, n. Reversing *S. C.*, 1 Cab. & E. 319.

Goods were shipped under a bill of landing at Calcutta to be delivered in like good order and condition from the ship's tackles at the port of London. On arrival in the port of London the consignee demanded overside delivery into lighters immediately from the ship's tackles. The shipowner landed them on the dock wharf, and was ready to deliver them thence into the consignee's lighters, but the consignee carted them away, thereby becoming liable to certain dock charges, which he paid. In an action by the consignee to recover the amount so paid, the jury found that there was a custom for steamships having a general cargo (the defendant's ship being such) coming into the port of London and using the docks, to discharge the goods on to the quay, and thence into lighters:—Held, that the custom found was not inconsistent with the terms of the bill of lading, and that the shipowner was entitled to discharge the goods on to the quay, and was not liable for the charge sought to be recovered. *Marzetti* v. *Smith*, 49 L. T. 580; 5 Asp. M. C. 166—C. A. Affirming 1 Cab. & E. 6.

10. Jettison.

See also XVII. Average.

Safety of Life—Passengers throwing Cargo Overboard.]—Passengers, for the safety of their lives, may cast cargo overboard without being liable to the owners of it. *Mouse's Case*, 12 Co. Rep. 63.

Cargo—Jettison—Rights of Cargo Owner.]—Where a ship is stranded by the negligence of her master, and a jettison of cargo is properly made:—Held, that the cargo owners are entitled to general average contribution; secus as to the shipowner. *Strang, Steel & Co.* v. *Scott*, 59 L. J., P. C. 1; 14 App. Cas. 601; 61 L. T. 597; 38 W. R. 452; 6 Asp. M. C. 419—P. C.

Rights and Remedies of Cargo Owner in case of Jettison considered.]—*Ibid.*

11. Sale, Assignment, and Mortgage.

Sale on the Hypothesis of its Existence.]—Merchants at Smyrna chartered a vessel, and loaded it at Salonica with a cargo of Indian corn. The bill of lading was indorsed by them, and sent, together with the charterparty, to B., their agent in London, with instructions to sell the cargo on their account. They also, through B., insured the cargo "at and from Salonica to the port of discharge in the United Kingdom," "corn warranted free from average, unless general, or the ship be stranded." Corn factors in London were accordingly, on the 1st May, 1848, employed by B. to sell the cargo, and they sold it to C. on the 15th May. The bought note stated that C. had bought of them "a cargo of about 1,180 quarters of Salonica Indian corn," &c., "of a fair average quality when shipped," &c., "27*s.* per quarter free on board, and including freight and insurance to a safe port in the United Kingdom;" "payment at two months from this date, or in cash, less discount," &c., "upon handing shipping documents." The vessel sailed from Salonica with a cargo described in the bought note, and was obliged to put into Tunis in distress. It was there found that from the heated and damaged state of the corn it was unfit to be carried farther, and it was consequently unshipped, and sold by the captain on the 24th April. The parties interested in the cargo were ignorant of these facts till after the sale to C.:—Held, that the contract was for the sale of a cargo supposed to exist and to be capable of transfer, and that, as it had been sold and delivered to others before the sale to C., the corn factors were not liable. *Couturier* v. *Hastie*, 5 H. L. Cas. 673; 25 L. J., Ex. 253; 2 Jur. (N.S.) 1241—H. L. (E.)

Assignment — "Appurtenances."]—B., being entitled to a moiety of a ship engaged in the whale fishery, executed a bill of sale of such moiety, together with a moiety of the tackle of the ship and the appurtenances to the ship belonging to H., for the purpose of indemnifying him against certain bills accepted by H. to accommodate B.:—Held, that the cargo did not pass under the word "appurtenances." *Langton* v. *Horton*, 5 Beav. 9; 6 Jur. 357. *S. C.* on another point, infra.

—— Bankruptcy, Order and Disposition.]—A. was the owner of a ship which, in March, 1857, sailed for the coast of Africa, and in May and July she was supposed by him to be upon that coast, completing her cargo of palm-oil, and it was also expected that she would be home again about October. On the 11th of November, 1857, the ship had not arrived, and A. assigned the cargo to B.; and on the 23rd of January, 1858, B. sent by post, to the captain, notice of such assignment. This notice never reached the captain. The ship remained on the coast of Africa till the 12th of February, 1858, when she set sail and arrived at Bristol on the 14th of April. A. had become bankrupt on the 1st of March, 1858, and when the ship arrived his assignees claimed the cargo:—Held, that they were not entitled to it, as there had been no default upon the part of B., and as, therefore, the cargo could not be said to be in the possession of A. at the time of his bankruptcy, as reputed owner, by the consent and permission of the true owner. *Acraman* v. *Bates*, 2 El. & El. 456; 29 L. J., Q. B. 78; 6 Jur. (N.S.) 294; 1 L. T. 322.

A., by deed, assigns the cargo of two ships to B. and C., but has no charterparty or bill of lading to deliver to them. On the arrival of one of the ships, he assigns to another person, and afterwards commits an act of bankruptcy;—Held, that B. and C., not having been ready to take possession of the ship on her arrival, had thereby permitted A. to continue reputed owner under the statute 21 Jac. 1. *Philpott* v. *Williams*, 2 Eden, 231.

Advance on Cargo—Consignee for Sale—Lien of Vendor.]—A. being interested in a moiety of a cargo, and having entered into a contract with B. to let him have half his share, wrote to C.

and D., the consignees, informing them and authorising them to sell the cargo, and carry the proceeds to their separate accounts. The consignees acted upon this, and made advances to B., and B. also charged his interest in favour of E. It had been agreed between A. and B. that they should pay for the cargo by two bills each to be paid by one of them. B. did not pay his bill. It did not appear whether A. had paid it or not:—Held, that A. had no lien on the proceeds of B.'s share, either as against him or as against C. and D., or against E. *Holroyd* v. *Griffiths*, 3 Drew. 428.

Consignee — Bills drawn against Cargo — Lien.]—The general lien of a consignee cannot be set up in opposition to a positive appropriation by the consignor of cargo to the payment of specified bills of exchange. *Frith* v. *Forbes*, 32 L. J., Ch. 10; 8 Jur. (N.S.) 1111; 7 L. T. 261; 11 W. R. 4—L.JJ.

Direction to pay out of Proceeds—Lien.]—A. consigns a cargo to B., with a direction to pay to C., out of the proceeds, a sum of money, and writes C. to that effect; C. has no lien on the proceeds. *Heywood, Ex parte*, 2 Rose, 355.

Of future Cargo — Lien for Purchase-money supplied.]—Under an assignment of a ship and her present and future cargo, freight and earnings, by the owner, for securing to the assignees all moneys which they had advanced, or might become liable to pay, on account of the vessel and her cargo, which they had furnished the means of purchasing:—Held, that the assignees, who were also the ship's agents, were entitled to retain a bill which was given for the purchase of part of the homeward cargo, and was remitted but not indorsed to them by the owner; notwithstanding he denied that it was remitted in payment, and stated that they had not paid, and, contrary to an express understanding, had left him personally liable to some of the debts incurred in fitting out the vessel; and an injunction which had been obtained by the assignees, restraining an action of trover for the bill, was continued until the hearing. *Curtis* v. *Auber*, 1 Jac. & Walk. 526.

Execution Creditor.]—Equitable assignment of a future cargo (whales to be caught), perfected by possession taken on the ship's arrival, held good as against an execution creditor. *Langton* v. *Horton*, 1 Hare, 549; 11 L. J., Ch. 299. *S.C.*, on another point, supra.

Fraud—Bills accepted against Cargo—Subsequent Sale.]—A. chartered a ship in his own name, and consigned it to B. in Cuba, under an agreement that B. should ship goods and consign them to A., and that A. should accept B.'s bills for their value. After A. had accepted bills on the faith of the agreement, B. sold the cargo to C., who had notice of the terms of the charterparty, and that it was consigned to another person:—Held, that assuming that the fact of A.'s appearing principal on the charterparty made it incumbent on C. to ascertain the relations between A. and B., yet that, as B. was actually the principal, and not the agent of A., C. could safely deal with him for the cargo, and that the circumstances that B. had committed a fraud on A. did not prevent C. from obtaining a good title to the goods. *Zulueta* v. *Tyrie*, 15 Beav. 577.

A merchant in Cuba sold part of a cargo shipped by him to B., and C. (who was A.'s correspondent in England), being informed thereof by B., made no claim until four months afterwards, when he insisted on a paramount right over B. to the cargo:—Held, that even assuming he had originally such right, his conduct had been such, that a court of equity would not allow him to enforce it against B. *Ib.*

Sale by Consignor—Property in Consignor or Consignee.]—When by a bill of lading goods are made deliverable to the shipper, or his order, and not to the consignee, the jus disponendi, or control over the property in the goods shipped, remains with the shippers, although the invoice states that the goods were shipped "on account of and at the risk of" the consignee; such statement being not conclusive, of itself, that the right to the possession of, as well as the property in, the goods was intended to be unconditionally passed to the consignee. *Shepherd* v. *Harrison*, 40 L. J., Q. B. 148; L. R. 5 H. L. 116; 24 L. T. 857; 20 W. R. 1; 1 Asp. M. C. 66—H. L. (E.)

The burden of shewing the existence of a different state of things lies with the person who contradicts what would be the ordinary legal conclusion from the transaction. *Ib.*

Purchaser taking Risk of Voyage.]—C. agreed with P. to ship on board a vessel a cargo of fresh-water ice, and to despatch the vessel with all speed to any ordered port in the United Kingdom, "the vendor forwarding bills of lading to the purchaser, and upon receipt the purchaser takes upon himself all risks and dangers of the seas"; and purchaser agreed to buy and receive the ice on its arrival, and pay for it in cash on delivery, at the rate of 20*s.* a ton of 20 cwt., weighed on board during delivery. The vessel was lost during the voyage by risks and dangers of the seas within the meaning of the agreement, and after the receipt by the purchaser of the bills of lading. The vendor having brought an action against the purchaser to recover the value of the cargo:—Held, that he was entitled to recover. *Castle* v. *Playford*, 41 L. J., Ex. 44; L. R. 7 Ex. 98; 26 L. T. 315; 20 W. R. 440; 1 Asp. M. C. 255—Ex. Ch.

Delivery of Clean Bill of Lading — Non-acceptance of Bill of Exchange by Purchaser.]—In January, 1868, C. & Co. contracted to purchase 1,400 quarters of rye, then at Salonica, from the plaintiffs, at 41*s.* per quarter, free on board, March shipment, the plaintiffs finding the vessel. The plaintiffs having chartered the "Agatha," the captain on loading her informed the bank that she would take from 200 to 300 quarters of rye beyond that ordered by the defendants. The plaintiffs, being unable to obtain any rye, purchased seventy quarters of maize to make up the cargo. The rye and maize were shipped on board, and one bill of lading was made out for both rye and maize and sent to the plaintiffs. The maize was then offered to the defendants, and two invoices and two bills of exchange were made out, one for the rye, the other for the maize. The defendants, who refused to have anything to do with the maize, had in the meantime sold the rye to C., but C., on finding there was not a clean bill of lading, refused to accept either it or the bill of exchange. The plaintiffs on being informed of this informed the defendants,

that they would discharge the maize from the ship at their own expense, and shortly afterwards indorsed the bill of lading as follows: "Deliver the rye to Messrs. C. & Co. or their order, and the within-mentioned maize to us or our order. The delivery of the maize, and the freight, and all charges thereon to be at our expense, and the maize to be delivered so as not to interfere with the working and delivery of the rye":—Held, that the delivery of a clean bill of lading was not a necessary condition of the contract, the plaintiffs having been ready to pay all the expenses incident to the maize being included in the bill of lading, and also absolutely and unconditionally to deliver the rye in time; and also that there was a sufficient delivery to entitle the plaintiffs to recover for non-acceptance. *Imperial Ottoman Bank* v. *Cowan*, 31 L. T. 336; 2 Asp. M. C. 418—Ex. Ch.

Naming Port—Right of Purchaser of Cargo—Bill of Lading.]—Where a grain cargo was sold upon terms that the purchaser should have the right to name a port in the United Kingdom to which it was to be brought, and bills of lading were taken by the vendors without consulting the purchasers as to the port of delivery:—Held, that the vendors could not recover against the purchasers for not accepting the cargo. *Knox* v. *Mayne*, Ir. R. 7 C. L. 557; *Bateman* v. *Green*, Ir. R. 2 C. L. 166.

Retaining Bill of Lading.]—When an unpaid vendor shipping goods under a contract of sale takes a bill of lading making the goods deliverable to his order, and retains such bill of lading in his own or his agent's hands for his own protection, he does not reserve the vendor's lien only, in case of the purchaser's making default in payment of the price, but reserves a right of disposing of the goods so long at least as the purchaser continues in default. *Ogg* v. *Shuter*, 45 L. J., C. P. 44; 1 C. P. D. 47; 33 L. T. 492; 24 W. R. 100; 3 Asp. M. C. 77—C. A.

Custom of Vendors to hold Bills of Lading.]—A. having ordered goods from B., a firm at Calcutta, through C., their agent in this country, received an invoice of the goods, with a notice that B. had drawn upon him for the price at six months. On calling at C.'s office, A. was met by C.'s messenger, who handed to him for his acceptance the bill of exchange drawn upon him in respect of the goods, and the bill of lading, which was pinned to the bill of exchange. A. accepted the bill of exchange, and afterwards deposited the bill of lading with E. as a security for an advance, together with a policy of insurance upon the goods effected by himself in his own name, C. having declined to part with the original policy on the ground that it included other goods besides those purchased by A. A. having become bankrupt, and unable to take up his acceptance, the goods were claimed by B. and C., on the ground that the bill of lading had been improperly pledged, having come into A.'s hands irregularly, and without their knowledge, and contrary to an alleged custom amongst East India merchants not to part with the bill of lading of goods until the vendee has taken up his acceptances on account thereof:—Held, that the alleged custom of trade was merely exceptional, and was not established as being the usual course of business; and that the title of E., as bonâ fide assignee for value, must prevail over any claim by the unpaid vendors. *Coventry* v. *Gladstone*, 37 L. J., Ch. 30; L. R. 4 Eq. 493; 16 W. R. 304.

Sale of Cargo to include Cost Freight and Insurance—Bill of Lading indorsed to Purchaser—Transfer of Property — Charterparty.]—See *Delaurier* v. *Wyllie*, XI. CHARTERPARTY, supra, col. 237.

War Risk—Agreement to Insure.]—An agreement for purchase of a cargo of oats to be shipped by the "Ems," a German ship, at Archangel, stipulated that the seller should pay "cost freight and insurance to London or the east coast of Great Britain according to charterparty, . . . payment to be made in London on handing invoice and in exchange for shipping documents." After the agreement was made war between France and Germany was declared:—Held, that the seller was bound to insure against war risk; and that having refused to do so, the purchaser was entitled to rescind the contract. *Birkett* v. *Engholm*, 10 Ct. of Sess. Cas. (4th ser.) 170.

Delivery Order of Cargo to arrive—Bankruptcy—Lien.]—On the 20th of August, 1857, B., the senior partner of a firm of Bristol merchants and shipowners, being then in London, delivered to the plaintiff, for valuable consideration, a delivery order, directing D., one of the partners of B., then at Bristol, in whose name the wharfage business of B.'s firm at Bristol was carried on, to deliver to the order of the plaintiff "fifty tons of palm oil out of the first of our ships which shall arrive, whether it be the 'Glenelg,' 'Arab,' 'Mary Ann B.,' or 'Victory.'" On the following day the Bristol firm suspended payment, and their affairs were wound up, under the provisions of the arrangement clauses of the bankrupt act, by deed of assignment, dated the 8th of September, 1857, of which the defendants were trustees. The deed provided that no creditor having a specific lien or security for his debt, who executed the deed, should be prejudiced as to his security. Notice of delivery order was given to the defendants at latest on the 5th of September. The first of the ships named in the order which came to port arrived at Bristol on the 23rd of October, 1857; but of her cargo only twenty-seven tons of palm oil remained unaffected by contracts for sale, entered into by B.'s firm before the date of the delivery order:—Held, that the delivery order was an assignment of and a valid security upon fifty tons of palm oil, the first that should arrive belonging to the firm of B. & Co., in the ships named in the order. *Rayner* v. *Harford*, 27 L. J., Ch. 708; 4 Jur. (N.S.) 703; 6 W. R. 743.

Quantity Stated in Bill of Lading.]—Upon a purchase and sale of corn afloat, made before the arrival in England of the shipping documents, the written contract was in form "for the purchase of the cargo per 'Prima Donna,' from Ibraila, now at Queenstown, as it stands, consisting of about 1,300 quarters Ibraila Indian corn, at the price of 30*s.* per imperial quarter, free on board, including freight and insurance to a safe port in the United Kingdom; the quantity to be taken from the bill of lading, and measure calculated at 220 quarters = 100 kilos. Payment, cash on handing shipping documents." Upon the arrival of the bill of lading, it was found to be expressed as for a shipment at Ibraila of "1,667 quarters; quantity and quality unknown to the master."

Whereupon the vendee paid to the vendor as for 1,667 quarters, deducting freight on that number of quarters; but on delivery it was found that the cargo really contained only 1,614 quarters:—Held, that the construction of the contract was, that it was a sale of the cargo, whatever it might be, at a price which was to depend upon the amount which should be found stated in the bill of lading when it should come to hand, and not upon the real amount of corn; that the purchaser took the chance of the cargo really turning out more or less than mentioned in the bill of lading; and that he could not recover for a short delivery. *Covas* v. *Bingham*, 2 El. & Bl. 836; 2 C. L. R. 212; 23 L. J., Q. B. 26; 18 Jur. 596. And see XIII. FREIGHT, *Immanuel (Owners of)* v. *Glenholm*, ante, col. 425.

Adverse Claimants to Cargo.]—*See* XII. BILL OF LADING; 5, INDORSEMENT, ASSIGNMENT AND TRANSFER, ante, cols. 343, seq.

Payment—Tender by Vendor of One of a Set of Bills of Lading.]—Where by the terms of the contract for sale of goods to be shipped, payment is to be made in exchange for bills of lading of each shipment, the purchaser is bound to pay when a duly indorsed bill of lading, effectual to pass the property in the goods, is tendered to him, although the others of the set of three bills of lading are not tendered or accounted for. If he refuses to pay he does so at his own risk as to the bill of lading tendered being effectual or not. *Sanders* v. *Maclean*, 52 L. J., Q. B. 481; 11 Q. B. D. 327; 49 L. T. 462; 31 W. R. 698; 5 Asp. M. C. 160—C. A.

Contract to Deliver f. o. b.]—Semble, a charterer who buys goods f. o. b. is liable for the cost of putting them on board. *Glengarnock Iron & Steel Co.* v. *Cooper*, 22 Ct. of Sess. Cas. (4th ser.) 672.

Successive Mortgages of Whaler's Oil Cargo—Priorities—Oil Transhipped.]—The owner of a vessel made a mortgage of it and of the cargo in London to A., whilst the vessel was on a whaling voyage to the South Seas, subject to two prior mortgages thereof, and the third mortgagee forthwith gave notice of his mortgage to the two prior incumbrancers. The master of the vessel afterwards putting into Sydney transhipped the oil taken in the voyage to another vessel, consigned to consignees in London, who honoured his bill of exchange on them upon having a lien on the consignment. The mortgagor induced B. to advance him 1,000*l.* on a mortgage of the cargo so transhipped, and consigned without notice of any other charge thereon except the lien of the consignee. B. gave notice of his mortgage to the consignee. A., as soon as he knew of the consignment (but subsequent to B.'s notice), gave notice to the consignee of the mortgage to him; and after such notice the consignee, after satisfying his own lien, paid over the balance of the proceeds of the oil to B.:—Held, that A., having done all he could do towards possession, was entitled to priority over B. *Feltham* v. *Clark*, 1 De G. & Sm. 307.

Outward Bound Cargo — Assignment of.]—Where there is an assignment of an outward bound cargo, it is a complete contract, though the cargo is not delivered to the assignee. *Brown* v. *Heathcote*, 1 Atk. 160.

Sale of Corn shipped in good Condition.]—Indian corn, shipped at Orfano for Cork, sold under an agreement that it "had been shipped in good and merchantable condition":—Held, the sale good, though the corn shipped was not in good and merchantable condition for a foreign voyage. *Dickson* v. *Zizinia*, 10 C. B. 602.

Sale of Cargo—Passing of Property.]—B. at Bristol sent to L. at Plymouth, asking for samples of barley and for an offer of a cargo. L. sent samples offering to sell 400 or 500 quarters at a specified price, f. o. b., at Kingsbridge. B. accepted L.'s offer, and L. wrote for particulars of the vessel to be sent, in order to insure. L. sent a charterparty of the vessel made out in L.'s name. The vessel was loaded, and L. received from the master a bill of lading by which the barley was deliverable at Bristol to order of L. or assigns on payment of freight. Subsequently L. left the bill of lading unindorsed and invoice at B.'s counting-house. A dispute arose as to the quality of the barley, but B. did not refuse to accept it. B. tendered the price of the barley to L., but L. refused to accept it, took away the bill of lading, and endorsed it to the plaintiffs. B., on the ship's arrival, claimed and obtained part of the barley; but the plaintiffs claimed and obtained the rest, paying freight:—Held, in trover, that no property in the barley passed to the defendant, and that the plaintiffs were entitled to recover. *Wait* v. *Baker*, 2 Ex. 1.

Mistaken Shipment—Refusal to accept.]—The plaintiffs, at New York, contracted to sell and deliver 1,000 quarters of wheat to the defendants at Bristol upon the terms "cost, freight, and insurance." By mistake they shipped, by sailing vessel, a cargo of 2,000 quarters of wheat to K. at Bristol. They also forwarded by steamer to K. at Bristol a bill of lading and policy of insurance of the whole cargo of wheat. This policy was "free from particular average." K., at the request of the plaintiffs, accepted a bill of exchange drawn upon him by them for the price of the 2,000 quarters. The defendants afterwards refused to accept the 1,000 quarters from K.:—Held, in an action against the defendants for refusing to accept the 1,000 quarters, that the plaintiffs were not ready and willing to deliver the 1,000 quarters to the defendants within the terms of the contract. *Hickox* v. *Adams*, 34 L. T. 404; 3 Asp. M. C. 142.

Actions for Possession of Cargoes in England and in France—Election as to Tribunal.]—An action was brought in this country by an English company against French merchants for the delivery of the cargoes of certain ships or, in the alternative, for damages and for an injunction and a receiver. When the action was brought the ships were in British waters, but they were afterwards removed, by order of the defendants to French waters, and the defendants had taken possession of the cargoes. Proceedings had been instituted by the plaintiffs in a French court for recovery of the cargoes. The English action comprised a claim for the cargo of one ship which was not claimed in the French action. Motion by the defendants that the plaintiffs should be ordered to elect whether they would proceed in the English or in the French action refused. *Peruvian Guano Co.* v. *Bockwoldt*, 52 L. J., Ch. 714; 23 Ch. D. 225; 48 L. T. 7; 31 W. R. 851; 5 Asp. M. C. 29—C. A.

Assignment of Cargo — Bankruptcy — Notice of Assignment.] — On November 11, 1857, A.

assigned to B. the cargo of a ship belonging to him, and then supposed to be about to sail to England from Africa. If B. had sent notice to the master of the assignment, it would have reached him before February 12, 1858, the day on which the ship sailed. B. did not send notice until January 23, 1858, and the notice never reached the master. On April 14, 1858, the ship arrived, and the master, on receiving notice of the assignment, delivered the cargo to B., notwithstanding notice from A.'s assignees in bankruptcy:—Held, that B. was entitled to the cargo. *Acraman* v. *Bates*, 2 El. & El. 456; 29 L. J., Q. B. 78; 6 Jur. (N.S.) 294; 1 L. T. 322.

Mortgage of Cargo—Notice—Reputed Ownership.]—London sub-mortgagees of shipments from China sent by the next mail notice of the mortgage to the persons in possession. They became bankrupt before the notice reached its destination. There was another mail route by which the notice might have arrived earlier, but not before the bankruptcy:—Held, the notice was sufficient to take the goods out of the mortgagors' reputed ownership. *Kelsall, Ex parte*, 1 De G. 352.

—— Bankruptcy of Mortgagor—Order and Disposition.]—Mortgagees of a cargo on board a ship on the coast of Africa, sent no notice of their security to the captain for two months after the date of the mortgage, and the captain received no notice until the mortgagor was bankrupt:—Held, that there was a primâ facie case for an application, ex parte, for a sale of the cargo as being in the order and disposition of the bankrupt. *Lucas, Ex parte, Gwyer, In re*, 3 De G. & J. 113.

Right of Holder of Bill of Lading—Mortgage.]—Goods which, by the terms of the bill of lading, have been carried upon a nominal freight, can be lawfully demanded, by the holder of the bill of lading, on payment of that amount. *Keith* v. *Burrows*, 46 L. J., C. P. 801; 2 App. Cas. 636; 37 L. T. 291; 25 W. R. 831; 3 Asp. M. C. 481—H. L. (E.)

The owner of a ship cannot, by his subsequent acts, give to his mortgagees, as against the holder of a bill of lading, rights different from those possessed by himself under it. *Ib.*

Bill of Lading—Pledge—Execution Creditor—Re-delivery of Goods to Pledger—Scotch Law.]—In the law of Scotland, as in the law of England, a pledgee may deliver the goods to the pledgor for a limited purpose without thereby losing his rights under the contract of pledge. The pledgees of a bill of lading representing a specific cargo were under contract to sell a larger quantity of goods to a third person. The pledgees returned the bill of lading to the pledgors to obtain delivery of the goods and sell on the pledgees' behalf, and account for the proceeds towards satisfaction of the debt. Held, that the pledgees' security was not affected, and that they were entitled to the proceeds of the cargo, as against the diligence of general creditors of the pledgors. *North Western Bank* v. *Poynter*, [1895] A. C. 56; 11 R. 73; 22 Ct. of Sess. Cas. (4th ser.) 1—H. L. (Sc.)

Right to Goods on board belonging to Bankrupt Master—Shipowner or Assignees.]—D., captain of a ship bound to the East Indies, and owner of the cabin furniture, deserts the ship on the voyage; the command is taken by the mate, who is confirmed in his position as master by the owners. On the voyage home, D., being indebted to the owners, authorises them in writing to keep possession of the furniture on the ship's arrival, as security for their debt. The ship arrived on December 5; a fiat in bankruptcy against D. issued on December 18 on an act of bankruptcy committed on December 2:—Held, that D.'s assignees could not recover in trover against the shipowner for the furniture. *Belcher* v. *Oldfield*, 8 Scott, 221; 6 Bing. (N.C.) 102; 9 L. J., C. P. 34; 3 Jur. 1194.

Sale by Court of Salved Cargo.]—See *The Kathleen*, infra, col. 670.

12. Action for Loss, Detention, Damage or Non-Delivery.

a. Parties.

Consignor or Consignee.]—By a bill of lading, the captain undertook to deliver goods therein specified for the consignor, and in his name, to the consignee. At the time of shipment the consignee had no property whatever in the goods:—Held, that an action against the owner of the ship for damage done to the goods by their being imperfectly stowed must be brought in the name of the consignor, although the consignee had insured the goods, and advanced the premiums of insurance before the ship arrived. *Sargent* v. *Morris*, 3 B. & Ald. 277; 22 R. R. 382. See also *The Marathon*, infra, col. 970.

A consignee of goods has such a right of property in the goods consigned to him, as to maintain an action of assumpsit against the shipowner for non-delivery of the goods. *Tronson* v. *Dent*, 8 Moore, P. C. 419.

A., as captain, by a charterparty between himself and B., agreed to receive a cargo from the agents and assigns of B., and B. agreed to procure the same; A., having received a cargo aboard, signed a bill of lading, stating the goods to have been shipped by order of C., and to be delivered to his order, and freight to be paid according to the charterparty. In an action for negligence in stowing the goods, brought by C. against A., held that C. was only an agent, and that the action should have been brought in the name of B. *Moores* v. *Hopper*, 2 Bos. & P. (N.R.) 411.

Amount of Interest.]—A., a resident at Naples, sent an order to M. & Co., hardwaremen at Birmingham, to despatch to him certain goods, on insurance being effected. Terms, three months' credit from the time of arrival. M. & Co. having marked the package with A.'s initials, despatched the goods by the canal to Liverpool, and effected an insurance declaring the interest to be in A. At Liverpool the goods were delivered by the agent of M. & Co. to the owner of a vessel bound to Naples, through whose negligence they were damaged:—Held, that the property in the goods vested in A. as soon as they were despatched from Birmingham, and that the terms of the order did not make the arrival of the goods at Naples a condition precedent to A.'s liability to pay for them, and that he might therefore maintain an action for an injury done to the goods through the negligence of the shipowner. *Fragano* v. *Long*, 4 B. & C. 219; 6 D. & R. 283; 3 L. J. (O.S.) Q. B. 177

Where S. had been in the habit of making consignments of goods to the plaintiff, to be sold

on account of the former, and of frequently drawing bills of exchange on the plaintiff, in anticipation of future consignments; and on the 5th of January there was a balance due to the plaintiff of 1,659*l.*; and on the 6th, S. shipped goods on board the defendant's vessel to the amount of 5,926*l.*, consigned to the plaintiff, sending him the bill of lading and invoice, and at the same time drew a bill on him for 500*l.*, which the plaintiff having refused to accept, S. indemnified the defendant, who thereupon relanded the goods, and redelivered them to S.:—Held, that the plaintiff might sue the defendant for the non-delivery of the goods, as he had at all events a sufficient qualified interest in them to enable him to maintain such an action. *Anderson* v. *Clarke*, 2 Bing. 20.

Parties to be Sued — Negligence of Third Party.]—An action will lie by the owners of goods in a ship against the owners for a loss occasioned by the ship's striking against an anchor lying under water in the river Trent, without a buoy. *Trent and Mersey Navigation* v. *Wood*, 3 Esp. 127; 4 Dougl. 287; 1 Term Rep. 28, n.

—— **Master or Owner.**]—A separate action cannot be maintained against the master and the owner of a ship for the same identical cause of action. The creditor has an election to sue either the one or the other; but he cannot, after he has sued the one to judgment, maintain another action against the other. *Priestley* v. *Fernie*, 3 H. & C. 977; 34 L. J., Ex. 172; 11 Jur. (N.S.) 813; 13 L. T. 208; 13 W. R. 1089.

Where a cargo consisting of oranges had been materially damaged through the improper conduct of the captain, who was also a part owner of the vessel, and the freighters brought an action against him and his co-partners, for negligence in the conveyance of the goods:—Held, that such action was well brought, although the captain had entered into a charterparty under seal with the freighters, by which he engaged to convey the cargo to its port of destination; it not appearing from that instrument that he possessed any other character or interest than that of commander or master. *Leslie* v. *Wilson*, 6 Moore, 415; 3 Br. & B. 171; 23 R. R. 605.

Liability of Owner or Charterer for Loss of Cargo.]—See *Baumwoll Manufactur von Carl Scheibler* v. *Furness*, supra, col. 297.

Liability of Shipowner for Detention of Cargo by Arrest of Bottomry Bondholder.]—See *Anderston Foundry Co.* v. *Law*, ante, col. 210.

Collision — Authority of Master to Sue on Behalf of Cargo Owner.]—The master of a ship that has been in collision abroad has authority on behalf of the cargo owners to institute a suit in a foreign court on behalf of ship and cargo owners against the other ship. *The Reinbeck*, 60 L. T. 209; 6 Asp. M. C. 366.

Owner of Ships Primâ Facie Owner of Goods on Board.]—As against a wrongdoer, the owner of a ship is primâ facie owner of the goods on board. *Brancker* v. *Molyneux*, 3 Scott (N.R.) 332; 3 Man. & G. 84; 10 L. J., C. P. 310.

Non-Delivery—Property in Consignee—Action by Shipowner.]—If a consignor of goods makes a special contract with the shipowner as to the carriage of the goods, the consignor may maintain an action for their loss, though the goods be the property of the consignee. *Dunlop* v. *Lambert*, 6 Cl. & F. 600.

Shipowner Estopped from Denying that Contract made with him.]—A company owned a line of steamers called the "Monarch Line," running between New York and London. A. was in the habit of shipping goods on steamers running on this line. A. shipped goods on a steamer at New York and received a bill of lading made out in the ordinary form given by the company for goods shipped on their steamers, save that it had the words "extra steamer" added after the words "Monarch Line of Steamships." At London an overside release for the goods was signed and given by the company's agent to A., and the freight received by them from A.:—Held, in an action by A. against the company for non-delivery of the goods that the company were estopped from saying that the contract of shipment was not made with them. *Herman* v. *Royal Exchange Shipping Co.*, 1 Cab. & E. 413. Affirmed in C. A.

Ship Demised — Supplementary Action.]—Action for loss of goods carried in defendant's ship; defence, ship demised to another; supplementary action against the latter; conjoinder of actions; issues directed in both actions. *London and Caledonian Marine Insurance Co.* v. *London and Edinburgh Shipping Co.*, 5 Ct. of Sess. Cas. (3rd ser.) 982.

Charterer or Shipowner—Third Party Order.]—A cargo owner sued the charterers of the ship for damage to cargo. Defendants applied for leave to serve a third party notice on the shipowner, alleging that the damage was caused by the unseaworthiness of the ship. *Speller* v. *Bristol Steam Navigation Co.*, 50 L. T. 419; 32 W. R. 670; 5 Asp. M. C. 228.

b. Proof of Receipt.

What is Sufficient.]—If a ship is chartered for a particular voyage, and put up as a general ship by the charterer, it is not enough, to make the owners liable for the non-delivery of goods, to shew that they were put on board the ship to be carried on this voyage, unless it is proved that they were received on board by some person appointed or authorised by the owners. *Mackenzie* v. *Rowe*, 2 Camp. 482.

It is not necessary, in order to render a shipowner liable for the loss of the goods of a shipper, that the goods should have been actually delivered on board the ship. *British Columbia and Vancouver's Island Spar, Lumber and Saw Mill Co.* v. *Nettleship*, 37 L. J., C. P. 235; L. R. 3 C. P. 499; 18 L. T. 291; 16 W. R. 1046.

Where goods are to be carried coastwise, and the usage of the wharf is to deliver them on the wharf to the mate of the ship by which they are to be carried; if they are delivered to the mate, the wharfinger's responsibility is at an end, and he is not liable, though the goods are lost from the wharf before they are shipped. *Cobban* v. *Downe*, 5 Esp. 41; 8 R. R. 825.

Shipowner Estopped from Denying Receipt.]—Shipowner under special circumstances not estopped from proving non-shipment of cargo declared by bill of lading signed by the master to have been shipped. *Berkeley* v. *Watling*, 7 A. & E. 29; 2 N. & P. 178; 6 L. J., K. B. 195.

c. Proof of Loss or Negligence.

In Unloading.]—Where goods were landed according to the custom of the port of London, on one of the quays of the Victoria Dock, and the dock company loaded the lighter, and it was proved that although all the bales were landed on the quay one of them was lost and was never put upon the lighter:—Held, that by the terms of the bill of lading, "goods to be delivered from the ship's deck, where the ship's responsibility shall cease," the shipowner's liability was over, and that he was therefore not liable for the non-delivery of the missing bale. *Petrococchino* v. *Bott*, 43 L. J., C. P. 214; L. R. 9 C. P. 355; 30 L. T. 840.

Primâ facie Evidence.]—In an action against the owner of a chartered vessel for negligence, in consequence of which the plaintiff's goods were lost, the non-arrival of the vessel at her destined port is not even primâ facie evidence of negligence. *Boyson* v. *Wilson*, 1 Stark. 236.

—— **Burden of Proof.**]—See *Beckford* v. *Clerke*, 1 Keb. 830, supra, col. 332, *and Cases*, infra, cols. 555, 556.

—— **Loss by Perils of the Sea—Negligence—Onus of Proof.**]—In an action brought by a shipper against a shipowner for damage to the goods shipped under a bill of lading, containing the usual exception of damage or loss by perils of the sea, upon the shipowner showing that the loss was within the exception, the onus of proving that the loss was occasioned by the negligence of the shipowner's servants is on the shipper of the goods. *Wilson* v. *The Xantho*, supra, col. 329, discussed. *The Glendarroch*, 63 L. J., Adm. 89; [1894] P. 226; 6 R. 686; 70 L. T. 344; 7 Asp. M. C. 420—C. A.

—— **Interrogatories.**]—In an action for non-delivery of cargo the defendant admitted non-delivery, alleging that delivery was prevented by excepted perils. The plaintiff delivered interrogatories for the purpose of shewing that the ship sank in consequence of a sea cock being negligently left open:—Held, that such interrogatories were not admissible. *Grumbrecht* v. *Parry*, 32 W. R. 558—C. A. Affirming 49 L. T. 570; 5 Asp. M. C. 176.

As to Condition of Goods.]—In a suit against shipowners for damage to cargo, the onus is upon the shipper to shew in the first instance that the goods were shipped in good order and condition before he can call upon the shipowners to shew excuse for the injury done to the goods. *The Prosperino Palasso*, 29 L. T. 622; 2 Asp. M. C. 158.

There is no rule of law by which the consignee of goods under a bill of lading stating the goods to have been shipped in good order and condition, but containing the words "quantity and quality unknown," is bound to shew that the goods were shipped in good order and condition, or fail in his suit against the shipowner for damage done to the cargo; but failing proof of the condition of the cargo when shipped, the consignee is bound to shew that the damage which it sustained is traceable to causes for which the shipowner is responsible. *The Ida*, 32 L. T. 541; 2 Asp. M. C. 551—P. C. *And see Cases*, ante, col. 319 et seq.

Stowing.]—In an action against the proprietors of a steam-vessel to recover compensation for damage done to goods sent by them as carriers, if, on the whole, it is left in doubt what the cause of the injury was, or, if it may as well be attributable to perils of the sea as to negligence, the plaintiff cannot recover;—but if the perils of the sea require that more care should be used in the stowing of the goods on board than was bestowed on them, that will be negligence for which the owners of the vessel will be answerable. *Muddle* v. *Stride*, 9 Car. & P. 380.

Management of Boiler.]—Where damage was done to the cargo of a steam-vessel, by water escaping through the pipe of a steam boiler, in consequence of the pipe having been cracked by frost:—Held, that this was not an act of God, but negligence in the captain in filling his boiler before the time of heating it, although it was the practice to fill over-night when the vessel started in the morning. *Siordet* v. *Hall*, 4 Bing. 607; 1 M. & P. 561; 6 L. J. (O.S.) C. P. 137; 29 R. R. 651.

Delay in Taking in Stores.]—The master, whilst waiting for cargo, omitted to take in sufficient stores and provisions for his voyage, and whilst subsequently taking in such provisions and stores the frost set in, and the ship was frozen in port, and detained from the beginning of October until the breaking up of the ice in the ensuing year:—Held, that the owners of the ship were responsible to the owners of the cargo for any loss accruing from such detention; it being, by maritime law, the duty of the master to convey the cargo to its port of delivery with all expedition; and if by neglecting to avail himself of all fair opportunity the voyage is delayed, and damage accrues to the owners of the cargo, the owners of the ship are liable to make good the loss. *The Wilhelm*, 14 L. T. 636.

Incorrect Entry at the Excise.]—Where a consignee was not ready to receive a cargo consisting of rums, and the owners of the ship, being desirous to get her cleared, unloaded the cargo, and incorrectly entered it at the excise, in consequence of which the cargo was seized:—Held, that the shipowners were not liable to the consignees for the non-delivery of the cargo, as the bill of lading did not properly describe the same. *Shirwell* v. *Shaplock*, 2 Chit. 397.

Seizure of Goods and Acknowledgment of Master.]—In an action against the master for not safely conveying goods consigned to the plaintiffs at a foreign port agreeably to bills of lading, evidence that the goods were seized in another foreign port, coupled with a letter of the master, in which he acknowledged that he was accountable for the goods, agreeably to the tenor of the bills of lading, is sufficient to warrant the jury in finding for the plaintiffs. *Cullen* v. *MacAlpine*, 2 Stark. 552.

Mate's Receipts.]—The plaintiff having verbally chartered a ship to carry iron from Glasgow to Swansea, the ship was loaded with iron brought by the plaintiff from W. & Co. The iron was weighed by the agents of W. & Co., to whom the mate gave a receipt signed by him for 330 tons, but there was no bill of lading. On delivery at Swansea, the quantity of iron was

discovered to be 326½ tons only, but the mate deposed, and was not contradicted, to the delivery of all that had been shipped. The plaintiff having paid on the full amount of 330 tons to W. & Co., who refused to repay them the difference, sued the shipowner for short delivery :—Held, that there was no evidence of negligence in the shipowner, and that if there had been, it would not be negligence causing loss to the plaintiff. *Biddulph* v. *Bingham*, 30 L. T. 30.

Short Delivery of Cargo by Porters in the Mersey Docks.]—The Mersey Docks Acts Consolidation Act, 1858, s. 36, making the master porters, appointed under that act to discharge cargoes in the Mersey Docks, responsible for any loss, damage, or injury sustained by the cargoes discharged by them during the receiving, weighing, and loading off by the master porters or their servants, does not in any way discharge the shipowner from his liability existing before he delivers to the master porter, and his responsibility for short delivery remains unaffected by the act. *The Emilien Marie*, 44 L. J., Adm. 9 ; 32 L. T. 435.

Defence—Ship and Goods Arrested for Bottomry—Master Carrying on Goods without Authority.]—Held, that to a count upon a bill of lading for non-delivery, a plea, alleging that the injury and damage could not be repaired, so as to enable the ship to proceed to its destination, except at a cost exceeding what would be the value of the ship, after her repair, on her arrival, and that no prudent owner would have incurred the expense ; and that the master acted imprudently, and without authority from the defendant ; and that the defendant never had the control of the goods after the arrival of the vessel at the port of its destination, was bad after verdict. *Benson* v. *Duncan*, 3 Ex. 644 ; 18 L. J., Ex. 169 ; 14 Jur. 218.

Admiralty Action—Damage to Cargo—Tort or Contract.]—Oil-cake, which the master had agreed to deliver in good order and condition, was stowed with hogsheads of tobacco, oaken staves being placed between them, and the oil-cake was damaged on the voyage :—Held, that the damage, however caused, was occasioned by the negligence or misconduct, as well as by the breach of contract, of the shipowner and his servants. *The Figlia Maggiore*, 37 L. J., Adm. 52 ; L. R. 2 A. & E. 106 ; 18 L. T. 532.

Damage to Cargo by Sea Water—Onus of Proof.]—Where cargo shipped in good condition is delivered damaged by sea water, the burden of proof is in the first instance on the shipowner to shew that he met with weather sufficient to cause the damage ; the burden then shifts to the cargo owner to shew that the damage was by fault of the shipowner or his servants and not by weather. *Williams* v. *Dobbie*, 10 Ct. of Sess. Cas. (4th ser.) 982.

Short Delivery — Burden of Proof.] — The master of a ship has no authority to grant bills of lading for goods which were not put on board his vessel ; but when he signs a bill acknowledging the receipt of a specific quantity of goods, the shipowner is bound to deliver the full amount specified unless he can show that the whole or some part of it was in fact not shipped. *Smith* v. *Bedouin Steam Navigation Co.*, 65 L. J., P. C. 8 ; [1896] A. C. 70—H. L. (Sc.)

Where the quantity of goods delivered is less than that stated in the bill of lading, the burden of proving that the quantity stated in the bill of lading was not in fact shipped is on the shipowner. *Horsley* v. *Grimond*, 21 Ct. of Sess. Cas. (4th ser.) 410 ; *and see Cases* supra, cols. 552, 553, as to burden of proof.

Negligence of Crew—Burden of Proof.]—An organ was shipped under a bill of lading, marked, "At owner's risk," and under printed sailing bills which exempted the shipowner from liability for loss or damage on board ship, or at or after landing, or by negligence, default, or error in judgment of the crew. The organ was destroyed by falling into the hold whilst being landed ; and the facts proved were consistent with negligence in the crew or accident :—Held, that the shipowners were not liable for the loss. *Wood* v. *Burns*, 20 Ct. of Sess. Cas. (4th ser.) 602.

Cargo in Bags—Duty to Deliver in Bags as signed for in Bill of Lading.]—By signing bills of lading for cargo in bags, the shipmaster becomes bound to deliver the same bags with their contents ; and, if not, the burden is on him to shew that he has delivered the contents, and that the bags were rotten without negligence on his part. *Shankland* v. *Athya*, 3 Ct. of Sess. Cas. (3rd ser.) 810.

Cargo incapable of Indentification — Non-delivery.]—Semble, per Lord Russell of Killowen, that where in the shipment of cotton some of the bales become unidentifiable, the several owners of the cotton become, in point of law, owners in common of the bales in proportion to their respective interests, and in an action by a single owner the shipowner can only attribute such proportion in answer to a claim for non-delivery. *Smurthwaite* v. *Hannay*, 63 L. J., Q. B. 737 ; [1894] A. C. 494 ; 6 R. 299 ; 71 L. T. 157 ; 43 W. R. 113 ; 7 Asp. M. C. 485—H. L. (E.)

Foreign Bill of Lading—Proof as to Quantity of Cargo.]—XIII. FREIGHT ; 3. PAYMENT ; *e.* RATE AND AMOUNT, *Immanuel* (*Owners*) v. *Denholm*, supra, col. 425.

Extent of Liability when Ship Sold—Value of Ship and Freight.]—In an action against an owner to recover damages, in consequence of the loss of goods laden on board his ship, the extent to which he is liable, where the completion of the voyage was prevented by the improper sale of the ship, is her value at the time of such sale, and the amount of freight she would have earned had she completed her voyage, and not the amount of freight as calculated at the time of its commencement. *Cannan* v. *Meaburn*, 2 Moore, 633 ; 1 Bing. 465 ; 1 L. J. (o.s.) C. P. 84.

Loss of Part of Goods—Deterioration of Rest.]—In the absence of notice of the consequences which will ensue from a part of goods shipped being lost, and of any contract express or implied to be answerable for such consequences, the shipper of such goods, on a part being lost, is, over and beyond the sum necessary to replace it, only entitled as for the delay to receive interest on the said sum till payment, even though the rest of the goods has been rendered useless till the portion lost was replaced. *British Columbia and Vancouver's Island Spar, Lumber and Saw Mill Co.* v. *Nettleship*, 37 L. J., C. P. 235 ; L. R. 3 C. P. 499 ; 18 L. T. 291, 604 ; 16 W. R. 1046.

Insurance Policy.]—Where goods destined to a foreign port are captured in consequence of a deviation, the owners of the goods are entitled to recover from the owners of the ship only the prime cost of the goods, together with the shipping charges, and not the expense of effecting a policy of insurance upon them, without direct proof that the goods, at the time of the loss, were enhanced in value beyond their first price, to the amount sought to be recovered for insurance. *Parker* v. *James*, 4 Camp. 112.

Neglect to obtain Possession.]—Through the negligence of a pilot, not compulsorily taken, a vessel got aground in the course of the voyage, and part of the cargo (rice) was thereby damaged, and other parts it became necessary to throw overboard. The vessel subsequently put into the Mauritius for repairs, where the damaged portion was sold. On the arrival of the vessel at her port of discharge, the master, who was under the circumstances entitled to land and warehouse the cargo, neglected to cause it to be assorted, and also wrongfully refused delivery to the consignee:—Held, that the consignee was entitled to damages for the goods jettisoned; for the goods sold at the Mauritius; for the non-assortment of the cargo at Liverpool; and for the loss of interest occasioned by the wrongful withholding of the cargo. In estimating the damages for non-delivery of cargo, the court will not take into account that the consignee might have prevented some damage if he had availed himself of 25 & 26 Vict. c. 63, ss. 70, 71, to obtain possession of his cargo; that privilege being conditional upon the consignee depositing with the wharfinger the full amount claimed by the master. *The Norway*, 12 L. T. 57; 13 W. R. 296.

Wrongful Detention of Cargoes—Right of Wrongdoer to be reimbursed Freight and Landing charges.]—In an action by the plaintiffs claiming as consignees named in a bill of lading of certain cargoes and damages for detention, the defendants, who claimed the goods under a contract with the consignor, were allowed to receive and hold the goods pending trial, under a consent order, without prejudice. Ten months later a receiver was appointed. The court subsequently held that the plaintiffs were entitled to the cargoes, and directed an inquiry as to damages, refusing to allow the defendants freight and landing charges paid by them. On appeal to the house of lords the freight and landing charges were allowed to the defendants, no order being made as to the terms of the inquiry. The chief clerk awarded damages as for wrongful detention from the arrival of the cargoes until the decree of the court. Upon summons to vary the certificate it was held that the wrongful detention was from the arrival of each cargo to the appointment of the receiver; per Lords Watson and Macnaghten—on general principles, notwithstanding the wrongful detention by them, the defendants were entitled to be reimbursed freight and landing charges. *Peruvian Guano Co.* v. *Dreyfus*, 61 L. J., Ch. 749; [1892] A. C. 166; 66 L. T. 536; 7 Asp. M. C. 225—H. L. (E.)

d. Damages.

Market Value—Price.]—The defendants, by charterparty, agreed with the plaintiff that their ship should, at a specified time, load 1,300 tons of coal in the river Tyne, to be carried to Havre for the plaintiff. They broke their contract, and the plaintiff had, in consequence, first, to hire other vessels at an advanced freight, and, secondly, to buy 1,300 tons of coal at an enhanced price. He was unable, according to the custom of the colliery trade in the Tyne, to secure a cargo until he had chartered vessels to carry it. The plaintiffs having sued the defendants in respect of both these heads of damage, they admitted their liability to pay the advanced freight, but denied that they were liable for the enhanced price of the coal. At the trial the rise in price at the pit's mouth was not disputed; but it was not directly proved that there had been an equivalent rise at Havre:—Held, that the fact of the plaintiffs having paid the additional price was primâ facie evidence of damage to that extent, and entitled him, in the absence of evidence to the contrary, to recover. *Featherston* v. *Wilkinson*, 42 L. J., Ex. 78; L. R. 8 Ex. 122; 28 L. T. 448; 21 W. R. 422; 2 Asp. M. C. 31.

Loss of Market.] — The carriage of goods by ship on a long voyage is entirely different from the carriage of goods by railway, when they may be expected to arrive on a particular day or for a particular market, and loss of market on such a voyage cannot (in the absence of express stipulation) be said to have been within the contemplation of both parties at the time of making the contract so as to be recoverable as damages in case of delay in the carriage. *The Parana*, 2 P. D. 118; 36 L. T. 388; 25 W. R. 596; 3 Asp. M. C. 399—C. A.

The assignee of a cargo of hemp and other goods instituted a cause under s. 6 of the Admiralty Court Act, 1861 (24 Vict. c. 10), against a British ship, and claimed to recover damage for a breach of contract resulting from unreasonable delay in the carriage of the goods. The shipowner admitted his liability, and the amount of damage was referred to the registrar, assisted by merchants, to report upon. The registrar found that there had been a fall in the market value of the hemp between the date when the ship ought to have delivered her cargo and the date when the delivery actually took place, and reported that the plaintiff was entitled as compensation for the delay to interest at 5*l.* per cent. on the invoice value of the hemp, but not to any further compensation for loss of market. On appeal to the judge of the admiralty division:—Held, that the registrar was wrong, and that the proper measure of damage was the difference between the market value of the hemp when it was delivered and when it ought to have been delivered; but, on appeal to the court of appeal:—Held, that the registrar's decision must be restored, and that the plaintiff was not entitled to any claim for loss of market. *Ib.*

The defendant, the master of the steamer "Carbis Bay," lying at Wilmington, signed bills of lading for 400 bales of cotton "shipped on board the 'Carbis Bay'" for Liverpool. In consequence of insufficient room only 165 bales could be shipped, and the defendant directed the remaining 235 bales to be shipped on board the steamer "Wylo," then lying in the same port, bound for Liverpool. The "Carbis Bay" arrived at Liverpool on the 26th of October, and the "Wylo" on the 29th of October, and both cargoes were delivered to the plaintiffs, who were indorsees of the bills of lading. Between the 26th and

the 29th of October a fall in the price of cotton took place, and the plaintiffs sued the defendant for the loss thereby occasioned :—Held, that on the 26th of October the plaintiffs had a right of action against the defendant for non-delivery, that the measure of damages was the market price of cotton on that day, and that the subsequent delivery of the cotton ex "Wylo" could only be taken into account in reduction of damages. *Smith* v. *Tregarthen*, 56 L. J., Q. B. 437; 57 L. T. 58; 35 W. R. 665; 6 Asp. M. C. 137.

Cargo damaged by Unseaworthiness of Ship — Limitation of Liability.]—A ship loaded with beans, whilst in dock before sailing, was damaged in a gale, started a plank and wetted some of the beans; and there was delay in carying the rest of the beans to their destination. The market for the beans was lost and they were sold at a lower rate. The jury found that the ship was unseaworthy, and gave damages for the wetting of the beans and for loss of market. New trial applied for and refused. Rule nisi to reduce the damages to the amount limited by 53 Geo. 3, c. 159, s. 1. *Christie* v. *Trott*, 2 W. R. 15.

Advanced Freight insured—Subrogation of Insurer to Rights of Assured.]—Goods were shipped by the plaintiffs on the defendants' ship under a charterparty, which provided that if required the whole freight should be advanced subject to a deduction for interest and insurance. The freight was paid in advance, and the amount was insured. The charterers sold the goods to the plaintiffs at a price covering cost, freight, and insurance. The cargo was lost by the negligence of the defendants. In an action for the loss of the goods :—Held, that the plaintiffs were entitled to recover as part of the damages sustained by them the amount of the advanced freight, which was included in the price paid by them for the goods, for the insurers of the freight who had indemnified the plaintiffs were entitled to be subrogated to the rights of the plaintiffs in respect of the advanced freight, and to have the action maintained for their benefit for the amount insured, as it would, but for the insurance, have formed part of the damages to which the plaintiffs would have been entitled. *Dufourcet* v. *Bishop*, 56 L. J., Q. B. 497; 18 Q. B. D. 373; 56 L. T. 633; 6 Asp. M. C. 109.

Right of Owner of Cargo to recover Salvage Expenses from Shipowner.]—The plaintiffs under a charterparty shipped a large quantity of rye on board one of the defendants' ships, to be carried from the port of T. to the port of A. Owing to the negligent navigation of the defendants' servants the ship was cast ashore, and a large quantity of the rye was lost; but a considerable quantity was saved by the salvage association, who were employed by the underwriters of the cargo with the assent of the defendants. The average statement was prepared, and the sum assessed was agreed to by the plaintiffs, and the salvage association were paid by the underwriters the expenses claimed by them. The plaintiffs brought their action to recover the amount of the salvage expenses so paid by the underwriters. The plaintiffs recovered a verdict for an amount to be settled out of court. The question of law involved in the case was reserved for further consideration. The defendants contended that they were not liable because the plaintiffs themselves had not paid the expenses, and the payment under the circumstances was voluntary :—Held, that the plaintiffs were entitled to recover the amount of the salvage expenses, as, without their being incurred, the remainder of the cargo could not have been sent to it destination, which was for the benefit of the defendants, and that the payment under the circumstances was not voluntary. *Scaramanga* v. *Marquand*, 53 L. T. 810; 5 Asp. M. C. 506—C. A. Affirming 1 Cab. & E. 500.

Circumstances peculiar to Plaintiff—Advanced Freight "subject to Insurance."]—The plaintiffs having sold the cargo "to arrive," at a price less than the market value of the goods at the port of discharge at the time when the cargo should have arrived :—Held, that in estimating the damages such market value must be looked to, and not the price at which the plaintiffs had sold the cargo. The charterparty provided that sufficient cash for ship's disbursements should be advanced, if required, to the captain by the charterers on account of freight, subject to insurance only. The plaintiffs having advanced sums for ship's disbursements on account of freight as provided for in the charterparty :—Held, that, in estimating the damages for non-delivery of the cargo, only the unpaid freight must be deducted from the market value of the goods, not the advanced freight as well. *Rodocanachi* v. *Milburn*, 56 L. J., Q. B. 202; 18 Q. B. D. 67; 56 L. T. 594; 35 W. R. 241; 6 Asp. M. C. 100—C. A.

Collision — Both Ships to Blame — Damage to Cargo.]—The admiralty court rule that in cases of collision the damages are to be equally divided where both ships are to blame, does not apply to actions for breach of contract of carriage brought by owners of cargo against the carrying ship to recover damages for loss of, or injury to, their goods, and hence the plaintiffs in such actions are entitled to recover their full damages from the owners of the carrying ship. *The Bushire*, 52 L. T. 740; 5 Asp. M. C. 416.

—— **Transhipment — Loss by Perils not previously excepted — Limitation Action.**]—A cargo was shipped by the plaintiff on the defendants' vessel under a charterparty and bill of lading, not excepting the negligence of the master and crew. During the voyage, and through the negligence of the masters and crews of both ships, the vessel came into collision with another, and was so much damaged as to render it necessary to discharge her cargo at a port of refuge, and, after temporary repairs, to complete the voyage in ballast. The master transhipped the cargo with the knowledge, but without the assent or dissent of the plaintiff, into three other vessels, under bills of lading excepting the negligence of the masters and crews. Two of these vessels with their cargoes were, through the negligence of their masters and crews, lost before reaching the port of discharge. The defendants obtained a decree limiting their liability arising out of the collision to 8*l.* per ton, and the proceeds were distributed to the claimants, of whom the plaintiff was not one. In an action for non-delivery of the portion of the cargo lost :—Held, that the defendants were liable; for the loss did not arise from an excepted peril, and the transhipment, though justifiable, was for the purpose of earning the freight under the charterparty; and that the judgment in the limitation

action was no bar to the present claim, as the loss of the portion of the cargo, the subject of this action, was not caused by the collision in respect of which the defendants had limited their liability. *The Bernina*, 56 L. J., Adm. 38; 12 P. D. 36; 56 L. T. 450; 35 W. R. 214; 6 Asp. M. C. 112.

Ship Bound for Performance of Charterparty —Extent of Owners' Liability.]—See *Anon., Cases in Ch.*, pt. 2, 238; supra, col. 207.

13. Lien on Cargo.

By Indorsees of Bill drawn against Cargo.]—B. consigned a cargo of maize to O. & Co., for sale by them on a joint speculation of himself and them, and he drew upon them against the cargo six bills of exchange for sums amounting to 1,500*l*. He wrote them a letter advising them of the bills and sent them the bill of lading of the cargo, and asked them to protect the bills on presentation. They replied that they would do so. The bills of exchange were on the face of them expressed to be on account of the cargo. B. afterwards indorsed three of the bills to R. & Co. Before the bills were presented to O. & Co. for acceptance they had heard that B. had stopped payment, and when the bills were presented they declined to accept them:—Held, that R. & Co. were not entitled to any lien upon the cargo as against O. & Co. in respect of the three bills indorsed to them. *Robey & Co.'s Perseverance Ironworks* v. *Ollier*, L. R. 7 Ch. 695; 27 L. T. 362; 20 W. R. 956; 1 Asp. M. C. 413.

Of Agent for Expenses.]—A vessel having gone ashore with a cargo on board, a ship agent was put in possession of the ship and cargo by the captain, with authority from the captain to do, as his agent, what was for the benefit of all concerned. The agent did work and expended money in discharging the cargo, and brought it to a place of safety, where he took possession of it. The hull broke up and became a wreck. The expenditure by the agent was not for the purpose of enabling the shipowner to perform his contract and to earn freight, but was an extraordinary expenditure for the purpose of saving the property at risk, namely, the cargo:—Held, that the agent had a lien on the cargo for his charges as against the owner, though such charges were incurred without authority from the owner, the claim being analogous to that for general average or salvage. *Hingston* v. *Wendt*, 45 L. J., Q. B. 440; 1 Q. B. D. 367; 34 L. T. 181; 24 W. R. 664; 3 Asp. M. C. 126.

Authority of Agent to pay Charges on Cargo.]—Held, also, that an agent to whom bills of lading are handed for the purpose of obtaining possession of the cargo of a stranded vessel, is impliedly authorised to bind the owner by an agreement to pay, on condition of the cargo being given up, charges for which there is a lien on the cargo. *Ib.*

Goods Loaded under Agreement with Broker —Notice of Charterparty.]—A firm of brokers, having chartered a ship, advertised her as about to sail, and invited shippers to send their goods by her. Under the charterparty, the captain was to have an absolute lien on the cargo for freight, dead freight and demurrage. The plaintiff, who had no notice of the charterparty, dealing with the charterers only, sent some tea on board, to be carried at a rate of freight agreed upon between himself and the charterers. Afterwards the charterers were unable to fill the ship and so to carry out their contract with the owner, and the ship accordingly did not sail. No bills of lading for the tea had been signed, and the captain refused to sign them unless they were expressly made subject to the charterparty. The shipowner claimed a lien on the tea, for the expenses incurred by him through his dealings with the charterers:—Held, that he had no such lien, the plaintiff having had no notice of the charterparty, and there being nothing to put him on inquiry; and the tea was ordered to be given up to the plaintiff, the intended carriage thereof having failed. *Peek* v. *Larsen*, 40 L. J., Ch. 763; L. R. 12 Eq. 378; 25 L. T. 580; 19 W. R. 1045.

The goods of a shipper in a general ship are not affected by a clause in a charterparty of which he has no notice or knowledge, giving the shipowner a lien on all cargo and freight for arrears of hire due under the charterparty. Semble, the fact that no bills of lading were given for the goods makes no difference in this respect as to the rights and liabilities of the parties. T. hired a ship from M., and by the charterparty gave M. a lien on all cargo and freight for arrears of hire. T. advertised the ship as a general ship, and gave no notice of the charterparty. B. shipped goods and obtained a receipt, but no bill of lading. The hire being in arrears, M. detained the goods of B. for the whole of the arrears:—Held, that M. was not entitled to detain the goods of B., and that B. was entitled to damages for their detention. *The Stornoway*, 51 L. J., Adm. 27; 46 L. T. 773; 4 Asp. M. C. 529.

Default of Owner of Goods.]—If a shipowner is prevented from carrying the cargo to its destination by the act or default of the owner, he has a possessory lien on the cargo for the entire freight and for contribution to any general average expenses incurred. *Galam, Cargo ex*, Br. & Lush. 167; 2 Moore, P. C. (N.S.) 216; 33 L. J., Adm. 97; 10 Jur. (N.S.) 477; 9 L. T. 550; 12 W. R. 495.

Landing and Warehousing Cargo—Excessive Claim.]—Under the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 67, a shipowner may land goods whenever the delivery of them to the owner within the proper time has been prevented by the force of circumstances, whether the owner of the goods is or is not to blame. *The Energie, Miedbrodt v. Fitzsimon*, 44 L. J., Adm. 25; L. R. 6 P. C. 306; 32 L. T. 579; 23 W. R. 932; 2 Asp. M. C. 555.

If, on landing the goods, the shipowner warehouses them under a stop-order for a sum manifestly, and to his knowledge, in excess of the amount of his lien, such conduct is equivalent to a wrongful detention of the goods, for which the owner of them may bring an action. *Ib.*

A fortiori an action will lie against the shipowner if, on payment of a sum due for average by the owner of the goods, he refuses to reduce the stop-order to the amount for which he then has, or can reasonably claim, a lien. *Ib.*

Where no Statutable Warehouses.]—Semble, that the master may still land the cargo without

losing his possession and control over it (placing the goods in a warehouse belonging to or hired for his owners), and so preserve his lien. *Morsle-Blanch* v. *Wilson*, 42 L. J., C. P. 70; L. R. 8 C. P. 227; 28 L. T. 415; 1 Asp. M. C. 605.

Lien of Consignee Charterer.]—A. B. chartered nine vessels in England, to fetch C. D.'s timber from Nova Scotia, under an agreement between them, that he, A. B., was to be the consignee. C. D., in breach of the contract, consigned the cargoes to other persons, but A. B. arrested the produce of one of them in the hands of the consignee, by means of an injunction:—Held, that A. B. could maintain a bill against C. D. and the consignee to enforce his lien on the produce of that cargo, and that such lien extended to all sums properly expended by him in respect of the nine ships, and to all pecuniary losses and liabilities, but not to commission, consignee's profits, or damages for breach of the contract. *Young* v. *Neill*, 32 Beav. 529; 2 N. R. 212; 9 Jur. (N.S.) 976; 9 L. T. 9; 11 W. R. 1052.

Advances on Cargo—Lien—Foreign Attachment.]—The plaintiffs advanced several sums of money to S. M. & W. on the security of shipments coming to them as return remittances from their correspondents in Hayti, which shipments they directed the Haytian house to consign to the plaintiffs. The Haytian house was informed of the contracts, and promised the plaintiffs to make the remittances accordingly. In June, 1842, a cargo of goods was prepared by the Haytian house as return remittances, and they directed the plaintiffs to insure a part of the cargo on the account of S., and informed W. that a part of the cargo was intended for him, which W. communicated to the plaintiffs. The resident partner in the Haytian house died in June, 1842, after the cargo had been shipped but before it was consigned, and his administratrix consigned the cargo to B. in London, under whose orders it was sold, and by whom the proceeds were received in December, 1842. S. & Co., creditors of the Haytian house, on the 29th August, 1842, attached by foreign attachment, according to the custom of London, the goods of the Haytian house in B.'s hands. By a letter dated the 7th September, 1842, the surviving partner in the Haytian house directed B. to hold the cargo for S. M. & W. in certain parts. On a bill and motion to restrain the proceedings of S. & Co. against B., in the lord mayor's court:—Held, that the right of the plaintiffs, if any, was an equitable and not a legal right; that the plaintiffs were entitled to the aid of the court in the trial of the right; and that the proceedings in the lord mayor's court should be restrained by injunction. *Cotesworth* v. *Stephens*, 4 Hare, 185.

Passenger's Luggage.]—The master has a lien upon the luggage of a passenger for his passage money. *Wolf* v. *Summers*, 2 Camp. 631; 12 R. R. 764.

Money borrowed by Master to buy Cargo—Lien of Lender.]—The master without authority borrowed money abroad to buy cargo to bring home. The shipowners having taken the benefit of the advance are liable to the lender for repayment; but the lender has no lien on the cargo. *Ashmall* v. *Wood*, 3 Jur. (N.S.) 232; 5 W. R. 397. And see *S. C.*, 2 Jur. (N.S.) 837; 4 W. R. 694.

Warehouse Owners' Lien—Custom.]—A custom for warehouse owners in London to have a general lien on goods for moneys due from the merchants employing them in respect of goods consigned to them from abroad, is bad, because unreasonable. *Leuckhart* v. *Cooper*, 3 Bing. (N.C.) 99; 3 Scott, 521; 6 L. J., C. P. 131.

Money Awarded as Compensation for Seizure of Cargo—Lien of Consignee.]—A consignee in Denmark paid charges for freight, &c., upon a cargo, the property of the consignor, who afterwards became bankrupt. The cargo was seized by the Danish government in consequence of war having broken out with England. At the end of the war a sum of money was awarded by the British government to the assignee of the bankrupt as compensation for the cargo:—Held, that the consignee had a lien on the compensation money for the charges paid by him. *Good, Ex parte, Atkinson, In re*, 3 Mont. & Ayr. 246; 2 Deac. 389; 7 L. J., Bk. 7; 1 Jur. 456.

Bill of Exchange—Appropriation of Cargo to Meet.]—B. & Co. consigned a cargo to the defendants, and sent them a bill of lading in a letter as follows: "The present serves to cover bill of lading for timber, &c., shipped per 'China,' against which we have valued on you at six months in favour of F. S. & Co. for 1,200*l.*, which kindly protect." On the same day B. & Co. sent to F. S. & Co. the bill of exchange, which was drawn on the defendants to the order of F. S. & Co., and concluded: "Place the same with or without advice to account consignment per 'China.'" After the cargo arrived F. S. & Co. presented the bill for acceptance, but the defendants refused to accept it. Shortly after B. & Co. stopped payment, and the cargo arrived:—Held, that it was appropriated to meet the bill, and that F. S. & Co. had a lien prior to that of the defendants for their general balance. *Frith* v. *Forbes*, 4 De G. F. & J. 409; 32 L. J., Ch. 10; 10 Jur. (N.S.) 1113; 10 W. R. 291.

Lien for Freight.]—*See* XIII. FREIGHT, supra, cols. 428, seq.

14. MISCELLANEOUS.

Breach of Blockade—Condemnation of Cargo.]—The cargo of a ship condemned for breach of blockade, though not belonging to the shipowner, is subject to condemnation. *The Alexander*, 4 C. Rob. 93. S. P., *The Adonis*, 5 C. Rob. 256.

Cattle Cargo — Cleansing and Disinfecting Ship.]—Clause 100 of the Animals Order in Council of 1886, made under s. 32, sub-s. 21, of the Contagious Diseases (Animals) Act, 1873, requires that a vessel used for carrying animals by sea should, after landing animals therefrom, and before taking on board any other animal or other cargo, be cleansed and disinfected by having all parts of the vessel with which animals or their droppings had come in contact scraped and swept:—Held, that this order requires that before any new cargo can be put on board any part of the vessel, even those parts which had not been used for carrying cattle, must be cleansed and disinfected as mentioned above. *Ismay* v. *Blake*, 66 L. T. 530; 7 Asp. M. C. 189; 56 J. P. 486.

Perishing Cargo Salved—Sale by Court.]—A barque laden with a cargo shipped at Charleston under bills of lading whereby the cargo was to be delivered on payment of freight at Bremen, whilst prosecuting her voyage to Bremen was run into in the English Channel and damaged by another vessel, which was alone to blame for the collision. The master and crew of the barque abandoned her, and in her abandoned state she was taken possession of by salvors, who brought the barque and her cargo into Dover. The cargo was damaged by seawater, and was alleged to be deteriorating. In a suit instituted by some of the salvors against the barque, her cargo and freight, the court, on an application made on their behalf, without notice to the owners of the barque, ordered the cargo to be sold. The owners of the barque afterwards hearing of the order, and wishing to have the cargo transhipped and carried on to its destination, applied to rescind the order, and offered to give bail for the cargo. The court, being of opinion that it was for the benefit of all parties that the cargo should be sold, refused to prevent the sale, but reserved all questions of freight. Afterwards the cargo was sold and the proceeds brought into court, and the owners of the barque then applied for an order for payment out of the proceeds in court of a sum of money in respect of freight:—Held, that, by the abandonment of the barque, the contract to pay freight had been dissolved, and that the owners of the barque were not entitled to any payment in respect of freight. *The Kathleen*, 43 L. J., Adm. 39; L. R. 4 A. & E. 269; 31 L. T. 204; 23 W. R. 350; 2 Asp. M. C. 367.

XVI. STOPPAGE IN TRANSITU.

1. *Generally*, 565.
2. *Transfer of Bill of Lading*, 568.
3. *Transitus not at an End*, 571.
4. *Part Delivery*, 574.
5. *Goods in Hands of Wharfingers*, 575.
6. *Transitus at an End*, 576.

1. GENERALLY.

Who may Stop—Surety for the Price.]—One who is merely surety for the price of the goods cannot stop them in transitu. *Siffken* v. *Wray*, 6 East, 371; 2 Smith, 480.

—— **Alien Enemy—Licence to Trade.**]—A licence to a British merchant to bring a cargo from an enemy's port legalises the sale of the cargo by the enemy and enables him to stop it in transitu. *Fenton* v. *Pearson*, 15 East, 419.

—— **Foreign Purchaser.**]—A trader abroad who, on his own credit, buys goods, and ships them to a merchant in England upon the order of the latter, charging a commission, may, upon the bankruptcy of the merchant in England, stop the goods in transitu; and that although the merchant had before his bankruptcy accepted bills for the cost of the goods. *Feise* v. *Wray*, 3 East, 93; 6 R. R. 551.

—— **Agent.**] — M. & Co., merchants, of Jamaica, ordered of P. & G., merchants, of Baltimore, goods to be shipped to Jamaica at the risk and expense of M. & Co. The goods were shipped under bills of lading making them deliverable to M. & Co. on payment of freight. The goods were not paid for. During the voyage M. & Co. became bankrupt. On the arrival of the ship at Jamaica the agents of P. & G. went on board and demanded a package of the cargo, in the name of the whole, on behalf of P. & G. Before the ship's arrival P. & G. had written to their agents, saying, "In disposing of the cargo use your own judgment," forwarding a power of attorney; but the letter did not arrive until after the agents had taken possession of the cargo:—Held, that the agents had authority to stop the cargo on behalf of P. & G.; and that there had been a valid stoppage in transitu. *Hutchings* v. *Nunes*, 1 Moore, P. C. (N.S.) 243; 10 Jur. (N.S.) 109; 9 L. T. 125. See also *Bird* v. *Brown*, infra, col. 579.

Policy Moneys not subject to Right of Stoppage in Transitu.]—The right of stoppage in transitu does not extend over policy moneys paid in respect of insurances effected upon the goods by the vendee. *Berndtson* v. *Strang*, 37 L. J., Ch. 665; L. R. 3 Ch. 588; 19 L. T. 40; 16 W. R. 1025.

Sub-sale does not put an End to Right of Stoppage.]—Where the master of a ship is still a carrier and retains a lien for freight, a sub-sale of the cargo and handing over of a delivery order to the sub-purchaser, and actual receipt by him of part, do not put an end to the transitus, and the unpaid vendor has, upon giving notice to the master, the right to stop the surplus proceeds payable by the sub-purchaser after discharging intermediate equities. *Falk, Ex parte, Kiell, In re*, 14 Ch. D. 446; 42 L. T. 780; 28 W. R. 785; 4 Asp. M. C. 280—C. A.

The mere fact that the purchaser has resold the goods, and that the bill of lading has been made out in the name of the sub-purchaser, does not put an end to the transitus, or destroy the vendor's right to stop the goods in transitu. *Golding, Davis & Co., Ex parte, Knight, In re*, 13 Ch. D. 628; 42 L. T. 270; 48 W. R. 481—C. A.

Mutual Dealings — Right to Stop though Accounts not Adjusted.]—A merchant in England sent goods of a given value to a merchant at Quebec for sale on his account. Before the goods were sold the latter shipped three cargoes of timber to the former to credit on his account. Two of them arrived; against the third the consignor drew a bill for the amount whilst it was in transitu. The consignee dishonoured the bill, and became bankrupt:—Held, that the consignor was entitled to stop the cargo in transitu, and was not bound to wait until their mutual accounts were adjusted. *Wood* v. *Jones*, 7 D. & R. 126.

Transitus not Begun—Right to hold Possession.]—It follows from the right of the vendor to stop in transitu, if he hears of the bankruptcy of the vendee before delivery, that he has à fortiori a right to refuse to part with possession of the goods, if he has notice of bankruptcy whilst the goods are in his possession. *Gibson* v. *Carruthers*, 8 M. & W. 321; 11 L. J., Ex. 138.

Provisional Stoppage—Insolvency Expected.]—The right of stoppage in transitu may be exercised provisionally without actual insolvency of the consignee; but if insolvency does not take place, the right does not arise, and the act is a nullity. *The Constantia*, 6 C. Rob. 321.

Foreign Law.]—Goods were delivered on board a ship chartered by the consignee, and by the law of Russia the owner of such goods may by process of law retake possession of them until payment, in case of the bankruptcy of the vendee. The master of the ship, upon the application of the owner of the goods, who had heard of the bankruptcy of the vendee, signed bills of lading for the goods, making them deliverable to their order:—Held, that this was a substantial compliance with the Russian law, and that the master was bound to deliver the goods on arrival to the vendor, and not to the assignees of the vendee. *Inglis* v. *Usherwood*, 1 East, 515. And see *Fowler* v. *McTaggart*, 1 East, 522, n.; 7 Term Rep. 442, n.; 4 R. R. 485.

General Principle—No Relief in Equity.]—A. beyond seas consigns goods to B. in London. Before the goods arrive B. becomes bankrupt. If A. can by any means prevent the goods coming to the hands of B. or his assignees, he may do so, and equity will not relieve. *Wiseman* v. *Vandeputt*, 2 Vern. 203.

Whether Contract rescinded by.]—A vendor of cotton in America, by direction of purchasers in England, shipped the cotton on board a vessel belonging to the purchaser, who became bankrupt before its arrival. A mortgagee of the ship, who was an agent of the vendor, took possession of the ship under his mortgage, and sold the cotton under a supposed right of his principal to stop it in transitu; and the principal in account with his agent gave credit for the proceeds of the cotton. The assignees of the purchaser then brought an action against the mortgagee for the seizure, and he paid them, under a compromise, the amount for which the cotton sold:—Held, that the contract was not rescinded by the seizure of the cotton, and that the vendor could prove for the purchase-money. *Humberston, In re*, De G. 262; 8 Jur. 675.

What Amounts to—Notice to hold Proceeds of Goods—Notice to Consignees and not to Carrier.]—J. P. & Co., merchants at Pernambuco, having received orders to purchase goods at New York for customers, instructed S. J. & Co., their agents at Liverpool, to purchase and ship the goods, and have them shipped to J. P. & Co.; S. J. & Co. thereupon instructed R. B. B., the agent at New York of J. P. & Co. and S. J. & Co., to purchase the goods. R. B. B. purchased the goods and shipped them to J. P. & Co., sending the invoices and bills of lading. To provide himself with funds to purchase the goods, R. B. B. drew bills of exchange on S. J. & Co., in which were the words: "And charged to account as advised." Attached to each bill was a counterfoil headed "Advice of draft." This was addressed to S. J. & Co., mentioning the particulars of the bill, and concluded with these (or similar) words: "Against shipments per steamship 'Glensannox,' No. 6, N. Y. to Brazil viâ Baltimore. Please protect the drafts as advised above, and oblige drawer. R. B. B., New York, May 9th, 1879." These bills were sold in New York, and R. B. B. advised S. J. & Co. of the bills, and at the same time forwarded a statement of account. On presentation of the bills for acceptance, S. J. & Co. detached the counterfoils and kept possession of them. On June 10th, 1879, while the plaintiffs, P. S. & Co., were holders of these bills, drawn according to their course of business in respect of a shipment to J. P. & Co., to whom the bills of lading were at the same time sent, S. J. & Co. suspended payment. The same day the failure was known in New York, and R. B. B., under pressure from P. S. & Co., telegraphed to J. P. & Co.: "Having pledged documents and shipments 'Glensannox,' hold proceeds subject order P. S. & Co." The next day, June 11th, the "Glensannox" arrived at Pernambuco, and the goods were delivered to the customers of J. P. & Co., who received from them the purchase-money. The bills of lading had been delivered to the customers before the telegram was received. The bills of exchange were dishonoured by S. J. & Co. J. P. & Co. claimed to be entitled to retain the purchase-money against sums alleged to be due to them from S. J. & Co.:—Held, that even if the telegram had been addressed to the owner or master of the ship, or had been received before the bills of lading had been delivered to the customers, it would not have operated to stop them in transitu. *Phelps* v. *Comber*, 54 L. J., Ch. 1017; 29 Ch. D. 813; 52 L. T. 873; 33 W. R. 829; 5 Asp. M.C. 428—C. A.

2. Transfer of Bill of Lading.

Effect of—Assignment for Value.]—The consignor may stop goods in transitu before they get into the hands of the consignee, in case of the insolvency of the consignee; but if the consignee assigns the bills of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is at an end. *Lickbarrow* v. *Mason* (*in error*), 4 Bro. P. C. 57; 2 Term Rep. 63; 5 Term Rep. 367, 683; 6 Term Rep. 131; 1 H. Bl. 357; 2 H. Bl. 211. *And see* 6 East, 20, n. 3; 1 R. R. 425.

L. & S., carrying on business at Hong Kong and London, bought goods of L. and others, Manchester merchants, to be shipped to their firms at Hong Kong. The goods were on a ten months' credit, and it was agreed that remittances of the proceeds of the goods should be made from Hong Kong, to asset the acceptances of L. & S. for the price of the goods, on receipt of the bill of lading. L. & S. shipped the goods in a vessel engaged by them for the purpose, and bills of lading, making the goods deliverable to their firm in Hong Kong, or their assigns, were signed by the master, and delivered to L. & S., who accepted the vendors' draft for the price of the goods. Before the goods or bills of lading reached Hong Kong, L. & S., being insolvent, in consideration of debts to two banks at Hong Kong, assigned all their property to the banks, and indorsed the bills of lading to them, the banks knowing of the insolvency of L. & S.:—Held, that there was no sufficient consideration for the assignment of the bills of lading, so as to defeat the right of the unpaid vendors to stop in transitu, and that the transitus continued until the goods were delivered at Hong Kong. *Rodger* v. *Comptoir D'Escompte de Paris*, 6 Moore, P. C. (N.S.) 538; 38 L. J., P. C. 30; L. R. 2 P. C. 393; 21 L. T. 33; 17 W. R. 468.

Assignee of Bill of Lading becoming Partner with Consignee.]—If the consignee of goods, to whom the bill of lading was indorsed in blank, assigns it over as a security for acceptances given by the assignee, not amounting to the value of the goods, and afterwards by an agreement between them they become partners in the

goods, by which agreement it appears that the consignor has not been paid for them, the assignee of the bill of lading cannot maintain trover against the consignor if he stops the goods in transitu upon the insolvency of the consignee. *Salomons* v. *Nissen*, 2 Term Rep. 674 ; 1 R. R. 592.

Sub-Vendee taking Bill of Lading.]—If the shipper of goods takes a receipt from the captain, who executes a bill of lading in favour of a sub-vendee, the former may stop the goods in transitu. *Craven* v. *Ryder*, 2 Marsh. 127 ; 6 Taunt. 433 ; Holt, 100 ; 16 R. R. 644.

Indorsement bonâ fide.]—A bill of lading for the delivery of goods to order and assigns is a negotiable instrument, which by indorsement and delivery passes the property in the goods to the indorsee, subject only to the right of the unpaid vendor to stop them in transitu. *Pease* v. *Gloahec*, 3 Moore, P. C. (N.S.) 556 ; 35 L. J., P. C. 66 ; L. R. 1 P. C. 219 ; 12 Jur. (N.S.) 677 ; 15 L. T. 6 ; 15 W. R. 201. *S. C.*, nom. *The Marie Joseph*, Br. & Lush. 449.

The indorsee may deprive the vendor of this right by indorsing the bill of lading for a valuable consideration, although the goods are not paid for, even if bills had been given which are certain to be dishonoured, provided the indorsee for value has acted bonâ fide, and without notice. *Ib.*

If the vendee of goods having received from the vendor an indorsed bill of lading, making the goods deliverable to order or assigns, indorses and delivers it to a banker as a security for past and future advances, the banker's claim upon the goods for all such advances will prevail against a claim of the unpaid vendor to stop the goods in transitu. *Ib.*

The vendee of goods having received from the vendor an indorsed bill of lading, making the goods deliverable to order or assigns, and having given an acceptance for the price, returned a bill of lading to the vendor, to hold as security against the acceptance until the goods were sold or the vessel arrived, and afterwards by fraudulent representation again obtained possession of the bill of lading from the vendor, and negotiated it by indorsement and delivery to a third person, who took it without notice of the fraud :—Held, that the vendee's fraud did not vitiate his power to pass a good title by indorsement, and that the right of such third person under the indorsement should prevail against the claim of the unpaid vendor to stop the goods in transitu. *Ib.*

—— **Of One of Set of Three.**] — The mere indorsement and delivery of one of a triplicate set of bills of lading is not necessarily such a negotiation as to preclude a vendor from exercising his right of stoppage in transitu. *The Tigress*, Br. & Lush. 38 ; 32 L. J., Adm. 97 ; 9 Jur. (N.S.) 361 ; 8 L. T. 117 ; 11 W. R. 538.

—— **Without Notice of Consignee's Insolvency.**]—The consignor loses his right of stoppage in transitu upon the insolvency of the consignee, when, prior to the insolvency, the bill of lading has been transferred, by indorsement, to a purchaser for value bonâ fide, and without notice of the consignee's insolvency, under 18 & 19 Vict. c. 111. *Kemp* v. *Canavan*, 15 Ir. C. L. R. 216.

The right of an unpaid consignor to stop in transitu is not taken away by an assignment of the bill of lading, for a valuable consideration, to, a third person, with notice of the insolvency of the consignee. *Vertue* v. *Jewell*, 4 Camp. 31.

Mere Delivery to Consignee.]—The delivery by the consignor of a bill of lading to the consignee is not such a transfer of the property as will preclude him from stopping the goods in transitu. *Tucker* v. *Humphrey*, 4 Bing. 516 ; 1 M. & P. 378, n. ; 6 L. J. (O.S.) C. P. 92.

The unpaid vendor may stop goods in transitu before they come to the hands of the vendee's factor ; although such factor has the bill of lading indorsed to order in his hands, and is under an acceptance to the vendee on a general account. *Patten* v. *Thompson*, 5 M. & S. 350 ; 17 R. R. 350. *See* 5 & 6 Vict. c. 39.

Purchase on Account of Third Person.]—A merchant who purchases goods on his own credit for another, to whom he indorses a bill of lading of the goods, stands for the purpose of stoppage in transitu in the position of a vendor, and the indorsement by him of one bill of lading to the vendee does not of itself defeat his right to stop in transitu. *Ib.*

The vendor claiming to stop need not represent to the master that the bill of lading is still in the hands of the vendee. *Ib.*

When Goods Pledged.]—The purchaser of goods (shipped by the vendor) consigned them abroad, and indorsed the bill of lading to a bank as security for an advance. Afterwards, and before the arrival of the ship, the consignees sold the goods "to arrive" to sub-purchasers, to whom they were delivered. The purchaser having become bankrupt, the unpaid vendor gave notice to the master, after the sub-sales, but before delivery and before payment of the freight, to stop the goods in transitu. The consignees remitted the proceeds of the sub-sales to the bank, who, after repaying themselves their advance, handed to the trustee of the bankrupt the balance, which was less than the original purchase-money : — Held, that the principles established by *Westzinthus, In re* (infra), and *Spalding* v. *Ruding* (infra), were applicable ; that the right of stoppage in transitu was not at an end when the notice was given ; and that the vendor was entitled to the balance after satisfaction of the bank's claim. *Kemp* v. *Falk*, 52 L. J., Ch. 167 ; 7 App. Cas. 573 ; 47 L. T. 454 ; 31 W. R. 125 ; 5 Asp. M. C. 1—H. L. (E.)

In equity the vendor may, when goods under a bill of lading have been pledged, by giving notice to the pledgee, resume his former interest in the goods, subject to the pledgee's claim, and will be entitled to the residue of their proceeds after the pledgee's demand has been satisfied out of them, or to the goods themselves if it be satisfied aliunde, notwithstanding the pledgee may have other demands against the consignee. *Westzinthus, In re*, 5 B. & Ad. 817 ; 2 N. & M. 644 ; 3 L. J., K. B. 56.

In equity a transfer of goods for valuable consideration by a consignee for a limited purpose, does not destroy the consignor's right of stoppage in transitu, ultra the particular lien of the transferee. *Spalding* v. *Ruding*, 12 L. J., Ch. 503 ; 6 Beav. 376.

A. consigned goods to the value of 1,000*l.* to B., who transferred the bill of lading to C. to secure 1,000*l.* B. having become bankrupt, C., as B.'s factor, claimed, as against A.'s title to stop in

transitu, a right to retain the whole in satisfaction of a general balance due to him from B. :—Held, that he was entitled to retain the goods, but only against the advance of 1,000*l*. *Ib.*

3. TRANSITUS NOT AT AN END.

Termination of Transitus—Not until Goods in Possession of Consignee.]—M. bought lead of the plaintiff at Newcastle, and some time after directed that it should be sent to him in London. Plaintiff gave his agent at Newcastle a delivery order, which the agent indorsed to a keelman, who put the lead on board a ship bound to London. The ship arrived in London on 21st of June, and the defendants, as wharfingers, undertook to deliver the lead. M. failed upon the same day. On the 23rd and 24th June M. demanded delivery of the lead from the master of the ship, who refused to deliver it, alleging that the defendants had stopped it because of his failure. On the 28th June the plaintiff wrote ordering the lead, which was then in the defendants' lighter, to be stopped :—Held, that the transitus was not at an end. *Jackson* v. *Nichol*, 5 Bing. (N.C.) 508 ; 7 Scott, 577 ; 8 L. J., C. P. 294.

Delivery to Carrier named by Purchaser.]—The transit continues until the goods are in the possession of the buyers, and it makes no difference that their ultimate destination has not been communicated to the vendor. Delivery by the vendor to the carrier is not delivery to the purchaser, although the carrier be named and paid by the purchaser. *Rosevear China Clay Co., Ex parte, Cock, In re*, 48 L. J., Bk. 100 ; 11 Ch. D. 560 ; 40 L. T. 730 ; 27 W. R. 591 ; 4 Asp. M. C. 144.

Delivery to Forwarding Agent.]—A., in Guernsey, employed his agent at Southampton to ship all goods arriving there addressed to him. The agent paid carriage and wharfage dues, and selected the ship to carry the goods on :—Held, that the vendor could stop the goods after shipment from Southampton. *Nicholls* v. *Le Feuvre*, 2 Bing. (N.C.) 81 ; 1 Hodges, 255 ; 2 Scott, 146 ; 7 Car. & P. 91 ; 4 L. J., C. P. 281.

Goods in King's Stores — Nonpayment of Duties.]—Where goods are consigned, but, on account of the duty not being paid, are lodged in the king's stores, the consignor may stop them in transitu, if he claims them before they are actually sold for the payment of duties ; or, if sold, he is entitled to the proceeds. *Northey* v. *Field*, 2 Esp. 613.

—— **Delivery of Bill of Lading "to Order or Assigns."**]—F. ordered wine of A. of Oporto, who loaded the wine and took from the master bills of lading for delivery to order or assigns. One of these bills they sent to F. in a letter advising him of the shipment on his account, and stating that they had drawn upon him for the price. F. accepted the bill, payable nine months after date. Before the bill was due the wine arrived, and, F. not being able to pay the duties, it was sent to the king's warehouse. F. being indebted to N., and called upon to pay, sold the wine whilst in the warehouse to N. for his debt and 40*l*. F. soon after became bankrupt. A., having paid the duties, obtained possession of the wine ; whereupon N. sued him for its value :—Held, that the right of the consignor to stop in transitu was not at an end. *Nix* v. *Olive*, Abbott on Shipping, 13th ed. 707.

Notice to Master of Consignee's Ship.] — A timber merchant in Sweden sold timber to L. & R. By the original contract the goods were to be delivered "free on board, payable by buyers' acceptance at six months from date of bills of lading, shipment to London, &c." ; the seller was to provide ships at rates specified. Afterwards it was agreed that the buyers should charter a ship to bring the timber, and this was done. The ship put into Copenhagen, and the buyers having stopped payment before the acceptance became payable, the vendor caused a notice of stoppage in transitu to be served on the master :—Held, a good stoppage. *Berndtson* v. *Strang*, 37 L. J., Ch. 665 ; L. R. 3 Ch. 588 ; 19 L. T. 40 ; 16 W. R. 1025.

Demand of Bills of Lading—Lien.]—An agreement was entered into between L. in London and W. in Yorkshire, that W. should supply L. with goods, W. drawing on L., who was to accept bills for the price of the goods. L. was to ship the goods to Shanghai for sale on W.'s account. On receipt of the bills of lading L. was to send them to R., to whose order they were to be made out. W. was to have a lien on the bills of lading and each shipment on transit outwards or in the hands of consignee or other person, which lien was to cease on payment of the bills of exchange in respect of each shipment. No notice of this agreement was given to R. W.'s packer forwarded a parcel of goods to London, marked for Shanghai and per a ship, the "Gordon Castle," named by L. W. paid the freight. The packer advised L. of the despatch of the goods, and told him that they were at his disposal. L. accepted a six months' bill drawn on him by W. for the price of the goods. The railway company advised L. of the arrival of the goods at the docks, and told him that they remained at his risk for shipment by the "Gordon Castle." The goods were shipped and the bills of lading made out to order of L. or his assigns, by his directions ; but they were never delivered to him, as he paid no freight. The ship sailed with the goods on board. A few days before, L. stopped payment, and shortly after she sailed he committed an act of bankruptcy and became a bankrupt. W. and the trustee in bankruptcy both claimed the bills of lading in the hands of the shipowners. It was arranged that the goods should be sold by the agent of the shipowners at Shanghai, and the proceeds paid to the person entitled :—Held, that the agreement did not prevent W. from exercising his right to stop the goods in transitu ; and that the transit did not end until the goods were at Shanghai ; and that the demand by W. of the bills of lading in the hands of the shipowners was an exercise of the right to stop ; and that W. was entitled to have the bill of exchange satisfied out of the proceeds of the goods. *Watson, Ex parte, Love, In re*, 46 L. J., Bk. 97 ; 5 Ch. D. 35 ; 36 L. T. 75 ; 25 W. R. 489 ; 3 Asp. M. C. 396—C. A.

Goods Shipped but not Arrived.]—The purchaser of goods directed the vendor, who carried on business at Wolverhampton, to consign goods to a vessel then loading in the East India Docks for Melbourne. The vendor delivered the goods to a railway company to be forwarded and shipped. Afterwards the vendor, on the

purchaser becoming insolvent, gave notice to the railway company to stop the goods, but too late to prevent shipment. The ship sailed with the goods on board, but before arriving at Melbourne the vendors claimed the goods from the shipowners as their property :—Held, that the transit was not at an end until the goods reached Melbourne, and that the vendors were entitled to the goods. *Bethell* v. *Clark*, 57 L. J., Q. B. 302 ; 20 Q. B. D. 615 ; 59 L. T. 808 ; 36 W. R. 611 ; 6 Asp. M. C. 346—C. A.

Ship chartered by Shipper—Bill of Lading to his Order — Indorsement — Ship calling for Orders.]—W. at Bahia sold goods to A. at Glasgow. Under the contract W. shipped the goods on board a vessel chartered by himself to proceed either direct or viâ Falmouth, Cowes or Queenstown, for orders to any port in the United Kingdom or the continent as specified. The bill of lading was made out to W.'s order or assigns, signed by the master, and indorsed in blank by W., who forwarded it with the charterparty and invoice, which expressed the goods to be shipped on the account and at the risk of and to A. The bill of lading, charterparty and invoice were received by A. On the ship's arrival at Falmouth, W.'s agents applied to A. for instructions as to the destination, and before receiving them they heard of A.'s insolvency :—Held, that W.'s agents had a right to stop in transitu. *Fraser* v. *Witt*, L. R. 7 Eq. 64 ; 19 L. T. 440 ; 17 W. R. 92.

Ship chartered by Vendee.]—Delivery on ship chartered by vendee does not necessarily end the transitus. *Bothlingk* v. *Inglis*, 3 East, 381 ; 7 R. R. 490.

Goods delivered on Board—Receipts taken—Purchaser Passenger in same Ship.]—The purchaser of goods directed the vendors to deliver the goods at a wharf, to be forwarded by a specified ship to the purchaser abroad. The vendors delivered the goods, and took receipts from the shipowners, which they delivered to the purchaser, who exchanged them for the bills of lading, and himself sailed as a passenger in the ship :—Held, that the goods were liable to be stopped in transitu. *Lyons* v. *Hoffnung*, 59 L. J., P. C. 79 ; 15 App. Cas. 391 ; 63 L. T. 293 ; 39 W. R. 390 ; 6 Asp. M. C. 551—P. C.

Rejection of Goods by Purchaser—Contract Rescinded.]—A ship's cargo was bought, and after it was unloaded by the purchaser he became insolvent. Part of the cargo was afterwards, at the request of the dock people, removed from the quay to the purchaser's house for the purpose of safe custody. The cargo was, in fact, rejected by the purchaser as not according to the contract ; whereupon the seller had rescinded the contract : —Held, that the seller was entitled to the cargo as against the trustee in bankruptcy. *Booker* v. *Milne*, 9 Ct. of Sess. Cas. (4th ser.) 314.

Voyage not Completed because of Quarantine.]—Where before the ship's arrival the consignee of cargo becomes bankrupt, the arrival of the ship in the port, where she is taken possession of by the assignees, but from whence she is ordered to perform quarantine, is not such a completion of the voyage as shall vest the property in the assignees ; but the consignor may stop them as in transitu whilst the vessel is performing quarantine. *Holst* v. *Pownal*, 1 Esp. 240. *See* 5 R. R. 658, n.

Mate's Receipt.]—Goods were sold f.o.b., and on shipment the vendor's agent tendered a receipt to the mate by which the goods were acknowledged to be shipped on account of the vendor. The mate kept, but did not sign, the receipt ; and on the next day signed bills of lading, making the goods deliverable to the order of the vendee :—Held, that the vendor could stop the goods on the vendee's insolvency. *Ruck* v. *Hatfield*, 5 B. & Ald. 632 ; 24 R. R. 507.

Overside Order.]—Goods were shipped by A., a firm in Calcutta, to the order of B. in England. B. pledged the bill of lading to C., and afterwards became bankrupt. On the ship's arrival C. obtained from the brokers, on payment of freight, an overside order for delivery of the goods. On presenting this order to the officer on board the ship, the lighterman employed by C. was told that he should have the goods as soon as they could be got at. Before they could be got at, or the ship broke bulk, A.'s agents served notice on the master and ship's agents of stoppage in transitu :—Held, that the notice was good, and that A. was entitled to the goods, after satisfying C.'s charge. *Coventry* v. *Gladstone*, 37 L. J., Ch. 492 ; L. R. 6 Eq. 44 ; 16 W. R. 837.

Goods in Hands of Forwarding Railway Company.]—A. & Co., of Moscow and Birmingham, bought goods from B. & Co., of Glasgow, to be shipped by C.'s "first steamer from Leith to Riga, to A. & Co.'s orders." By the bills of lading, which stated that the goods were shipped by A. & Co., they were to be delivered at Riga to the agent of a railway company, to be forwarded to A. & Co. at Moscow. A. & Co. became insolvent, and B. & Co. stopped the goods at Riga in the hands of the railway company :—Held, that the transitus was not at an end. *McLeod* v. *Harrison*, 8 Ct. of Sess. Cas. (4th ser.) 227.

4. Part Delivery.

Freight Lien Existing.]—A cargo of 114 tons of iron castings was consigned from Scotland to London on board a ship chartered by the vendor, the bill of lading being made out in favour of the purchaser or his assigns, he or they paying freight. After thirty tons were delivered to the purchaser the vendor gave notice to stop the unloading. At this time part only of the freight had been paid to the master. Soon after the purchaser became insolvent, and a receiver was appointed. The balance of the freight was paid by the receiver, and the rest of the cargo was placed in medio :—Held, that, inasmuch as it could not be supposed that the master intended to abandon his lien for the unpaid freight, the delivery of the thirty tons did not operate as a constructive delivery of the whole, and that the transitus was not at an end. *Cooper, Ex parte, McLaren, In re*, 48 L. J., Bk. 49 ; 11 Ch. D. 68 ; 40 L. T. 105 ; 27 W. R. 518 ; 4 Asp. M. C. 63—C. A.

—— **Reshipment.**]—A. consigned iron to B., and sent it to a carrier, who delivered part on a wharf of B. ; on discovery that B. was insolvent the carrier reshipped the part delivered, and held the whole to satisfy his lien for freight and for a general account between him and B. :—Held, that A.'s right of stoppage in transitu was not gone ; and that he could maintain trover for the iron against the carrier. *Crawshay* v. *Eades*, 2

D. & R. 288 ; 1 B. & C. 181 ; 1 L. J. (o.s.) K. B. 90 ; 25 R. R. 348.

Constructive Delivery of Whole.]—A. at a foreign port ships goods by order and on account of B., to be paid for at a future day, and bills of lading accordingly are signed by the master. One of the bills is sent to B., who before the ship arrives sells the goods and hands the bill of lading to C. After the ship's arrival and delivery of part of the goods to C.'s agent, B. becomes bankrupt :—Held, that there having been constructive delivery of the whole of the goods, the vendor's right to stop in transitu was at an end. *Slubey* v. *Heyward*, 2 H. Bl. 504 ; 3 R. R. 486.

Part delivery by carrier to consignee held to be constructive delivery of the whole, so as to put an end to the transitus. *Betts* v. *Gibbins*, 4 N. & M. 64 ; 2 A. & E. 57 ; 4 L. J., K. B. 1.

Sampling and Selling Part of Cargo.]—Wheat was shipped in London under bill of lading making it deliverable at Barmouth or Tremadoc to T. or his assigns, on payment of freight. The cargo was paid for partly by cash and partly by acceptance. Before the acceptance became due T. assigned his property to the plaintiff, A., in trust for his creditors ; being at the time insolvent, to the plaintiff's knowledge. T. indorsed the bill of lading to the plaintiff. On the ship's arrival at Barmouth the plaintiff went on board, took samples, and sold seventy of the eighty quarters on board to purchasers, having paid the freight. The remaining ten quarters he ordered to be carried on to Tremadoc. On the ship's arrival at Tremadoc, T.'s acceptance having been dishonoured, the vendor claimed the remaining ten quarters, tendering freight :—Held, that the transitus was determined by the acts done by the plaintiff at Barmouth. *Jones* v. *Jones*, 8 M. & W. 431 ; 10 L. J., Ex. 481.

5. Goods in Hands of Wharfinger.

Consignee not in Possession.] — Goods were consigned to A. deliverable in the Thames. A., being pressed by the master of the ship to have them landed, sent his son to tell the master to land them at the wharf where goods usually were landed for him. At the same time, being insolvent, he told his son that he should not meddle with them :—Held, that the transitus was not at an end ; A.'s statement to his son, which was admitted in evidence, shewing that he had not taken possession of the goods as owner. *James* v. *Griffin*, 2 M. & W. 622 ; 6 L. J., Ex. 241.

Before Shipment.]—Goods at a wharfinger's in London on their way to be shipped to the vendee at Newcastle are subject to the vendor's right to stop in transitu ; and that although they have been attached by process out of the mayor's court at the suit of a creditor of the vendee. *Smith* v. *Goss*, 1 Camp. 282 ; 10 R. R. 684.

After Weighing for Purchaser.]—Bale goods were forwarded by ship to London deliverable to B. & Co. or their assigns, being factors for sale, and were landed at the defendant's wharf. B. & Co. ordered the defendant to weigh and deliver to M., a purchaser from B. & Co. They were weighed, and an account of weight sent to B. & Co., who sent invoices accordingly to M. M. resold some bales, and they were delivered upon his order by the defendants to his vendees. The rest remained on the wharf until stopped by B. & Co. as unpaid vendors. The goods were never transferred in the wharf books from the names of B. & Co. to that of M., and no warehouse rent was ever paid by M. :—Held, that the defendants never held the goods as wharfingers for M. ; and that the right of stoppage in transitu was not determined by part delivery to his vendees. *Tanner* v. *Scovell*, 14 M. & W. 28 ; 14 L. J., Ex. 321.

—— **Order to Weigh.**]—An order by the vendor to the wharfinger to weigh and deliver the goods to the vendee does not defeat the right of stoppage in transitu :—Aliter, where the order is for delivery forthwith. *Withers* v. *Lys*, Holt N. P. 18 ; 16 R. R. 781.

In Vendor's Name—Order not to Deliver.]—G. at North Tawton ordered goods to be sent to him from London, not specifying any particular ship, by way of Exeter. They were shipped and carried to Exeter, where they were put into the hands of a wharfinger to be forwarded to North Tawton. In the wharfinger's books they were put into the name of G. The vendor received a letter from G. that he would not receive the goods, and that the vendor might take them back. The vendor ordered the wharfinger not to deliver them, and the wharfinger promised not to do so until he could with safety, but afterwards delivered them to G.'s assignees in bankruptcy :—Held, that C.'s right to stop in transitu was not at an end, and that he could maintain trover against the wharfinger. *Mills* v. *Ball*, 2 Bos. & P. 457 ; 5 R. R. 653.

Goods were landed and entered in the wharfinger's book, with freight and charges set opposite to them, not in the name of anyone as consignee. The master of the ship had landed them at the instance of the clerk of the consignee, who was away from home :—Held, that the transitus had not ended. *Edwards* v. *Brewer*, 2 M. & W. 375 ; 6 L. J., Ex. 135.

Delivery Order by Consignee — Goods not Arrived.]—A consignee of goods delivering over to a third person the shipping note of such goods, and a delivery order on the wharfinger to deliver such goods when they arrive, does not pass the property in them, so as to prevent a stoppage in transitu by the consignor. *Akerman* v. *Humphrey*, 1 Car. & P. 53.

Goods Warehoused for Vendee.]—Goods conveyed by a barge on the Thames were deposited in the carrier's warehouse for the convenience of the vendee, to be delivered as he should want them :—Held, that the vendor's right to stop in transitu was gone. *Allen* v. *Gripper*, 2 C. & J. 218 ; 2 Tyr. 217 ; 1 L. J., Ex. 71.

Transfer in Warehouseman's Books to Name of Purchaser.]—Where the purchaser of goods has lodged with the wharfinger an order to deliver them, and the wharfinger has transferred them in his books into the name of the purchaser, the vendor's right to stop in transitu is at an end. *Harman* v. *Anderson*, 2 Camp. 242 ; 11 R. R. 706.

6. Transitus at an End.

Corporal Touch of Purchaser — Delivery to Third Person.]—The right to stop in transitu

exists until the goods come to the "corporal touch" of the vendee; delivery to a third person, to convey to the vendee, does not determine the transitus. *Hunter* v. *Beale*, cited, 3 Term Rep. 466.

Bills of Lading indorsed, and Goods delivered to Railway Company.]—Bills of lading for cotton sent to the vendor's agent at Liverpool provided for delivery at Liverpool to order or assigns. The purchaser at Liverpool sent to the vendor's agent his acceptance for the price of the cotton, and the bills of lading were sent to the purchaser, who indorsed them to a railway company, to whom the cotton was delivered for carriage to the purchaser in Yorkshire:—Held, that the vendor had no right to stop the cotton after delivery to the railway company. *Gibbes, Ex parte, Whitworth, In re*, 45 L. J., Bk. 10; 1 Ch. D. 101; 33 L. T. 479; 24 W. R. 298.

Delivery on Board Ship of Purchaser.]—H. & Co. were in possession of a ship let to them for three years at 52*l.* 10*s.* per month, they finding stock and provisions for the ship, paying the master, and to have complete control of the ship. The ship went a voyage to Alexandria, and had goods on board her which they were sending upon an adventure:—Held, that the unpaid vendor of the goods could not stop the goods, the delivery having been complete. *Fowler* v. *M'Taggart* or *Rymer*, cited, 1 East, 522; 7 Term Rep. 442; 3 East, 396.

Delivery on board a ship belonging to the vendee under bills of lading making the goods deliverable to the vendee or his assigns ends the transitus. *Schotsmans* v. *Lancashire and Yorkshire Ry.*, 36 L. J., Ch. 361; L. R. 2 Ch. 332; 16 L. T. 189; 15 W. R. 534.

Shipment by Vendee.]—Goods delivered to the vendee at the wharf and shipped by him cannot afterwards be stopped. *Noble* v. *Adams*, 7 Taunt. 59; 2 Marsh. 366; Holt, 248; 17 R. R. 445.

Goods taken to Purchaser's Premises against his Wish.]—Goods were consigned from London to A. in Sunderland, the invoice and bill of lading being forwarded to A. on the arrival of the goods at Sunderland. The goods were, against the wish of A., who was in difficulties, taken from the wharf to A.'s premises. A. wrote to the vendor stating that a stoppage of his business had been decided on, and expressing his regret that he could not return the goods to the wharf. Afterwards he delivered the key of his warehouse in which the goods lay to a trustee for his creditors:—Held, that the transitus was at an end, and that the creditors were entitled to the goods as against the vendor, who claimed a right of stoppage in transitu. *Heinekey* v. *Earle*, 8 El. & Bl. 410; 28 L. J., Q. B. 79; 4 Jur. (N.S.) 848; 6 W. R. 687.

Goods delivered on Board to be carried at Purchaser's Risk.]—Coffee was shipped in a ship of the purchaser's under bills of lading making it deliverable to the order or assigns of the vendors "freight free." An invoice was made out, stating the coffee to have been shipped by order, and on account, and at risk of the purchasers. A bill of lading indorsed in blank was sent to the purchasers, but afterwards, and after the bankruptcy of the purchasers, placed in the hands of a third person, at the request of the vendors, to secure bills drawn for the price of the coffee:—Held, that it was a question for the jury whether the coffee was delivered on board on account of, and to be carried at the risk of, the purchasers; if so, the right of stoppage in transitu was at an end. *Van Casteel* v. *Booker*, 2 Ex. 691.

Bill of Lading indorsed to Purchaser.]—B. sold wheat to A., the price to be paid by banker's draft on London at two months, to be remitted on receipt of invoice and bill of lading. B. shipped the wheat by order of A. to be carried to M. for the account, and at risk, of A. The master signed a bill of lading, making the wheat deliverable to B.; B. indorsed the bill of lading to A., and sent it to A. with an invoice, asking for payment; A. failed to remit the banker's draft:—Held, that B.'s right of stoppage in transitu was at an end. *Wilmshurst* v. *Bowker*, 7 Man. & G. 882; 12 L. J., Ex. 475—Ex. Ch.

Delivery Order of Whisky handed to Excise Officer by Consignee.]—A. in Scotland consigned ten puncheons of whisky to B. at N. in Ireland, sending to B. an invoice and delivery order directed to the collector of excise at N., instructing him to receive the duty and deliver to B. B. lodged the delivery order with the excise and the keeper, and removed six of the puncheons, paying the duty; but no transfer of the whisky was made in the excise books. B. afterwards became bankrupt, and A. transferred the other four puncheons to C. The assignees of B. brought trover for the four puncheons:—Held, that the right of stoppage in transitu was at an end when the delivery order was lodged, and that the transfer in the excise books was immaterial. *Orr* v. *Murdock*, 2 Ir. C. L. R. 9.

Receipt given for Goods—Shipment.]—Goods were ordered from R. & Co. by G. and were delivered at the docks marked, according to G.'s order, "J. H. A., Trinidad." With the goods were forwarded shipping instructions from G., directing the goods to be put on board the ship "M." A receipt signed by the dock superintendent was given for them to R. & Co. as follows: "Bought of R. & Co., J. H. A., 500 boxes, ss. 'M.' on account G. Trinidad." During the passage of the goods to Trinidad G. became bankrupt, and R. & Co. gave notice to stop the goods. Under an order of the Trinidad court the goods were delivered to J. H. A., who paid the trustee in bankruptcy for them. R. & Co. claimed the money so paid:—Held, that the transit was determined when the receipt was given, and that R. & Co. were not entitled to the money. *Gurney, In re, Hughes, Ex parte*, 67 L. T. 598; 7 Asp. M. C. 249; 9 Morrell, 294.

Bill of Lading to Consignor or Order—Goods delivered to Purchaser.]—Goods were shipped for the use and at the risk of the consignee, the consignor taking bills of lading making them deliverable to his order. The master delivered the goods to the consignee, in whom the property in the goods was held to have vested:—Held, that the consignor's right to stop in transitu was gone; but semble, per Lord Ellenborough, the master might be liable in an action by the consignor for not delivering according to the bill of lading. *Coke*

v. *Harden*, 4 East, 211, 217 ; 1 Smith, 20 ; 7 R. R. 570.

Mate's Receipts.]—The vendor's lighterman took mate's receipts for goods contracted to be sold and delivered f. o. b., to be paid for by cash or bills at the purchaser's option. The goods were paid for by bills, the vendors retaining the mate's receipts. During the currency of the bills the purchaser became insolvent :—Held, that the transitus and the vendor's right to stop were at an end. *Cowasjee* v. *Thompson*, 5 Moore, P. C. 165 ; 3 Moore, Ind. App. 422.

Stoppage by Agent—Ratification.]—C. and T., merchants at Liverpool, sent orders to T., a merchant at New York, to purchase goods for them, which were shipped in five vessels for Liverpool, and consigned to C. and T., who, after receipt of the goods in one of the vessels, stopped payment on April 7th. I. had drawn bills for the goods, partly on C. and T., and partly on B. & Co., with whom C. and T. had dealings. B. & Co., who were merchants at Liverpool, having a house at New York, purchased there several of the bills, which were drawn at sixty days' sight and were dated, some on March 28th, and some on March 30th. On May 8th a fiat in bankruptcy issued against C. and T. The four other vessels arrived on May 3rd, 5th, 6th and 9th respectively, and immediately on the arrival of each ship B. & Co., on behalf of I., before the transitus was ended, gave notice to the masters and consignees to stop the goods. B. & Co. were not the general agents of I., nor had they received from him authority to make the stoppage. On May 11th the assignees of C. and T. demanded the goods from the masters and consignees, tendering the freight. The latter refused to deliver them, and on the same day delivered them to B. & Co. The assignees claimed them from B. & Co., who refused to deliver them up. On 28th April I. heard at New York of C. and T. having stopped payment, and executed a power of attorney to H. at Liverpool to stop the goods in transitu. On May 13th H. received the power of attorney and confirmed the stoppage by B. & Co. I. afterwards adopted and ratified all that had been done by H. and B. & Co. :—Held, that after the demand by the assignees there could be no stoppage in transitu, and that the pretended ratification by I. of H.'s and B. & Co.'s acts had no effect. *Bird* v. *Brown*, 4 Ex. 786 ; 19 L. J., Ex. 154 ; 14 Jur. 132.

Possession of Consignee.]—The transitus is at an end when the consignee has taken possession of the goods and exercised an act of ownership over them. *Wright* v. *Lawes*, 4 Esp. 82.

XVII. AVERAGE.

1. *Generally—Average Act*, 580.
2. *Spars, &c., Sacrificed*, 581.
3. *Cargo Sold for Repairs*, 582.
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5. *Port of Refuge Expenses*, 583.
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9. *Who and what Contribute ; In what Manner*, 588.
10. *Average Statement*, 590.
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12. *Action for—Practice*, 591.
13. *Jurisdiction, Admiralty*, 592.

1. Generally—Average Act.

Loss must be voluntarily Incurred.] — To found a claim for average contribution the loss must be voluntarily incurred—per Lord Stowell. *The Copenhagen*, 1 C. Rob. 289, 293. S. P., *Hallett* v. *Wigram*, infra.

What Necessary to establish Claim to.]—In order to establish a claim to general average against the owner of cargo, the shipowner must shew a common risk existing, and a voluntary sacrifice or an extraordinary expenditure incurred for the joint benefit of both ship and cargo. If, therefore, goods are landed from a stranded ship, and deposited in a place of safety, whence they may be shipped again in another vessel and carried to their destination, without greater expense to the owner of the goods, or deterioration to the goods themselves, so that it is indifferent to him by what ship they go forward, extraordinary expenses subsequently incurred in floating the stranded vessel do not constitute general average to which the cargo is bound to contribute. *Walthew* v. *Mavrojani*, 39 L. J., Ex. 81; L. R. 5 Ex. 116; 22 L. T. 310—Ex. Ch.

Not within Suing and Labouring Clause of Policy.]—General average and salvage do not come within either the words or the object of the suing and labouring clause of a policy of marine assurance. *Aitchison* v. *Lohre*, 49 L. J., Q. B. 123 ; 4 App. Cas. 755 ; 41 L. T. 323 ; 28 W. R. 1 ; 4 Asp. M. C. 168—H. L. (E.)

Lien.]—There is a lien for general contribution to individual loss by property thrown overboard for the safety of the ship. *Hallett* v. *Bousfield*, 18 Ves. 187 ; 11 R. R. 184.

A right to general average contribution from a ship after adjustment made gives the owners of the cargo no lien on the ship by the law maritime. *The North Star*, Lush. 45 ; 29 L. J., Adm. 73.

When a person has been employed by the master of a stranded vessel to do various acts for the purpose of saving the cargo, such person has a lien on the cargo for his charges, the services being in the nature of salvage, and the charges payable by particular average. *Hingston* v. *Wendt*, 45 L. J., Q. B. 440 ; 1 Q. B. D. 367; 34 L. T. 664 ; 24 W. R. 664 ; 3 Asp. M. C. 126.

Silk put Ashore to save Capture.]—A ship with oils and silk on board was surprised by the enemy. The silk, being valuable and light, was sent ashore in boats and saved. The ship and oils were captured :—Held, no case for average contribution as between the owner of the ship and oils and the owner of the silk. *Sheppard* v. *Wright*, Shower P. C. 23 (ed. 1876).

Goods Stowed on Deck.]—*See* infra, 7. Jettison.

Where Insurance effected.]—The fact of an owner having effected an insurance does not affect his right to recover general average. *Price* v. *Noble*, 4 Taunt. 123 ; 13 R. R. 566.

Ship and Cargo in Peril—Tipping Ship Head down to repair Propeller—Damage to Cargo.]—A ship, laden with a perishable cargo which could not by any means be discharged, having on her voyage become unnavigable and incapable of moving through damage to her propeller is, with her cargo, in peril, although the ship be

tight and strong and the cargo sound. If tipping the ship head down to repair her propeller be resorted to, and in the course of the operation a portion of the cargo be damaged by salt water, the cargo-owners have a right to a general average contribution. The operation of so tipping the ship is under the circumstances a general average act, and the loss a general average and not a particular average loss. *McCall* v. *Houlder*, 66 L. J., Q. B. 408; 76 L. T. 469.

See also B. MARINE INSURANCE, infra, cols. 1240 seq.

2. SPARS, &c., SACRIFICED.

Spars, &c., burnt to keep Donkey-engine at Work.]—A ship sailed well equipped and manned for the voyage, having a donkey-engine on board and a reasonable supply of coals to work it for pumping purposes. The ship met with very heavy weather and sprang a leak, and in order to keep her afloat it became necessary to use the engine for pumping, and the coals running short, the captain burnt with the coals the ship's spare spars and some of her cargo:—Held, that the sacrifice of the spars and cargo was general average. *Robinson* v. *Price*, 46 L. J., Q. B. 551; 2 Q. B. D. 295; 36 L. T. 354; 25 W. R. 469; 3 Asp. M. C. 407—C. A.

Loss of Tackle.]—An action lies by a shipowner to recover from the owner of the cargo his proportion of general average loss incurred by sacrificing the tackle belonging to the ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern. *Birkley* v. *Presgrave*, 1 East, 220; 6 R. R. 256.

If anything on board a ship, which is cut or cast away because it is endangering the whole adventure, is in such a state or condition that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average. *Shepherd* v. *Kottgen*, 47 L. J., C. P. 67; 2 C. P. D. 585; 37 L. T. 618; 26 W. R. 120; 3 Asp. M. C. 544—C. A.

Mast cut away—Question for Jury.]—A ship being caught in a storm, portions of the rigging gave way to such an extent that the mainmast began to lurch violently; whereupon, fearing that the mast would rip up the decks and thereby endanger the safety of the ship, the captain ordered it to be cut away, which was done. In an action by the owner of the ship to recover from the owners of the cargo their proportion of general average loss incurred by the sacrifice of the mast, the judge left to the jury the following questions: first, Are you of opinion that the mast was virtually a wreck, and gone at the time it went over? secondly, Do you find it was hopelessly lost? The jury answered both questions in the affirmative:—Held, that there had been no misdirection, and that substantially the right questions had been left to the jury. *Ib.*

Mast working through Ship's Bottom.]—Cutting away a steamship's iron mast that had worked loose at the keel and was in the master's reasonable opinion, though not in fact, likely to go through the ship's bottom:—Held, general average. *Corry* or *Corrie* v. *Coulthard*, cited 2 C. P. D. 583; 3 Asp. M. C. 546, n.

3. CARGO SOLD FOR REPAIRS.

Repairs of Damage by Perils of Sea.]—No claim for general average arises when the master has been obliged to sell part of the cargo for the purpose of executing repairs rendered necessary by ordinary perils of the sea. The claim for general average arises when part of the cargo is sacrificed to preserve the rest from impending peril. *Hallett* v. *Wigram*, 9 C. B. 580; 19 L. J., C.P. 281.

Repairs of General Average Damage.]—Where cargo is sold necessarily by the master to raise money for repairs of injuries which are the subject of general average, the loss on cargo is also the subject of general average. *The Constancia*, 4 Not. of Cas. 677. S. P., *The Gratitudine*, 3 C. Rob. 240, 264.

Advantageous Sale of Cargo.]—The master on the voyage sold part of the cargo to pay for necessary repairs for a higher price than it would have fetched at the port of destination. Upon a reference to settle the average loss between shipowner and charterer, the arbitrator allowed for the actual value of the goods when sold, and not at the port of destination. The court refused to set aside the award. *Richardson* v. *Nourse*, 3 B. & Ad. 237.

Sale of Cargo to avoid Arrest.]—Where the master of a ship in a foreign port was arrested by process out of a court of justice, at the suit of the agent of the ship, for sums of money the latter had disbursed on his account, and the master not being able to raise money by other means, that he might procure his liberation and pursue the voyage, sold a part of the cargo:—Held, that the owner of the goods so sold had no right to a contribution in the nature of general average from the shippers of the other goods on board, which arrived safely at the port of destination. *Dobson* v. *Wilson*, 3 Camp. 480; 14 R. R. 817.

4. FORWARDING AND SALVING CARGO.

Expenses, &c., in transhipping Cargo and arranging for Sale.]—A ship during her voyage from India to London was stranded on the coast of France. The shipowner dispatched his manager and other persons to take part in the necessary salvage operations and the whole of the cargo was saved, transhipped and brought forward to London and the freight earned. Part of the cargo which could not be identified was sold by the shipowner by an arrangement with the consignees through a broker, who received his brokerage. The shipowner incurred considerable trouble in chartering ships to carry on the cargo from France to London, and in sending out lighters and necessary appliances to France, and in the identification of the cargo, preparing for the sale, answering the inquiries of and arranging with the consignees. In the average statement a remuneration to the shipowner for "arranging for salvage operations, receiving cargo, meeting and arranging with consignees, and receiving and paying proceeds, and generally conducting the business," was charged partly to general average, and partly as particular average on the several interests ratably, the average stater thinking that the amount was a reasonable remuneration

to the shipowner for his services and for commission on the sale of unidentified cargo, and on disbursements:—Held, that under the circumstances the amount was improperly charged, and could not be recovered, there being no contract on the part of the owners of the cargo to remunerate the shipowner for his services, a great part of which had been rendered with the object of earning his freight. *Schuster* v. *Fletcher*, 47 L. J., Q. B. 530; 3 Q. B. D. 418; 38 L. T. 605; 26 W. R. 756; 3 Asp. M. C. 577. And see *Rose* v. *Bank of Australasia*, infra.

Payment by Shipowner—Liability of Cargo-owner—Question for Jury.]—When ship and cargo are in peril, the fact that the shipowners have by the act of the master become bound to pay, and have paid, a sum of money for preservation of ship and cargo, and that the master in so binding them pursued a reasonable course under the circumstances, is not conclusive that the whole sum was chargeable to general average, so as to bind the cargo-owners to pay their proportion. A new trial was ordered on the ground that the question of the amount chargeable to general average ought to have been submitted to the jury. *Anderson* v. *Ocean Steamship Co.*, 54 L. J., Q. B. 192; 10 App. Cas. 107; 52 L. T. 441; 33 W. R. 433; 5 Asp. M. C. 401—H. L. (E.)

Extraordinary Expenditure—Sale of Unidentified Cargo—Commission.]—Where a ship, which carries a perishable cargo, is thrown away, the shipowner is bound to convey the goods to a place of safety. He need not, therefore, make his election as to whether he will earn freight by carrying the goods to their destination at any particular time, but has a reasonable time within which to make up his mind, and expenditure incurred while carrying the goods to a place of safety cannot be regarded as expenditure on account of freight alone. *Rose* v. *Bank of Australasia*, 63 L. J., Q. B. 504; [1894] A. C. 687; 6 R. 121; 70 L. T. 422; 7 Asp. M. C. 445—H. L. (E.)

The shipowner cannot render owners of cargo liable for the cost of employing assistance to do that which he might himself have done. But where he acts reasonably in incurring extraordinary expenditure—either by employing extraneous aid to salve the cargo, or a commission merchant to sell unidentified parts of it—for the benefit of the adventure generally, he is at liberty to charge such expenditure upon those who are benefited. *Schuster* v. *Fletcher*, supra, disapproved. *Ib.*

Cargo forwarded—Expense of getting Ship afloat.]—A ship got ashore, and her cargo was landed and forwarded in another ship:—Held, that expenses subsequently incurred in getting the ship off were not general average, to which the cargo should contribute. *Job* v. *Langton*, 6 El. & Bl. 779. S. P., *Oppenheim* v. *Fry*, 5 B. & S. 348; *Moran* v. *Jones*, 7 El. & Bl. 523.

5. Port of Refuge Expenses.

Expenses of unloading, &c., during Repairs—Deserters.]—A ship after collision had to cut away part of her rigging and return to put to repair:—Held, that, the expenses of unloading and repairs to enable the ship to proceed were general average, but not the expenses of the master, or of replacing deserters during the repairs, which fell on the shipowner. *Plummer* v. *Wildman*, 3 M. & S. 482; 16 R. R. 334.

Expenses during Repairs—Press of Sail on Lee Shore.]—Wages of crew and repairs to ship compelled to put into port of refuge to repair damage caused by bad weather not general average, nor damage to ship caused by carrying press of sail to keep off a lee shore. *Power* v. *Whitmore*, 4 M. & S. 141; 16 R. R. 416.

Average Adjustment at a Port of Refuge—Pro ratâ Freight.]—The mere temporary suspension of the voyage by reason of the necessity of repairing the ship at a port of refuge does not, as between the shipowner and the owner of cargo, warrant an average adjustment at the intermediate port. *Hill* v. *Wilson*, 48 L. J., C. P. 764; 4 C. P. D. 329; 41 L. T. 412; 4 Asp. M. C. 198.

A ship sailed from Riga for Hull with a general cargo and was stranded, but was afterwards got off (part of the cargo having been washed out of her, and part jettisoned) and towed into Copenhagen, where her cargo was discharged, and the ship, having been repaired at considerable expense, was sent on to Hull after a delay of about two months, with some of her cargo on board, other part having been sent on by the master in other vessels. The plaintiffs' goods were so much damaged as not to be worth sending on, and were (properly, but without the plaintiffs having an opportunity of exercising an option) sold at Copenhagen, and an average adjustment took place there according to Danish law, under which the plaintiffs were charged with pro ratâ freight from Riga to Copenhagen. In an action for the price realised by the sale at Copenhagen:—Held, that the shipowners were not entitled to deduct the general average expenses ascertained by the adjustment at Copenhagen, nor pro ratâ freight. *Ib.*

Expense of Warehousing, Seamen's Wages and Repairs.]—Where a ship has for the benefit of all concerned to put into a port of refuge for repairs, the charges for unloading for repairs, warehousing cargo and seamen's wages during repairs are general average. *Da Costa* v. *Newnham*, 2 Burr. 407; 2 Term Rep. 413.

Where a ship is compelled to put into port to repair damage occasioned by a general average sacrifice, the expenses of warehousing and reshipping cargo, necessarily unloaded in order to repair, and the port and pilotage charges and other expenses on leaving the port, are the subject of a general average contribution. *Attwood* v. *Sellar*, 49 L. J., Q. B. 515; 5 Q. B. D. 286; 42 L. T. 644; 28 W. R. 604; 4 Asp. M. C. 283—C. A.

Expenses of reshipping Cargo and of Ship leaving Port of Refuge.]—A ship on a voyage having sprung a dangerous leak, the captain, acting justifiably for the safety of the whole adventure, put into a port of refuge to repair. In port the cargo was reasonably, and with a view to the common safety of the ship, cargo and freight, landed in order to repair the ship. The ship was repaired, the cargo reloaded, and the voyage completed:—Held, that the cargo-owners were not chargeable with a general average contribution in respect of the expenses of reshipping the cargo. *Attwood* v. *Sellar*, supra, discussed.

Svensden v. *Wallace*, 54 L. J., Q. B. 497; 10 App. Cas. 404; 52 L. T. 901; 34 W. R. 369; 5 Asp. M. C. 453—H. L. (E.)

Port of Refuge—Refitting.]—If A. let his ship to B. for a voyage, engaging to keep it in repair during the whole time, for which he is to receive freight on the return of the ship; and, for the safety of the ship, it becomes necessary during the voyage to put into a port to refit, the expense of refitting must be borne entirely by A; and B. is not liable to contribute to it in proportion to his interest in the cargo, as for a general average. *Jackson* v. *Charnock*, 8 Term Rep. 509; 5 R. R. 425.

Discharge of Part of Cargo before Commencement of extraordinary Measures.]—A steamer, carrying among other cargo a large amount of specie, ran aground, and lay in a dangerous position. The specie was landed by the master soon after the vessel struck. After the landing of the specie, the master jettisoned part of the cargo, and had recourse to other extraordinary measures for getting off the vessel. These measures succeeded, and she completed her voyage with the cargo remaining on board. The specie was conveyed to a neighbouring port, whence it was sent on in another vessel, but for the purposes of the case was to be treated as having arrived in the steamer:—Held, that the losses and expenses incurred in getting the steamer off, and the expenses incurred in landing and conveying the specie, were not general average to which the owners of the specie were liable to contribute. *Royal Mail Steam Packet Co.* v. *English Bank of Rio de Janeiro*, 57 L. J., Q. B. 31; 19 Q. B. D. 362; 36 W. R. 105.

6. Fire.

Scuttling Ships to put out Fire.]—Damage to cargo by scuttling a ship to put out a fire is the subject of general average contribution. *Achard* v. *Ring*, 31 L. T. 647; 4 Asp. M. C. 422.

Damage by Water to put out Fire.]—Bark was shipped on board a general ship, under a bill of lading, from Santa Martha to London, by which average, if any, was to be adjusted according to British custom. When the ship was about to sail, a fire broke out in the forehold, and pumping water through the deck of the forecastle not being sufficient to extinguish the fire, a hole was cut in the side of the ship, and her fore compartment being thereby filled with water, the fire was extinguished. If this course had not been adopted the cargo on board would in all probability have been destroyed, and the ship most seriously damaged, if not rendered a total wreck. The bark was destroyed by the water poured into the ship. In an action for general average contribution in respect of the destruction of the bark it was found, in addition to the above facts, that it is the practice of British average adjusters to treat a loss so caused as not a general average loss:—Held, that the loss was, according to the general law of England, the subject of general average contribution, as a voluntary and intentional sacrifice of the bark made under pressure of imminent danger, and for the benefit and with the view to secure the safety of the whole adventure then at risk. *Stewart* v. *West India and Pacific Steamship Co.*, 42 L. J., Q. B. 191; L. R. 8 Q. B. 362; 28 L. T. 742; 21 W. R. 953; 1 Asp. M. C. 528—Ex. Ch.

Held, secondly, that the shipper, by the terms of the bill of lading, had made the admitted practice of British average adjusters part of the contract; and he was bound by it, although erroneous. *Ib.*

Ship on Fire in Harbour—Water poured upon Cargo—Termination of Maritime Adventure.]—To pour water upon the cargo, pursuant to the master's orders, for the purpose of extinguishing a fire which has broken out in a ship's hold, is a general average act; and if the cargo is thereby injured, the owner is entitled to a contribution. Whilst the cargo remains on board a ship after her arrival at the port of destination, the maritime adventure is not terminated so as to absolve the owners of the cargo and the ship from mutual rights and liabilities. The defendants were the owners of the "H.," which, having arrived at her port of destination at the end of a voyage, unloaded about 1,300 tons of her cargo; about 100 tons remained on board. Whilst she was lying at a wharf, a fire broke out in her hold; and, in order to extinguish it, her master caused water to be poured into her, whereby some goods, forming part of the cargo and belonging to the plaintiffs, were damaged. The "H." might have been scuttled and raised again; but if the fire had not been extinguished, she would have been in peril of partial destruction:—Held, that the defendants were liable to contribute by way of general average for the damage done to the plaintiff's goods. *Whitecross Wire Co.* v. *Savill*, 51 L. J., Q. B. 426; 8 Q. B. D. 653; 46 L. T. 643; 30 W. R. 588; 4 Asp. M. C. 531—C. A.

7. Jettison.

General Principles as to Jettison.]—Where goods are jettisoned for the common good, the loss, as a rule, comes within general average, and must be borne proportionally "by those interested." To this rule there is an exception, viz., that deck cargo jettisoned is not entitled to general average contribution. To this exception, however, there are two exceptions, viz., that coasting vessels are without the exception, and also those cases where by custom the deck cargo is one customary in the trade, and, perhaps, also from the port. It is said that there is a further exception, viz., where by agreement with the shipper the cargo is shipped on deck. We are of a different opinion. Per cur., in *Wright* v. *Marwood*, infra.

Of Deck Cargo—Liability of Shipowner for.]—The plaintiffs shipped certain cattle as a deck cargo on board the defendants' vessel: during the voyage a storm arose, and owing to stress of weather the master jettisoned the deck cargo by throwing the cattle overboard. The act of jettison was proper and necessary on the part of the master for the safety of the defendants' vessel:—Held, that the plaintiffs could not recover from the defendants a general average contribution for the loss of the cattle. *Johnson* v. *Chapman*, infra, commented on. *Wright* v. *Marwood*, 50 L. J., Q. B. 643; 7 Q. B. D. 62; 45 L. T. 297; 29 W. R. 673; 4 Asp. M. C. 451—C. A.

In consequence of a severe storm which a vessel encountered, her deck cargo of timber, which was lawfully stowed on deck according to the terms of the charterparty between the shipowner and the charterer, broke adrift, and knocked against the pumps, so that the captain was compelled, in

order that the crew might work the pumps and to prevent damage to the bulwarks and pumps, and for the safety of the ship and all on board, to throw a portion of such cargo overboard :—Held, that such jettison was the subject of a general average contribution, it being both voluntary and to save all from the danger caused by the storm, which was common to the whole adventure. *Johnson* v. *Chapman*, 19 C. B. (N.S.) 563; 35 L. J., C. P. 23; 15 L. T. 70; 14 W. R. 264.

The proprietor of goods laden on the deck of a ship, according to the custom of a particular trade, is entitled to contribution from the shipowner for a loss by jettison. *Gould* v. *Oliver*, 5 Bing. (N.C.) 144 ; 5 Scott, 445 ; 3 Hodges, 307 ; 7 L. J., C. P. 68.

General average contribution payable in respect of deck cargo (pigs) jettisoned, if there is a custom to carry such cargo on deck. *Milward* v. *Hibbert*, 3 Q. B. 120 ; 2 G. & D. 142 ; 11 L. J., Q. B. 137 ; 6 Jur. 706. *Royal Exchange Shipping Co.* v. *Dixon*, supra, col. 504.

Goods stowed on deck have no benefit of general average. *Myer* v. *Van der Deyl*, Abbott, on Shipping, 13th ed. 652.

—— **Deck Cargo "at Merchant's Risk."**]—It was stipulated in a charterparty that the "ship should be provided with a deck cargo, if required, at full freight, but at merchant's risk " :—Held, that the words "at merchant's risk" did not exclude the right of the charterers to general average contribution from the shipowners in respect of deck cargo shipped by the charterers, and necessarily jettisoned to save the ship and the rest of the cargo. *Burton* v. *English*, 53 L. J., Q. B. 133 ; 12 Q. B. D. 218 ; 49 L. T. 768 ; 32 W. R. 655 ; 5 Asp. M. C. 187—C. A.

Right to Contribution—Remedies—Lien on Goods salved.]—The right of contribution in respect of jettisoned cargo is based on the danger to ship and cargo requiring sacrifice to which all must contribute. Such right does not belong to the wrongdoers whose acts have led to the jettison, or to those who are legally responsible for them. Where a ship is stranded through the negligence of her master, and thereby ship and cargo are placed in a position of such imminent danger as to make it prudent and necessary to jettison part of the cargo in order to save the remainder and the ship :—Held, that innocent owners of the jettisoned cargo are entitled to general average ; secus with regard to the owners of the ship unless their ordinary relations to the shippers have been varied by contract. *Strang or Steel* v. *Scott*, 59 L. J., P. C. 1 ; 14 App. Cas. 601 ; 61 L. T. 597 ; 38 W. R. 452 ; 6 Asp. M. C. 419—P. C.

The rules of maritime law relating to the rights and remedies resulting from a proper case of jettison are :—(1) Each owner of jettisoned goods becomes a creditor of ship and cargo saved. (2) He has a direct claim against each of the owners of ship and cargo for a pro ratâ contribution towards his indemnity ; which he can recover (*a*) by direct action ; (*b*) by enforcing through the ship master, who is his agent for that purpose, a lien on each parcel of goods salved to answer its proportionate liability. *Ib.*

Master decides what Goods to be jettisoned.]—It is for the master to decide what part of the cargo is to be sacrificed in case of jettison—per Lord Stowell. *The Gratitudine*, 3 C. Rob. 240, 258.

Of Ship's Stores.]—The owners of a ship's cargo are liable to contribution for ship's stores necessarily thrown overboard, after a vessel was captured, and while she was in the hands of an enemy. *Price* v. *Noble*, 4 Taunt. 123 ; 13 R. R. 566.

Exception of Jettison in Bill of Lading—Cargo carried on Deck in Breach of Bill of Lading—Liability of Shipowner.]—See *Royal Exchange Shipping Co.* v. *Dixon*, supra, col. 504.

Collision—Jettison of Cargo.]—See *The Marpessa*, post, col. 728.

See also *Butler* v. *Wildman* and cases infra, cols. 1101 seq.

8. Contribution, by What Law.

Law of Port of Discharge.]—In the absence of a contract to the contrary, general average as between shipowner and cargo, owner is computed according to the law of the port of discharge. *Simonds* v. *White*, 4 D. & R. 375 ; 2 B. & C. 805 ; 2 L. J. (O.S.) K. B. 159 ; 26 R. R. 560.

Custom excluding, not Valid.]—There is no valid custom excluding general average. *Achard* v. *Ring*, 31 L. T. 647 ; 2 Asp. M. C. 422.

The plaintiff chartered a ship from the defendant, and by the charterparty it was provided : "All questions of general average to be settled according to the custom of the London underwriters at Lloyds'." A fire broke out on board, the ship was scuttled to extinguish it, and the cargo was damaged thereby. The loss was adjusted as general average, and the plaintiff brought his action to recover from the defendant the ship's contribution. The judge directed the jury that the loss was general average according to law, and the question was whether there was a valid custom excluding such loss from general average. The jury found that no such custom existed, and the verdict was entered for the plaintiff. *Ib.*

"British Custom"—Damage by Water used to extinguish Fire.]—It became necessary for the safety of the whole adventure to extinguish a fire on board a ship by means of water, and the water caused damage to part of the cargo. The damaged goods were shipped pursuant to a bill of lading, which contained the following clause : "Average, if any, to be adjusted according to British custom." The usage among average staters in England is, that goods thus damaged are not brought into account in an average adjustment :—Held, that the phrase "British custom" in the bill of lading referred to this usage, and that the goods damaged could not be deemed subject to general average. *Stewart* v. *West India and Pacific Steamship Co.*, 42 L. J., Q. B. 191 ; L. R. 8 Q. B. 362 ; 28 L. T. 742 ; 21 W. R. 953—Ex. Ch.

To be calculated by Foreign Usage—Admiralty Jurisdiction.]—See *Gold* v. *Goodwin*, post, col. 935.

9. Who and What Contribute ; in what Manner.

Cargo Owners amongst themselves.]—An action may be maintained to recover a contribution in the nature of general average by one

shipper of goods against another. *Dobson* v. *Wilson*, 2 Camp. 480; 14 R. R. 817.

Consignee not Owner.]—A consignee (not the owner) of goods, receiving them in pursuance of a bill of lading, whereby the shipowner agrees to deliver them to the consignee, by name, he paying freight, is not liable for general average, although he has had notice, before he received the goods, that they have become subject to that charge. *Scaife* v. *Tobin*, 3 B. & Ad. 523; 1 L. J., K. B. 183.

Provisions do not contribute.]—Provisions do not contribute to general average, even where the cargo of the ship consists only of passengers. *Brown* v. *Stapleton*, 4 Bing. 119; 12 Moore, 334; 5 L. J. (O.S.) C. P. 121; 29 R. R. 524.

Right of Shipowner for Loss of Freight.]—P. shipped a cargo of coals upon D.'s ship to be carried to S. and there delivered on payment of freight. A fire broke out spontaneously in the coals, and portions were thrown overboard, and the remainder so wetted and damaged by water poured upon them to extinguish the fire, that they were necessarily discharged, and sold at a port of refuge. Owing to no freight being payable there, they realised nett a larger sum than if they had safely reached their destination; but the freight upon them was wholly lost:—Held, that the shipowner was entitled to a contribution in general average for the lost freight. *Pirie* v. *Middle Dock Co.*, 44 L. T. 426; 4 Asp. M. C. 388. *See* per cur., in *Wright* v. *Marwood*, supra, col. 586.

Loss of Cargo.]—Semble, that there was no claim on account of the cargo; first, because there was no loss on account of it: secondly, because the vice in it was the cause of the sacrifice. *Ib.*

General and Particular — Ship and Cargo — Value of Ship, how ascertained—"New for Old Allowance."]—For the purpose of ascertaining the amount to be contributed to in general average in the case of a ship which has suffered both particular and general average damage and has been sold as a constructive total loss, the value of such ship is her value at the time immediately preceding the general average sacrifice in respect of which contribution is to be made, and such value is to be ascertained by deducting from the value of the ship at the time she left port the amount which it would have cost to repair the particular average damage, and also the amount which she fetched when sold as a constructive total loss. *Henderson* v. *Shankland*, 65 L. J., Q. B. 340; [1896] 1 Q. B. 525; 74 L. T. 238; 44 W. R. 401; 8 Asp. M. C. 136—C.A.

Where no repairs have in fact been done, the shipowners are not entitled to the one-third "new for old" allowance in estimating the value of a ship for the purpose of ascertaining the amount to be contributed to in general average as above. *Ib.*

Loss caused by Negligence of Crew—Right of Shipowner.] — The shipowner is entitled to average contribution from cargo-owner, although the loss was occasioned by negligence of the crew, if by the terms of the charterparty the shipowner is not liable to the cargo-owner for such negligence. *The Carron Park*, 59 L. J., Adm. 74; 15 P. D. 203; 63 L. T. 356; 29 W. R. 191; 6 Asp. M.C. 543.

10. AVERAGE STATEMENT.

Duty of Shipowner to get Average Statement.]—A shipowner, where a general average loss has occurred, may be liable to an action for damages for delivering up the cargo without taking the necessary steps for procuring an adjustment of the general average and securing its payment. The plaintiffs shipped goods at Liverpool on board a steamer belonging to the defendants under a bill of lading, by which the defendants undertook to deliver the goods at the port of Montreal unto the Grand Trunk Railway, by them to be forwarded (upon the conditions before and after expressed) thence per railway to the station nearest to Toronto, &c., and among the conditions was the following: "The shipowner or railway company are not to be liable for any damage to any goods which is capable of being covered by insurance," &c. In the course of the voyage the plaintiffs' goods sustained damage which came under the heading of general average. The ship returned to Liverpool, and the cargo was discharged and handed over by the defendants to a company to be distributed and disposed of for the benefit of the parties concerned, without giving any assistance to the bailees, the underwriters, or the persons whose goods were damaged to get an average statement made out, or taking any steps to enable the plaintiffs to recover contribution:—Held, first, that the bill of lading did not relieve the defendants from contribution to general average; and, secondly, that they were liable to an action by the plaintiffs for their omission to take the necessary steps to secure an adjustment and payment of the general average. *Crookes* v. *Allen*, 49 L. J., Q. B. 201; 5 Q. B. D. 38; 41 L. T. 800; 28 W. R. 304; 4 Asp. M. C. 216.

At Foreign Port—Expenses.]—An owner of a British ship may avail himself of a statement of average made at the port of delivery in a foreign country, according to the law thereof, so as to charge a British freighter of goods, under a charterparty made in Britain, with the expenses of wages and provisions for the seamen incurred during the necessary detention of the ship at an intermediate port, although by the law of this country such expenses would not be recoverable as average. *Dalgleish* v. *Davidson*, 5 D. & R. 6; 27 R. R. 519.

Average Stater—Employment of.]—The parties to an average bond agreed to pay their proper and respective proportions of any general average charges to which they might be liable, and forthwith to furnish to the captain or owners of the ship a correct account and particular of the value of the goods delivered to them respectively, in order that any such general average charges might be ascertained and adjusted in the usual manner:—Held, that there was no implied condition to employ an average stater residing at the port of discharge. *Wavertree Sailing Ship Co.* v. *Love*, 66 L. J., P. C. 77; [1897] A. C. 373; 76 L. T. 576—P.C.

There is no obligation on shipowners to employ an average stater at all for the adjustment of liabilities. (*Simonds* v. *White*, 2 L. J. (O.S.) K.B. 159; 2 B. & C. 805; 26 R. R. 560) explained. *Ib.*

11. AVERAGE BOND.

Average Bond—Proportion of Salvage—Duty of Shipowner.]—See *The Raisby*, ante, col. 656.

Security for Payment—Unreasonable Terms—Liverpool Bond.]—Where a shipowner in the exercise of his lien for general average requires security from the owner of the cargo liable to contribution without insisting upon immediate payment of the amount due, the security so required must be reasonable. The defendants, who had a lien upon goods on board their ship for general average, did not demand payment of the amount due, but required as security that the consignees should make a deposit of 10 per cent. on the estimated value of the goods in the joint names of the defendants and their average adjuster, or in the names of the defendants, or in the name of the average adjuster, or should execute a bond providing that the deposit should be held as security for the general average and particular charges, and that the parties in whose name it stood might pay thereout such sums as they should from time to time consider ought to be paid to the owners or master on account of money actually disbursed by them or him, or to enable them or him to pay off and discharge claims which formed part of the general average and other expenses. It also provided that all questions of general average should be referred to the average adjuster of the shipowner, subject to an appeal from the adjustment to arbitrators, whose decision should be final:—Held, that the conditions of the deposit and the form of the bond were both unreasonable, and could not in the circumstances be imposed upon the consignees. *Huth* v. *Lamport*, or *Gibbs* v. *Lamport*, 55 L. J., Q. B. 239; 16 Q. B. D. 735; 54 L. T. 663; 34 W. R. 386; 5 Asp. M. C. 593—C. A.

Delivery of Cargo—Duty of Master to take Average Bond.]—It is the practice in the case of a general ship, for the master, before delivering cargo, to take security from the merchants for payment of general average. *Myer* v. *Van der Deyl*, Abbott on Shipping, 13th ed. 446.

And see 10, AVERAGE STATEMENT, supra.

12. ACTION FOR—PRACTICE.

Inspection of Documents.]—In an action by a shipowner for contribution in respect of general average, the defendant is entitled to an inspection of the statement of the general average, but not of the documents from which it is drawn up. *Twizzell* v. *Allen*, 5 M. & W. 337; 7 D. P. C. 496; 8 L. J., Ex. 269.

Pleading Unseaworthiness.]—In an action for contribution for an average loss, it is not sufficient to allege in a plea that the vessel was unseaworthy at the time of sailing, but that the average loss was occasioned by her being unseaworthy. *Schloss* v. *Heriot*, 14 C. B. (N.S.) 59; 32 L. J., C. P. 211; 10 Jur. (N.S.) 76; 8 L. T. 246; 11 W. R. 596.

Counter-claim before Adjustment.]—Where to a claim for damage to cargo a counter-claim of general average is set up, it is not necessary that such general average should have been adjusted; but if the evidence supports the fact of a general average loss having been sustained, the amount, together with the amount of loss sustained through damage to the cargo, will be referred to the registrar and merchants to report. *The Oquendo*, 38 L. T. 151; 3 Asp. M. C. 558.

13. JURISDICTION, ADMIRALTY.

The rule of the court of admiralty as to deciding upon questions of average is this: not that when a possessory right of lien arises incidentally before it, such right will be treated as a nullity; but that when the court is called upon to enforce such a lien not depending upon possession, or to adjust the rights which grow out of it, the court will then refuse to interfere. *Galam, Cargo ex, Cleary* v. *McAndrew*, 2 Moore, P. C. (N.S.) 216; Br. & Lush. 167; 3 N. R. 254; 33 L. J., Adm. 97; 10 Jur. (N.S.) 477; 9 L. T. 550; 12 W. R. 495.

The possessory lien of the master for general average will be supported in admiralty when it arises incidentally in the progress of a cause over which the court properly has jurisdiction. A court of admiralty will not interfere to enforce a lien for general average which does not depend on possession, or to adjust the rights which grow out of it. But where a clear legal right of lien is proved in the court of admiralty to exist, the court will not dispose of the property without regarding it. As between the owner of the cargo and the holder of a respondentia bond, the latter is not liable to contribute to general average, but as between him and those who have a lien for salvage services, he is liable. *Ib.*

Semble, the court of admiralty had no jurisdiction, except perhaps where the proceeds of the ship, cargo and freight were in court, to enforce general average contribution. *The Constancia*, 4 Not. of Cas. 677. See also *Gold* v. *Goodwin*, post, col. 935.

Semble, since the passing of the judicature acts the admiralty division has acquired a right to entertain a claim for a general average loss which the high court of admiralty did not possess. *The Oquendo*, supra.

Ship's Agent has no Lien for.]—Although the master has a lien upon the ship for average expenses, the ship's agent, if he has paid them, has no such lien. A claim by ship's agent for disbursements cannot be recognised in the court of admiralty, even against the proceeds of ship or cargo. *The Soblomstein*, 36 L. J., Adm. 5; L. R. 1 A. & E. 293; 15 L. T. 393; 15 W. R. 591.

XVIII. SALVAGE.

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1. GENERALLY.

Ingredients of Salvage Service.]—The ingredients of salvage service are (1) enterprise in the salvors and risk incurred; (2) risk of loss to the property salved; (3) the skill and labour shewn and incurred by the salvors; (4) the value of the salved property. Where all these circumstances concur a large and liberal reward is given; where none or only in a small degree, it is little more than remuneration for work and labour. *The Clifton*, 3 Hag. Adm. 117.

Origin and Principles of.]—Origin and principle of salvage reward discussed by Sir Christopher Robinson. *The Calypso*, 3 Hag. Adm. 209, 217.

Acceptance of Service.]—An express demand or an express acceptance of salvage services actually performed is not necessary to entitle to salvage reward; but for services rendered without demand or acceptance, and indirectly only no salvage is due. *The Annapolis* and *The Golden Light* and *H.M.S. Hayes*, Lush. 355; 5 L. T. 37; followed in *The Vandyck*, 7 P. D. 42; affirmed, 47 L. T. 695; 5 Asp. M. C. 17.

Salvage Service under Contract with Insurers.]—See *The Solway Prince*, infra, col. 626.

Vessels Sailing as Consorts.]—Where vessels sail as consorts, under an agreement to render each other assistance, salvage will not be given for services rendered by one to the other. *The Zephyr*, 2 Hag. Adm. 43. See *The Margaret*, 2 Hag. Adm. 48, n.

In a cause of salvage of a vessel engaged in the South Sea fishery, the defendants alleged a custom for vessels in that fishery to assist each other gratuitously. Issue directed to the common pleas under 3 and 4 Vict. c. 5, s. 11, to try the existence of the custom; verdict for the custom. Motion for new trial rejected. *The Harriot*, 1 W. Rob. 439.

Rescue from Ice—Custom of Whalers.]—A Greenland whaler that sailed to rescue another that was fast in the ice:—Held, not to be prevented by custom from claiming salvage. *The Swan*, 1 W. Rob. 68.

River and Sea Salvage.]—There is no distinction between river salvage and sea salvage, the danger and meritorious nature of the services in either case being the ground on which the quantum of compensation is awarded. *The Carrier Dove, Trask* v. *Maddox*, 2 Moore, P. C. (N.S.) 243; 19 L. T. 768.

Notice to Receiver of Wreck—Salvage.]—The provisions of s. 450 of the Merchant Shipping Act, 1854, requiring a person who finds or takes possession of a wreck to give notice to the receiver are not applicable to the case of a person who takes possession of a stranded vessel under the belief that he is the purchaser thereof, and in such a case these provisions do not operate to deprive him of his right to recover salvage. *The Liffey*, 58 L. T. 351; 6 Asp. M. C. 255.

Receiver of Droits—9 & 10 Vict. c. 99—Lien of Receiver.]—A ship having been stranded near D., A. as receiver of droits and also acting as Lloyds' agent, assisted in getting the ship off the bank and employed tugs and men for that purpose. Part of the ship's cargo was taken out, in order to lighten her, and was taken to D. A. detained the cargo on its arrival at D. claiming salvage, also fees payable to him as receiver of droits. B., agent for the shippers, paid the fees under protest:—Held, that B. could recover from A. the money paid for fees, which were payable to B. only whilst salving property and were payable by the owners only, and that there was no lien for them; also, that A. could set off his claim for salvage under 9 & 10 Vict. c. 99. *Coatesworth* v. *Walsh*, 3 Ir. C. L. R. 93.

Derelict Must be Brought in.]—A derelict ship and cargo picked up at sea must be brought into the admiralty—to be restored to the owner on payment of salvage—or subject to salvage to be condemned as a droit of the admiralty. *The King* v. *Property Derelict*, 1 Hag. Adm. 383, n.; and see 12. DERELICT AND WRECK, infra.

Custom that Salvor shall have best Anchor and Cable.]—Semble, a custom that the lord of the manor shall have the best anchor and cable from a ship cast upon the shore of the manor, in consideration of his burying the dead and caring for the living persons and the goods coming ashore from the ship, is good. *Simpson* v. *Bithwood*, 3 Lev. 307; 2 Danv. 429. But see aliter, *Geere* v. *Burkensham*, 3 Lev. 85; 2 Danv. 429 (where no consideration was pleaded).

Civil Salvage awarded to Military Salvors.]—Civil salvage awarded in addition to military salvage to a ship of war that took in tow a ship recaptured from the enemy, she being in a distressed state. *The Louisa*, 1 Dods. 317. S. P., *The Franklin*, 4 C. Rob. 147.

Services asked for, but not allowed to be rendered.]—Where a vessel has rendered necessary services to another, and is in a position to render further services of a valuable kind, but her assistance is dispensed with, she has a right to have the further services which she was ready

and able to render taken into account in a salvage award. *The Maasdam*, 6 R. 716; 69 L. T. 659; 7 Asp. M C. 400.

Services rendered by Request—No actual Benefit resulting therefrom.]—Where a vessel stands by or renders services to another upon request, even though no benefit results from her so doing, she is entitled to salvage remuneration. *The Cambrian*, 76 L. T. 504.

Salvors not required to take Ship to Foreign Port.]—Salvors are not bound to take the salved ship to a foreign port at the request of her master. Their duty is to take her to a place of safety; the onus is on the objectors to show that it was not a proper place. *The Houthandel*, 1 Spinks, 25.

Tug and Tow—Tug not entitled to Salvage where Danger caused by her own Fault.]—See *The Robert Dixon*, infra, col. 607.

Protest—Duty of Salved Ship to make.]—*The James McQueen*, 4 W. R. 91.

Royal Fish.]—Salvage is payable to those who bring in royal fish, being admiralty droits. *Rex* v. *Cinque Ports* (*Lord Warden*), 2 Hag. Adm., 438.

Agreement to refer—Jurisdiction.]—An agreement to refer to arbitration does not prevent the salvor from arresting the ship in a cause of salvage. *La Purissima Concepcion*, 13 Jur. 545.

Salvage at Common Law.]—A seaman was ordered by his captain to go on board a ship that was stranded and in distress, and to put himself under the orders of her captain. He did so and helped to get the ship afloat. He sued the owners of the stranded ship for salvage at common law: —Held, without deciding whether an action for salvage would lie at common law, that the owner was not liable, there being no contract. *Lipson* v. *Harrison*, 2 W. R. 10. *See also*, per Lord Mansfield, *Cornu* v. *Blackburne*, 2 Dougl. 641, 649.

Salvage Actions at Common Law.]—*The Ooster Ems*, 1 C. Rob. 284, n.; Hay and Mar. Pref. xxvii.; cited, 3 C. Rob. 357. *The True Briton*, cited, 3 C. Rob. 360.

A. found on the towpath timber that had got adrift from a dock in the Thames and secured it. He refused to deliver it up until the owner paid him for his trouble:—Held, that he was liable in trover. *Nicholson* v. *Chapman*, 2 H. Bl. 254. See also *Vivian* v. *Mersey Docks and Harbour Board*, 39 L. J., C. P. 3; L. R. 5 C. P. 19; 21 L. T. 362.

Subject-matter of Salvage Services — Gas Float.]—Salvage (apart from life salvage) is by the maritime law of England confined to ship, apparel, and cargo, or what has formed part of these, and to freight earned by carriage of cargo, and is not applicable to a gas float used as a floating beacon, which, though capable of being moved on the face of the water, is not "a ship or vessel" in the sense in which the merchant shipping act uses these terms, or in any fair sense of the words. *Gas Float Whitton* (No. 2), 66 L. J., Adm. 99; [1897] A. C. 337; 76 L. T. 663—H. L. (E.) Affirming 44 W. R. 263; 8 Asp. M. C. 110—C. A.

—— **"Ship or Boat Stranded or in Distress."**]—Justices awarded salvage in respect of services rendered to a hopper barge which had been found adrift without any person on board of her in the Wash, about three miles from Boston. The barge was not furnished with any means by which she could be propelled, and was used for dredging purposes:—Held, that the barge was "a ship in distress" on the shore of a sea or tidal water within the meaning of the Merchant Shipping Act, 1854, s. 458. *The Leda* (Swabey 40) followed. *The Mac* or *Macadam* v. *Saucy Polly*, 51 L. J., Adm. 81; 7 P. D. 126; 46 L. T. 907; 4 Asp. M. C. 555—C. A.

2. Success.

Attempt to render Assistance.]—A steam-tug attempting to render assistance to a ship exhibiting signals of distress may, in a case where such ship is afterwards salved by means of other assistance, be entitled to salvage reward, even though her efforts have been practically unavailing. *The Melpomene*, 42 L. J., Adm. 45; L. R. 4 A. & E. 129; 29 L. T. 405; 21 W. R. 956.

When a ship makes a signal of distress, and another goes out with the bonâ fide intention of assisting that distress, and as far as she can does so, but an accident occurs which prevents her services being as effectual as she intended them to be, and no blame attaches to her, the court will not allow her to go entirely unrewarded, but for the interests of commerce and of navigation, and as an encouragement to perform salvage services, will give some reward if the property is salved by other means. *Ib.*

When Service Unsuccessful.]—When salvors enter into an agreement to take a disabled vessel into harbour for a specific sum, and do all in their power to perform their engagement; but in consequence of an adverse change of wind fail to fulfil it, they are nevertheless entitled to salvage reward. *The Aztecs*, 21 L. T. 797. And see *The Cumbrian*, infra, col. 657.

Efforts to give assistance under an engagement to a ship in distress will, although the ship receives no benefit from them, be rewarded as being in the nature of salvage services, if the ship is otherwise saved. *The Undaunted*, Lush. 90; 29 L. J., Adm. 176; 2 L. T. 520.

Attempted services performed under an agreement of salvage are entitled to be rewarded where the performance of them is rendered impossible by the act of God. *Ib.*

Salvage is a reward for services actually conferred, and not for services attempted to be rendered. *The Chetah*, 5 Moore, P. C. (N.S.) 278; 38 L. J., Adm. 1; L. R. 2 P. C. 205; 19 L. T. 621; 17 W. R. 233. S. P., *The Eintracht*, 29 L. T. 851; 2 Asp. M. C. 198.

A steamer employed under an agreement for a specific sum to tow a partially-disabled steam vessel to a specific destination, towed the vessel for some hours, but in consequence of a gale causing the breaking of the hawser, left the vessel in a position of considerable danger, from which she was only saved by her own exertions:—Held, that as it did not appear that the towing had contributed to her safety, the steamer was not entitled to towage, as she had not performed her contract; nor to salvage, as no attempt was made by her to save the vessel. *The Edward Hawkins*, 15 Moore, P. C. 486; Lush. 515; 31 L. J., Adm. 46.

Unsuccessful salvage services does not entitle those rendering them to reward. *The Zephyrus*, 1 W. Rob. 329.

Where salvors found a derelict, but were unable to take her into safety, and a second set of salvors dispossessed the first set and brought her into safety, the first set were awarded a sum to cover their expenses. *The Magdalen*, 31 L. J., Adm. 22 ; 5 L. T. 807.

Salvage Agreement — Service impossible.]—See *The Hestia*, infra, col. 655.

The time occupied in endeavouring to render unsuccessful salvage services will be taken into consideration in awarding compensation for subsequent successful services, if it appear that the original services were rendered at the request of the defendants. *The Arenir*, Ir. R. 2 Eq. 111.

Agreement to attempt to Tow—Payment for Work done.]—In an action of salvage it appeared that the master of the defendants' ship requested the master of the plaintiffs' ship to tow his vessel to Gibraltar, which the latter agreed to attempt to do. The value of the defendants' ship, her cargo and freight, was 78,000*l.*, and at the time this request was made she was in a disabled state. The plaintiffs' ship, after towing the defendants' ship for 130 miles towards Gibraltar, left her, the hawsers having parted owing to severe weather, in a more dangerous position than she was in when she was taken in tow. The defendants' ship was afterwards towed into Gibraltar by another vessel :—Held, that the plaintiffs were not entitled to a salvage reward, but were entitled to adequate remuneration for what they had done in fulfilment of their contract. The court awarded them 400*l.* *The Benlarig*, 58 L. J., P. 24 ; 14 P. D. 3 ; 60 L. T. 238 ; 6 Asp. M. C. 360.

The "C." broke down in the English Channel ten miles from Anvil Point, and was then in a position of risk, but not of imminent danger. The "H." at her request took the "C." in tow ; near the Shambles the hawsers parted, and the "C." then anchored and was in a position of considerable danger, greater than when the "H." took her in tow. The "H." was unable to make fast a hawser again, and in trying to do so came into collision with the "C." The "H." then left the "C.," which was soon after taken in tow by two tugs and brought in safety to Portland : —Held, that the "H." was not entitled to salvage. *The India* (1 W. Rob. 406) followed. *The Cheerful*, 55 L. J., Adm. 5 ; 11 P. D. 3 ; 54 L. T. 56 ; 34 W. R. 307 ; 5 Asp. M. C. 525.

Agreement to Pay for Unsuccessful Service.]—See *The Alfred*, *Wellfield* (*Owners*) v. *Adamson*, infra, col. 681.

Salvors contributing to but not alone effecting Salvage.]—Salvors whose services, though contributing to the ultimate salvage of the property, would not by themselves have effected the salvage, are entitled to salvage reward. *The E. U.*, 1 Spinks, 63.

Salvors abandoning Ship on a Sand.]—Where salvors abandoned the ship on a sand from which she was afterwards salved by others, the first salvors were awarded nothing. *The India*, 1 W. Rob. 406.

First Salvors Negligent — Second Salvors Successful.]—One set of salvors negligently put the vessel on the Long Sand ; a second set got her off. Salvage awarded to the second set and none to the first set of salvors. *The Neptune*, 1 W. Rob. 297.

Second salvors not prejudiced by joining with first salvors in salvage suit. *Ibid.*

Ship extricated before Salvors arrive.]—Where the ship in distress extricates herself before the intended salvors come up, no salvage awarded, though risk incurred. *The Ranger*, 3 Not. of Cas. 589 ; 9 Jur. 119.

A vessel ashore on the rocks off Folkestone was boarded by boats, who could not get her off. A steamship towed her off, but the tow rope parting she drove ashore and was lost. Her cargo was saved. Salvage was awarded to the boats and to the steamship. *The Santipore*, 1 Spinks, 231.

3. Possession of Salvors.

Legal Interest of Salvors.]—Salvors in possession have a legal interest, which cannot be divested except by adjudication. Salvors, who have dispossessed other salvors must show an actual or apparent necessity for their interference. *The Blendenhall*, 1 Dods. 414 ; and see *The Fleece*, 3 W. Rob. 278.

Salvors have a common law lien on the salved property. *Baring* v. *Day*, 8 East, 57.

A ship that has been taken into a roadstead by salvors is not to be removed without the salvors' consent. *The Nicolai Heinrich*, 17 Jur. 329.

Right to retain Possession against Owners.]—Where salvors have brought a vessel into a position of safety they are bound on demand by the owners, to deliver up possession of the salved property, and have no right to retain it for the alleged purpose of completing the repairs. If the vessel is at the time of the demand in such a critical position that there may be risks of loss or damage to her unless the salvors are allowed to complete their operations, semble that the salvors may retain possession pending their completion. *The Pinnas*, 59 L. T. 526 ; 6 Asp. M. C. 313.

A salvor has a right to retain possession of the salved property until payment of salvage. *Hartfort* v. *Jones*, 1 Ld. Raym. 393.

Subsequent Salvors—Unnecessary Interference by.]—Two smacks picked up an abandoned vessel in the North Sea and were towing her to Harwich, when a gun brig came up and insisted upon taking the vessel in tow. Eventually she ordered the smacks to cast off, and took the vessel to Dover :—Held, that the claim of the gun brig to salvage was of the weakest kind ; her assistance being unnecessary. 50*l.* awarded to her and two-fifths of the salved property to the smacks. *The Maria*, Edwards, 175.

Where salvors are in possession, and are able to perform the service, no others may interfere. *The Queen Mab*, 3 Hag. Adm. 242. S. P., *The Glory*, 14 Jur. 676.

Second Salvors wrongfully dispossessing First.]—If first salvors lawfully in possession of a derelict ship are wrongfully and violently

dispossessed by second salvors, who succeed in bringing the ship into safety, the second salvors will receive no benefit from the service they may render, but the whole reward will go to the benefit of the original salvors. *The Kathleen*, 43 L. J., Adm. 39; 31 L. T. 204. See also *The Magdalen*, 31 L. J., Adm. 22; 5 L. T. 807.

Two fishing smacks fell in with a derelict vessel twenty miles from the English coast, and took her in tow after great risk, and two days afterwards brought her close to Yarmouth, when the smacksmen to expedite the completion of the salvage engaged a steam tug to take her in tow, but through the mistake or misconduct of those on board the tug the vessel got aground, whereupon the tug left the smacksmen and went in search of assistance. In their temporary absence a number of beachmen took possession of the vessel and brought her safely into harbour. A liberal salvage was allowed to the smacksmen on appeal, reversing the decision of the admiralty court, which had decreed salvage to the beachmen only. *The Atlas*, *Hewett* v. *Aylan*, 15 Moore, P. C. 329; 31 L. J., Adm. 210; 8 Jur. (N.S.) 753; 6 L. T. 737; 10 W. R. 850.

The court jealously maintains the right of original salvors; subsequent salvors acquire a right to salvage only where their assistance is necessary to preserve the property. *The Charlotta*, 2 Hag. Adm. 361.

The burden is upon subsequent salvors to prove that previous salvors in possession were unable to effect the service, or engaged or adopted their assistance. *The Eugene*, 3 Hag. Adm. 156, 160.

Jurisdiction does not depend on Salvors' Possession.]—*The Lady Katherine Barham*, Lush. 404.

Salvors do not impair their right to salvage by quitting possession of the salved ship. *The Eleanora Charlotta*, 1 Hag. Adm. 156.

Possession of Derelict.]—Salvors of a derelict have a right to retain possession until they are divested by law. *The Tritonia*, 5 Not. of Cas. Supp. 1.

Salvors in possession of a ship abandoned by all her crew who could get away are under no obligation to wait to take the crew on board again. *The Orbona*, 1 Spinks, 161.

Semble, a salvor of derelict has a right of exclusive possession. He takes possession on behalf of the crown. *The Dantzic Packet*, 3 Hag. Adm. 383.

Seizure of Salved Property by Colonial Governor.]—A governor of an island near which a ship was cast away, on pretence of recovering the cargo for the seamen, seized it all to his own use as wreck-fishing. On his return to England he was decreed to account for the whole. *Trott* v. *Le Clé*, Colles' P. C. 219; Pre. Ch. 239.

4. Misconduct or Want of Skill.

Forfeits Right to Salvage.]—The right to salvage is forfeited by misconduct of the salvors in retaining possession of and improperly dealing with the salved property. *The Lady Worsley*, 2 Spinks, 253.

Misconduct of salvors punished by forfeiture of salvage and liability to costs of salvage suit. *The Barefoot*, 14 Jur. 841.

Misconduct of salvors punished by diminished award. *The Clarisse*, Swabey, 129, 133; nom. *Gann* v. *Brun*, 12 Moore, P. C. 340.

Salvors may forfeit, partially or totally, by various degrees of misconduct, their right to salvage reward; but the evidence to establish their misconduct must be conclusive. *The Charles Adolphe*, Swabey, 153.

Forcibly retaining Possession.]—A salvage claim dismissed in part because of the misconduct in the salvors in obtruding their services after being formally discharged by the owners of sunken vessel. *The Glasgow Packet*, 2 W. Rob. 306.

Not taking Necessary Assistance.]—Salvage award diminished by reason of the salvors not placing the ship in a position of safety, as they might have done, if they had taken further assistance which was offered. *The Dosseitei*, 10 Jur. 865.

Prior salvors have no right, whilst the master is in command, to exclude subsequent salvors. *The Dantzic Packet*, 3 Hag. Adm. 383. S. P., *The Glory*, 14 Jur. 676.

——**Resisting Employment of Tug.**]—Boatmen who resisted the employment of a steamship to get the vessel off a sand held to have forfeited all claim to salvage. *The Martha*, Swabey, 489; and see *The Magdalen*, infra, col. 601.

Associated Salvors—Misconduct of Some.]—In cases of associated salvage service all the salvors may be prejudiced by the misconduct of one of their number. *The Cherubim*, Ir. R. 2 Eq. 172.

Robbing Wreck—Conviction.]—Persons who have been convicted under 9 & 10 Vict. c. 99, for improper interference with a wreck cannot claim as salvors. *The Wear Packet*, 2 Spinks, 256.

Inflated Claim.]—Salvors setting up an inflated and exaggerated case dismissed with costs. *The Towan*, 2 W. Rob. 259.

Effect of Mere Mistake.]—Where salvage is finally effected, those who meritoriously contribute to that result are entitled to a share in the reward, although the part taken by them would not of itself have produced the result. *The Atlas*, *Hewett* v. *Aylan*, 15 Moore, P. C. 329; 31 L. J., Adm. 210; 8 Jur. (N.S.) 753; 6 L. T. 737; 10 W. R. 850. See *The Rosalind*, 12 L. T. 553.

If success is finally obtained, no mere mistake or error of judgment in the manner of procuring it, nor misconduct short of that which is wilful and may be considered criminal on the part of the salvors (which must be proved by those who impute it), will work an entire forfeiture of the salvage. *Ib.*

Mistake or misconduct, other than criminal, which diminishes the value of the property salved, or occasions expense to the owners, is properly to be considered in the amount of compensation to be awarded. *Ib.*

Damage by Negligence equal to Probable Loss from Peril.]—The master and crew of the "Y.," a vessel in distress, got on board the "K.," a steamer standing by her. The mate and two of the crew of the "K." afterwards went on board the "Y." but refused to take her master back with

them. The mate subsequently also refused the services of a steam-tug, and finally having from want of local knowledge anchored the "Y." in an insecure place, she began to drift, was forsaken by the salvors, and sank. She was subsequently raised by her owners at considerable expense. In an action for salvage the owners of the "Y." denied that a reward was due and counter-claimed for damages:—Held, that the mate was guilty of misconduct in refusing to take the master of the "Y." on board of her, and to engage the services of the tug; but that if the "Y." had been ultimately saved such misconduct would have worked a partial forfeiture of the reward only:—Held, further, that as the loss arising from the misconduct of the salvors was probably equal to that from which the "Y." was first rescued, no salvage reward was due. *The Yan-Yean*, 52 L. J., Adm. 67; 8 P. D. 147; 49 L. T. 186; 31 W. R. 950; 5 Asp. M. C. 135.

Damage by Negligence — Deduction from Award.]—Where a wreck had been greatly damaged by the erroneous conduct of the salvors in their treatment of it, the court awarded them a smaller sum, deducting from the reward which it would have otherwise held that they had earned, a certain amount as compensation for the additional damage thus done to the property, and the court proportioned the amount that it deducted to the want of skill shewn. *The Magdalen*, 31 L. J., Adm. 22; 5 L. T. 807.

In rendering salvage services, want of skill on the part of the salvors—not amounting to negligence—which occasions damage to the salved property is a ground for reducing the amount of the award, though it will not support a counter-claim by the owners of the salved property to recover damages from the salvors in respect of the injury so occasioned to their property. *The Dwina*, 61 L. J., Adm. 71; [1892] P. 58; 66 L. T. 862; 7 Asp. M. C. 173.

—— **Collision by Salvors' Negligence.**]—A screw steamer fell in with a disabled barque in the English Channel, and in answer to signals of distress approached her to render assistance. In rendering salvage services to the barque damage was caused to that vessel by the negligent navigation of the screw steamer, the two vessels coming into collision on three occasions. To recover for the damages sustained in these collisions, the owners of the barque promoted a cause of damage against the steamer, and subsequently an action for the recovery of salvage remuneration was brought by the owners of the steamer against the barque. On the two causes coming on to be heard together:—Held, that the owners of the barque were entitled to recover in the damage cause, and that the owners of the steamer were entitled to recover in the salvage cause. *The C. S. Butler. The Baltic*, 43 L. J., Adm. 17; L. R. 4 A. & E. 178; 30 L. T. 475; 22 W. R. 759; 2 Asp. M. C. 237.

A salvor whose ship succeeds in bringing an injured ship into safety, but in so doing inflicts damage upon her by coming into collision through negligence and want of proper navigation, which is gross but not wilful, is not thereby deprived of his right to a reward which has been agreed upon between the masters of the respective vessels. *Ib.*

Negligence of Pilot employed by Salvors.]—Salvors having brought a vessel in distress to a situation of safety from ordinary peril, but not to anchor, and having given up the charge to a licensed pilot, are not prejudiced as to their claim by injury subsequently happening to the ship from the negligence of such pilot. *The Bomarsund*, Lush. 77.

Misconduct of Tug—Towage Contract—Subsequent Salvage.]—See *The Minnehaha*, infra, col. 607, *The Robert Dixon*, infra, col. 607.

Misconduct of Boatmen — Refusal of Sum Tendered.]—Claim of boatmen for salvage dismissed; misconduct of boatmen, refusal of sum tendered for work done. *The Black Boy*, 3 Hag. Adm. 386, n.

Violence.]—Violent and overbearing conduct on the part of salvors, although it may not amount to such wilful misconduct as to cause an entire forfeiture of salvage reward, will yet operate to induce the court to diminish the amount of the reward. *The Marie*, 7 P. D. 203; 47 L. T. 737; 5 Asp. M. C. 27.

Refusal to give up Clothes taken.]—Salvors of a derelict took and used the clothes found on board and refused to give them up. 20*l.* was deducted from the award, to be paid to the master and crew of the derelict in respect of their clothes. *The Louisa*, 7 Jur. 182.

Negligently putting Ship Ashore.]—A claim for salvage dismissed because the salvor, a steam tug, negligently got the ship on Sandwich Flats, when towing her off the Goodwins; the fact that the salved ship had a pilot on board, not excusing the salvors. *The Duke of Manchester*, 2 W. Rob. 470; 4 Not. of Cas. 582; 6 Moore, P. C. 90; 10 Jur. 863.

Deduction from salvage award made because the salvors in performing the service by their want of skill had brought the ship into danger and injured her. *The Cape Packet*, 3 W. Rob. 122.

Salvors attempted to tow ship into harbour when there was not enough water for her, and got her ashore and damaged her. A smaller award of salvage made in consequence. *The Perla*, Swabey, 230; and see *The Yan-Yean*, supra.

A revenue cutter put some men aboard a vessel that had lost her masts in a collision to take her to Penzance. She drew too much water, took the ground, and received much damage:—Held, no salvage to be awarded. *The Lockwoods*, 9 Jur. 1017.

Forcibly Dispossessing other Salvors.]—Salvors who forcibly dispossessed other salvors engaged by the master of the ship in distress allowed no share of the salvage award. *The Fleece*, 3 W. Rob. 278. See *The Blenden Hall*, 1 Dods. 414.

If first salvors lawfully in possession of a derelict are wrongfully dispossessed by second salvors who succeed in bringing the ship into safety, the second salvors will receive no benefit from the service they may render, but the whole reward will go to the original salvors. *The Kathleen*, 43 L. J., Adm. 39; L. R. 4 A. & E. 269; 31 L. T. 284; 23 W. R. 350; 2 Asp. M. C. 367.

Excluding Crew from Possession.] — Misconduct of salvors, who took possession of a

vessel, whose crew they knew were in distress on shore waiting to return to her, punished by a small award. *The Lisbon*, Ir. R. 1 Eq. 144. And see *The Cleopatra*, infra, col. 641.

Where salvors having taken possession of a vessel which had got ashore and been temporarily abandoned by her master and crew in order to get tug assistance, refused to allow her master and crew on board, and remained in possession on board whilst the tugs provided by the master towed the ship into a place of safety:—The court held that there had been such misconduct as to work a total forfeiture of award, although the plaintiffs had in the absence of the master and crew laid out two anchors which contributed to the vessel's ultimate safety. *The Capella*, [1892] P. 70; 66 L. T. 388; 7 Asp. M. C. 158.

5. Salvage Services.

a. Supplying Anchor.

Taking out Anchor and Chain in Bad Weather.]—Taking out during bad weather an anchor and a chain to a vessel, which is compelled to slip her cable to get away from a dangerous position and run for a place of safety, is, although the anchor and chain in the result are not needed, a salvage service; 280*l.* awarded to two luggers and their crew on a value of 40,000*l.* *The Æolus*, 42 L. J., Adm. 14; L. R. 4 A. & E. 29; 28 L. T. 41; 21 W. R. 704; 1 Asp. M. C. 516.

Supplying an anchor and a cable to a vessel in the Gulls that had slipped her own is salvage service. *The Prince of Wales*, 6 Not. of Cas. 39.

b. Giving Advice.

Warning Ship of Danger—Frauds.]—Claims for salvage in warning foreign ships of danger, dismissed as fraudulent or not proved. *The Giacomo*, 3 Hag. Adm. 344; *The Henrietta*, 3 Hag. Adm. 345, n.

Advice Given—Salvors not on Board.]—Advice given as to the proper steps to be taken to get a ship off a sand, the salvors not being able to go on board because of the sea, remunerated by salvage award. *The Eliza*, Lush. 536.

Giving Information.]—The mere giving information as to the locality, even to a foreign ship, will not constitute a salvage service. *The Little Joe*, Lush. 88; 6 Jur. (N.S.) 783; 2 L. T. 473.

c. After Collision.

Service to One of Two Ships in Collision—Tugs.]—A collision having occurred between two ships, the "Woburn Abbey" and the "British Trident," two steam-tugs, the "Superb" and the "Conqueror," went to their assistance. In order to extricate the "Woburn Abbey," it was necessary that the "British Trident" should be towed away from her, and the pilot of the "Woburn Abbey" requested the captain of the "Superb" to perform this service. The "Superb" then towed the "British Trident," but the ships still dragged. The "Conqueror" arrived about half-an-hour after the "Superb," and the two tugs together held the "British Trident" and the "Woburn Abbey," and prevented the ships from dragging further:—Held, that the benefit received by the "Woburn Abbey" from the services of the "Superb" was a direct and not an indirect benefit; that there was no substantial difference between the merits of the "Superb" and the "Conqueror," and therefore that they were entitled to equal amounts of salvage. *The Woburn Abbey*, 21 L. T. 707—P. C.

Towing Vessels Clear—Rights of Tug.]—Where two vessels are in collision and are entangled together in a position dangerous to both, salvors who, by towing one of the vessels clear, free both vessels from danger, are entitled to recover salvage reward from the owners of both vessels. A screw steamship drifted, during a gale of wind, across the bows of a ship at anchor in the Mersey, and with her propeller caught the anchor chains of the ship, and the two vessels were held together in a position dangerous to both. A steam-tug went to the assistance of the ship, and held her whilst her chains were slipped and towed her clear of the steamship:—Held, that the owners, master, and crew of the tug were entitled to recover salvage reward from the owners of the steamship. *The Vandyck*, 47 L. T. 695; 5 Asp. M. C. 17—C. A. Affirming, 7 P. D. 42.

Tug assisting her Tow after Collision.]—A collision occurred between two vessels, "A." and "B." "A." was in tow of a steam-tug; the tug afterwards rendered assistance to "B." "B." was found solely to blame for the collision:—Held, that the tug's right of salvage remuneration was not affected by 25 & 26 Vict. c. 63, s. 33, which makes it the duty of ships mutually to assist each other after a collision. *The Hannibal* v. *The Queen*, 37 L. J., Adm. 12; L. R. 2 A. & E. 53.

The 25 & 26 Vict. c. 63, s. 33, does not debar the innocent sufferer in a collision from salvage reward for services subsequently rendered to the other party to the collision. *The Retriever* v. *The Queen*, 17 L. T. 329.

The case of a towing ship is not a casus omissus from the statute. The tug of the vessel declared not to blame in a collision, rendered salvage services to the wrongdoer:—Held, that this section did not affect the right of the tug to salvage reward. *Ib.*

Services by Ship in Fault for Collision.]—A vessel rendering assistance to another which she has injured in collision cannot claim salvage reward if the collision takes place by her default. *The Glengaber*, 41 L. J., Adm. 84; L. R. 3 A. & E. 534; 27 L. T. 386; 21 W. R. 168; 1 Asp. M. C. 401.

The owners, master, and crew of a vessel which renders assistance to a vessel injured by collision are not deprived of their right to salvage reward by the fact that some of the owners are also owners of another vessel by whose misconduct the collision takes place. *Ib.*

A vessel rendering salvage assistance is not deprived of her right to reward by the fact that she is employed by a vessel whose misconduct renders her employment necessary. *Ib.*

A collision occurred between two vessels. Both were found to blame. A cause of salvage was instituted by the master and crew of one of the vessels for having saved a quantity of specie laden on board the other vessel:—Held, that the salvors were not entitled to reward for saving property which they had by their own wrongful acts contributed to place in jeopardy. *Capella, Cargo ex*, L. R. 1 A. & E. 356; 16 L. T. 800.

d. Mutiny.

Rescue of Ship from Mutineers.]—Salvage is not due to a crew for rescuing the ship from mutineers. *The Governor Raffles*, 2 Dods. 14.

—— **By Government Ship.**]—A government ship acting under directions of a vice-consul rescued a convict ship from the crew of mutinous convicts:—Held, no salvage payable. *The Francis and Eliza*, 2 Dods. 165.

Rescue from Mutinous Slaves.]—Rescue of a slave ship from insurgent slaves by another ship. One-tenth of the value awarded. *The Trelawney*, 4 C. Rob. 223.

e. Various Services.

Sending Seamen on board Vessel in Distress.]—A ship fell in on the high seas, in the winter season, with a brig in distress for want of sufficient hands to work her. The master of the ship sent two of his crew, who had volunteered to go, on board the brig, and by their assistance the brig was navigated safely into a British port. In consequence of the absence of the two men, the ship was exposed to risk, and the remainder of her crew had to undergo extra labour:—Held, that not only the two men who went on board the brig, but the master and owners of the ship and the rest of the crew of the ship, were entitled to salvage reward for the services rendered. *The Charles*, L. R. 3 A. & E. 536; 26 L. T. 594; 21 W. R. 13; 1 Asp. M. C. 296.

Where a ship is in distress, and accepts the services of strange hands, the services are in the nature of salvage, although the work done may be of no great difficulty or importance. *The Bomarsund*, Lush. 77.

Where the crew of a vessel is much reduced by death or sickness, another vessel supplying the deficiency on the high seas from among her own crew, is entitled to salvage. *The Roe*, Swabey, 84.

Loan of Navigator to Infected Vessel.]—The loan of a navigator to a vessel in distress, by reason of her own navigators being incapacitated by an infectious disease, is a salvage service on the part of the ship lending the navigator. *The Skibladner*, 47 L. J., Adm. 84; 3 P. D. 24; 38 L. T. 150; 3 Asp. M. C. 556.

It is a salvage service of a very high order on the part of a navigator to go on board an infected vessel and navigate her. *Ib.*

Detaining Seamen of Salved Vessel.]—The court will not lay down any general rule, but will be guided by the circumstances of each case, in determining whether or not the master of the salvors' vessel is justified in refusing to allow the crew of the salved vessel to return to their own ship before the completion of the salvage. *The Cleopatra*, 37 L. J., Adm. 31.

Starting a Ship ashore off the Ground.]—A troopship ashore was assisted in getting off the bank by another ship anchoring near and heaving on the ship ashore; thereby loosening her hold on the bank; when got off she was not attached to the salvor and got off by her own crew. Salvage (2,000*l.*) awarded. *The Himalaya*, Swabey, 515.

Vessel in Distress making ambiguous Signal.]—When a vessel makes an ambiguous signal it will be construed by the court according to the condition of the vessel when boarded; if she is damaged, and is in need of assistance, the signal will be treated as a signal for assistance, and those answering it as salvors; if she is not damaged and wants only a pilot, the signal will be treated as a signal for a pilot only. *The Racer*, 30 L. T. 904; 2 Asp. M. C. 317.

Salvors, induced by an ambiguous signal to put off from the shore to the assistance of a ship, are not entitled to salvage reward, if the actual condition of the ship shews that the signal was for a pilot only. *The Little Joe*, Lush. 88; 6 Jur. (N.S.) 783; 2 L. T. 473; *The Otto Hermann*, 33 L. J., Adm. 189.

Vessel going out of her Course.]—A steam-tug, having a vessel in tow, saw a ship ashore, and went out of her way to inform, and informed, another steam-tug of what she had seen. The other steam-tug thereupon proceeded to the stranded ship and towed her into safety. In an action of salvage instituted on behalf of both steam-tugs against the ship:—Held, that the owners, masters, and crews of both steam-tugs were entitled to salvage remuneration. *The Sarah*, 3 P. D. 39; 37 L. T. 831; 3 Asp. M. C. 542.

Barge Ashore.]—A barge ashore on the Grain Spit, and full of water, brought to Sheerness:—Held, no salvage, because barges commonly grounded there. *The Upnor*, 2 Hag. Adm. 3.

Expedition to Punish Pirates.]—A ship, whose master and crew had been captured by pirates, was retaken by salvors and afterwards ransomed. Subsequently the salvors organised an expedition for the purpose of punishing the pirates:—Held, that the expedition was not a salvage service. *The Mary*, 1 W. Rob. 448.

Ship engaged to render Service—Other Ship employed for less Sum.]—When a ship is engaged to render assistance to another ship in distress, without any fixed sum being agreed upon, and does remain by ready to give assistance, she cannot be deprived of her right to reward by reason of another vessel offering and being engaged to tow for a less sum than the former ship is willing to accept, and she will be entitled to recover a fair sum which will remunerate her for the services rendered, and compensate her for the loss she has sustained. *The Maude*, 36 L. T. 26; 3 Asp. M. C. 338.

Lying alongside Vessel after taking her to Anchorage.]—When a steam-tug is engaged to render assistance to a ship aground in the night-time, and succeeds in getting her off, and takes her to a safe anchorage for the night and lies alongside of her till morning, the salvage service does not end on the ship being anchored, but the steam-tug is entitled to reward for the time she lies alongside the ship ready to render further assistance if required. *The Philotaxe*, 29 L. T. 515; 2 Asp. M. C. 141.

Salvor leaving Ship in Distress under Belief that Service no longer wanted.]—When a steam-ship has been engaged to render assistance to another in distress by towing her to her port of destination, and after several hours' towing, the

ships are parted by no default of the salvor, and the conduct of the ship in distress leads the salvor to the honest belief that his services are no longer required, and thereupon the latter proceeds to her own destination, he is not thereby deprived of his right to salvage reward, but upon the other vessel arriving safely in port by her own exertions, may proceed against her in respect of the services actually rendered. *The Nellie*, 21 L. T. 516; 2 Asp. M. C. 142.

Transhipping Cargo.] — Cargo transhipped from a stranded vessel in order to be taken to a place of safety:—Held a salvage service. *The Westminster*, 1 W. Rob. 229.

Misconduct of Tug rendering Service Necessary.]—A tug under a contract to tow, which by misconduct or negligence or want of reasonable equipments, occasions or materally causes danger to the ship in tow, is not entitled to salvage reward for rescuing the ship from such danger. *The Minnehaha, Ward* v. *McCorkill*, Lush. 335; 15 Moore. P. C. 133; 30 L. J., Adm. 211; 7 Jur. (N.S.) 1257; 4 L. T. 810; 9 W. R. 925.

A tug agreed to tow a ship from Liverpool round the Skerries for a fixed sum. The tug negligently towed the ship in bad weather too near a lea shore, and the weather becoming worse, the hawser parted, and the ship being in a position of danger was compelled to let go her anchors to avoid being driven on shore. From this position she was rescued by the tug after being compelled to slip her anchors and chains, which were lost:—Held, that the tug was not entitled to claim salvage remuneration, and that her owners were liable to pay for her anchors and chains. *The Robert Dixon*, 5 P. D. 54; 42 L. T. 334; 28 W. R. 716; 4 Asp. M. C. 246—C. A.

Recapture from Enemy.]—A master and a boy rescuing their ship from French captors:—Held, entitled to salvage. *The Beaver*, 3 C. Rob. 292.

Recapture of Foreign Ship.] —Foreign ship rescued from the enemy (France):—Held, that the admiralty court had jurisdiction if any British subject engaged in the rescue claimed salvage. *The Two Friends*, 1 C. Rob. 271.

Ransoming Captured Ship and Restoring to Owner.]—Salvage awarded to one who ransomed a prize from her captor and brought her to England. *The Henry*, Edwards, 192.

Carrying News of Ship in Distress.]—Carrying news of a vessel in distress, so that a tug should go to her, rewarded as a salvage service. *The Ocean*, 2 W. Rob. 91.

Fire Ashore—Towing away from.]—Salvage awarded for towing a vessel in dock away from burning warehouses. *The Tees, The Pentucket*, Lush. 505.

—— **Extinguishing in Dock.**]—See *The City of Newcastle*, infra, col. 690.

6. Life Salvage.

Formerly no Power to Award.]—The admiralty Court formerly had no power to award salvage for saving of life, if no property was saved; 1 & 2 Geo. 4, c. 75, did not enable justices or the Cinque Ports commissioners to award life salvage. *The Zephyrus*, 1 W. Rob. 329.

Under 9 & 10 Vict. c. 99.]—Salvage awarded for saving bullion and life under 9 & 10 Vict. c. 99. *Silver Bullion*, 2 Spinks, 70.

Saving Life Enhances Award.] — Saving of life adds to the value of salvage services and leads to a liberal award. *The Ardincaple*, 3 Hag. Adm. 151.

A liberal award is to be given for the saving of human life, consideration being had to the degree of peril to which the salvors and the persons saved are exposed. *The Eastern Monarch*, Lush. 81.

The court will always take into its special consideration the salvation of human life, and give a corresponding reward. *The Bartley*, Swabey, 198.

In estimating salvage services the court will be guided above all by the consideration whether there was danger to human life. *The Thomas Fielden*, 32 L. J., Adm. 61.

Passengers and Crew.]—The words "persons belonging to such ship," in the 17 & 18 Vict. c. 104, s. 458, include passengers on board the ship as well as the master and crew; and who in respect to remuneration for life salvage, stand on the same footing as the master and crew. *The Fusilier, Bligh* v. *Simpson*, 3 Moore, P. C. (N.S.) 51; 34 L. J., Adm. 25; 11 Jur. (N.S.) 289; 12 L. T. 186; 13 W. R. 592.

Liability of Cargo Owners to Contribute.]—The owners of the cargo are liable to contribute to that portion of the claim of salvors which arises from saving the lives of passengers, although the salvors may have rendered no direct benefit to the cargo, as the benefit to property is not a criterion of remuneration for life salvage. *Ib.*

The remuneration of service in life salvage does not rest upon a consideration of any direct benefit conferred upon those upon whom there falls the liability to pay, but rather upon the interest which the community has in encouraging the efforts of salvors; and upon this ground the owners of cargo on board a salved vessel are liable to a share of the payment of life salvage for the rescue of those on board. *Ib.*

Amount.] — The accident of the amount of salvage awarded exceeding the amount of the salvage vessels is wholly immaterial, as the value of such vessel is not an element to detract from the value of the salvage vessel. *Ib.*

Twenty-five men, the crews of four boats, saved the lives of ten men, and gave information to a steamboat which rescued others. The services lasted about four hours and were attended with much danger. Part of the cargo worth 40,000*l.* having been afterwards recovered, the court awarded the salvors of life 500*l.* *Schiller, Cargo ex*, 2 P. D. 145; 36 L. T. 714; 3 Asp. M. C. 439—C. A. Affirming 46 L. J., Adm. 9.

In a case of salvage the court, having out of the proceeds of ship and cargo, amounting to 608*l.*, awarded one-half to salvors of property, awarded 150*l.* to life salvors taking off the crew, together with costs to both plaintiffs. *The Anna Helena*, 49 L. T. 204; 5 Asp. M. C. 142.

Priority.]—Preservation of human life is made, by 17 & 18 Vict. c. 104, s. 459, a distinct ground

of salvage reward, with priority over all other claims for salvage where the property is insufficient. *The Coromandel*, Swabey, 205.

Claim against Specie subsequently Saved by Divers.]—A German steamship was wrecked in British waters, and the lives of ten passengers and some of her crew were saved by certain boats. Subsequently, divers employed by the owners of cargo in the steamship succeeded in recovering from the wreck a large amount of specie. A cause of salvage was instituted on behalf of the owners, masters and crews of the boats against the owners of the specie:—Held, that the plaintiffs were entitled to be paid salvage remuneration out of the proceeds of the specie. *Schiller, Cargo ex*, 2 P. D. 145; 36 L. T. 714—C. A. Affirming 46 L. J., Adm. 9.

When Salvor, after towing Vessel, abandons her and Saves Crew.]—When a steamship, having taken in tow a vessel in distress, after towing her for some hours, on the weather getting worse and the lives of her crew becoming endangered, takes the crew out of her and finally abandons her in a place where she is afterwards picked up by another vessel and taken into port, the owners, master, and crew of the steamship are entitled to salvage reward in respect of the lives so saved, but not in respect of ship and cargo. *The Eintracht*, 29 L. T. 851; 2 Asp. M. C. 198.

Saving Boats' Crew who left Ship contrary to Orders.]—A steam-vessel incurred serious damage by a collision, and her master ordered her boats to be got out. Some of her crew without leave from the master, got into one of the boats and rowed away. The boat's crew was afterwards picked up at sea, and rescued from a position of danger, by a smack. In a salvage suit instituted on behalf of the owners and crews of the smack, against the steamship:—Held, that they were entitled to recover for the service they had rendered. *The Cairo*, 43 L. J., Adm. 33; L. R. 4 A. & E. 184; 30 L. T. 535; 22 W. R. 742; 2 Asp. M. C. 257.

Taking Shipwrecked Persons off Island.]—A ship was wrecked in the Red Sea off an island which was uninhabited and without water. A ship took the passengers and crew on board and brought them to England:—Held, that the service was not life-salvage. The sum of 200*l.* was awarded to the ship for services. *Woosung, Cargo ex*, 44 L. J., Adm. 45; 33 L. T. 394; 3 Asp. M. C. 50.

Ship wholly Lost.]—When lives and cargo have been salved from a ship, but the ship has been totally lost, the owners of the cargo are liable to pay salvage in respect of the lives, and the owners of the lost ship are not liable to contribute to such payment. *Sarpedon, Cargo ex*, 3 P. D. 28; 37 L. T. 505; 26 W. R. 374; 3 Asp. M. C. 509.

Award only allowed out of res Salved.]—Life salvage awards can only be made out of the res salved, and not against owners of a ship personally. *Ib.*

No res Saved—Validity of Agreement.]—A steamship was requested by another steamship in distress to stand by her. An agreement was accordingly made between the two masters for a fixed sum that the sound vessel would remain by the damaged one until she was in a safe position to get to port. The sound vessel remained by the damaged one until the latter was about to sink, when she took her crew on board, and the damaged steamer immediately afterwards sank. The owners, master and crew of the salving ship brought an action for life salvage:—Held, that as no res was saved the action would not lie either as a salvage action simply or on the agreement. *The Renpor*, 52 L. J., Adm. 49; 8 P. D. 115; 48 L. T. 887; 31 W. R. 640; 5 Asp. M. C. 98—C. A.

Not rendered in British Waters.]—A Dutch vessel took fire on the high seas, and some of her crew and some passengers who were on board her escaped in boats, and were picked up by a French schooner. The schooner afterwards fell in with a British steam-vessel, and the persons who had been picked up by the schooner were, at their own request, put on board the steam vessel, and were carried by her into an English port. The schooner was not within British waters during any portion of the time when the services were rendered:—Held, that the schooner had not rendered services such as to entitle her to claim salvage reward by virtue of the provisions of the Merchant Shipping Act, 1854, or the Admiralty Court Act, 1861. *The Willem III.*, L. R. 3 A. & E. 487; 25 L. T. 386; 20 W. R. 216; 1 Asp. M. C. 129.

The court of admiralty has no original jurisdiction to award salvage for the saving of life only; and the 17 & 18 Vict. c. 104, does not give the court jurisdiction over salvage of life only performed on the high seas, at a distance of more than three miles from the shores of the United Kingdom, at least, if the ship from which the lives are saved is a foreign ship. It is immaterial to this question that before action the ship has been brought by other salvors into a British port. *The Johannes*, Lush. 182; 30 L. J., Adm. 91; 3 L. T. 757.

Ship Sunk by Collision—Expense of Raising—Liability of Damages recovered.]—The defendants' vessel having been sunk in the Thames by a collision occasioned by the fault of another vessel, the conservators, acting under 20 & 21 Vict. c. cxlvii. s. 86, caused it to be raised and sold, and the proceeds of the sale being insufficient to defray the expenses of raising it, they recovered, under s. 86, the amount of the deficiency from the defendants. The defendants on their part recovered the full value of their vessel from the owners of the vessel which was to blame for the collision. In an action for salvage in respect of the preservation of the lives of the crew of the defendants' vessel at the time of the collision:—Held, that the salvors could not recover; that the defendants' vessel not having been saved there was nothing to which the claim for life salvage could attach; and that it would not be preferred against the defendants in respect of the amount recovered as damages from the vessel to blame for the collision. *The Annie*, 56 L. J., Adm. 70; 12 P. D. 50; 56 L. T. 500; 35 W. R. 366; 6 Asp. M. C. 117.

Passengers forwarded from Wreck—Liability of Shipowner.—See *The Mariposa*, supra, col. 87.

7. Salvage or Towage.

a. Towage, not Salvage.

Where no Danger.]—In a salvage suit promoted in respect of certain services whereby the defendant's vessel, which at the time such services were rendered was in neither actual nor imminent probable danger, had been safely towed into port:—Held, that such services must be regarded as towage, and not as salvage services. No tender of the amount thereof having been made, such amount could not be recovered in a salvage suit. *The Strathnaver*, 1 App. Cas. 58; 34 L. T. 148; 3 Asp. M. C. 113—P. C.

The services of a tug were accepted by a vessel in no danger to carry her into port. A tender of a sum for towage upheld, there having been no salvage performed. *The Harbinger*, 16 Jur. 729.

A ship whilst docking in the Mersey got ashore on Pluckington bank, but was pulled off by her tugs in a few minutes:—Held, that they were not entitled to salvage. *The Lady Egidia*, Lush. 513.

Towage, as distinguished from salvage, is where the ship has received no injury and encountered no accident. *The Reward*, 1 W. Rob. 174; and see *The Princess Alice*, 3 W. Rob. 138.

Contract to Endeavour to Tow into Safety—Failure.]—Plaintiffs in a salvage action had left a vessel ultimately saved by other salvors in a worse position than that in which they picked her up. The court having found that there was an agreement that the plaintiff should endeavour to tow her to a place of safety for a remuneration to be fixed on shore:—Held, that the plaintiffs, having performed the agreement, although not entitled to salvage, were entitled to remuneration for what they had done. *The Lepanto*, [1892] P. 122; 66 L. T. 623; 7 Asp. M. C. 192.

Towage Agreement—Alleged Concealment.]—The owners and crew of a tug sued for salvage services, alleging that an agreement entered into for towage service was invalid, by reason of the fact of the illness of a great part of the crew of the vessel salved having been withheld. No danger to property was proved:—Held, that there was no salvage service, and the court pronounced for the agreement with costs. *The Canova*, L. R. 1 A. & E. 54; 12 Jur. (N.S.) 528.

b. Salvage, not Towage.

Steamer's Shaft broken.]—Where a steamship carrying fore and aft sails only, and not rigged for proceeding under sail alone, breaks the main shaft of her propeller and is compelled to take assistance from another ship which tows her forty miles into a port, the service is of a salvage character, although the service is not attended with any danger to the salvors. *The Jubilee*, 42 L. T. 594; 4 Asp. M. C. 275.

Where a steamship, disabled by the breaking of her crank-shaft, was towed a distance of about thirty miles without danger or risk by another steamship belonging to the same owners as the disabled vessel, and fifteen of the crew of the towing vessel instituted a salvage action in the sum of 5,000*l.* against the vessel towed, and arrested the vessel, cargo, and freight therein, the court held such services to be salvage services, but of so slight a character that on a value of 105,500*l.* it awarded 15*l.*, and ordered the salvors to pay all the costs of the action, expressing disapprobation both at the institution of the action in the high court, and at the arrest of the vessel for such an amount. *The Agamemnon*, 48 L. T. 880; 5 Asp. M. C. 92.

The "V." fell in with the "C.," showing signals of distress, with her propeller shaft broken, about thirty miles out of her usual course from America to England, and took her in tow. After the "V." had towed the "C." from 8.10 p.m. to 7.45 the hawser broke, and owing to the danger to the cattle on board, the "V." would not take the "C." again in tow. By the services of the "V." the "C." was brought ten to fourteen miles nearer her proper track, and towed eighty-five miles on her course, and thus brought into greater comparative safety. The "C." subsequently arrived safely at Queenstown:—Held, that the "V." was entitled to some salvage reward, and she was accordingly awarded 200*l.* *The Camellia*, 53 L. J., Adm. 12; 9 P. D. 27; 50 L. T. 126; 32 W. R. 495; 5 Asp. M. C. 197.

Towing Disabled Ship.]—Service performed by a steamer to a disabled vessel can never be considered as mere towage. *The Charles Adolphe*, Swabey, 153.

Tug Engaged in Towing—Service to Third Ship.]—A tug with a ship in tow cast her off in order to pull a steamship off a bank of mud and stones at a harbour mouth, it being then high tide. 50*l.* awarded for salvage. *Lawson* v. *Grangemouth Dockyard Co.*, 15 Ct. of Sess. Cas. (4th ser.) 753.

c. Towage converted into Salvage.

Towage may be Converted into Salvage.]—A towage service may, if exceptional circumstances arise, develop into a salvage service. *The Isabella*, 3 Hag. Adm. 428.

An agreement for towage, when from unavoidable circumstances salvage service becomes necessary, does not preclude the tug rendering such service from claiming as salvor. *The William Brandt*, cited, 2 W. Rob. 172; 2 Not. of Cas. Suppl. 67; *and see* infra, 16. Salvage Agreements.

Circumstances under which Towage may become Salvage.]—In order to entitle a steam-tug engaged to tow a vessel to successfully claim salvage remuneration for services rendered to such vessel, it must be shown not only that the tow was in danger when the services in respect of which salvage remuneration is claimed were rendered, but that at such time something was done either in the nature of risk run or extra services performed by the tug beyond what was included in the contemplation of the parties of the towage agreement. *The Liverpool*, [1893] P. 154; 1 R. 601; 68 L. T. 719; 7 Asp. M. C. 340.

A contract to tow embraces the risk of ordinary bad weather, but is put an end to by weather rendering the completion of the undertaking impossible; and in that case subsequent services may be in the nature of salvage. *The Galatea*, Swabey, 349; 4 Jur. (N.S.) 1064; 7 W. R. 21.

A contract to tow in law implies an engagement that each party to the contract will perform his duty in completing it; that proper skill and diligence will be used on board both the vessel and tug; and that neither party, by neglect or

mismanagement, will create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. *The Julia*, 14 Moore, P. C. 210; Lush. 224.

If in the course of the performance of the contract, any inevitable accident happens to the one, without any default on the part of the other, no cause of action arises, as such accident is one of the necessary risks of the engagement to which each party was subject. But on the other hand, if the wrongful act of either occasions any damage to the other, such wrongful act creates a responsibility on the party committing it, if the other party has not by any misconduct, or unskilfulness on his part, contributed to the accident. *Ib.*

A contract to tow is not a warranty to tow to destination, but an engagement to use best endeavours and competent skill for that purpose, with a vessel properly equipped. *The Minnehaha*, Lush. 335; 15 Moore, P. C. 133; 30 L. J., Adm. 211; 7 Jur. (N.S.) 1257; 4 L. T. 810; 9 W. R. 925.

If performance of the stipulated service is rendered impossible by a vis major, the obligation is terminated. *Ib.*

If unforeseen danger unavoidable by the steam-tug supervenes to the ship in tow, as by breaking of the hawser, the steam-tug is bound to complete the service, if possible; and the steam-tug, if thereby incurring risk and performing duties not within the scope of the original engagement, is entitled to salvage reward. *Ib.* S. P., *The Julia*, Lush. 224; 14 Moore, P. C. 210; *The I. C. Potter*, infra.

If, in the performance of a contract to tow, an unforeseen and extraordinary peril arises to the vessel towed, the steam-tug is not at liberty to abandon the vessel, but is bound to render to her the necessary assistance, and thereupon becomes entitled to salvage reward. *The Saratoga*, Lush. 318.

A steam-tug under contract to tow into dock was lashed alongside a vessel; in rounding to enter the dock basin the tide forced the vessel and the steam-tug close to a landing-stage, the steam-tug next to the stage; the pilot of the vessel hailed the tug to hold on and go ahead, which the tug did, but was forced against the stage, and injured:—Held, that the steam-tug was bound to endeavour to save the vessel from the impending peril, especially upon the order of the pilot, and so doing was entitled to salvage reward, including repayment of all damages and losses thereby incurred. *Ib.*

When the master of a steamer engages to tow a vessel, it is upon the supposition that the wind and weather and the time of performing the service will be what are ordinary at the time of year; but if an unexpected change of weather or other unforeseen accident occurs, he is bound to adhere to the vessel, and to do all in his power to rescue her from danger; and he will be entitled to reasonable extra remuneration for the extra service. *The White Star*, L. R. 1 A. & E. 68.

A steamer engaged to tow is bound, notwithstanding a merely temporary accident interrupting the service, and endangering the vessel towed, to complete the stipulated service with all reasonable skill and promptitude, and for so doing the steamer, if incurring no risk, is not entitled to salvage reward. *The Annapolis*, *The Golden Light*, Lush. 355; 5 L. T. 37—P. C.

In order to entitle a steam-tug engaged to tow a vessel to successfully claim salvage remuneration for services rendered to such vessel, it must be shown not only that the tow was in danger when the services in respect of which salvage remuneration is claimed were rendered, but that at such time something was done either in the nature of risk run or extra services performed by the tug beyond what was included in the contemplation of the parties in the towage agreement. *The Liverpool*, [1893] P. 154; 1 R. 601; 68 L. T. 719; 7 Asp. M. C. 340.

A steam-tug entered into a contract to tow a ship at sea into the port of Liverpool for 45*l.* During the performance of the service a hurricane arose and the vessels were in serious danger. The tug, at great peril to herself, continued to tow the ship during the hurricane, and by so doing prevented the ship drifting upon a lee-shore. The wind soon afterwards moderated, and the tug, still continuing to tow the ship, brought her into the port of Liverpool in safety:—Held, that the tug was entitled to salvage reward. *The I. C. Potter*, 40 L. J., Adm. 9; L. R. 3 A. & E. 292; 23 L. T. 603; 19 W. R. 335.

Though a towing vessel may be justified in abandoning her contract, it is still her duty to remain by the towed vessel to render assistance; but for such assistance she may claim salvage reward. *Ib.*

A tug under contract to tow a ship into port may be entitled to salvage reward for bringing the ship into port, although nothing has occurred to occasion an actual interruption to the towage. *Ib.*

Towage of a ship near the land in unsettled weather, if her ground tackle is disabled, is in the nature of salvage. *The Albion*, Lush. 282.

A tug engaged under the ordinary contract to tow, may, by the performance of substantial salvage service in saving the ship towed from supervening danger, earn salvage reward, though not herself incurring risk. *The Pericles*, Br. & Lush. 80.

—— **Fog—Stranding.**]—A tug, which had been engaged to attend a vessel into harbour, accompanied her to the entrance, when, a fog coming on and before the tug had made fast, the vessel went ashore, and was in a position of danger. The tug assisted to get her off:—Held, that such service was outside the scope of her engagement, and that she was entitled to salvage. Semble, the existence of such an engagement has no practical effect in diminishing the amount of the award. *The Westburn*, 74 L. T. 200; 8 Asp. M. C. 130.

Salvage Reward in Addition to Towage.]—Semble, where owing to an accident to the tow the tug is delayed in the performance of the towage contract, the tug may, in an action for salvage, be entitled to remuneration beyond the charge for towage. *The Hjemmett*, 49 L. J., Adm. 66; 5 P. D. 227; 42 L. T. 514; 4 Asp. M. C. 14.

8. Salvage or Pilotage.

Test.]—The test is, whether the risk attending the services to the vessel was such, that the pilot could not be reasonably expected to perform them for the ordinary pilot's fees, or even for extraordinary pilotage reward. A vessel was, during a heavy storm, being driven to leeward towards dangerous sands: her captain was ignorant of the locality, and her loss appeared almost inevitable:

some pilots, seeing her danger, put off to sea at the peril of their lives in order to assist her; they were unable to board her by reason of the height of the sea: but by preceding her and signalling to her, they guided her to a safe anchorage. The vessel had sustained no damage:—Held, that the pilots were entitled to be remunerated for salvage services. *Akerblom* v. *Price*, 50 L. J., Q. B. 629; 7 Q. B. D. 129; 44 L. T. 837; 29 W. R. 797; 4 Asp. M. C. 441—C. A.

Ship in Distress.]—A fishing-smack fell in near the Long Sand buoy with a foreign steamship. The steamship had been on the sands near the Kentish Knock lightship, but had got off with some damage to her rudder, and had a signal for a pilot hoisted. The master of the smack boarded the steamship and piloted her to the entrance of Harwich harbour:—Held, that the owners, master and crew of the fishing-smack were entitled to salvage remuneration. When a person goes on board of a vessel in distress, and pilots her into harbour, he is entitled to salvage remuneration, unless it is established that he has contracted to render the services for pilotage remuneration only. *The Anders Knape*, 48 L. J., Adm. 53; 4 P. D. 213; 40 L. T. 684; 4 Asp. M. C. 142.

Smack engaged to Sail Ahead.]—A foreign vessel fifty miles off the Dutch coast being in difficulty, in consequence of the boisterous state of the weather, and being leaky, called in the assistance of an English fishing-smack, and engaged the captain by a written agreement "to pilot and to sail ahead for 50*l*." After four days' boisterous weather, during which the captain of the smack worked at the pumps, the vessel was got into port. In an action for salvage services:—Held, that nothing had been done to convert pilotage service into a salvage service, and that the sum specified in the agreement was a sufficient compensation. *The Jonge Andries*, Swabey, 303; 11 Moore, P. C. 313; 6 W. R. 198—P. C.

Pilotage may, by circumstances of extreme danger and personal exertion, be converted into salvage. *The Joseph Harvey*, 1 C. Rob. 306.

Waterman acting as Pilot.]—A Dutch barque was riding at anchor off Deal, and waiting to proceed down channel, and a waterman who, though not a licensed pilot, was in the habit of piloting vessels, was taken on board her, under an arrangement whereby he was to receive 7*s.* a-day, with 5*l.* in addition, for navigating the vessel as pilot until she arrived off Beachy Head. The day after the waterman came on board, and whilst the barque was still at anchor, a gale came on, and the tempestuous state of the weather caused the vessel to drive, and rendered it necessary to slip the chain, when, under the direction of the waterman, the vessel was taken through the Gull Stream and brought up in safety in Margate Roads. In a salvage suit instituted on behalf of the waterman and other persons who had rendered services to the vessel:—Held, that the services rendered by the waterman were within the scope of his contract, and that he was not entitled to claim as a salvor. *The Æolus*, 42 L. J., Adm. 14; L. R. 4 A. & E. 29; 28 L. T. 41; 21 W. R. 704.

A pilot entering into an engagement to pilot a vessel undertakes to supply local knowledge and the peculiar skill of his class, and will not be allowed, even though he contributes to the safety of the vessel, to change the character of his service from pilotage to salvage, except where the vessel was in distress before he went on board to render the service, or where such circumstances of extreme danger and personal exertion supervene, which exalt his service into a salvage service. *Ib.* S. P., *The Columbus*, 2 Hag. Adm. 178, n.

Pilot assisting to Pump.]—Pilots going on board a leaky ship and assisting to pump held to be salvors. *The Hebe*, 2 W. Rob. 246; and see *The Jonge Andries*, supra.

Pilot doing Seaman's Duty.]—A pilot on a salved ship who rendered trifling assistance by helping at the wheel and windlass:—Held, not entitled to salvage. *The Monarch*, 56 L. J., Adm. 114; 12 P. D. 5; 56 L. T. 204; 35 W. R. 292; 6 Asp. M. C. 90.

Pilotage by Persons not Pilots.]—Pilotage service by persons who are not licensed pilots in a place where there are no such pilots is salvage service. *The Rosehaugh*, 1 Spinks, 261.

Pilot Boat Towing.]—Formerly, pilots were bound to give the use of their boats for towing, if necessary, being paid for damage to the boat and for extra labour. Tender of 50*l.* for towing a dismasted vessel into Portsmouth upheld. *The General Palmer*, 2 Hag. Adm. 176; *The Enterprise*, infra.

Pilots waiting for Fine Weather to Board.]—Pilots waiting for fair weather to go off to a ship ashore in distress only allowed pilotage, and not salvage, for getting her into harbour. *The City of Edinburgh*, 2 Hag. Adm. 333.

Pilotage of Ship with Rudder gone.]—Double pilotage given to a pilot taking a steamship that had lost her rudder; semble, the pilot boat towing. *The Enterprise*, 2 Hag. Adm. 178, n.

Incompetent Persons acting as Pilots.]—Fishermen who assume to act as salvors to the exclusion of pilots and more competent persons will get no reward if they do no good. *The Dygden*, 1 Not. of Cas. 115.

Ship that has Lost her Reckoning.]—A foreign ship bound to St. Petersburg from Malaga was boarded in the Bristol Channel by fishermen. Her master did not know where he was. Salvage awarded. *The Eugenie*, 3 Not. of Cas. 430.

Ship Put Back to stop Leak.]—An outward bound ship put back in the English Channel, finding herself making some water; she put into Dover and the leak was stopped for a trifling expense:—Held, that the pilot who took her into Dover was to be paid for a salvage and not a pilotage service. *The Elizabeth*, 8 Jur. 363.

Beachman undertaking Pilotage.]—A Deal man who boarded a ship in the Gull Stream and undertook to pilot her into the Downs, but ultimately put her ashore on Sandwich Flats, from whence she was with difficulty salved:—Held, not entitled to salvage. *The Branken Moor*, 3 Hag. Adm. 373.

Signalling for Pilot or Salvor.]—A vessel in a damaged condition out of pilotage waters signalling for a pilot:—Held, to be signalling for salvage assistance. *The Felix*, 1 Spinks, 23, n.

Ship out of Pilotage Water.]—Assistance given to a ship out of pilotage waters to bring her to a place of safety is salvage, not pilotage. *The Hedwig*, 1 Spinks, 19.

False Claim by Pilot—Costs.]—Pilot wrongfully claiming salvage condemned in costs. *The Johannes*, 6 Not. of Cas. 288, n.

A steamship put two men on board a foreign galliot brought up between the Needles and Hurst Castle, and she was taken by them to Cowes, the wind being fair but strong:—Held, no salvage service. *The Wilhelmina*, 1 Not. of Cas. 376.

Ship in Distress—Pilot awarded Salvage.]—A pilot engaged by a foreign ship as such awarded salvage, the ship being damaged and the weather bad. *The King Oscar*, 6 Not. of Cas. 285.

In an action for salvage it appeared that on March 20, about 11 A.M., the plaintiffs' fishing-smack fell in with the defendants' vessel which was showing an English Jack flag in her rigging, in the North Sea, forty miles from Lowestoft. The crew of the vessel were suffering from frost-bite, the helmsman in consequence steering with one hand. They were also short of provisions. They told the master of the smack that they wished to be piloted to the nearest port, the vessel being at this time out of pilotage waters, and he agreed to take and took the vessel to Great Yarmouth:—Held, that even assuming that the signal exhibited by the defendants' vessel was ambiguous, the assistance rendered to her was in the circumstances a salvage service, and that the plaintiffs were entitled to remuneration accordingly. *The Aglaia*, 57 L. J., Adm. 106; 13 P. D. 160; 59 L. T. 528; 37 W. R. 255; 6 Asp. M. C. 337.

A pilot is not bound to go on board a vessel in distress for mere pilotage reward; but if he go on board as pilot he will not be entitled to salvage reward for trifling assistance given to the crew. *The Cherubim*, Ir. R. 2 Eq. 172; S. P., *The Frederick*, 1 W. Rob. 16.

9. Who are entitled to.

a. Officers and Crews of H. M. Ships.

General Rule.]—Officers and crews of her majesty's ships are entitled to the same salvage as other salvors; but the award is diminished by reason of the ship not being private property. *The Earl of Eglinton*, Swabey, 7; *The Iodine*, 3 Not. of Cas. 140; *The Ewell Grove*, 3 Hag. Adm. 200; *The Wilsons*, 1 W. Rob. 172; *The Mary Anne*, 1 Hag. Adm. 158; *The Rapid*, 3 Hag. Adm. 419; *The Rosalie*, 1 Spinks, 188.

A queen's steamship assisted a merchant ship in distress under an agreement with the admiral at Portsmouth, that the latter should pay for all damage and loss of stores to the steamship:—Held, that this did not prevent the officers and crew of the steamship from claiming salvage. *The Lustre*, 3 Hag. Adm. 154.

The commander and crew of a queen's ship, or of a ship of the Bombay government, have the same rights to remuneration for salvage as the master and crew of a merchant ship. *The Woosung, Cargo ex*, 1 P. D. 260; 35 L. T. 8; 25 W. R. 1; 3 Asp. M. C. 239—C. A. Reversing 44 L. J., Adm. 45.

The commander of a queen's ship, sent to render help to a wrecked ship, cannot impose terms and refuse to give salvage services unless those terms are accepted. *Ib.*

Officers and crews of her majesty's ships, on receiving the consent of the admiralty, as required by 17 & 18 Vict. c. 104, s. 485, may recover salvage from the owners of the ship and cargo for services rendered thereto, and for salvage services rendered to passengers belonging to the ship. *The Alma*, Lush. 378.

Whole Ship's Company entitled.]—The officers and crew of a queen's ship who remain on board are entitled to salvage, as well as those who actually perform the service. *The Charlotte Wylie*, 2 W. Rob. 495.

Arduous Service—Lightening Ship—Preservation from Robbery.]—A vessel with a valuable cargo on board, struck on a reef on an uninhabited island in the Red Sea near the mainland; and the crew began to jettison part of the cargo, which they threw into shallow water. Armed Arabs then crossed over from the mainland and began to plunder the jettisoned cargo. A queen's ship having come up, her commander anchored near the wrecked vessel, and sent a number of his crew to act as sentinels on the beach of the mainland, who were posted for about a mile along the beach, and were exposed to severe heat. Others of the crew were employed in discharging the cargo, working up to their waists in water in the hold, which was greatly fouled. They threw out the cargo and hauled it across the reef to the mainland, where it was collected by the sentinels and labourers. In an action of salvage by the commander and crew of the queen's ship:—Held, that the services rendered by them being beyond the scope of their public duty were salvage services, and that they were entitled to remuneration accordingly. *Ulysses, Cargo ex*, 58 L. J., Adm. 11; 13 P. D. 205; 60 L. T. 111; 37 W. R. 270; 6 Asp. M. C. 354.

Ship belonging to or hired by Government.]—A transport ship, hired by government, and performing by orders of the officer of a queen's ship, salvage services not within the terms of the charterparty, is entitled to a share of the amount awarded as salvage. *The Nile*, 44 L. J., Adm. 38; L. R. 4 A. & E. 449; 33 L. T. 66; 3 Asp. M. C. 11.

A ship belonging to the Bombay government with a hired commander and crew is, with respect to the provisions of the Merchant Shipping Act, 1854, s. 484, in the same position as a queen's ship with commissioned officers. *Woosung, Cargo ex*, supra

Government Transport—Government Stores.]—The owners, master, and crew of a steamship chartered to the government as a transport under the ordinary form of government charter, incorporating the transport regulations (by which it is provided that "when necessary, steam transports will be required to tow other vessels") are entitled to recover for salvage services rendered to a ship and her freight, even though the services be rendered with the assistance of a naval officer and naval seamen, and the salved vessel be laden (inter alia) with government stores. *The Bertie*, 55 L. T. 520; 6 Asp. M. C. 26.

Board of Trade's Vessels.]—The Board of Trade, as owners of a steam-tug and lifeboat belonging to Ramsgate harbour, may sue for an

award of salvage in respect of service rendered by the steam-tug and lifeboat. *The Cybele*, 47 L. J., Adm. 86; 3 P. D. 8; 37 L. T. 773; 26 W. R. 345; 3 Asp. M. C. 352—C. A.

Rescue from Enemy.]—Salvage not due to a king's ship for rescuing from the enemy a hired transport engaged in the same expedition. *The Belle*, Edwards, 66.

Service by Queen's Ship to Ship in Service of Foreign Government.]—Salvage awarded where the service was to ship and cargo, and the ship alone was arrested and brought before the court. The service was by a queen's ship to a ship in the service of the French government. *The Mary Pleasants*, Swabey, 224.

Military Salvors.]—Military salvors awarded civil salvage. *The Sir Francis Burton*, 2 Hag. Adm. 156.

Queen's Ship.]—The officers and crew of the "Dalhousie," a ship in the service of the Bombay government awarded 4,500*l.* out of 22,400*l.*, being the value of cargo salved with difficulty from a ship ashore in the Red Sea and in danger from Arabs. *The Dalhousie*, 1 P. D. 271, n.

b. Both Ships belonging to same Owners.

General Rule.]—When salvage services are performed by one ship to another, both ships belonging to the same owners, the master and crew of the ship which has performed the salvage services are entitled to salvage remuneration, provided the services performed are not within the contract which they originally entered into with the owners, and which they would be paid for by their ordinary wages. *The Sappho, Sappho (Owners)* v. *Denton*, 8 Moore, P. C. (N.S.) 66; 40 L. J., Adm. 47; L. R. 3 P. C. 690; 24 L. T. 795. Affirming 19 W. R. 24.

The crews of two ships belonging to J. L., gave some assistance to a third ship chartered by J. L. upon the terms that he should pay the master and crew; the cargo belonging to J. L.: —Held, that no salvage could be claimed against the third ship. *The Maria Jane*, 14 Jur. 857.

A steam vessel laden with a general cargo, became disabled at sea in consequence of her machinery breaking down. Her cargo had been shipped under bills of lading, which contained among the excepted perils "accidents from machinery." Another steam vessel belonging to the same owners fell in with the disabled vessel, and towed her into safety:—Held, that the owners of the vessel rendering the service were entitled to recover salvage remuneration against the cargo laden on board the disabled vessel, and that the master and crew of the vessel rendering the service were entitled to recover salvage remuneration against the disabled vessel, her freight and cargo. *The Miranda*, 41 L. J., Adm. 82; L. R. 3 A. & E. 561; 27 L. T. 389; 21 W. R. 84; 1 Asp. M. C. 440.

Part Owners of Salving and Salved Ship the same.]—When a part owner has an interest in the vessel salved, his co-owners and the master and crew of the salving vessel may sue for salvage; the sum to which they are entitled being computed by deducting, from the value of the entire service, the share which would have been due to such part owner, if he could have joined. *The Caroline*, Lush. 334; 5 L. T. 89.

Chartered Ship Salving another belonging to the Charterers.]—A ship chartered by the East India Co. rendered salvage service to a ship owned by the company:—Held salvage was payable to the owners of the chartered ship. *The Waterloo*, 2 Dods. 433.

Master and Crew entitled, Owners not.]—A steamship laden with cargo became disabled at sea in consequence of the breaking of her crank shaft. Such breakage was caused by a latent defect in the shaft, arising from a flaw in the welding, which it was impossible to discover. Her cargo was shipped under bills of lading which contained among the excepted perils "all and every the dangers and accidents of the seas and of navigation of whatsoever nature or kind." Another vessel belonging to the same owners towed the disabled vessel to a place of safety. In an action of salvage brought by the owners, masters, and crew of the salving vessel against the owners of cargo on the salved ship:—Held, that the master and crew were entitled to salvage, but that the owners were not, for that there was an implied warranty by them that the vessel was seaworthy at the beginning of the voyage. *The Glenfruin*, 54 L. J., Adm. 49; 10 P. D. 103; 52 L. T. 769; 33 W. R. 826; 5 Asp. M. C. 413.

Salvage of Cargo—Owners entitled.]—A steamship became disabled at sea owing to the breaking of her fly-wheel shaft, through a flaw in the welding existing at the commencement of the voyage, but not discoverable by the exercise of any reasonable care. The cargo on board her was shipped under three bills of lading, the first of which contained, amongst other excepted perils, the clause:—"warranted seaworthy only so far as ordinary care can provide"; the second: "warranted seaworthy only as far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers, and crew can ensure it"; and the third: "owners not to be liable for loss, detention, or damage . . . if arising directly or indirectly . . . from latent defects in boilers, machinery, or any part of the vessel in which steam is used, even existing at time of shipment, provided all reasonable means have been taken to secure efficiency." A vessel belonging to the same owners towed the disabled vessel to a place of safety. In an action of salvage brought by the owners, master and crew of the salving vessel against the owners of cargo in the salved vessel: —Held, that the owners of the salving vessel (though at the same time owners of the salved vessel) were entitled to salvage, and that the owners of the cargo had no remedy for breach of the contract of carriage, for the exceptions in the bills of lading were such as to constitute a limited warranty of seaworthiness at the commencement of the voyage, which limited warranty had been complied with by the ship-owners. *Laertes, Cargo ex*, 56 L. J., Adm. 108; 12 P. D. 187; 57 L. T. 502; 36 W. R. 111; 6 Asp. M. C. 174. *See* also *The Agamemnon*, ante, col. 612.

c. Shipowner or Charterer.

By agreement between the owner of a steamer and C., he agreed to charter the steamer for the purpose of running between certain named ports, and to pay a sum weekly for the use of the

steamer until the agreement was determined in manner therein provided. The agreement provided that C. should pay all expenses of the crew and other expenses incidental to the running of the steamer, excepting only marine insurance, which was to be defrayed by the owner; that the steamer should be delivered up by C. on the termination of the agreement in as good condition as at the time of making the agreement, reasonable wear and tear excepted; that the master should not, except in the event of his misconduct, be removed by C. without consent of the owner. The steamer, while running under this agreement, fell in with a disabled vessel and towed her into safety:—Held, that C. was entitled to salvage reward, in respect of the service rendered by the steamer, and that the owner was not entitled to salvage reward. *The Scout*, 41 L. J., Adm. 42; L. R. 3 A. & E. 512; 26 L. T. 371; 20 W. R. 617; 1 Asp. M. C. 258.

The charterers of a vessel are not, except under very special circumstances, entitled to the salvage earned by that vessel. *The Alfen*, Swabey, 189.

The owners rendering salvage services, being also the charterers of the vessel receiving the services, are not, thereby debarred from claiming salvage reward, unless the effect of the charterparty has been to divest the owners of the possession and control of the salved vessel, and to transfer the same for the time to the charterers. *The Collier*, L. R. 1 A. & E. 83; 12 Jur. (N.S.) 789; 16 L. T. 155.

The claim of an owner to a share in a salvage reward beyond compensation for damage incurred by his vessel, is of feeble character, and he has no claim to the custody of such money. *The Princess Helena*, Lush. 190; 30 L. J., Adm. 137; 4 L. T. 869.

In the absence of special provision in the charterparty to the contrary, the owner and not the charterer is entitled to salvage; but the salvage may give rise to claims by the charterer against the owner. *The Alfen*, Swabey, 189.

Semble. Salvage performed by a ship demised to and wholly in the possession of a charterer enures to the benefit of the charterer. *The Maria Jane*, 14 Jur. 857.

The owner of a ship under charter awarded two-thirds of a prize captured by her. *Thurgar* v. *Morley*, 3 Mer. 20.

d. Apprentices.

Master of Apprentice Salvor.]—The master of an apprentice is not entitled to salvage awarded for the services of the apprentice. *The Two Friends*, 2 W. Rob. 349; 8 Jur. 1011.

Apprentices are entitled to share in salvage, and a contract that their masters should take their shares is, semble, invalid. *The Columbine*, 2 W. Rob. 186.

e. Agents.

Authority of Agent to Incur Expenses—Principle upon which Award based.]—An agent is not precluded from claiming as a salvor; but where the owners of the property in danger have requested him to render assistance, and thereby have given him a right to some remuneration, though the operations prove unsuccessful, the assessment of the award, for successful salvage services, will be based upon the principle that the agent did not, like an independent salvor, run the risk of the loss of the entire expenditure if his efforts had proved unsuccessful. *The Kate B. Jones*, [1892] P. 366; 69 L. T. 197; 7 Asp., M. C. 332.

Agent to Salve Cargo.]—One who is appointed agent by the master to save cargo wrecked may, nevertheless, claim as salvor in admiralty. *The Happy Return*, 2 Hag. Adm. 207.

Lloyds' Agent Hiring Men to Salve.]—Lloyds' agent hiring men to assist a vessel in distress is not entitled to claim as a salvor. *The Lively*, 3 W. Rob. 64.

A Lloyds' agent, who had undertaken the salvage of a vessel, and had employed men for the purpose, without incurring risk himself, allowed to claim as salvor. *La Purissima Concepcion*, 3 W. Rob. 181.

A valuable ship went ashore off Beachy Head. Two persons, Lloyds' agent and another, as agents, were employed by the master to salve the ship and cargo. They employed a large number of men at an expense of over 1,000*l.*:—Held, that they were entitled to salvage. *The Lady Cranstown*, cited 2 Hag. Adm. 207.

Extraordinary Services.]—Where ship agents render extraordinary services in saving property, the court will, under particular circumstances, allow a claim as agent and a claim as salvor to be united and combined. *Honor, Cargo ex*, 35 L. J., Adm. 113; L. R. 1 A. & E. 87; 12 Jur. (N.S.) 773; 15 L. T. 677; 15 W. R. 10.

Repayment of Advance to Salvors.]—Money paid by the ship's agent to salvors, in anticipation of an award, will not be repaid out of the fund in court to those who advance it. *The Louisa*, 3 W. Rob. 99.

f. Owner of Salving Ship.

Ship supplying Seamen—Owners entitled to Salvage.]—The owners, master and crew of a ship that supplies seamen in mid-ocean to another that is short handed are entitled to salvage, as well as the seamen who are transferred. *The Roe*, Swabey, 85.

Owner of Smack Salvor.]—Where services of smacksmen are accepted, the smackowner is entitled to share in the award. *The Norden*, 1 Spinks, 185.

Owners of Boats used by Salvors.]—The owners of boats used in a salvage service:—Held, not entitled to salvage, not having been personally engaged in the service; but to remuneration for the use of their boats. *The Charlotte*, 3 W. Rob. 68; 6 Not. of Cas. 279.

g. Coastguard and Lightship Men.

Coastguardmen.]—Coastguardmen are entitled to salvage, though it is their duty to do such work. *Silver Bullion*, 2 Spinks, 70.

Coastguard Officer.]—Claim for salvage of a coastguard officer who sent his men and boat, but did nothing himself, rejected. *The Vine*, 2 Hag. Adm. 1.

Lightship Crew.]—Some of the crew of a lightship rendered salvage services:—Held, that those who remained on board could not share in the award. *The Emma*, 3 W. Rob. 151.

h. Other Persons.

Lifeboat Crew in Employment of Harbour Authority.]—The Mersey Docks and Harbour Board agreed with a tug owner that the latter should, by day or night, tow their lifeboat to sea at fifteen guineas for each trip. The tug, in pursuance of this agreement, towed out the lifeboat, which rescued the crew of a ship in distress; afterwards she returned and brought in the ship and cargo:—Held, that the owners, master and crew of the tug were entitled, notwithstanding the agreement with dock company, to claim for life salvage. *The Pensacola*, Br. & Lush. 307.

Passenger—Naval Officer.]—A naval officer, being a passenger on board a brig that got into distress, contributed his assistance:—Held, that he could not claim as a salvor. *The Branston*, 2 Hag. Adm. 3, n.

Whole Crews of Boats employed entitled to Share.]—Where two luggers rendered salvage service, all the crews of both were held entitled to share, though some only were employed. *The Mountaineer*, 2 W. Rob. 7.

Wrecked Crew on Board Salved Ship.]—A wrecked crew on board the salved ship awarded salvage for their exertions in salving the ship. *The Salacia*, 2 Hag. Adm. 262.

Ship's Company adrift Picking up an Abandoned Ship.]—A vessel ashore and abandoned on a reef off Cuba was picked up by the crew of another vessel also ashore and abandoned in the neighbourhood and brought to England. Salvage awarded to the crew, but not to the owners, of the other ship. *The Two Friends*, 2 W. Rob. 349; 8 Jur. 1011.

Representatives of Deceased Salvors.]—Share of the salvage awarded to the representatives of salvors who were drowned in the service. *The Marquis of Huntly*, 3 Hag. Adm. 246.

Salvors abandoning Ship afterwards Salved by others.]—Salvors made great efforts to save a ship, but were at last compelled to abandon her; it was uncertain what effect their action had on the saving of the ship. Afterwards she was picked up derelict and brought in by other salvors:—Held, that the original salvors were entitled to salvage. *The E. U.*, 1 Spinks, 63.

Crew Returning to Abandoned Ship.]—A ship was, by her master's order, abandoned at sea. The next day her crew, by order of the consul at Vigo, were put on board a steamship, which fell in with the abandoned ship. Part of the crew volunteered to go on board her, without the master; and they did so, and with some assistance from boats, carried her to Corunna:—Held, that they were entitled to salvage. *The Florence*, 16 Jur. 572.

Lords of Manors.]—A lord of a manor is not entitled to salvage for taking, against the consent of the owner, and preserving part of a ship thrown on his manor, when the servants of the owner are there to take care of it for him. *Sutton* v. *Buck*, 2 Taunt. 302; 11 R. R. 585. See also *Geere* v. *Burkensham*, supra, col. 594.

Beachmen.]—Two fishing smacks fell in with a derelict vessel, about seventy miles from the English coast, and took her in tow after great risk, and two days afterwards brought her close to Yarmouth, when the smacksmen, to expedite the completion of the salvage, engaged a steam-tug to take her in tow, but through the mistake or misconduct of those on board the tug the vessel got aground, whereupon the tug left the smacksmen, went in search of assistance, and, in their temporary absence, a number of beachmen took possession of the vessel and brought her safely into harbour. The admiralty court held, that, owing to the misconduct of the tug, the smacksmen's efforts, however meritorious, did not successfully salve the vessel, and that they were not entitled to share in the salvage, and decreed salvage to the beachmen only. Upon appeal, the judgment was reversed, and a liberal salvage allowed to the smacksmen. *The Atlas*, 15 Moore, P. C. 329; 31 L. J., Adm. 210; 8 Jur. (N.S.) 753; 6 L. T. 737; 10 W. R. 850.

Anchors of Salved Ship Recovered.]—Where salvors, in getting a ship off a sand slipped both her anchors, and after getting the ship off the sand called in another boat to recover the anchors:—Held, that the people who got the anchors were not entitled to share in the salvage award for ship and cargo. *The Endeavour*, *Colley* v. *Watson*, 6 Moore, P. C. 334; 6 Not. of Cas. 57.

Schooner Salvor Superseded by Steamship.]—A ship abandoned at sea was taken possession of by a small schooner, and after being towed by her for some time was boarded and taken to Liverpool by the steamship. The steamship had been hired for the purpose by underwriters of the abandoned ship and cargo. In a salvage action by these persons:—Held, that the schooner was entitled to claim as first salvor; also, that the hirers of the steamship were entitled to salvage, being justified in taking possession, as against the schooner, she being too small to accomplish the service. *The Pickwick*, 16 Jur. 669.

Both Ships British.]—It is no answer to a claim for salvage abroad that both ships were British. *The Portia*, 9 Jur. 167.

Civil Salvage awarded to Military Salvors.]—Civil salvage awarded to one claiming military salvage, the ship being in distress at the time. *The Franklin*, 4 C. Rob. 147. S. P., *The Louisa*, 1 Dods, 317.

Intention of Salvor — Mistake of Fact.]—Where a person renders services in a nature of salvage to a vessel which he at the time bonâ fide believes to be his own by purchase or otherwise, he is not precluded from recovering salvage reward in respect of such services because it turns out in fact that the vessel was not his property. *The Liffey*, 58 L. T. 351; 6 Asp. M. C. 255.

Whole Crew of Salving Ship entitled to Share.]—Those of a ship's crew who go on board the ship in distress have not an exclusive claim to salvage. The rest of the crew, being ready to assist, are entitled to share. *The Baltimore*, 2 Dods. 132.

Passengers—Cattle-men.]—The "B." while on a voyage from Boston to Liverpool with live

cattle, fell in with a derelict ship, and towed her to Queenstown. In an action by the owners, master and crew of the "B." for salvage, the cattlemen claimed to participate in the award:—Held, that they were not entitled to any share in the salvage award. *The Coriolanus*, 59 L. J., Adm. 59: 15 P. D. 103; 62 L. T. 844; 6 Asp. M. C. 514.

Passengers rendering services to ship, where there is a common danger, are not entitled to salvage reward. *The Vrede* (Lush. 322; 30 L. J., Adm. 209), infra.

Passengers voluntarily remaining on board a vessel injured by a collision, and working at the pumps, are not entitled to salvage. *Ib.*

A ship being in danger, and the captain and part of the crew having made their escape, a passenger, at the request of the rest of the crew, took the command, and brought the ship safe to port. The merits of the passenger in saving the ship were acknowledged by the owner in a letter to one of the underwriters, wherein he expressed a desire to make him a compensation:—Held, that the passenger was entitled to sue the owner for the salvage. *Newman* v. *Walters*, 3 Bos. & P. 612; 7 R. R. 886.

Mate remaining on Vessel abandoned by Crew.]—Two vessels came into collision on the high seas. One of the vessels (a barque) received damage, and all her crew, except her mate, escaped on board the other vessel. The mate of the barque remained on board her, and navigated her until he obtained assistance from a steam vessel. The steam vessel then took the barque in tow and brought her into port in safety, the mate still assisting in her navigation:—Held, that, in awarding salvage to the owners, master and crew of the steam vessel, the right of the mate of the damaged ship to claim salvage reward for his services should be taken into consideration, and that the mate, upon his claim being brought before the court, was entitled to rank as a salvor. *The Le Jonet*, 41 L. J., Adm. 95; L. R. 3 A. & E. 556; 27 L. T. 387; 21 W. R. 83; 1 Asp. M. C. 438.

Seamen of Salving Ship.]—Salvage service may be performed by the seamen of the ship salved when an abandonment of her has put an end to their original contract. *The Vrede* (Lush. 322; 30 L. J., Adm. 209), supra.

If, upon a ship being wrecked, the master, improperly disregarding the interests of the owners of ship and cargo, discharges the seamen, the discharge is nevertheless valid, unless the seamen are proved to have fraudulently accepted their discharge; and subsequent services rendered by them to ship and cargo are salvage services. *The Warrior*, Lush. 476: 6 L. T. 133.

In order to deprive a seaman of his right to share in salvage, neither the agreement for the vessel to be employed in salvage service, nor the stipulation that he shall waive his claim for salvage, need be in writing to satisfy 25 & 26 Vict. c. 63, s. 18, but both must be clearly proved by those who dispute his right. *The Pride of Canada*, Br. & Lush. 208; 9 L. T. 546.

Contract with Underwriters — Work and Labour—Failure of Underwriters—Liability of Owners.]—Persons rendering services in themselves of a salvage nature under a contract for work and labour, are excluded from subsequently claiming against the property as salvors in respect of those services, whether the contract under which the services are performed be made with the owners of the property or with third persons. *The Solway Prince*, 65 L. J., Adm. 45; [1896] P. 120; 74 L. T. 32; 8 Asp. M. C. 128.

See also 5, SALVAGE SERVICES, supra.

10. WHO ARE LIABLE TO PAY SALVAGE.

Ship indirectly Benefited.]—Salvage is not due from the owners of a vessel that only indirectly receives a benefit from salvage services rendered to another vessel driving in her neighbourhood. *The Annapolis, The Golden Light, and The H. M. Hayes*, Lush. 355; 5 L. T. 37—P. C.

Liability of Persons not the actual Owners of Property saved.]—The liability to pay salvage is not confined to the actual legal owners of the property saved, but extends to those who have an interest in that property, which interest has been saved by the placing of the property itself in a position of security. *Five Steel Barges*, 59 L. J., Adm. 77; 15 P. D. 142; 63 L. T. 499; 39 W. R. 127; 6 Asp. M. C. 580.

Bail Insufficient—Liability of Appearers.]—See *The Dictator*, infra, col. 851.

Salvage payable by cargo owners in consequence of the negligence of the master is recoverable against the ship, under 24 Vict. c. 10. *The Princess Royal*, 39 L. J., Adm. 43; L. R. 3 A. & E. 41; 22 L. T. 39.

Salvage by Ship of same Owners.]—See *The Waterloo*, supra, col. 620.

Foreign Ship of War.]—Salvage services having been rendered to a Dutch ship of war brought into Mount's Bay, she was arrested in a salvage suit, and 800*l.* awarded to the salvors. *The Prinz Frederik*, 2 Dods. 451. N.B.—No application for release of the ship was made, and a protest to the jurisdiction having been put in, the case was decided by Sir W. Scott at the request of the Netherlands government.

Life Salvage—Passengers taken from Wreck.]—The owners of a passenger vessel ashore, from which, at her master's request, a passing vessel took the passengers, there being no risk of life, are not liable for salvage. *The Mariposa*, 65 L. J., Adm. 104; [1896] P. 273; 75 L. T. 54; 45 W. R. 191; 8 Asp. M. C. 159.

Action in personam—Lies in Admiralty for Salvage.]—*The Five Steel Barges*, supra. And see *The Hope*, and cases infra, col. 667.

11. CONTRIBUTION TO SALVAGE.

Shipowners.]—The "C.," a Spanish steamship, fell in at sea with the "S.," an English steamship, with signals of distress flying, and helpless from injuries sustained in a collision. The passengers of the "S." and specie, which had formed part of her cargo, having been taken on board the "C.," attempts were made by the "C." to tow the "S." into safety. These attempts were ineffectual, and ultimately, after the master and crew of the "S." had gone on board the "C.," the "S." was abandoned and her passengers, master and crew were landed in safety at an English port. Afterwards the

specie was arrested in an action for salvage instituted at the suit of the owners, master and crew of the "C.," who claimed to recover for life salvage and for salvage services rendered to the "S." and the specie. The owners of the specie appeared as defendants, and served a notice on the owners of the "S." to contribute to the remuneration claimed by the plaintiffs. Thereupon the owners of the "S." appeared. At the hearing the court awarded salvage to the plaintiffs for the services rendered, but reserved all questions as to the liability of the owners of the "S." The owners of the specie then moved the court to declare that such portion of the sum awarded as was awarded for life salvage ought to be recouped to the owners of the specie. The court refused the motion, on the ground that no property belonging to the owners of the "S." having been salved, they could not be held personally liable to pay any portion of the sum awarded. *The Sarpedon, Cargo ex*, 3 P. D. 28; 37 L. T. 505; 26 W. R. 374; 3 Asp. M. C. 509.

Shipowner and Owner of Cargo.]—The payment into court of 8*l.* a ton under 25 & 26 Vict. c. 63, s. 54, does not place the shipowner in the position of a person who has not done wrong. The owner of a ship sunk by a collision in the Thames admitted it to be his fault, and paid into court 8*l.* a ton in a suit to limit his liability. The Thames conservators having powers under the Removal of Wrecks Act, 1877, and the Thames Conservancy Acts, raised the ship and delivered the ship and cargo to the owner, he undertaking to pay the expenses of raising. Part of the cargo was some wool, which was damaged by being sunk:—Held, that the shipowner was bound to deliver the wool to the owner of the wool without claiming from him by way of contribution to salvage any part of the expenses of raising the ship and cargo. *The Ettrick* or *Prehn* v. *Bailey*, 6 P. D. 127; 45 L. T. 399; 4 Asp. M. C. 465—C. A. Affirming 50 L. J., Adm. 65.

Ship and cargo must each pay its own share of salvage; neither can be made liable for the salvage due from the other, whether the salvors proceed in the admiralty court or before the local magistrates. *The Pyrénnée*, Br. & Lush. 189.

The owners of goods on board a ship are bound to contribute to the general salvage of the ship and cargo as in a case of general salvage. *Briggs* v. *Merchant Traders' Ship, Loan and Assurance Society*, 13 Q. B. 167; 18 L. J., Q. B. 178; 13 Jur. 787.

Negligent Navigation — Right of Owner of Cargo against Shipowner.]—The plaintiffs under a charterparty shipped a large quantity of rye on board one of the defendants' ships, to be carried from the port of T. to the port of A. Owing to the negligent navigation of the defendants' servants the ship was cast ashore, and a large quantity of the rye was lost; but a considerable quantity was saved by the Salvage Association, who were employed by the underwriters of the cargo with the assent of the defendants. The average statement was prepared, and the sum assessed was agreed to by the plaintiffs, and the Salvage Association were paid by the underwriters the expenses claimed by them. The plaintiffs brought their action to recover the amount of the salvage expenses so paid by the underwriters. The plaintiffs recovered a verdict for an amount to be settled out of court. The question of law involved in the case was reserved for further consideration. The defendants contended that they were not liable because the plaintiffs themselves had not paid the expenses, and the payment under the circumstances was voluntary:—Held, on further consideration, that the plaintiffs were entitled to recover the amount of the salvage expenses, as without their being incurred, the remainder of the cargo could not have been sent to its destination, which was for the benefit of the defendants, and that the payment under the circumstances was not voluntary. *Scaramanga* v. *Marquand*, 53 L. T. 810; 5 Asp. M. C. 506—C. A. Affirming 1 Cab. & E. 500.

Shipowner and Charterer.]—Where a ship was chartered on the voyage out and home, at 2*l.* 10*s.* per ton, register measurement, per month, 2,500*l.* to be paid on clearing outwards, the like sum at the end of twelve months, and the remainder three months after being reported at the custom-house on her return: and the ship delivered her outward cargo, and sailed with her homeward cargo, and was captured and recaptured on the homeward voyage; and the ship and cargo were sold by consent of all parties, the owners and charterers having respectively made claim in the admiralty court to ship and goods, where restitution was decreed to them upon payment of salvage:—Held, that the charterers (having paid the two sums of 2,500*l.*) were not liable to contribute to the shipowner for salvage in respect of their goods, where the proceeds of the goods fell short of the sum due for the residue of the freight; but that the shipowner, in respect of the freight, was liable for the whole salvage; and the charterers having paid such contribution out of the proceeds of the goods, under a security given by them for payment of the salvage, with the assent of the shipowner as far as his liability was concerned:—Held, that they might set it off in an action by the owner for the residue of the freight. Secus, as to the charges of establishing the claim to the cargo, and procuring the decree for its restitution; for the charterers alone were liable to them. *Cox* v. *May*, 4 M. & S. 152; 16 R. R. 422.

Ships in Collision.]—Two vessels came into collision. The court pronounced them both in fault. One vessel was subsequently abandoned, but salved by other parties:—Held, that the owners of the abandoned vessel could not recover the salvage awarded against them from the other vessel. *The Linda*, 4 Jur. (N.S.) 146; 6 W. R. 196.

Bullion — Liability to Contribute.] — Where steam-tugs rendered salvage services by towing a sinking ship with passengers, cargo and bullion on board into safety, it was held, that the bullion was liable to contribute to the salvage reward in proportion to its value rateably with the other property salved. *The Longford*, 50 L. J., Adm. 28; 6 P. D. 60; 44 L. T. 254; 29 W. R. 491; 4 Asp. M. C. 385. But see *The Emma*, infra.

Smacksmen warped a derelict off a rock and put her in a position where part of some bullion on board could be, and was, taken away by her master. She afterwards sank, and was subsequently weighed and taken to Harwich by other salvors:—Held, that all the salvors should share alike, and that the bullion taken off by the

master must contribute. *The Jonge Bastiaan*, 5 C. Rob. 322.

Cargo-owners not before Court.]—A sum of 400*l.* was decreed in pursuance of an agreement for salvage to ship, cargo and freight; the values of ship and freight only being then known, and the cargo-owners not before the court. Separate proceedings were afterwards taken against the cargo-owners, who offered to pay their share of the 400*l.* upon the nett proceeds of the cargo:—Held, that in ascertaining the nett proceeds, discount and other accustomed charges might be deducted, and that the costs of the original proceedings must be borne rateably by the cargo-owners, though not then before the court. *The Peace*, Swabey, 115.

Ship and Cargo salved Assessed together.]—The court assesses the salvage award upon the ship and cargo as a whole, and each pays its rateable share of the sum awarded, without reference to the fact that the services were of greater value to the one property than to the other; except only in case of bullion saved. *The Emma*, 2 W. Rob. 315; 3 Not. of Cas. 114. Not followed in *The Longford*, supra.

Agreement by Shipowner to pay Salvage—Liability for Salvage of Cargo.]—See *The Prinz Heinrich*, infra, col. 654.

Amount awarded paid to Shipowners—Enforcing Payment to Seamen.]—No action is maintainable by a seaman for his share of salvage awarded by two justices, under 17 & 18 Vict. c. 104, s. 460, and paid to the owner of the salvor vessel. *Atkinson* v. *Woodall*, 1 H. & C. 170; 31 L. J., Ex. 352; 8 Jur. (N.S.) 720; 6 L. T. 361; 10 W. R. 671.

Lender on Bottomry.]—Not liable to contribute to salvage. *Walpole* v. *Ewer*, Park, Marine Insurance (8th ed.) 898; *Joyce* v. *Williamson*, 3 Dougl. 162.

12. Derelict and Wreck.

Derelict—What is.]—A laden barge accidentally breaking loose from her moorings in the Thames, and drifting about with no one on board, is not derelict, and consequently not wreck within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and persons finding her and mooring her in safety are not precluded from recovering salvage for so doing by reason of their neglecting to comply with the provisions of s. 450, and to deliver the barge to the receiver of wreck. *The Zeta*, 44 L. J., Adm. 22; L. R. 4 A. & E. 460; 33 L. T. 477; 24 W. R. 180; 3 Asp. M. C. 73.

When on the alarm attending a collision the crew of one vessel jumps on board the other, such abandonment does not of itself constitute a case of derelict. *The Fenix*, Swabey, 13.

In the case of a derelict the salvors have a right to exclusive possession of the vessel; unless it has been utterly abandoned, and is in contemplation of law a derelict, the occupying salvors are bound to give up charge to the master on his appearing and claiming charge, and the master may then refuse to continue to employ them, and may employ others, and may take what measures he thinks fit for the preservation of the vessel. *The Champion*, Br. & Lush. 69.

Where a vessel was picked up with four to five feet water in the hold, her compasses and the seamen's clothes having been taken off, the court pronounced against her as a derelict, though it did not appear that her crew had left sine spe recuperandi. *The Gertrude*, 30 L. J., Adm. 130.

A vessel having run ashore on the coast of Essex, was assisted by the owner of a smack, who put down an anchor and a hawser attached to the vessel for the purpose of securing her. The smack then left her, for the purpose of carrying away some of her stores, with the intention, however, of returning. The owner of another smack came to her afterwards, and finding no one in or near the vessel, and her deck under water, took away the anchor and hawser, and delivered them up to the deputy vice-admiral of Essex:—Held, that the anchor and hawser were not parted with, or left and abandoned, within 1 & 2 Geo. 4, c. 75, s. 1, and that the deputy vice-admiral was not justified in detaining them until salvage was paid or security given for its payment. *Clark* v. *Chamberlain*, 2 M. & W. 78; 2 Gale, 217.

—— **Abandonment of, by Salvors—Right to Remuneration.**]—The barque "N." fell in with the "K.," a derelict barque, in the Atlantic, and put five hands on board of her, who navigated her for three days. The "K." then fell in with the barque "B.," and the five hands on board of the "K." were, at their own request, taken on board the "B." The "B." then sent some of her own crew on board the "K.," and took her in tow, and towed her till the tow-rope broke, when the vessels parted company, and the hands on board the "K.," with the assistance of the "L.," a steamship which they afterwards fell in with, brought the "K." into Falmouth. In suits instituted on behalf of the masters, owners and crews of the "N.," the "B." and the "L.," the court held, that the master, owners and crew of the "N." were not entitled to salvage reward, but awarded salvage to the remaining plaintiffs. *The Killeena*, 51 L. J., Adm. 11; 6 P. D. 193; 45 L. T. 621; 30 W. R. 339; 4 Asp. M. C. 472.

Wreck.]—Timber which has been moored on a river (some miles above a harbour) opposite to the owners' premises, and has drifted therefrom to the sea, in consequence of an accidental loosening of the fastenings, is not a wreck within 17 & 18 Vict. c. 104, s. 458, entitling the justices to make an award for salvage, and the salvors, obligees of a bond given by the owner to abide this award, are not entitled to sue on such bond. *Palmer* v. *Rouse*, 3 H. & N. 505; 27 L. J., Ex. 437; 6 W. R. 674.

The jurisdiction of the admiralty subsists as long as the shore is covered with water, and the rights of lords of manors can exist only as long as the land is left dry. Therefore a ship cannot be considered "wreckum maris," nor the claim of a lord of the manor to wreck sustained, unless at the time of taking possession she is either on the shore itself or left high and dry on land. *The Pauline*, 2 W. Rob. 358; 9 Jur. 286. See also *Stackpole* v. *Reg.*, Ir. R. 9 Eq. 619—C. A.

Award in case of.]—*See* 13, Award, cols. 632, 641.

Ship abandoned by Captors.—A ship that had been captured and afterwards abandoned by the

enemy was picked up at sea by salvors :—Held, that she was not derelict. *The John and Jane*, 4 C. Rob. 216.

A ship captured by the enemy and abandoned by the captors was picked up and brought into safety. A moiety of her value awarded for salvage, as for a derelict. *The Lord Nelson*, Edwards, 79.

13. Award.

a. Generally.

Principles discussed.]—Principles governing amount of award discussed. *The Salacia*, 2 Hag. Adm. 262.

Not Assessed on quantum meruit Principle.]—Salvage expenses are not assessed upon the quantum meruit principle, but on the general principle of maritime law, rewarding persons who by great, and perhaps dangerous, exertions bring in a ship, for which exertions, if not successful, nothing would have been paid. *Aitchison* v. *Lohre*, 49 L. J., Q. B. 123 ; 4 App. Cas. 755 ; 41 L. T. 323 ; 28 W. R. 1 ; 4 Asp. M. C. 168—H. L. (E.) See also *The De Bay*, infra, col. 636.

Salvage is not to be calculated merely at the rate of work, labour, or by the number of hours occupied ; risk, value and public policy are also to be considered. *The Industry*, 3 Hag. Adm. 203. Cf. *The Hector*, 3 Hag. Adm. 90 ; *Nicholson* v. *Chapman*, 2 H. Bl. 254.

Short Time Occupied in Rendering Service.]—Where salvage services are rendered by steamships, the amount of salvage which the court will award is not necessarily affected by the fact of the services performed occupying only a short time. *The Northumberland* v. *The Andalusia*, 12 L. T. 584. And see *The Strathgarry*, infra, col. 657.

Amount for which Action entered not necessarily the Limit.]—The sum for which the action is entered is not necessarily the limit of what may be awarded. *The Jonge Bastiaan*, 5 C. Rob. 323. And see *The Dictator*, infra, col. 976.

Value—Effect on Award.]—Although the quantum of remuneration to salvors is to some extent to be affected by the value of the property salved, it must not be raised to an amount altogether out of proportion to the services actually rendered. *The Amérique*, L. R. 6 P. C. 468 ; 31 L. T. 854 ; 23 W. R. 488 ; 2 Asp. M. C. 460.

Large value of the property salved is considered chiefly with reference to the adequacy of the fund out of which the award is made. *The James Dixon*, 2 L. T. 696. And see *The Werra*, infra, col. 637.

Where the property salved is small a large proportion of its value is awarded ; where it is large, a smaller proportion ; in derelict (formerly) half the value was given to salvors. *The Blenden Hall*, 1 Dods. 414.

Value, how Calculated.]—Salvors are entitled upon a value calculated at the place where their services terminated. *The Norma*, Lush. 124 ; 5 L. T. 340.

The value of freight salved is to be reckoned pro ratâ itineris peracti, and the other equities of the case. *Ib.*

A ship bound from Honduras to England was disabled on the voyage, and towed into Bermuda, where expenses nearly equal to the whole freight were incurred to refit ; the voyage home was afterwards completed, and the cargo delivered. The court allowed salvage upon one-half of the total gross freight. *Ib.*

The value stated by the owners of salved property in proceedings before commissioners is not conclusive upon the salvor, even though assented to at the time. *The Hope*, 14 W. R. 467.

The value of the salved property is to be taken at the place to which it is taken by the salvors ; when carried away and sold elsewhere, the cost of carriage and other charges being deducted from the proceeds of sale and a further percentage if the market is a better one. *The George Dean*, Swabey, 290.

Salvors took up money upon bottomry of the salved ship :—Held, that the amount of the bond and wages earned subsequently to the service ; but (semble) not wages earned before, were to be deducted from the value of the property, out of which the award was to be made. *The Selina*, 2 Not. of Cas. 18.

Expenses of Pumping, &c.]—Expenses incurred in salving a vessel, such as pumping, watching, &c., which strictly ought to be paid by the marshal, will, if paid by the salvors, be deducted by the court from the value of the salved vessel in assessing the salvage reward. *The Le Jonet*, 41 L. J., Adm. 95 ; L. R. 3 A. & E. 556 ; 27 L. T. 387 ; 21 W. R. 83 ; 3 Asp. M. C. 438.

Wages, Deduction of.]—Wages earned after the salved ship has been brought into port are not to be deducted from the freight upon which salvage is earned. *The Emma*, 4 W. R. 91.

Suit entered against Vessel alone.]—Her majesty's steamship "Leopard" rendered a salvage service to an English vessel then in the service of the French government, and laden with a valuable cargo. The suit was entered against the vessel alone, her value being 4,247*l.* The court, adverting to the difficulty of apportioning salvage where the cargo was not before it, awarded 600*l.* on the value of the vessel. *The Mary Pleasants*, Swabey, 224.

Rule as to a Moiety.]—A moiety of the value of the salved property awarded in a case of very great merit in the salvors, who had to contend with weather, armed resistance on shore and danger of infection. *The Elliotta*, 2 Dods. 75.

No precedent of more than a moiety being given for salvage of a derelict being forthcoming, a moiety awarded and costs out of the other moiety. *The Frances Mary*, 2 Hag. Adm. 89.

Except in very special cases no more than half the value of the property salved will be awarded as salvage. *The Inca*, *Gore* v. *Bethel*, 12 Moore P. C. 189 ; Swabey, 370. But see *The Rasche*, and cases, post, col. 641.

—— **In Case of Derelict.**]—See *c.* Derelict, infra, col. 641.

Appraisement — Fresh Appraisement on Appeal.]—Upon appeal from justices in a salvage case a fresh appraisement was made at the shipowners' request, although they had made no

objection to the appraisement in the court below. *The Oscar*, 2 Hag. Adm. 257.

—— **Decree Altered or Amended in consequence of Mistake in Value of Cargo.**]—Salvage services having been rendered to a ship laden with cargo, a salvage suit was instituted against ship, freight and cargo. Separate appearances were entered on behalf of the owner of the ship and the owner of the cargo. The owner of the cargo filed an affidavit of value stating the value of the cargo, and the owner of the ship filed an affidavit of value stating the value of the ship and freight. At the hearing, the court, taking these values as accurate, by its decree awarded to the salvors a certain sum as salvage. Some time afterwards, the owner of the cargo discovered that he had by mistake included in his valuation of the cargo the value of the freight, and that the freight was of more value than appeared by the affidavit of value filed on behalf of the owner of the ship, and he made application to reduce the value of the cargo, and to reduce the amount it had previously decreed as salvage. On the mistake being proved:—Held, that the court had power to correct the mistake and to make the necessary alterations in the decree. *The James Armstrong*, L. R. 4 A. & E. 380; 33 L. T. 390.

—— **Appraisement is Binding.**]—An appraisement by order of the court binds both parties to a salvage action; the court will not after appraisement, at the instance of the owner, order the property to be sold in order to ascertain its value. *The R. M. Mills*, 3 L. T. 513; *Venus, Cargo ex*, L. R. 1 A. & E. 50; 12 Jur. (N.S.) 379; 14 W. R. 460.

—— **Awards to Salvors absorbing whole Proceeds—Application to vary Decree.**]—In an action of salvage the plaintiffs obtained an award of 1,500*l.* upon an appraised value of the defendants' ship of 1,250*l.*, and of her cargo of 5,004*l.*; total, 6,254*l.* The ship was subsequently sold by the marshal for 713*l.*, the cargo, which was of a nature not readily saleable in this country, for 1,649*l.*, and the total, 2,362*l.*, was reduced by fees and disbursements to 1,625*l.* An award of 130*l.* obtained by the pilot and 100*l.* by boatmen in separate actions in respect of the same salvage operations brought the total salvage claims up to 1,730*l.*, which more than absorbed the whole proceeds. On motion by the defendants to vary the decree by reducing the award of 1,500*l.*:—Held, that the application must be refused, as the defendants had allowed the court to proceed to award salvage upon the basis of the appraisement without taking any exception at the time, and, beyond the difference between the appraised value and the sum realised by the sale, there was nothing to indicate that the appraisement did not fairly represent the value at the time and place when the property was brought into safety. *The Georg*, [1894] P. 330; 71 L. T. 22; 7 Asp. M. C. 476.

Valuation of Salved Property made Abroad—Court unwilling to open.]—The court is unwilling to disturb a valuation of the salved property made by arbitration abroad by agreement between the foreign consignees and the salvors. *The Sir Francis Burton*, 2 Hag. Adm. 156.

Where no application is made in the court below for a commission of appraisement, the court of appeal will not admit affidavits directed to shew that the value of the salved property was greater than supposed in the court below. *The Endeavour, Colby* v. *Watson*, 6 Moore, P. C. 334; 6 Not. of Cas. 27—P. C.

Consideration of Risk.]—In awarding the amount for salvage services well performed, the court holds the shortness of the duration of such services as an element of meritoriousness; and where the amount of property salved is very large, the court will not take advantage of the extent of such amount further than to give a liberal reward, according to meritoriousness of the services actually performed. *The United Kingdom* v. *The Syrian*, 14 L. T. 833. And see *The Werra*, infra, col. 637.

In estimating the value of salvage services, circumstances, among others, to be considered by the court are, the degree of danger to which the vessel was exposed, and from which she was rescued by the salvors, the mode in which the services of the salvors were applied, and the risk incurred by the salvors in rendering those services. *The Chetah*, 38 L. J., Adm. 1; L. R. 2 P. C. 205; 5 Moore, P. C. (N.S.) 278; 19 L. T. 621.—P. C.

In estimating salvage reward to the owners of the salving vessels, the circumstances that the salving vessel deviating from her course might have vitiated the insurance, the possibility of being answerable to the owners of the cargo for such deviation, and the exposure to danger of the salving ship, in rendering salvage services, are elements to be taken into consideration. *The Sir Ralph Abercrombie*, 4 Moore, P. C. (N.S.) 374; L. R. 1 P. C. 454.

Where no special risk has been incurred by the salvors, salvage reward is allotted upon a calculation of a fair remuneration for time and trouble to the owners of the salving vessel and to each hand engaged. *The Otto Hermann*, 33 L. J., Adm. 189.

Where there is danger to the salvors, the risk of life receives the greatest remuneration. *Ib.*

A lower scale of remuneration is given where the vessel salved is not one of present danger, but a case of urgency. *Ib.*

The lowest where, a vessel being disabled from proceeding, as in the case of a steam vessel in want of fuel, there is a possible contingency of serious consequences. *Ib.*

In all cases, the value of the vessel salving is regarded, and to whatever remuneration is given must be added a sum to meet any damage she sustains. *Ib.*

—— **Great Danger incurred by Salvors.**]—Salvage services of a highly meritorious character having been performed by salvors, in saving the lives of the crew, and the ship and cargo having been valued at 46,000*l.*, the admiralty court awarded 1,000*l.* as salvage for such services:—Held, that the sum was insufficient, and the remuneration increased to 2,000*l.*, in consideration of the great danger the salvors incurred, and of the fact of saving of lives, and the value of the ship and cargo. *The Glenduror, Arnold* v. *Cowie*, L. R. 3 P. C. 589; 24 L. T. 499; 1 Asp. M. C. 31.

Steamships—Time and Expense.]—Where a steamship goes out of port for the purpose of rendering salvage service to the vessel in distress, the time and expense incurred in reaching her is

to be taken into account in fixing the award. *The Graces*, 2 W. Rob. 294.

Steamships — Liberal Awards to.]—Steam vessels are important agents in salvage services, and their owners will be adequately rewarded. *The Spirit of the Age*, Swabey, 286. Cf., *The Raikes*, 1 Hag. Adm. 246; *The Earl Grey*, 3 Hag. Adm. 363; *The Martin Luther*, Swabey, 287; *The London Merchant*, 3 Hag. Adm. 394; *The Ella Constance*, 15 L. J., Adm. 191; *The Santipore*, 1 Spinks, 231; *The Medora*, 5 Not. of Cas. 156; *The General Palmer*, 5 Not. of Cas. 159, n.

The capability of steamers to perform services with greater rapidity and certainty entitles them as salvors to a higher scale of reward. *The Otto Hermann*, 33 L. J., Adm. 189. See also *The Palmyra*, 25 L. T. 884; 1 Asp. M. C. 182.

Liberal Awards generally—Public Policy of.]—The interests of commerce and public policy require that liberal rewards should be given to salvors. *The Sarah*, 1 C. Rob. 313, n. S. P., *The William Beckford*, 3 C. Rob. 355.

—— **Against Passenger Ships.**] — Liberal awards are given against great passenger and mail steamship companies. *The London Merchant*, 3 Hag. Adm. 394; *The Ardincaple*, 3 Hag. Adm. 151.

Nautical Skill.]—Salvage award is estimated upon the consideration that nautical skill enhances the value of manual labour. *The Duke of Clarence*, 1 W. Rob. 346.

Loss of possible Earnings.]—The loss of possible profit of fishing boats is not to be included in an award of salvage for services rendered by them. *The Nicolai Heinrich*, 17 Jur. 329. S. P., *The Louisa*, 3 W. Rob. 99. And see *The Sunniside*, infra.

A specific sum (1,000*l.*) awarded for loss of a sealing voyage incurred by the salvors. *The Salacia*, 2 Hag. Adm. 262.

Salving and Salved Ships associated.]—Where the salving and salved ships are associated in a voyage in a common interest, a lesser amount of salvage is awarded than where the ships are wholly independent of each other and the salvage accidental. *The Trelawney*, 4 C. Rob. 223, 228.

Sum accepted by other Salvors immaterial.]—The amount at which other salvors have estimated their services is immaterial. *The Antelope*, 27 L. T. 663; 1 Asp. M. C. 477.

Damage to Salvor. —If a vessel rendering salvage services is damaged without negligence on her own part, she is entitled to recover the damage and demurrage during repairs from the salved vessel. *The Mud Hopper*, 40 L. T. 462; 4 Asp. M. C. 403.

Where the salvors' vessel is injured or lost whilst engaged in the salvage service, the presumption is that the injury or loss was caused by the necessities of the service, and the burden of proof is on the parties alleging that the loss was caused by the default of the salvors. *The Thomas Blyth*, Lush. 16.

Where the property saved is ample, losses voluntarily incurred by the salvor should be transferred to the owner of the property saved, and in addition the salvor should receive a compensation for his exertions and for the risk he runs of not receiving any compensation in the event of his services proving ineffectual. *The De Bay*, *Bird* v. *Gibb*, 52 L. J., P. C. 57; 8 App. Cas. 599; 49 L. T. 414; 5 Asp. M. C. 156—P. C.

The losses should be ascertained with precision where practicable, but in that case the salvage remuneration added thereto should be fixed on a more moderate scale than where the losses cannot be fixed with precision. *Ib.*

In an action for salvage, evidence of the loss of earnings by and of the costs of repairing damage done to the salving vessel in consequence of rendering salvage services is admissible. These sums are only to be regarded as elements for consideration in estimating the amount of the salvage reward, and are not to be considered as fixed amounts to be awarded to the salvors in respect of these matters. *The Sunniside*, 52 L. J., Adm. 76; 8 P. D. 137; 49 L. T. 401; 31 W. R. 859; 5 Asp. M. C. 140.

In an action of salvage, in which the value of the salving steamer was 85,000*l.*, and of her cargo and freight 104,047*l.*, and of the salved steamer 90,000*l.*, and of her cargo and freight 89,535*l.*, the court awarded 4,500*l.* to the owners, 500*l.* to the master, and 1,500*l.* to the crew, During the hearing the owners tendered evidence of the particular injuries to their steamer caused by the performance of the services, of the costs of the repairs, and of the pecuniary loss caused by the detention of their steamer whilst such repairs were being executed: the court refused to receive this evidence, or to refer it to the registrar and merchants to assess the amount of such costs and losses:—Held, on appeal, that the judge of the admiralty court is not bound ex debito justitiæ to admit such evidence or to decree in terms that a specific and ascertained amount shall be paid to salvors in respect of damages or costs caused by rendering salvage services, for he is not bound always to award a sum sufficient to indemnify a salvor. But the judge may, in his discretion, receive such evidence, and may, if it be proper, under the circumstances, include an amount in respect of damages in his award. Having regard to the large value in the present case, the decree should be varied by awarding 1,000*l.* to the shipowners for the actual services rendered, and by referring the costs of repairs to, and of the detention of the salvor's steamer, to be ascertained by the registrar and merchants, unless the appellants were willing that the decree of the court below should stand. *The City of Chester*, 53 L. J., Adm. 90; 9 P. D. 182; 51 L. T. 485; 33 W. R. 104; 5 Asp. M. C. 311.—C. A.

Loss of Information leading to Profitable Employment.]—A paragraph in a statement of claim for salvage, stating that by rendering the salvage service, the salving vessel had been prevented from obtaining information which would have resulted in profitable employment, ordered to be struck out, as relating to matters which the court could not take into consideration in estimating the value of the services. *The Cybele*, 47 L. J., Adm. 86; 3 P. D. 8; 37 L. T. 773; 26 W. R. 345; 3 Asp. M. C. 532—C. A.

Excessive Claim.]—Where a steamship, disabled by the breaking of her crank-shaft, was towed a distance of about thirty miles without danger or risk by another steamship belonging to the same owners as the disabled vessel, and

fifteen of the crew of the towing vessel instituted a salvage action in the sum of 5,000*l.* against the vessel towed, and arrested the vessel, cargo and freight therein, the court held such services to be salvage services, but of so slight a character that on a value of 105,500*l.* it awarded 15*l.*, and ordered the salvors to pay all the costs of the action, expressing disapprobation both at the institution of the action in the high court, and at the arrest of the vessel for such an amount. *The Agamemnon*, 48 L. T. 880; 5 Asp. M. C. 92.

8,000*l.* claimed, 600*l.* awarded. Evil consequences of excessive demands insisted upon. *The Nimrod*, 14 Jur. 942.

5,000*l.* claimed, 15*l.* awarded. See *The Agamemnon*, supra.

Value of Property—Perils of Salving Ship—Possibility of Assistance—Character of Service.]—In estimating the amount of a salvage remuneration the court takes into consideration, first, the value of the property saved, and next the actual perils from which it has been saved. In considering the perils, the possibility of assistance being rendered to the vessel in peril must be taken to lessen the amount to be awarded. The value of the salving ship will not substantially affect the amount of the reward, but the length of time to which she is exposed to additional risks is a material element for consideration. *The Werra*, 56 L. J., Adm. 53; 12 P. D. 52; 56 L. T. 580; 35 W. R. 552; 6 Asp. M. C. 115.

Loss to Salvors.]—Where salvage services have occasioned the salvors serious pecuniary loss, and where the value of the ship and cargo saved is ample not only to defray loss sustained by a salvor, in addition to a proper sum for the master and crew, but also to leave a substantial surplus for the owner of the property saved, the salvor should be remunerated where possible with a sum sufficient to reward him for the risk and labour, and to cover damages and expenses incurred through rendering the service, and evidence of the damages and expenses ought to be received by the judge, so that they may be ascertained with precision. Per Baggallay and Lindley, L.JJ. *The City of Chester*, infra.

Where the property saved is ample, losses voluntarily incurred by the salvor should be transferred to the owner of the property saved, and in addition the salvor should receive a compensation for his exertions and for the risk he runs of not receiving any compensation in the event of his services proving ineffectual. *The De Bay, Bird* v. *Gibb*, 52 L. J., P. C. 57; 8 App. Cas. 559; 49 L. T. 414; 5 Asp. M. C. 156—P. C.

The losses should be ascertained with precision where practicable, but in that case the salvage remuneration added thereto should be fixed on a more moderate scale than where the losses cannot be fixed with precision. *Ib.*

Repairs Ordered by Salvors.]—Repairs to a salved vessel, ordered by the salvors, for which the shipwright has a lien, will not be dealt with by the court in a salvage suit. *The Rainger*, 2 Hag. Adm. 42.

Different Rates of Salvage for Ship and Cargo—Specific Parts of Cargo.]—An award of different rates of salvage for ship and different parts of the cargo is unusual and inconvenient, and will not be made; nor is it now the practice to award specific parts of the cargo. *The Vesta*, 2 Hag. Adm. 189.

Saving of Life enhances Award.]—In estimating the value of salvage services the court will be guided above all by the consideration of whether there was danger to life. *The Thomas Fielden*, 32 L. J., Adm. 61. *And see* 6, LIFE SALVAGE, supra.

Award Affected by Misconduct.]—*See* 4, MISCONDUCT, OR WANT OF SKILL, supra, cols. 599 et seq.

b. Amounts Awarded.

Amounts Awarded.]—A sum of 400*l.* was decreed, in pursuance of an agreement for that sum, for salvage service to ship, cargo and freight. The value of ship and freight only were then known. Afterwards the owners of the cargo were proceeded against, and offered to pay their proportion of the 400*l.* upon the net proceeds of cargo:—Held, in ascertaining nett value of the cargo, that 2½ per cent. discount, and certain other items sworn to be accustomed charges, might be deducted, but not a gratuity of 5*l.* 5*s.* to the master, and that costs of the original proceedings must be borne by the owners of the cargo proportionably with the owners of the ship, though the former were not before the court when the decree was made. *The Peace*, Swabey, 115; 4 W. R. 635.

A collier steamer of the value of 5,000*l.*, bound from Newcastle to Seville with a cargo, fell in, in the English Channel, with a large American ship, totally disabled by tempest. A boat, at great peril, was sent on board, and the vessel taken in tow, and brought safely into Portland. The value of the property saved was 52,000*l.* The court awarded to the salvors 2,800*l.*—1,500*l.* to the owners, 500*l.* to the master, 800*l.* to the crew, and double shares to the seamen who boarded in the boat. *The St. Nicholas*, Lush. 29.

The "Grenada," 684 tons register, bound from Singapore to Liverpool, with a general cargo, fell in, when about four days' sail from Chili, with the barque "Golondrina," 475 tons register, laden with a cargo of copper regulus, bound from Chanaval, in Chili, for Swansea, and in distress, her first and second mate having deserted her previously to her departure from Chanaval, and her master having jumped overboard in a deranged state of mind from drinking. At the request of the crew of the barque, the master of the "Grenada" put on board her his second mate, who, after great difficulty, brought the barque safely into Swansea. The value of the property saved amounted to 26,000*l.* The court awarded to the salvors 1,800*l.*—1,000*l.* to the owners, 300*l.* to the second mate, 200*l.* to the master, and 300*l.* to the crew, to be distributed according to their ratings. *The Golondrina*, L. R. 1 A. & E. 334.

Salvage services were rendered by four steamers; one had come into collision with the vessel salved, and was found to blame, and she rendered the principal services. The value of the property salved was 22,200*l.*:—Held, that the three vessels not to blame were entitled to reward. And the court awarded 310*l.* *The Glengaber*, 41 L. J., Adm. 84; L. R. 3 A. & E. 534; 27 L. T. 386; 21 W. R. 168.

Twenty-five men, the crews of four boats, saved the lives of ten men, and gave information to a steamboat, which rescued others. The services lasted about four hours, and were attended with much danger. Part of the cargo, of the value of

40,000*l.*, having been afterwards recovered, the court awarded the salvors of life 500*l.* *Schiller, Cargo ex*, 2 P. D. 145 ; 36 L. T. 714 ; 3 Asp. M. C. 226 ; 3 Asp. M. C. 439—C. A.

In a most meritorious case of salvage, where a steamship which had got aground on the shore of the Red Sea, ninety-five miles from Suez, in such a position that without help she must before many hours had elapsed have been lost with all hands on board her, was towed off the shore and to within a few miles of Suez by another steamship, the court, on a value of 62,000*l.*, awarded to the salvors 6,000*l.* *The Lancaster*, 9 P. D. 14 ; 49 L. T. 705 ; 36 W. R. 608 ; 5 Asp. M. C. 58—C. A.

In case of a salvage, where the services mainly consisted in towing a large steamer, disabled in her machinery, in the Atlantic Ocean, in the winter, for six and a half days into safety at Halifax, the value of the salved vessel, her cargo and freight being 90,000*l.*, and the owners of the salving vessel having incurred expenses in consequence of deviation and delay, the court made a salvage award of 5,350*l.*, awarding to the owners of the salving vessel 4,225*l.*, to her master 375*l.*, and to her crew 750*l.* *The Edenmore*, [1893] P. 79 ; 1 R. 574 ; 69 L. T. 230 ; 41 W. R. 654 ; 7 Asp. M. C. 334.

A vessel having got ashore on the Parkin rock, in the Red Sea, her master and part of the crew proceeded to Aden for assistance. During their absence the crew left on board were driven away by Arab wreckers, but the vessel was never permanently abandoned. Three steamers rendered valuable services to the vessel, and finally succeeded in getting her off the rocks and saving part of her cargo. The value of the vessel for the purposes of the action was taken to be 3,750*l.* The court awarded 2,000*l.* as salvage. *The Erato*, 57 L. J., P. 107 ; 13 P. D. 163 ; 59 L. T. 840 ; 6 Asp. M. C. 334.

The value of the property salved was 12,663*l.*, and the total award made by the court for salvage was 4,200*l.* *The Killeena*, supra, col. 630.

A mail steamer lost her propeller. 1,200*l.* awarded for towing her to Malta. *The Ellora*, Lush. 550.

A ship worth, with cargo, 13,400*l.*, struck on the Goodwins and came off leaking badly. She was assisted to Sheerness by two luggers, fourteen men pumping, and arrived with nine feet of water in her. 400*l.* awarded and the hire of two tugs. *The Jan Hendrick*, 1 Spinks, 181.

500*l.* awarded for towing property worth 40,000*l.* off a mud bank off Sumatra ; no risk. *The Rajasthan*, Swabey, 171.

A vessel was sunk at the mouth of the Thames with brandy on board. After great expense (2,300*l.*) and labour she was partly raised, and brandy worth 14,352*l.* recovered. 9,000*l.* was awarded to the salvors. *The Jubilee*, 3 Hag. Adm. 43, n.

A steamship bound to England fell in with another disabled in the Bay of Biscay. She towed the latter into Plymouth. The value salved was 4,060*l.* Tender of 800*l.* upheld with costs. *The Paris*, 1 Spinks, 289.

400*l.* awarded for getting a ship and cargo worth 17,337*l.* off the rocks, near Holyhead, by thirty-four hands and a pilot laying out anchors. *The Persia*, 1 Spinks, 166.

Tender of 50*l.* to three smacks for piloting a ship out of the sands at the mouth of the Thames to the Nore upheld. *The Funchal*, 3 Hag. Adm. 386, n.

A smack awarded 100*l.* for salvage, though she did little or no good, the real salvage being performed by others. *The Albion*, 3 Hag. Adm. 234.

A salvage service by smacks towing for five days : about one-fourth (1,100*l.*) of the value (4,600*l.*) awarded. *The Albion*, 3 Hag. Adm. 254.

A vessel supplying her mate to another in distress, her master having been drowned, awarded 1,000*l.* ; the mate having been satisfied. *The Janet Mitchell*, Swabey, 111.

Salvage of a steamship worth 75,000*l.*, with her shaft broken in the Red Sea, by towing her for ten days. 4,000*l.* awarded ; 3,000*l.* of which was awarded to the owners of the salving steamship. *The Kenmure Castle*, 7 P. D. 47 ; 47 L. T. 661 ; 30 W. R. 708 ; 5 Asp. M. C. 27.

Towing a dismasted vessel from off Ushant to Plymouth, value 12,000*l.* 1,500*l.* awarded—600*l.* to owners, 400*l.* to master, 500*l.* to crew. *The Martin Luther*, Swabey, 287.

Tender of twenty guineas to a pilot and six men for taking a ship ashore off Haslar into Portsmouth overruled, and eighty guineas awarded. *The Nicolas Witzen*, 3 Hag. Adm. 369.

Treasure to the amount of 150,000*l.* salved with difficulty by a king's ship from another king's ship sunk and abandoned. Award, 29,000*l.* for salvage and the expenses of the salving ship during the service. *The Thetis*, 2 Knapp, 390—P. C. See *S. C.*, 3 Hag. Adm. 14, 98, 228.

Ship ashore on the coast of Ireland worth, with cargo, 3,960*l.* Award to coastguard officer and boat's crew who boarded the ship with some peril, 120*l.* ; to owners and crew of steamship that towed her to Cork, 330*l.* *The Hebe*, 7 Not. of Cas. Suppl. i.

A steamship towing another (value 21,000*l.*) with propeller broken, without much risk or difficulty, into safety, awarded 500*l.* for salvage. *The Vulcan* v. *The Belin*, 9 Ct. of Sess. Cas. (4th ser.) 1057.

Capture from Enemy by Non-commissioned Captors.]—See *The Hause*, infra, col. 950.

10*l.* awarded to a boat for helping to pass a hawser from a ship ashore on a rock to a steam-tug. *Walker* v. *North of Scotland Steam Navigation Co.*, 19 Ct. of Sess. Cas. (4th ser.) 386.

A fire broke out on board a vessel which was lying alongside a jetty at the entrance to a dock. The vessel was under repairs, with no steam up, and had no one but her master and a watchman on board. At the request of her master a steamship, which had just arrived, hove alongside, and, getting her hose on board the burning vessel, extinguished the fire, which, if it had remained unchecked, would have caused very serious damage. The services were such as might have been rendered by a fire engine on shore. The value of the salved vessel was 9,500*l.* The defendants tendered 200*l.* The court upheld the tender, being of opinion that the services were not of such a character as to require that the award should be assessed upon the same liberal principles as obtain in the ordinary cases of sea salvage rendered by one ship to another. *The City of Newcastle*, 71 L. T. 848 ; 7 Asp. M. C. 546.

A ship and cargo worth 12,000*l.*, towed from a dangerous position on the East Hoyle bank to Hoylake in three hours by a tug or salving steamship worth 4,000*l.*, awarded 1,000*l.* *The Traveller*, 3 Hag. Adm. 370.

A steamship awarded 5,000*l.* for pulling another, worth 40,000*l.*, off a mud-bank (Sumatra Bank)

in a position of danger, but with no danger, and delay of a few hours, to herself. *The Rajasthan*, Swabey, 171.

A moiety allotted to the master and sole owner. *Ib.*

The master and a boat's crew, at great risk to themselves, rowed to a dismasted vessel with some of her crew sick. They rigged a jury-mast, and, with their ship, a whaler, towed her for six days to Plymouth. Value, 7,000*l.* Award, 1,200*l.*; 700*l.* to owners, 200*l.* to master, 20*l.* to each boatman, and the rest to the crew according to their shares in the voyage. *The Jane*, 2 Hag. Adm. 338.

Two-thirds of the property awarded where the vessel sank after being got off the rocks by one set of salvors, and was afterwards weighed and brought into Harwich, and bullion on board saved. *The Jonge Bastiaan*, 5 C. Rob. 322. And see *The Longford*, supra, col. 628; *The Peace*, supra, col. 629.

A tubular craft, constructed for the purpose of bringing to England Cleopatra's Needle, was abandoned in the Bay of Biscay, and next day picked up and brought to England. Her value being 25,000*l.*, 2,000*l.* was awarded for salvage; 1,200*l.* to owners, 250*l.* to master, and the rest to the crew. *The Cleopatra*, 47 L. J., Adm. 72; 3 P. D. 144.

c. Derelict.

Rule as to Moiety.]—Derelict, being sine spe recuperandi, is distinguishable from salvage in the amount awarded. *The Inca*, *Gore* v. *Bethel*, 12 Moore, P. C. 189; Swabey, 370.

A moiety of the value of the vessel and cargo, in a case of the salvage of a derelict, was formerly the amount awarded, but the maritime courts now give only such amount as is fit and proper with reference to all the circumstances of the case, having regard especially to the value of the property salved. *The Scindia*, 4 Moore, P. C. (N.S.) 84; L. R. 1 P. C. 241; 12 Jur. (N.S.) 534. S. P., *The Splendid*, 12 L. T. 585. *The Minerva*, 9 W. R. 81—P. C.

A ship on a voyage from Melbourne to London fell in with a derelict brigantine 220 miles to the westward of the Lizard, in the month of February, and put an officer and three hands on board her, who, under circumstances of great difficulty and danger, and after much hardship, brought her in safety to Liverpool. In a salvage suit instituted on behalf of the owners, master and crew of the ship, the court, after directing expenses incurred by the salvors to be paid to them out of the proceeds of the salved property, awarded more than a moiety of the residue as salvage reward. *The Rasche*, 42 L. J., Adm. 71; L. R. 4 A. & E. 127; 22 W. R. 240.

Two-fifths, and some additional sums to subsequent salvors, awarded. *The Queen Mab*, 3 Hag. Adm. 242.

A moiety of a derelict, brought in with great risk and courage, awarded. *The R. M. Mills*, 3 L. T. 513.

A moiety of the value awarded for salvage of a derelict. In no case where a claim has been given for a private owner has more than a moiety been awarded for salvage. *L'Esperance*, 1 Dods. 46.

The ancient rule of awarding salvors of derelict half the value of the property is no longer observed; the amount of salvage in such cases is now in the discretion of the court. *The Aquila*, 1 C. Rob. 37.

A moiety of the value of a derelict, after deduction of expenses of salvors for a tug and men to bring her in, awarded to salvors. A person who hired labourers to unload the stranded ship held not entitled to salvage award, but to remuneration for his services. *The Watt*, 2 W. Rob. 70.

A moiety of the value of a ship picked up derelict awarded for salvage: expense of appraisement paid out of the other moiety. *The Britannia*, 3 Hag. Adm. 153. Cf. *The Effort*, 3 Hag. Adm. 165.

Derelict Boiler.] — Where five men having found a derelict marine boiler floating in the sea, pulled it ashore and hauled it beyond high water, the court, in a default salvage action, out of 58*l.*, the net proceeds of the said boiler, awarded 50*l.* and costs. *Elephant*, *Boiler ex*, 64 L. T. 543.

See *The Mark Lane*, infra.

What is Derelict.]—A ship from which the crew and bullion were taken, she being in a sinking state, and her crew refusing to stay by her, treated as a derelict for salvage purposes. A moiety of the value of the bullion awarded. *The Columbia*, 3 Hag. Adm. 428.

—— **Ship left Ashore.**]—A ship and cargo are not necessarily derelict because they have been left on the Shipwash, an off-lying sand. *The Barefoot*, 14 Jur. 841.

—— **Recapture.**]—A British ship, recaptured by a man and boy from her French captors, claimed as derelict by a frigate that had rendered salvage service. One-sixth, 1,000*l.*, awarded to man and boy; 500*l.* to the king's ship:—Held, no derelict. *The Beaver*, 3 C. Rob. 292.

Spes Recuperandi.]—A vessel abandoned by her master and crew on the Hasborough Sands, in fear of their lives, is a derelict. *The Sarah Bell*, 4 Not. of Cas. 144.

For salvage purposes a ship may be derelict, though expectation of recovering her is entertained by her people. *The Genessee*, 12 Jur. 401.

A ship in great peril, and with women on board, was assisted by smacks, but the essential part of the salvage service was performed by a steamship that towed her clear of the sands:—Held, that the smacks were nevertheless entitled to a large award. *Ib.*

—— **Ship Abandoned, and afterwards Returned to.**]—A ship with four and a-half feet of water in her, and compasses and seamen's clothes taken away, held to be derelict. Though the master and seamen returned to her, the salvors were entitled to keep possession. *The Gertrude*, 30 L. J., Adm. 130.

Where the crew of a ship that had been in collision, at the moment of collision climbed on the other ship, thinking their own was sinking, and the master of the other ship refused to lend his boat for them to return to their own ship:—Held, not to be a case of derelict. *The Cosmopolitan*, 6 Not. of Cas., Suppl. 17.

Where during the performance of salvage services the master and crew of the salved ship went and remained on board the salving ship, which put men on the salved ship to steer her, the court refused to treat the salved ship as a derelict and award salvage on that basis. *The Lepanto*, [1892] P. 122; 66 L. T. 623; 7 Asp. M. C. 192.

Whole of Proceeds Awarded.]—The whole of the proceeds of a derelict of small value awarded to the salvors, no owners appearing. *The William Hamilton*, 3 Hag. Adm. 168.

Proceeds of a derelict brought into the Mersey by salvors, and sold as perishable, paid out upon first decree to the salvors. *The Conception*, 2 Hag. Adm. 175. And see *The Britannia*, supra, col. 642.

Amount of Award.]—The value of the property salved was 12,663*l.*, and the total award made by the court for salvage was 4,200*l.* *The Anna Helena*, 49 L. T. 204; 5 Asp. M. C. 142.

A derelict vessel was found in the North Atlantic Ocean, 800 miles from land, in a seriously damaged condition, and was navigated into Queenstown by salvors, who incurred great risk and hardship in rendering the service. The value of the derelict was 5,100*l.* The court awarded 2,300*l.* as salvage reward. *The Craigs*, 5 P. D. 186; 29 W. R. 446.

Where a derelict vessel and cargo of the value of 1,452*l.* were salved by a steamer, which, with her cargo, was of the value of 30,000*l.*, the vice-admiralty court awarded 300*l.* for salvage:—Held, that, under the circumstances, that sum was not sufficient, and the same increased to 450*l.* *The True Blue*, *Papayanni* v. *Hocquard*, 4 Moore, P. C. (N.S.) 96; L. R. 1 P. C. 250.

Salvors having by meritorious services, rendered at the risk of their lives, salved a derelict vessel, her cargo and freight, valued together at 750*l.*, the court awarded 360*l.* as salvage remuneration. *The Hebe*, 4 P. D. 217.

A steamer laden with a valuable cargo, and having passengers on board, fell in with a derelict brig in the Bristol Channel, and with great difficulty, in spite of a strong wind and heavy sea, succeeded in towing her into port. The value of the brig, together with her cargo and freight, amounted to nearly 2,800*l.* The court awarded 900*l.* to the salvors. *The Andrina*, L. R. 3 A. & E. 286; 22 L. T. 488.

Derelict ship and cargo worth 15,000*l.* picked up by small schooner in the Irish Sea; 1,800*l.* salvage awarded: 600*l.* to owners of schooner, 400*l.* to master, 250*l.* to mate, and rest to the crew. *The Caroline*, 2 W. Rob. 124.

Although there is no rule fixing the amount to be awarded in cases of salvage of derelict vessels, the increased risk of loss to the salved property, the difficulty of boarding a derelict vessel without assistance from her crew, and the extra labour thrown upon those remaining on board of the salving ship by placing some hands on board the derelict, are elements tending to augment the award in such cases. *The Janet Court*, 66 L. J., Adm. 34; [1897] P. 59; 76 L. T. 172; 8 Asp. M. C. 223.

Where a tug was engaged by the crew of two smacks to tow a derelict into port, but through the mistake of the tug the vessel got aground, whereupon the tug went in search of assistance, and some beachmen took possession of the vessel and brought her into harbour, a liberal salvage was awarded to the smacksmen. *The Atlas*, 15 Moore, P. C. 329; 31 L. J., Adm. 210; 8 Jur. (N.S.) 753; 6 L. T. 737; 10 W. R. 850.

A derelict was found at sea by salvors, who were incapable of performing the attempted service, but remained by the wreck until a second set of salvors came up, who dispossessed these first and brought it into port. The court allotted to the first set a sufficient sum to cover the expenses to which they had been put. *The Magdalen*, 31 L. J., Adm. 22; 5 L. T. 807.

Abandonment of Derelict by Salvors—Right to Remuneration.]—The barque "N." fell in with the "K.," a derelict barque, in the Atlantic, and put five hands on board of her, who navigated her for three days. The "K." then fell in with the barque "B.," and the five hands on board of the "K." were, at their own request, taken on board the "B." The "B." then sent some of her own crew on board the "K.," and took her in tow, and towed her till the tow-rope broke, when the vessels parted company, and the hands on board the "K.," with the assistance of the "L.," a steamship which they afterwards fell in with, brought the "K." into Falmouth. In suits instituted on behalf of the masters, owners and crews of the "N.," the "B.," and the "L.," the court held, that the masters, owners and crew of the "N." were not entitled to salvage reward, but awarded salvage to the remaining plaintiffs. *The Killeena*, 51 L. J., Adm. 11; 6 P. D. 193; 45 L. T. 621; 30 W. R. 339; 4 Asp. M. C. 472.

Wrongful Dispossession of First Salvors.]—See *The Kathleen*, supra, col. 602.

Derelict must be Brought into the Admiralty.]—See *The King* v. *Property derelict*, supra, col. 594.

Apportionment in Case of Derelict.]—See *The Livietta*, infra, col. 649.

d. Appeal—Reviewing Award.

Insufficient Award.]—The court of appeal will increase the amount of a salvage award, if in its opinion, considering the value of the property salved, and of the salving vessel, the award of the court below is insufficient. *The City of Berlin*, 47 L. J., Adm. 2; 2 P. D. 187; 37 L. T. 307; 25 W. R. 793; 3 Asp. M. C. 491—C. A. See also *The True Blue*, supra.

Excessive Award.]—When the court of admiralty had awarded an exceptional and excessive amount of remuneration solely from regard to the value of property salved, the judicial committee, notwithstanding their general rule of non-interference upon a question of mere discretion, reduced the amount by two-fifths. *The Amérique*, L. R. 6 P. C. 468; 31 L. T. 854; 23 W. R. 488; 2 Asp. M. C. 460.

An award of 30,000*l.* on a value of 190,000*l.* in the case of a derelict ship reduced to 18,000*l.*, on the ground that the award was out of proportion to the services rendered. *Ib.*

Where a judge had awarded 3,500*l.* for losses and 5,000*l.* for remuneration (the property saved being 67,000*l.*):—Held, that a total of 6,000*l.* was sufficient. *The De Bay*, *Bird* v. *Gibb*, 52 L. J., P. C. 57; 8 App. Cas. 559; 49 L. T. 414—P. C.

The court of appeal is unwilling to interfere with the judicial discretion in cases of salvage, where the quantum awarded is alone the subject of appeal. Though there is no precedent for the reduction of an amount awarded, yet in principle there can be no difference between increasing and reducing such amounts, both being equally an interference with judicial discretion. And the amount must be reduced on appeal when

the sum awarded is exorbitant or manifestly excessive. *The Chetah*, 5 Moore, P. C. (N.S.) 278; 38 L. J., Adm. 1; L. R. 2 P. C. 205; 19 L. T. 621; 17 W. R. 233.

Therefore, where the judge of the admiralty court, acting upon his own unassisted judgment, greatly overrated the value of the services rendered by the salvors:—Held, that the amount of his award must be reduced. *Ib.*

Deviation of Vessel.]—The court of appeal will alter an award of salvage made by the court below, where there is reason to believe that the court below has not taken into consideration the circumstance that rendering a salvage service to property alone constitutes a deviation in point of law, however small the deviation may be in point of fact. *The Farnley Hall*, 46 L. T. 216; 4 Asp. M. C. 499—C. A.

Discretion.]—In appeals as to the quantum of salvage allowed, the court will not interfere with or moderate the amount awarded by the admiralty court, unless that amount was exorbitant or excessive, though the court of appeal may be unable to affirm the principle on which the amount was assessed, or would have awarded a less amount than that awarded by the admiralty court. *The Woburn Abbey*, 21 L. T. 707—P. C.

In appeals as to the quantum awarded, the difference ought to be very considerable (to the extent of one-third at least) in order to induce the court to interfere upon a question of mere discretion. *The Glenduror*, *Arnold* v. *Cowie*, L. R. 3 P. C. 589; 24 L. T. 499; 1 Asp. M. C. 31.

The court of appeal will hesitate to interfere with the decision of local authorities on a question of salvage, but nevertheless is bound to act upon its own judgment if it should be of opinion that the award is wholly inadequate. *The Messenger*, Swabey, 191.

The appellate court will not disturb an award of salvage on the ground of the court below having awarded too large a sum, unless satisfied, beyond all doubt, that the judge has made an exorbitant estimate of the salvage services. *The Fusilier*, *Bligh* v. *Simpson*, 3 Moore, P. C. (N.S.) 51; 34 L. J., Adm. 25; 11 Jur. (N.S.) 289; 12 L. T. 186; 13 W. R. 592.

The judicial committee is always reluctant to review cases of salvage, which involve the exercise of the discretion of the judge of the court, but being a final court of appeal, will, if the justice of the case requires it, increase the amount. *The Scindia*, 4 Moore, P. C. (N.S.) 84; 35 L. J., P. C. 53; L. R. 1 P. C. 241; 12 Jur. (N.S.) 534—P. C.

The court of appeal in a disputed question respecting the amount of remuneration awarded for a salvage service, is indisposed, except it appears that the judgment is clearly erroneous, to interfere with the compensation which the court in its discretion has awarded. *The Clarisse*, 12 Moore, P. C. 340.

The amount of compensation to be awarded is in the discretion of the judge of the court of admiralty, and the judicial committee will not interfere with the manner in which that discretion has been exercised, either by diminishing or increasing the amount awarded, except in a case of very extraordinary character. *The Neptune*, *Green* v. *Bailey*, 12 Moore, P. C. 346.

The court of appeal is very unwilling to interfere with the judicial discretion exercised by the judge below with regard to the amount awarded for salvage services, and will not do so unless the sum awarded is other than a reasonable remuneration for the services rendered, and unless the difference is very considerable. *The England*, 5 Moore, P. C. (N.S.) 344; 38 L. J., Adm. 9; L. R. 2 P. C. 253; 20 L. T. 46.

From the Cinque Ports.]—An appeal to the court of admiralty under 1 & 2 Geo. 4, c. 76, from an award of the commissioners of the cinque ports in a salvage case, is in the nature of a rehearing rather than of an appeal, and it is obligatory on the court to allow a restatement of the case and to admit fresh evidence. The court will, however, in the exercise of its discretion as to costs, discourage the giving of fresh evidence unwarrantably. *The Caledonia*, L. R. 4 A. & E. 11, n.; 17 W. R. 626.

Rule of Court of Appeal.]—Where a salvage award is appealed against, the court of appeal adheres to the rule laid down in the privy council, and will not alter the sum unless it has been given on wrong principles, or with a misapprehension of the facts, or it is exorbitant and out of reason. 6,000*l.* was awarded for services rendered to a steamer which had run aground on a reef in the Red Sea, nearly five miles from Suez, and which, owing to the heavy sea, and the nature of her position, was in imminent peril. The services were rendered at much peril to the salving ship. The court of appeal refused to alter this award. *The Lancaster*, 9 P. D. 14; 49 L. T. 705; 36 W. R. 608; 5 Asp. M. C. 174—C. A.

The court of appeal will, in a salvage action, where it appears that the judge below has misapprehended the evidence, and consequently given a wrong award, increase or diminish the award as the justice of the case may require. *The Star of Persia*, 57 L. T. 839; 6 Asp. M. C. 220—C. A.

The barque "Star of Persia," having taken up a foul berth in bad weather in the Downs, collided with another barque. The tug "C." towed her clear after an hour's towing, during which time her anchor and chain were slipped. After she had been got clear the tug continued to tow ahead until another anchor had been brought off from the shore by other salvors, and she was ultimately saved. Her value and that of her cargo and freight amounted in all to 23,000*l.* The court, in a salvage action against the "Star of Persia," having awarded 150*l.*, the court of appeal held that the evidence as to the danger from which the "Star of Persia" had been saved had been misapprehended, and increased the award to 300*l.* *Ib.*

Salvage remuneration was reduced from $12,000 to $7,500, their lordships being of opinion that the difference between the sum awarded and that which would be liberal was so large as to require correction. *The Glenduror*, supra, col. 645, approved and followed. *The Thomas Allen*, 12 App. Cas. 118; 56 L. T. 285; 6 Asp. M. C. 99—P. C.

Where a judge had awarded 3,500*l.* for losses and 5,000*l.* for remuneration (the property saved being 67,000*l.*):—Held, that a total of 6,000*l.* was sufficient. *The De Bay*, *Bird* v. *Gibb*, ante, col. 636. And see *The City of Chester*, ante, col. 636.

Where the appeal is as to the amount awarded, the rule of the privy council is similar to that

of common law courts in dealing with a verdict as to damages, where the jury have attended to the judge's direction. *The Carrier Dove*, 2 Moore, P. C. (N.S.) 243; Br. & Lush. 113.

There is no essential distinction between river and sea salvage. *Ib.*

In salvage cases there is no rule binding a court of appeal not to interfere with an award unless the amount is so large, or so small, that no reasonable person could fairly arrive at that sum; but the amount awarded will be diminished or increased if, after a careful consideration of the facts, and after giving every possible weight to the view of the judge, the court is of opinion that the amount is so large as to be unjust to the owners of the ship which has been in distress, or so small as to be unjust to the salvors. *The Accomac*, [1891] P. 349; 66 L. T. 335; 7 Asp. M. C. 153—C. A.

The privy council will not interfere with an award in a salvage case except where the difference between what has been and what ought to have been awarded is very considerable. *The Clarisse*, Swabey, 129, 134; 12 Moore, P. C. 340.

Award reduced.]—Salvage award reduced on appeal from 1,000*l.* to 600*l.* *The General Palmer*, 2 Hag. Adm. 323.

Award of Justices.]—An award of justices for salvage will not be altered upon appeal unless excessive. *The Cuba*, Lush. 14; 6 Jur. (N.S.) 152.

The court is unwilling to disturb an award of justices on the mere ground of amount or wrong apportionment. *The Vesta*, 2 Hag. Adm. 189.

Magistrates' award of 15*l.* for getting a barge ashore on the Nore Sand afloat, and taking her to Sheerness, increased on appeal to 40*l.* *The Harriett*, Swabey, 218.

An agreement to pay 8*s.* 6*d.* for salvage services, there being real danger to the salvors, set aside as futile. *The Phantom*, L. R. 1 A. & E. 58; 12 Jur. (N.S.) 529; 14 W. R. 774.

14. Apportionment.

In what Shares.]—A ship built on purpose to convey the obelisk known as Cleopatra's Needle, was, whilst laden with the obelisk, abandoned about ninety miles N.E. of Ferrol, on the coast of Spain. A steamship discovered her and lay by her for a night, and the next day four of her crew volunteered and went to the ship, and after much difficulty and at considerable risk succeeded in getting the rudder clear and a hawser attached. The steamship, after towing her for fifty-two hours, brought her into port. The court appraised the ship and obelisk at 25,000*l.*, and awarded 2,000*l.*, and apportioned the latter sum as follows, viz. 1,200*l.* to the owners of the steamship, 250*l.* to her master, and the rest among the officers and crew according to their ratings, as follows, viz. double shares to the chief officer, second engineer and other volunteers, and three shares to the seamen immersed in water while clearing the shackles and towline; the rest among the others of the crew. *The Cleopatra*, 47 L. J., Adm. 72; 3 P. D. 145.

After deducting from the award the costs of repairs and detention during repairs, one half of the balance apportioned to the owner of the salving steamship, the other half to the master and crew. *The Spirit of the Age*, Swabey, 286. Cf. *The Howard*, 3 Hag. Adm. 356, n.

A brig was driven out to sea short-handed, and after she had been eighty days at sea and much damaged, with only four men on board, two of them disabled, a ship placed on board of her two hands, who assisted in working her till she was brought, after twelve days, into port. The brig and her cargo were of the value of 8,174*l.*:—Held, that this was a salvage service. An award was made of 400*l.*, and it was apportioned—to the owners, 50*l.*; to the master, 50*l.*; to the crew, 100*l.*; to the men placed on board the brig, 200*l.* *The Charles*, L. R. 3 A. & E. 536; 26 L. T. 594; 21 W. R. 13.

In apportioning 1,500*l.*, where the services were mainly the personal exertions of the master and crew of a sailing vessel, the court awarded 500*l.* to the owners, 650*l.* to the crew, and 350*l.* to the master. *The Palmyra*, 25 L. T. 804; 1 Asp. M. C. 278.

Special Reward to Mate.]—Two Norwegian barques, both bound to England, fell in with each other on the high seas, about 3,000 miles from Liverpool; one of the barques was in distress, her first mate having died, and her master, her second mate and one of the crew being sick with yellow fever. The other barque was short-handed, but her mate, with the consent of her master, went on board the distressed vessel and succeeded in navigating her to Liverpool. During the voyage the master, the second mate and two of the crew died. On the arrival of the vessel at Liverpool an action of salvage was instituted against her. At the hearing of the action, the value of the salved property was taken at 5,135*l.* 13*s.* 2*d.* The court awarded 600*l.* to the mate who had gone on board the distressed vessel, 100*l.* to the owners of the salving vessel, 50*l.* to her master, and 150*l.* amongst the remaining plaintiffs. *The Shibladner*, 47 L. J., Adm. 84; 3 P. D. 24; 38 L. T. 150; 3 Asp. M. C. 556.

Special Reward to Master.]—Where 3,500*l.* had been awarded for salvage services rendered by a steamship, 2,000*l.* was awarded to the owners and 700*l.* to the master for his skilful navigation in dangerous circumstances, the order of the vice-admiralty court of Bermuda being varied. *The Castlewood*, 42 L. T. 702; 4 Asp. M. C. 278—P. C.

Where the master undertakes the responsibility of deviating from his course, and so imperilling his insurance, for the purpose of rendering salvage service, he is entitled to considerable reward. The fact that a considerable sum has been awarded to the owners of the salving vessel does not diminish the amount to which the master and crew are entitled. *The Aletheia*, 13 W. R. 279.

Amount to Owners.]—In a suit instituted to recover salvage reward in respect of services rendered in towing a disabled vessel into safety, the court awarded a total sum of 4,000*l.*, of which 3,000*l.* was apportioned to the owners. *The Kenmure Castle*, 7 P. D. 47; 47 L. T. 661; 30 W. R. 708; 5 Asp. M. C. 27.

—— **Sailing Vessel or Steamship.**]—In apportioning salvage reward among the owners, master and crew of a sailing vessel which has rendered salvage services, the court will not allot to the owners the same proportion of the

reward as in the case of services rendered by a steamship (usually one-half), unless the circumstances shew that the vessel itself, as where the services are effected by steam power, was the chief agent in effecting the salvage. *The Palmyra*, 25 L. T. 884 ; 1 Asp. M. C. 182.

The capability of steamers to perform services with greater rapidity and certainty entitles them as salvors to a higher scale of reward. *The Otto Herman*, 33 L. J., Adm. 189.

—— **On Deviation having been Occasioned.**]—In a service mainly rendered by the steam power of the salving ship, and which had occasioned a deviation in point of law, and in rendering which the crew were exposed to some peril, an apportionment of two-thirds to the shipowners and one-third to the master and crew, altered to five-ninths to the shipowners and four-ninths to the master and crew, and the total award increased from 600*l.* to 900*l.*; owner's share increased from 400*l.* to 500*l.*; master's share increased from 80*l.* to 100*l.*; crew's share increased from 120*l.* to 300*l.* *The Farnley Hall*, 46 L. T. 216 ; 4 Asp. M. C. 499—C. A.

Custom to Share Salvage—Disproportionate Risks.]—Where there is a custom to share in salvage awards in a particular manner according to the ratings of the salvors on board their ship, yet if some of the salving crew have exposed themselves to much greater risk than the rest, the court will give them a larger share on equitable principles. *The Sarah*, 3 P. D. 39 ; 37 L. T. 831.

Derelict.]—The master of a Norwegian brig bound to Cardiff, with a crew of nine men, fell in, in the North Sea between Heligoland and the Dogger Bank, with a derelict vessel in a very crippled condition, and put his mate and two of his crew on board her. The mate and the two men on board the derelict, shortly after they had boarded her, fearing that she was about to founder, endeavoured to leave her, but their boat was swamped, and one of the men drifted astern, and was picked up by a fishing smack. The mate and the other hand succeeded in bringing the derelict safely into the English Channel, and within three miles of Dungeness; she was then taken in tow by a steamship and towed to the entrance of Dover Harbour, within which she was subsequently placed in safety. Actions of salvage were instituted by the owners, master and crew of the brig, and by the owners, master and crew of the steamship, against the derelict vessel and her cargo, and the court awarded a moiety of the value of the property proceeded against, and apportioned three-fifths of the amount to the owners, master and crew of the brig. *The Livietta*, 8 P. D. 24 ; 48 L. T. 799 ; 31 W. R. 643 ; 5 Asp. M. C. 132.

In General.]—Two tugs rendered salvage services to a ship driven from her moorings in the Bristol Channel, by towing her, in a very heavy gale, into the river Usk. The services lasted for about three hours. The value of the salved ship was 4,000*l.*, of her cargo 900*l.*, and of her freight 288*l.*; 450*l.* was awarded. *The Monarch*, 56 L. J., Adm. 114 ; 12 P. D. 5 ; 56 L. T. 204 ; 35 W. R. 292 ; 6 Asp. M. C. 90.

A vessel having got ashore on the Parkin Rock in the Red Sea, her master and part of the crew proceeded to Aden for assistance. During their absence the crew left on board were driven away by Arab wreckers, but the vessel was never permanently abandoned. Three steamers rendered valuable services to the vessel, and finally succeeded in getting her off the rocks and saving part of her cargo. The value of the vessel for the purposes of the action was taken to be 3,750*l.* The court awarded 2,000*l.* as salvage. *The Erato*, 57 L. J., Adm. 107 ; 13 P. D. 163 ; 59 L. T. 840 ; 6 Asp. M. C. 334. See also *The City of Chester*, ante, cols. 636, 637 ; *The Agamemnon*, ante, col. 637 ; and *The Anna Helena*, ante, col. 608.

No Fixed Rule.]—There is not any fixed rule as to apportioning a salvage award. *The Gipsy Queen*, 64 L. J., Adm. 86 ; [1895] P. 176 ; 11 R. 766 ; 72 L. T. 454 ; 43 W. R. 359 ; 7 Asp. M. C. 586.

Half-Shares to Non-navigating Part of Crew—Discretion.]—A large passenger steamship rendered salvage services to another passenger steamship, the amount being agreed at 12,000*l.* The court apportioned 9,200*l.* to the owners, 800*l.* to her master, and the remainder amongst the officers and crew according to their ratings, half-shares to be allotted to the surgeon, stewards, cooks and other non-navigating members of the crew. *The Spree*, [1893] P. 147 ; 1 R. 584 ; 69 L. T. 628 ; 7 Asp. M. C. 397.

Between Owners and Salvors.]—Apportionment of salvage, the seamen being dissatisfied with their shares. *The Beulah*, 1 W. Rob. 477.

Life and Property Salvors.]—Out of 1,660*l.* awarded for salvage of life and property, 980*l.* apportioned to life and 480*l.* to property salvors. *The Eastern Monarch*, Lush. 81.

Share of Shipowners—Policy Vitiated.]—The possible vitiating of a policy of insurance upon the salving vessel:—Held, not a reason for increasing the share of the shipowner as against the share of the crew in apportioning a sum tendered to and accepted by salvors (not now followed). *The Deveron*, 1 W. Rob. 180.

Expenses of Salvors.]—In apportioning the amount awarded as salvage, the court will not allow the owners of the vessel performing the service to deduct any expenses except those claimed in the petition in the salvage suit. *The Wigtownshire*, 36 L. J., Adm. 11.

Distribution of Salvage paid to Master—Remedy of Shipowner.]—A master receiving, under an award, salvage money from the owners of property to which he, the ship and crew, have rendered salvage services, is not bound to hand over to his owner the portion he bonâ fide conceives to be his own proper share ; the remedy of the owner is to apply to the court under s. 498 for a distribution of salvage. *The Princess Helena*, Lush. 190 ; 30 L. J., Adm. 137 ; 4 L. T. 869.

An owner of a ship refused to pay wages due to a master for a voyage, unless credited with salvage money received by the master under an award, and kept by him for his own share ; the master refusing to account for a subsequent voyage, except on condition of a settlement for the former voyage, without reference to the salvage money :—Held, that the payment of wages was improperly withheld, and that the master was entitled to ten days' double pay. *Ib.*

Where an owner thinks that a proper share of the salvage reward has not been paid to him, his proper course is to bring the share so paid to him into court, to pray for a monition to the master to do the same, and to apply for an order of distribution. *Ib.*

Agreement to Apportion.]—*See* infra.

15. AGREEMENTS TO APPORTION.

Agreement for Apportionment of Salvage.]—The 182nd section of the Merchant Shipping Act, 1854, does not prevent seamen who are entitled to recover salvage remuneration from entering into an arrangement, through their solicitor, for the apportionment of the amount due to them. Where the owners of a ship have received a lump sum in respect of services rendered by their ship, master and crew, and have paid over to the crew a portion of such sum, which the crew, acting under the advice of their own solicitor, have accepted in settlement of their claims for salvage, the court will not, where the portion so paid over is not extravagantly small, disturb the settlement in the absence of fraud or concealment. *The Afrika*, 49 L. J., Adm. 63; 5 P. D. 192; 42 L. T. 403; 4 Asp. M. C. 266.

Under 17 & 18 Vict. c. 104, s. 498, the court will decree an equitable apportionment, unless an equitable agreement is proved or any equitable tender has been made. *The Enchantress*, Lush. 93; 30 L. J., Adm. 15; 2 L. T. 574.

When salvors have entered into an agreement as to the apportionment of salvage, which in the opinion of the court is equitable, and not obtained by coercion, the court will uphold the agreement, and apportion the salvage awarded in accordance therewith. *The James Armstrong*, L. R. 4 A. & E. 380; 33 L. T. 390; 3 Asp. M. C. 46.

When persons agree to render a salvage service and to apportion the salvage in a particular way, and further salvage services are rendered not contemplated by the agreement, the whole body of salvors is entitled to share in the reward, and not only those actually engaged in the further salvage operations. *The Cadiz and The Boyne*, 35 L. T. 602; 3 Asp. M. C. 332.

Costs of all parties were ordered to be paid out of fund in court, except a defendant's, in consequence of his misconduct to the co-salvors. *Ib.*

By 17 & 18 Vict. c. 104, s. 182, every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage shall be wholly inoperative. By 25 & 26 Vict. c. 63, s. 18, this section "does not apply to the case of any stipulation made by the seamen belonging to any ship which, according to the terms of the agreement, is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship":—Held, that these sections do not fetter the discretion of the court upon the subject of these agreements, but that their effect is to render such agreements not illegal, and to place them on the same footing on which they stood before any legislation on the subject. *The Ganges*, 38 L. J., Adm. 61; L. R. 2 A. & E. 370; 22 L. T. 72; 4 Asp. M. C. 317.

The plaintiff was temporary master of a steam tug in the place of B., and without any extraordinary exertion or peril rendered salvage services to a vessel in distress. The steam tug belonged to a company whose business it was to render towage and salvage services to vessels in distress. The seamen employed by the company were paid, according to a special agreement, certain fixed wages, and a fixed rate of poundage on all towage and salvage money earned by the tug. The plaintiff knew that B. was employed under this agreement. The plaintiff claimed salvage remuneration independently of the agreement:—Held, that the agreement, as it did not appear to be inequitable, was valid, and the plaintiff was bound by it, and therefore could not maintain his claim for salvage. *Ib.*

By the ancient law of the court of admiralty, as well as by statute law prior to 25 & 26 Vict. c. 63, s. 18, any stipulation by which a seaman agreed to abandon a claim for salvage was invalid. *The Pride of Canada*, 9 L. T. 546; Br. & Lush. 208.

The burden of proof is upon those who assert such an agreement to shew, not merely the existence of the agreement, but that the seamen were fully aware of all its consequences. *Ib.*

A steam trawler is not a vessel "to be employed on salvage service" within s. 18 of the Merchant Shipping Act Amendment Act, 1862, though the agreement between the owners and seamen provides for an apportionment of any salvage earned. Sect. 182 of the Merchant Shipping Act, 1854, does not invalidate an equitable agreement between the shipowner and seamen as to the apportionment of any salvage earned. *The Wilhelm Tell*, 61 L. J., Adm. 127; [1892] P. 337; 1 R. 551; 69 L. T. 199; 41 W. R. 205; 7 Asp. M. C. 329.

By articles of agreement in the form sanctioned by the board of trade under the above act, ". . . every member of the crew, including apprentices, shall be regarded as entitled to participate in any sum or sums of money arising from any salvage or salvage services performed for any ship in distress or otherwise, in the proportion set forth opposite to their respective names in this agreement." The master and mate were paid wages on the footing of a share of the fishing profits, but the boatswain received so much per week; and the owners of the trawler, in arriving at the net sum to be apportioned, claimed to deduct the cost of repairs for damage sustained by the vessel in rendering the salvage services, and as against the boatswain, certain other sums for loss of profits, time, &c.:—Held, that these deductions could not be allowed, as the agreement for a certain share of the salvage meant a share of the sum awarded, less any unrecovered costs in obtaining the award. *Ib.*

Semble, the provisions of s. 182 of the Merchant Shipping Act, 1854, and of s. 18 of the amending act of 1862, do not apply to a master. *Ib.*

Power to Set Aside.]—The admiralty court has power to set aside agreements entered into by seamen as to sharing salvage earned by the ship, notwithstanding 17 & 18 Vict. c. 104, s. 214, and 25 & 26 Vict. c. 63, s. 18. *The Pensacola*, Br. & Lush. 306. And see *The Pride of Canada*, and cases supra, col. 625.

An agreement between the owners of a steam tug and her master and crew as to the giving up by the latter of their claims to salvage, in consideration of a higher rate of wages, held invalid. *The Mary Anne*, 11 L. T. 85.

Receipt for Salvage given in Ignorance.]—An ignorant salvor who has signed a receipt in full of all demands for salvage, will be relieved in admiralty. *Silver Bullion*, 2 Spinks, 70.

Set Aside as Unfair.]—An agreement for apportionment, entered into previously to the service performed, set aside as unfair. *The Louisa*, 2 W. Rob. 22; 2 Not. of Cas. 149.

Agreement between Shipowners and Crew as to Deductions—Validity.]—An agreement between shipowners and crew that before apportionment of salvage the shipowners shall be entitled to deduct from the sum awarded for salvage the amount of any damages sustained by the ship or her gear in the performance of the salvage service, and by reason of her loss of fishing, is inoperative. *The Saltburn*, 6 R. 702; 71 L. T. 19; 7 Asp. M. C. 474.

16. Assignment of Right to Salvage.

An assignment by a seaman of his right to salvage reward already acquired is wholly void and inoperative by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 182, although such assignment is for valuable consideration, and in an action for distribution of salvage a defence setting up such an assignment is bad. *The Rosario*, 46 L. J., Adm. 52; 2 P. D. 41; 35 L. T. 816; 3 Asp. M. C. 334.

Sixteen of the crew of a steamship sued her owners for distribution of salvage. The owners answered that after the date of the salvage services, but before the distribution of the salvage money, fourteen had assigned to the defendants for good consideration all their shares:—Held, that the fourteen were nevertheless entitled to sue. *Ib.*

17. Salvage Agreements.

Inequitable Agreements.]—The master of the "London" agreed for 400*l.* to tow the "Waverley" into Lisbon, about twenty-five miles. The weather, which was bad at the time of the agreement, subsequently became worse, and much difficulty was experienced in performing the salvage. In a suit for salvage the owners of the "Waverley" tendered 400*l.*, the amount agreed upon for salvage, and 123*l.* 11*s.* 8*d.* for quarantine expenses and consequent detention of the "London":—Held, that the agreement was equitable at the time when it was made, and was therefore valid notwithstanding the subsequent circumstances. *The Waverley*, 40 L. J., Adm. 42; L. R. 3 A. & E. 369; 24 L. T. 713; 1 Asp. M. C. 47.

Held, also, that the agreement was not affected by the tender of the amount of the extra expenses. Tender pronounced for, with costs from the time of making the tender. *Ib.*

An English steamship, bound from Sumatra to Jedda, having on board as passengers 550 pilgrims, was wrecked in the Red Sea. The pilgrims took refuge on a rock where, if bad weather had set in, they would have been exposed to imminent danger. In answer to signals of distress a steamship came up, and her master refused to rescue the pilgrims for a less sum than 4,000*l.*, which was the amount of the passage-money to be paid to the owners of the wrecked vessel for carrying the pilgrims from Sumatra to Jedda. Ultimately the master of the wrecked vessel signed an agreement to pay 4,000*l.* to the master of the steamship to take the pilgrims to Jedda, and the pilgrims were taken in his ship to Jedda in safety. In an action to enforce the agreement:—Held, that it must be set aside as inequitable, and the court awarded 1,800*l.* as salvage remuneration. *The Medina*, 2 P. D. 5; 35 L. T. 779; 25 W. R. 156; 3 Asp. M. C. 219—C. A. Affirming 45 L. J., Adm. 81.

Where, in the opinion of the court, a salvage agreement is exorbitant, the court will refuse to enforce it. In a case where the master of a disabled ship at sea about 340 miles from Queenstown, requested assistance from a mail steamer, and agreed in writing to make his owners responsible to the extent of 15,000*l.*, provided the master of the mail steamer would tow the disabled ship to Queenstown, and the service was performed, the court declined to enforce the agreement, and awarded to the salvors by way of salvage reward 7,000*l.*, in addition to a sum sufficient to cover penalties which had become payable by the owners of the mail steamer by reason of the vessel deviating to perform the service. *The Silesia*, 5 P. D. 177; 43 L. T. 319; 29 W. R. 156; 4 Asp. M. C. 338.

An agreement between salvors and the agent of the salving ship to leave the amount of their reward to his determination is inequitable and void. *The Enchantress*, Lush. 93; 30 L. J., Adm. 15; 2 L. T. 574.

Fair Agreements Upheld.]—Where an agreement is clearly established, the court will uphold it unless wholly inequitable, and will not set it aside on the ground that it is a hard bargain. *The Firefly*, Swabey, 240. S. P., *The Mulgrave*, 2 Hag. Adm. 78.

An agreement dishonestly made by the master to secure, to so-called salvors, an excessive reward, is not valid against the owner of the ship. *The Theodore*, Swabey, 351.

An agreement will be upheld, unless proved to be very exorbitant, or to have been obtained by compulsion or fraud. *The Helen and George*, Swabey, 368.

It is competent to the master to make an agreement with salvors as to the remuneration for their services, and if the agreement is fair, it will bind the owners. *The Arthur*, 6 L. T. 556.

The burden of proof is upon the parties alleging the agreement. *Ib.*

It is no reason for setting aside a salvage agreement that the salvors were not aware of the exact value of the cargo. *The Henry*, 15 Jur. 183.

Agreement for Particular Sum—Liability of Shipowners for Salvage of Cargo.]—A vessel, the value of which was 3,500*l.*, and the cargo of which was worth 14,000*l.*, having been for three days on rocks in Castraes Bay, in the Gulf of Tartary, the master entered into an agreement with the salvors to pay them 200*l.* for each day of service, and a further sum of 2,000*l.* in the event of the vessel being got or coming off the rocks during the continuance of the attendance of the salvors:—Held, that the agreement was fair and reasonable and binding on the owners of the vessel, and that the owners of the vessel were liable for the whole amount agreed upon without any deduction in respect of the salvage of the cargo. *The Raisby* (infra) distinguished. *The Prinz Heinrich*, 57 L. J., Adm. 17; 13 P. D. 31; 58 L. T. 593; 36 W. R. 511; 6 Asp. M. C. 273.

Where Sum too Small.]—An agreement for a sum of 8*s.* 6*d.* overruled as utterly futile, where it appeared that there was danger incurred by the salvors in rendering the service. *The Phantom*, L. R. 1 A. & E. 58 ; 12 Jur. (N.S.) 529 ; 14 W. R. 774.

Execution more Difficult than Expected.]—When an agreement to fix the amount of the remuneration to be paid for salvage services has been deliberately entered into at the time of the commencement of the danger between perfectly competent parties, the court will not allow the agreement to be set aside merely because the execution of it has turned out more difficult than was anticipated at the time of making the contract. *The Waverley*, 40 L. J., Adm. 42 ; L. R. 3 A. & E. 369 ; 24 L. T. 713 ; 1 Asp. M. C. 47.

A foreign vessel, fifty miles off the Dutch coast, being in difficulty, in consequence of the boisterous state of the weather, and being leaky, called in the assistance of an English fishing smack, and engaged the captain, by a written agreement, "to pilot and to sail ahead for 50*l.*" After four days' boisterous weather, during which the captain of the smack worked at the pumps, the vessel was got into port. The owners of the smack refused the tender of 50*l.*, and brought an action for salvage services rendered to the vessel. The court was of opinion that the agreement being to perform a service for a specific sum, was not to be set aside because the weather became tempestuous, and by reason thereof, that the vessel was longer in arriving at a port of safety than might reasonably be anticipated ; and held, that salvage was barred by the agreement, as nothing was done to convert pilotage service into a salvage service, and that the sum specified in the agreement was a sufficient compensation. *The Jonge Andries*, Swabey, 303 ; 11 Moore, P. C. 313 (nom. *Alsey* v. *Albertuszen*) ; 6 W. R. 198—P. C.

Agreement not to Claim.]—An agreement entered into between the master of a salving ship and the officer commanding the distressed vessel, by which the latter acknowledges the receipt of the men, and undertakes "to pay all expenses attached thereby, as my vessel is in distress for want of men, and I cannot bring her in without help," is not such an agreement as will oust the right of the salvors to reward, but is an agreement to pay expenses in all events. *The Charles*, L. R. 3 A. & E. 536 ; 26 L. T. 594 ; 21 W. R. 13.

Agreement Unperformed—Right to Salvage.]—A ship that performs a salvage service is entitled to salvage reward ; and not the less so because her master has entered into an agreement to take the ship in distress to a place of safety, which, owing to no fault of his own, he does not do. *The Hestia*, 64 L. J., Adm. 82 ; [1895] P. 193 ; 11 R. 808 ; 72 L. T. 364 ; 43 W. R. 669 ; 7 Asp. M. C. 599. And see *The Samuel*, infra, col. 657.

Agreement—Supervening Circumstances.]—The plaintiffs' steamer fell in with the defendants' steamer, which was disabled, about 260 miles from Gibraltar, and sixty miles from Carthagena. The weather at the time was described as "moderately" bad. An agreement was entered into between the captains of the two vessels by which it was agreed that the defendants' steamer should be towed to Gibraltar for the sum of 600*l.*, and that she should provide ropes and hawsers. The next day the weather became much worse, the wind blowing like a hurricane. The hawsers were several times broken, and, at length, one sound rope only was left. The plaintiffs' steamer, therefore, towed the disabled vessel to Carthagena instead of to Gibraltar. In an action of salvage the court held that the contract had been put an end to by supervening circumstances, and awarded the salvors 900*l.* The defendants appealed :—Held, that the circumstances had made the service wholly different from that contemplated by the parties ; that the court had authority to deal with the question as though no contract had been made ; and that the decision was therefore right. *The Westbourne*, 58 L. J., Adm. 78 ; 14 P. D. 132 ; 61 L. T. 156 ; 38 W. R. 56 ; 6 Asp. M. C. 405—C. A.

—— **Average Bond.**]—The "G." fell in with the "R.," which was in distress. The following agreement was signed by the two captains : "At my request the captain of the 'G.' will tow my ship, the 'R.' to St. Nazaire, that being the nearest port, for repairs. The matter of compensation to be left to arbitrators at home." The "G." towed the "R." safely to St. Nazaire. The "R." discharged her cargo at Dunkirk, and an average bond in the usual form was taken from the consignees of the cargo. The owners of the "G." brought an action for salvage of the ship and freight against the "R.," and were awarded salvage. They also brought an action in France for the salvage of the cargo against the cargo owners, but failed in it. They then brought this action in personam against the owners of the "R." to recover salvage in respect of the services to the cargo, or, in the alternative, damages from the defendants, for not taking a proper bond to secure salvage from the cargo owners :—Held, that the defendants were not primarily liable to pay salvage in respect of the cargo, that they had not bound themselves by the above agreement to do so, and that it was not their duty to obtain a bond from the cargo owners for the proportion of any salvage which might be due. *The Raisby* or *Cardiff Steamship Co.* v. *Barwick*, 54 L. J., Adm. 65 ; 10 P. D. 114 ; 53 L. T. 56 ; 33 W. R. 938 ; 5 Asp. M. C. 473.

Implied Authority of Master.]—Observations as to the implied authority of shipmasters to enter into salvage agreements. *The Renpor*, 52 L. J., Adm. 49 ; 8 P. D. 115 ; 48 L. T. 887 ; 31 W. R. 640 ; 5 Asp. M. C. 98.

Validity—Action by Seamen.]—An agreement was made between the masters of the "W." and the "N.," which was in need of assistance, that the "W." should tow the "N." to Queenstown for the sum of 200*l.* There was no evidence at the trial to shew that the master of the "W." consulted the officers and crew as to the terms of the agreement. The service was duly performed, and subsequently thirteen of the officers and crew of the "W." brought an action of salvage against the "N." The defendants pleaded, inter alia, that they had tendered 200*l.* to the owners of the "W.," but this sum was not paid into court :—Held, that the agreement must be upheld, and the 200*l.* apportioned amongst the owner and crew of the "W." Held, also, that when a fair salvage agreement has been made in a bonâ fide manner by the masters of the salving and the salved vessels the officers and seamen of the salving ship ought not to bring an action of salvage, and

that the plaintiffs must therefore pay the costs of the action. *The Nasmyth*, 54 L. J., Adm. 63; 10 P. D. 41; 52 L. T. 392; 33 W. R. 736; 5 Asp. M. C. 364.

Liability of Shipowner for Value of Ship, Freight and Cargo.]—An agreement made by the master of a vessel in distress to pay salvors a fixed sum is an agreement made on behalf of and pledging the credit of the shipowners, so as to make them liable to the salvors for the whole amount so agreed upon, and not merely for such proportion of such amount as the value of the ship and freight bears to the value of the cargo. *The Raisby*, supra, distinguished. *The Cumbrian*, 57 L. T. 205; 6 Asp. M. C. 151.

£500 for half-an-hour's Towage—Enforcement.]—An agreement by the master of a valuable steamship in the South Atlantic to pay 500*l.* for half-an-hour's towage by a large mail steamship in order to get his engines, which were partially disabled and would not turn over the centres, under way:—Held, to be fair and reasonable, and enforced by the court. *The Strathgarry* [1895] P. 264; 11 R. 783; 72 L. T. 900; 8 Asp. M. C. 19.

Owners Cited—Agreement to Pay Salvage.]—Owners cited to shew cause why salvage awarded by arbitrators abroad by arrangement between consignees and salvors should not be awarded. *The Sir Francis Burton*, 2 Hag. Adm. 156.

Agreement Binding on Salvors.]—An agreement to render salvage services for a named sum is binding, and ordinarily prevents further salvage being claimed. *The Musgrave*, 2 Hag. Adm. 77.

Salvage agreement upheld. *The True Blue*, 2 W. Rob. 176; 2 Not. of Cas. 413.

Agreement to stand by—Ship lost.]—The steamship "W." having found the "A." on February 12th off Finisterre in a disabled state, took her in tow until February 14th, when, owing to the condition of the "A.," the master of the "W." proposed to abandon her. The master of the "A." persuaded the master of the "W." to enter into an agreement in writing to "stand by the 'A.' as long as possible, and that the 'W.' and owners are to be paid for the time and towing already done and to be done from the 12th February, 1883." The "W." then took the "A." again in tow, but on February 16th, owing to the weather, it was found necessary to abandon her, and she was totally lost. In an action for towage against the owners of the "A." it was held that the agreement was reasonable, and one which the master had authority to make, and 400*l.* was awarded for the towage. *The Alfred, The Wellfield (Owners)* v. *Adamson*, 50 L. T. 511; 5 Asp. M. C. 214.

Unsuccessful Attempt—Agreement—Subsequent Salvors.]—Two agreements were made with salvors, both of which, after some services rendered, had to be abandoned; other salvors then came up, but the owners gave notice to two of them that no assistance was required:—Held, that the first salvors were entitled to salvage, apart from the agreements; that the subsequent salvors not having had notice that their services were not needed, were also entitled to salvage. *The Samuel*, 15 Jur. 407.

Concealment of Damage—Towage Agreement—Salvage Awarded.]—The master of a brig which had suffered some damage to her compass and lost an anchor, agreed with a tug to tow him to London for 40*l.*, without disclosing the damage. On discovering the damage, the tug owners brought a suit for salvage:—Held, that salvage cannot be engrafted on extraordinary, though it may be on ordinary towage; distinction between towage services and agreements:—Held, also, that the concealment of the damage to the brig vitiated the towage contract. Salvage awarded. *The Kingalock*, 1 Spinks, 267.

Power of Salving Owners to Bind their Crew by Agreement with Salved Ship.]—The master of a salving vessel, a part owner, agreed with the owners of the salved vessel in the presence of the other part owners to accept 800*l.* for the salvage services; and that sum was paid to him. The crew of another vessel engaged in the salvage service being dissatisfied with the share of the 800*l.* offered to them, brought an action for salvage:—Held, that neither the master nor the owners have power to bind the crew of the salvor without their consent, and further salvage awarded. *The Sarah Jane*, 2 W. Rob. 110.

An agreement between the owner of the salving ship and the owner of the ship in distress does not preclude the master and crew of the salving ship from suing for salvage. *The William Lushington*, 7 Not. of Cas. 361.

Burden on those who set up Agreement to Prove it.]—The burden of proving an agreement in a salvage action is on those who rely upon it. An agreement pronounced against as not proved, the court not coming to any decision as to whether as alleged, it was a forgery. *The Resultatet*, 17 Jur. 353.

—— And to Prove that it was Fair.]—It lies upon the shipowner setting up an agreement with the salvor that he should accept a stipulated sum to prove that it was just. *The British Empire*, 6 Jur. 608.

Agreement Cancelled by Consent.]—An agreement was made between the masters of two steamships that one should assist the other, which was aground, and the service completed under that agreement. It was subsequently cancelled by mutual consent of the two masters. The agreement cannot be set up as a bar to a salvage action. *The Africa*, 1 Spinks, 299.

No Duty to make Agreement.]—Salvors are entitled to the judgment of the court as to the amount of their remuneration, and are not under any obligation to negotiate. *The Tritonia*, 2 W. Rob. 529.

Master of Salvor can bind Owner but not Crew.]—The master of a salving vessel can by agreement, as to the amount of salvage, with those on board the salved ship, bind his own interest as salvor and that of his owners, but not those of the crew, except with their concurrence. *The Britain*, 1 W. Rob. 40.

An agreement to tow a ship in distress from the Queen's Channel to London for 50*l.* attempted to be set aside by persons claiming as salvors upon the ground that it had been cancelled either by mutual consent or by supervening bad weather, but upheld. Danger of setting aside towage or

salvage contracts except for exceptional circumstances. *The Betsey*, 2 W. Rob. 167; 2 Not. of Cas. 409.

An agreement between a Thames tug and a ship ashore off Shoebury that the tug should get her afloat and take her to Gravesend for 80*l.* upheld; although the ship had to be lightened and another tug employed, and the service was longer than expected. *The Cato*, 35 L. J., Adm. 116.

Unfair Agreements set aside.]—The court will set aside an agreement for salvage services where it is satisfied, first, that the parties were not contracting upon equal terms; and secondly, that the sum demanded and insisted on by the salvors is exorbitant. *The Rialto*, 60 L. J., Adm. 71; [1891] P. 175; 64 L. T. 540; 7 Asp. M. C. 35.

A steamer fell in with another steamer in the Atlantic, which had lost part of her propeller, was leaking, and could not use her engines. The vessel in distress was towed by the other vessel to Halifax, a distance of about 350 miles. Before the service was begun the masters of the salving and salved vessels signed an agreement that the owners of the salved vessel should pay 5,000*l.* for the service or a sum for work done if it was unsuccessful. The master of the salving vessel would not take a less sum, and the master of the salved vessel had reasonable grounds for believing, and believed, that his vessel would be abandoned if he did not sign the agreement. The sum of 5,000*l.* was more than one-fifth of the total value of the salved vessel, her cargo and freight:—Held, that the agreement must be taken to have been made under compulsion, and could not be enforced, having regard to the fact that the sum stipulated for was exorbitant. The court, treating the agreement as inoperative, awarded the salvors 3,000*l.* as a fair remuneration for the services, and allowed them their costs of the action. *The Mark Lane*, 15 P. D. 135; 63 L. T. 468; 39 W. R. 47; 6 Asp. M. C. 540.

The commander of a Queen's ship sent to assist a ship in distress cannot impose terms and refuse to give salvage assistance unless his terms are accepted. *Woosung, Cargo ex*, 1 P. D. 260; 35 L. T. 8; 25 W. R. 1; 3 Asp. M. C. 239—C. A.

Grounds for Setting Aside Agreement.]—Contract to stand by and see the distressed vessel into safety for 500*l.* upheld. Fraud or cancellation by consent are the only grounds for avoiding contracts to salve. *The Repulse*, 2 W. Rob. 396.

Corrupt Agreement by Vice-Consul.]—An agreement to render salvage service to a Portuguese ship ashore at Dungeness, made by the agent of the Portuguese vice-consul upon the terms that he should receive 50*l.* out of the 600*l.* agreed to be paid for salvage, set aside as corrupt. *The Crus V*, Lush. 583.

Agreement to Salve Ship and not Cargo.]—Agreement for salvage of the ship apart from the cargo on board not allowed by the court. *The Westminster*, 1 W. Rob. 229.

Arrest not superseded—Alleged Agreement.]—A warrant of arrest in a salvage suit will not be superseded upon an allegation of an agreement between the salvor and shipmaster to refer the claim to arbitration. *La Purissima Concepcion*, 13 Jur. 545.

Salvage for Sum fixed—Issue Directed.]—In an action for salvage claiming 2,000*l.* the defence was that the service was rendered under a contract for 50*l.* made between the masters of the ships, which was a fair contract. Issue directed to try the case. *Buchanan* v. *Barr*, 5 Ct. of Sess. Cas. (3rd ser.) 973.

18. Jurisdiction.

a. High Court.

Locality.]—Semble, salvage on the Leigh Middle Sand in the Thames is not within the ancient jurisdiction of the admiralty. *The Eleanor*, 6 C. Rob. 39.

Or salvage on the Black Tail Spit on the Essex coast. See *The Hercules, Baxter* v. *Reeder*, 6 C. Rob. 39, n.

—— **Services where Rendered.**]—Defendants in a cause of salvage, instituted against the cargo of a foreign ship to recover for salvage services rendered in saving the lives of a number of the crew and passengers on board such ship, alleged in their statement of defence that the vessel in which the cargo proceeded against had been laden was not, at the time the salvage services were rendered, stranded or in distress on the shore of any sea or tidal water within the limits of the United Kingdom. The plaintiffs demurred, on the ground that the facts therein stated were not sufficient to exclude the jurisdiction of the court. The court sustained the demurrer. *The Deutschland*, 25 W. R. 755.

The admiralty court had jurisdiction in a salvage case where part of the services were performed on shore, as unloading cargo after the ship has been brought in. *The Rosalie*, 1 Spinks, 188.

—— **Onus of Proof of Distance.**]—To oust the court of its municipal jurisdiction, it lies upon the defendant to prove that the vessel was at a distance from shore to which the powers of the court do not extend. *The Gertrude*, 30 L. J., Adm. 130.

—— **3 & 4 Vict. c. 65.**]—Monition to owner of timber picked up adrift in Yarmouth harbour to shew cause why he should not pay salvage rejected, on the ground that the court had no jurisdiction under 3 & 4 Vict. c. 65, s. 6. *Raft of Timber*, 2 W. Rob. 251.

Agreement made on Land.]—A ship sunk at the Nore was raised by divers, and a salvage suit brought against her. The owners appeared under protest to the jurisdiction, alleging that the services were performed under an agreement made on land:—Protest overruled. *The Catherine*, 12 Jur. 682; 6 Not. of Cas. Suppl. xliii.

Cinque Ports.]—The 17 & 18 Vict. c. 104. s. 460, does not alter the jurisdiction of the court of admiralty and the cinque ports in cases of salvage services performed within the limits of the cinque ports. *The Maria Luisa*, Swabey, 67; 2 Jur. (N.S.) 264; 4 W. R. 376.

Salvage of a Whale.]—Royal fish taken within the jurisdiction of the cinque ports belong to the warden. *Cinque Ports (Lord Warden)* v. *Rex*, 2 Hag. Adm. 438.

Extent of—Value.]—The court of admiralty and the admiralty court of the cinque ports

have both jurisdiction over claims for salvage where the value of the property salved does not exceed 1,000*l.* *The Jeune Paul*, 36 L. J., Adm. 11; L. R. 1 A. & E. 336; 16 L. T. 125; 15 W. R. 776.

The words in 25 & 26 Vict. c. 63, s. 49, determining the jurisdiction of the court of admiralty by the value of the property saved, mean the value of the property when first brought into safety by the salvors, and not its value at any subsequent period. *The Stella*, 36 L. J., Adm. 13; L. R. 1 A. & E. 340; 16 L. T. 335; 15 W. R. 936.

A salvage suit was instituted in the court of admiralty, in a sum exceeding 900*l.*; the value of the property saved was less than 1,000*l.*:—Held, that the court had jurisdiction to entertain the suit. *The Empress*, 41 L. J., Adm. 32; L. R. 3 A. & E. 452; 25 L. T. 885; 20 W. R. 553; 1 Asp. M. C. 183.

By 17 & 18 Vict. c. 104, s. 460, and 25 & 26 Vict. c. 63, ss. 49, 50, the court of admiralty has not jurisdiction to determine and award the amount of salvage due if the value of the property saved is proved not to exceed 1,000*l.*, but nevertheless it retains jurisdiction to condemn in costs and damages salvors so wrongfully arresting property, and for other collateral purposes. *The Kate*, Br. & Lush. 218; 33 L. J., Adm. 122; 10 Jur. (N.S.) 444; 9 L. T. 782.

A claim for less than the sum of 200*l.* was made for salvage service rendered within the limits of the United Kingdom, i.e. within three miles from the shore:—Held, that, under 17 & 18 Vict. c. 104, s. 460, the court of admiralty had not jurisdiction to adjudicate on the claim. *The Leda*, Swabey, 40; 2 Jur. (N.S.) 119; 4 W. R. 322.

Where the value of the property saved does not exceed 1,000*l.*, the court of admiralty will, notwithstanding an absolute appearance is given by the defendant, refuse to proceed in the salvage suit, on the ground that 17 & 18 Vict. c. 104, s. 460, and the 25 & 26 Vict. c. 63, s. 49, prohibit the court from exercising jurisdiction. *The Louisa*, Br. & Lush. 59; 9 Jur. (N.S.) 676; 11 W. R. 614. See also *The William and John*, post, col. 663.

—— **Owner.**]—It is immaterial to this question that the party defending is the mortgagee, not the owner of the ship. The word "owners" in 17 & 18 Vict. c. 104, s. 460, if necessary, extends to all persons interested in the property. *Ib.*

—— **Estoppel.**]—In a salvage suit the defendants entered an absolute appearance. The vessel being arrested, was released on the 11th January, on an undertaking by the proctors of the owners to file an affidavit of value within a week. On the 15th they filed an affidavit stating the value of the vessel, freight and cargo to be over 1,000*l.* On the 19th a receiver of wreck made an affidavit that the value was under 1,000*l.* On the 1st February the defendants applied to dismiss the suit with costs, on the ground that the court had no jurisdiction, which in such a case lay with the justices, under 25 & 26 Vict. c. 63, s. 49:—Held, that, under the circumstances, the defendants had estopped themselves from objecting to the jurisdiction, and the application was dismissed with costs. *The Dart*, 21 L. T. 765.

Agreement giving.]—Two causes of salvage against a vessel were consolidated upon motion by the defendants, and with the consent of all parties. On a petition being subsequently filed, the defendants moved for its dismissal, with costs and damages, on the ground that the value of the property salved was under 1,000*l.*:—Held, that the proceedings in reference to the consolidation must be construed as an agreement which gave the court jurisdiction under 31 & 32 Vict. c. 71, s. 9. *The Herman Wedel*, 39 L. J., Adm. 30; 23 L. T. 876.

Damages against Salvors for Arresting.]—The court will not decree for damages unless the circumstances shew mala fides or crassa negligentia on the part of the salvors in arresting, whereof the fact that salvors arrested without first obtaining a valuation of the property from the receiver of wreck (as provided for by 25 & 26 Vict. c. 63, s. 50) is not conclusive evidence. *The Kate*, Br. & Lush. 218; 33 L. J., Adm. 122; 10 Jur. (N.S.) 444; 9 L. T. 782.

Objection, when taken.]—The objection to the jurisdiction of the court on the ground that the property is under 1,000*l.*, should be alleged when the appearance is entered; but where a defendant appeared absolutely, and raised the objection after the petition was filed, the court entertained it, but refused costs. *The Louisa*, Br. & Lush. 59; 9 Jur. (N.S.) 676; 11 W. R. 614.

Release by Receiver of Wreck.]—After release by the receiver of wreck of salved property upon security given by the owner under 17 & 18 Vict. c. 104, s. 468, the salvors have no right to detain the property or to arrest it by admiralty warrant. *The Lady Katherine Barham*, Lush. 404; 5 L. T. 693.

Jurisdiction does not depend on Salvors' Possession.]—The rights of the admiralty court to enforce salvage did not depend upon the salvors retaining possession. *The Eleonora Charlotta*, 1 Hag. Adm. 156.

Proceedings before Justices—Subsequent Proceedings in High Court.]—The master of a vessel agreed to pay 140*l.* for salvage services to be rendered to his ship. The salvors took proceedings before justices to enforce payment; the justices held the agreement invalid and reduced the sum to be paid to 70*l.* A cause of salvage was then instituted in the high court of admiralty:—Held, under 17 & 18 Vict. c. 104, s. 460, and 25 & 26 Vict. c. 63, s. 49, that the suit be dismissed, the sum claimed being under 200*l.* *The William and John*, Br. & Lush. 49; 32 L. J., Adm. 102; 9 Jur. (N.S.) 284; 8 L. T. 56; 11 W. R. 535.

Award of Commissioners—Subsequent Action.]—See *The Elise*, supra, col. 664.

Capture—Ransom—Hostage.]—The master of a ship captured by a French privateer ransomed the ship and cargo and went himself as hostage. On the ship's arrival in England he arrested the cargo for payment of the ransom bill. Prohibition to the admiralty before appearance of the cargo-owner, refused. *Tranter* v. *Watson*, 6 Mod. 11.

b. Justices.

"Ship or Boat Stranded or otherwise in Distress."]—Justices awarded salvage in respect of services rendered to a hopper barge, which had been found adrift without any person on board

of her in the Wash, about three miles from Boston. The barge was not furnished with any means by which she could be propelled, and was used for dredging purposes:—Held, that the barge was a "ship in distress on the shore of a sea or tidal water," within the meaning of the Merchant Shipping Act, 1854, s. 458, and that the justices had jurisdiction to award salvage. *The Leda* (Swabey, 40) followed. *The Mac* or *Macadam* v. *Saucy Polly*, 51 L. J., Adm. 81; 7 P. D. 126; 46 L. T. 907; 5 Asp. M. C. 555—C. A.

"Sum Claimed."]—The 17 & 18 Vict. c. 104, s. 460, and 25 & 26 Vict. c. 63, s. 49, being read together, enact, that all disputes as to the amount of salvage, where either the sum claimed does not exceed 200*l.* or the value of the property saved does not exceed 1,000*l.*, shall be referred to justices of the peace, and thereby in those cases exclude the jurisdiction of the court of admiralty. *The William and John*, Br. & Lush. 49; 32 L. J., Adm. 102; 9 Jur. (N.S.) 284; 8 L. T. 56; 11 W. R. 535.

By "the sum claimed" is meant the sum claimed by the salvors before the dispute is referred. *Ib.*

The words "disputes as to the amount of salvage" extend to cases where an agreement stipulating for a fixed amount has been made. *Ib.*

The existence of an agreement does not confer jurisdiction upon the court of admiralty, but where that jurisdiction exists, and has been properly set in motion, it may induce the court to give costs to the salvors, although they recover a sum less than 200*l.* *See also Cases* ante, cols. 653, seq.

"Sum in Dispute."]—The words "sum in dispute" in 17 & 18 Vict. c. 104, s. 464, do not mean the sum awarded by the justices and appealed against; and where the only evidence of the sum in dispute is, that the salvors claimed before the justices a certain amount of salvage, not exceeding 200*l.*, an appeal from the award of the justices lies in the admiralty court. *The Andrew Wilson*, Br. & Lush. 56; 32 L. J., Adm. 104; 9 Jur. (N.S.) 474; 8 L. T. 177.

Salvors, having sent in a formal demand in writing for 40*l.*, afterwards, before the justices, claimed a sum not exceeding 200*l.* The justices found that no salvage was due, and from that decision the salvors appealed:—Held, that the sum in dispute was the sum formally demanded, and that as that was under 50*l.*, an appeal did not lie. *The Mary Anne*, 34 L. J., Adm. 73; 12 L. T. 238.

When the sum in dispute exceeds 50*l.*, the court has jurisdiction to entertain an appeal, even though the value of the property salved is under 1,000*l.* *The Generous*, 37 L. J., Adm. 37; L. R. 2 A. & E. 57; 17 L. T. 552; 16 W. R. 519.

Appeal—Varying Order.]—The court will not entertain an appeal from the salvage award of justices upon the mere question of amount, unless plainly exorbitant. *The Cuba*, Lush. 14; 6 Jur. (N.S.) 152.

The salvors brought a barge off a dangerous position near the Nore sand, and claimed 80*l.* The magistrates at Maidstone awarded 15*l.*:—Held, that the latter sum was quite inadequate, and the court gave 40*l.* *The Harriett*, Swabey, 218.

Unless the amount awarded is wholly inadequate, the court will not disturb the award, even though it is of opinion that the magistrates should have given a somewhat larger sum. *The Jeune Louise*, 37 L. J., Adm. 32.

—— **Practice.**]—The court rarely admits new evidence on the hearing of an appeal from an award of magistrates. *The Generous*, supra.

Estoppel.]—The value stated by the owners of salved property in proceedings before commissioners is not conclusive upon the salvor though assented to at the time. *The Hope*, 14 W. R. 467. And see *The Elise*, Swabey, 436.

Appeal from Justices—Sum in Dispute.]—There was no appeal from justices in salvage cases under 17 & 18 Vict. c. 104, s. 464, unless "the sum in dispute" was over 50*l.* The salvors claimed 40*l.* in substance, but formally a sum not exceeding 200*l.* The justices awarded nothing:—Held, that there was no appeal. *The Mary Anne*, Br. & Lush. 334.

17 & 18 Vict. c. 104, s. 460.]—The words "at or near the place where such ship or boat is lying" in the above section refer to justices residing at or near the place to which the ship is brought immediately after the salvage service. *Summers* v. *Buchan*, 18 Ct. of Sess. Cas. (4th ser.) 879.

c. County Court.

Extent of.]—By 17 & 18 Vict. c. 104, ss. 458, 460, and 25 & 26 Vict. c. 63, s. 49, where certain services are rendered to a ship or a boat in distress on the seashore, there shall be payable to the parties by whom the service is rendered a reasonable amount of salvage, the amount, in case of dispute, where the sum claimed does not exceed 200*l.*, or the value of the property saved does not exceed 1,000*l.*, to be referred to the arbitration of two justices or a county court judge:—Held, that a county court judge may exercise this jurisdiction where there has been a salvage agreement for a fixed sum, and that a rule by which such proceedings are to be commenced in the county court by plaint and summons is valid. *Beadnell* v. *Beeson*, 9 B. & S. 315; 37 L. J., Q. B. 171; L. R. 3 Q. B. 439; 18 L. T. 401; 16 W. R. 1008.

Distribution of Salvage.]—A county court, having admiralty jurisdiction, has jurisdiction to entertain a suit of distribution of salvage where the amount which the court is asked to apportion does not exceed 300*l.*, notwithstanding that the value of the property saved exceeds 1,000*l.* *The Glannibanta, Elemore* v. *Trim*, 46 L. J., Adm. 75; 2 P. D. 45; 36 L. T. 27; 25 W. R. 513.

The admiralty jurisdiction of the county courts extends to the distribution of salvage, although there has been no original claim in the county court for salvage. *Ib.*

Enforcing Bonds given to Receivers of Wreck.]—As it is a matter of doubt whether the county courts having admiralty jurisdiction have power to enforce salvage bonds given to receivers of wreck under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 468, the court of admiralty will, on the application of a salvor in respect of whose services such a bond has been

given, grant leave to proceed in the high court under the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 9. *The John Evans*, 43 L. J., Adm. 9; 30 L. T. 308; 2 Asp. M. C. 234.

19. SALVAGE LIEN.

Sum paid to release Ship.]—A shipowner who has paid a sum of money, under 9 & 10 Vict. c. 99, in order to release the ship and cargo from a claim for salvage, has a lien on the cargo for the proportion of those expenses payable to him by the owners of the goods, and an insurable interest in the cargo in respect of such lien. *Briggs* v. *Merchant Traders' Ship Loan and Assurance Association*, 13 Q. B. 167; 18 L. J., Q. B. 178; 13 Jur. 787.

Of Finder.] — The deputy vice-admiral, who received an anchor and a hawser, alleged to have been left at sea, from the finder, refused on application by the real owner to deliver them up, until the salvage was paid, or security given for the payment of it:—Held, that this was a conversion, but that if he had merely refused to deliver them up until it was ascertained whether salvage was due or not, it would not have amounted to a conversion. *Clark* v. *Chamberlain*, 2 M. & W. 78; 2 Gale, 217.

Solicitors' Costs — Expenses of Crew — Priority.]—Solicitors for defendants in a salvage action against a foreign ship, who are entitled to a charge upon the ship, or the proceeds thereof, for their costs and expenses incurred in the preservation of the property, do not take priority of the claim of the foreign government, who, on the abandonment of the ship by her owners, are entitled, by the provisions of their code, to a lien upon the ship, or the proceeds, for the expenses of sending back the ship's crew to their own country. An Italian ship was brought into a British port by salvors. A salvage action having been instituted, the ship was sold by order of the court, and a sum was awarded out of the proceeds to the salvors. After payment of that sum, and the costs of the plaintiffs, a balance of 60*l*. 10*s*. 3*d*. remained in court. The defendants' solicitors had incurred expenses in pumping the ship, paying the marshal's possession fees, &c., and claimed a charging order upon the balance in court for such expenses, and sought payment out of such balance to them. The Italian government, through their consul in this country, had sent home the crew of the ship, and had incurred expenses by so doing. By Italian law such last-mentioned expenses are a lien upon the ship. The Italian consul opposed payment out to the defendants' solicitors, and claimed priority for the lien of the Italian government:—Held, that the Italian government was entitled to such priority. *The Livietta*, 52 L. J., Adm. 81; 8 P. D. 209; 49 L. T. 411; 5 Asp. M. C. 157.

Cargo raised from Wreck.]—H. & Co., owners of copper ore, employed T. to convey it in his barge from Liverpool to Birkenhead, and to deliver it there to L., to be crushed in his mills, L. having agreed to indemnify H. & Co. against all risk of such transit. The barge with the ore on board, having afterwards, without any fault of T., sunk in the Mersey, he informed H. & Co. of the accident, and requested to be employed to raise the ore, when he was told that H. & Co. had nothing to do with it, and that he should see L., who had the management of it. L., when applied to by T. as to getting the ore up, said that he was insured with S., and that T. must therefore go to S. for orders. T. having accordingly obtained from S. directions to do the work, raised the ore, and afterwards conveyed it to Birkenhead, and then claimed a lien on it as against H. & Co. for the expenses of raising it:—Held, that he had no right to such lien, on the ground either of any contract with H. & Co., or of general average loss or of salvage. *Castellain* v. *Thompson*, 13 C. B. (N.S.) 105; 32 L. J., C. P. 79; 7 L. T. 424; 11 W. R. 147.

Priority.]—Salvage lien precedes a wages lien. *The Sabina*, 7 Jur. 182. As to damage lien, see *The Selina*, supra, col. 632; *Att.-Gen.* v. *Nørstedt*, supra, col. 164.

Cargo Sold—Following Proceeds.]—Where a suit for salvage of life is instituted against a cargo a part of which had been sold before action brought, the court perhaps has power to follow the proceeds. *The General Maclean*, 13 W. R. 728.

Judgment for Salvage—Action for Amount Paid for Salvage against Underwriter—Salvage not caused by Perils insured against.]—See *Ballantyne* v. *Mackinnon*, post, col. 1321.

20. PRACTICE.

a. Generally.

See also XXVI. ADMIRALTY LAW AND PRACTICE, infra.

Trinity Masters.] — In salvage actions the presence of Trinity masters is desirable. *The James Dixon*, 2 L. T. 696.

Compromise—Mistake of Fact.]—A compromise of a salvage action agreed to by the salvors under a mistake of fact is not binding upon them. *The Monarch*, 56 L. J., Adm. 114; 12 P. D. 5; 56 L. T. 204; 35 W. R. 292; 6 Asp. M. C. 90.

Several Salvors—Cross-examination.]—Rival salvors have a right to cross-examine each other's witnesses, but only on a point at which they are at issue. *Ib.*

In a suit by rival salvors being heard together the witnesses called on behalf of one set of salvors will be liable to cross-examination; first on behalf of the rival plaintiffs, and then on behalf of the defendants. *The Philadelphia*, Br. & Lush. 28.

Right to begin.]—The right to begin does not shift with the burden of proof, but is almost universally with the claimant. *The Magdalen*, 31 L. J., Adm. 22; 5 L. T. 807.

Where there are rival salvors, the salvor who first enters his suit has the right to begin, unless special circumstances are shewn. *The Morocco*, 24 L. T. 578; 1 Asp. M. C. 46.

Service of Writ on Solicitors for Party not appearing.]—An order made for leave to serve the writ in a collision action upon solicitors who had acted for the owners of the other ship in an action for the same collision, which action had been discontinued, and upon evidence that the solicitors no longer acted for the owners, set aside. *The Pommerania*, 48 L. J., Adm. 55; 4 P. D. 195; 39 L. T. 642.

Service of Notice of Writ.]—Where in an action in personam for alleged salvage services rendered to ship, freight and cargo, the plaintiffs, the owners, master and crew of the salving vessel, had served the writ upon the owners of the salved ship resident within the jurisdiction:—Held, that under R. S. C. 1883, Ord. XI. r. 1, leave might be obtained to serve the cargo-owners, out of the jurisdiction, with notice of the writ. *The Elton*, 60 L. J., Adm. 69; [1891] P. 265; 65 L. T. 232; 39 W. R. 703; 7 Asp. M. C. 66.

Salvage after Collision—Owner of wrongdoing Ship intervening.] — Where a ship has been found to blame in a collision suit and a salvage suit has been instituted against "B.," the other ship, "B." has a right to intervene in the salvage suit; and if they put in bail to answer the salvor's claim in lieu of the bail given by the owners of "B.," the court will give them the conduct of the defence of the salvage suit. *The Diana*, 31 L. T. 202; 2 Asp. M. C. 366. And see *The Kathleen*, infra, col. 672.

Action in personam.] — Monition decreed against the owner of ship and cargo salved, to shew cause why salvage should not be pronounced for; the salved property being at sea. *The Meg Merrilies*, 3 Hag. Adm. 346. S. P., *The Trelawney*, 3 C. Rob. 216, n. *S. C.*, 4 C. Rob. 223. *Duncan* v. *Dundee, Perth and London Shipping Co.*, 5 Ct. of Sess. Cas. (4th ser.) 742. *The Hope*, 3 C. Rob. 215. *Five Steel Barges*, supra, col. 626.

The court refused to allow proceedings in personam to be commenced against the owners of a ship that had received salvage assistance from a Queen's ship, and had on a subsequent voyage been lost. *The Chieftain*, 4 Not. of Cas. 459.

Effect of Judgment in rem in Salvage Action.]—See *Ballantyne* v. *Mackinnon*, post, col. 1321.

Court of Passage—Distribution of Salvage by High Court.]—See *The Theresa*, infra, col. 945.

Salvage paid to Master—Recovery by Shipowner.]—See *The Princess Helena*, supra, col. 650.

b. Parties.

Several Salvors.]—The court will protect owners where the expenses have been increased by separate suits having been brought by two sets of salvors, and the interest of the one set has been denied by the other. *The Bartley*, Swabey, 198.

Who to Sue.]—Two suits afterwards consolidated were brought, one by the owner and the other by the charterer of the salving ship, for salvage to a ship also chartered to the same charterer:—Held, that as under the terms of the charterparty the charterer of the salving ship was for the time being the owner, he, and not the owner, was entitled to institute the suit. *The Scout*, 41 L. J., Adm. 42; L. R. 3 A. & E. 512; 26 L. T. 371; 20 W. R. 617; 1 Asp. M. C. 258.

Third Party—Procedure.]—In an action for damage by collision brought by a vessel at anchor against a vessel in tow of a tug, the owners of the tug were made third parties under Ord. XVI. r. 18, as the defendants claimed to be indemnified by the owners of the tug against the plaintiffs' claim, on the ground that the improper navigation, if any, was that of the tug. An application for directions under Ord. XVI. r. 21, was subsequently made, and the plaintiffs thereupon asked that the third parties should be dismissed from the action on the ground that the plaintiffs would be embarrassed by the proceedings between the defendants and the third parties:—Held, that the third parties must be dismissed, as under the circumstances questions would probably arise between them and the defendants by which the plaintiffs might be embarrassed, as they were different from those upon which the action between the plaintiffs and defendants would turn. *The Bianca*, 52 L. J., Adm. 56; 8 P. D. 91; 48 L. T. 440; 31 W. R. 954; 5 Asp. M. C. 60.

Shipowners—Cargo-owners.]—Salvors of a ship engaged as a common carrier between Dundee and London, sued the shipowners for salvage of ship and cargo, the cargo being the property of various owners. The salvors averred that the salvage was rendered necessary by the negligence of the master:—Held that the action was rightly brought against the shipowners. *Duncan* v. *Dundee, Perth and London Shipping Co.*, 5 Ct. of Sess. Cas. (4th ser.) 742.

Joinder of Plaintiffs—R. S. C. 1883, Ord. XVI. r. 1; Ord. XVIII. r. 1.]—The plaintiffs, owners, masters and crews of four tugs issued a writ of summons, claiming salvage for services rendered to a ship, her cargo and freight. The owners of the ship and cargo appeared under protest, and moved to set aside the writ, or in the alternative to strike out all the plaintiffs but one set, upon the ground that the causes of action were separate:—Held, that the motion be dismissed; and that the above rules of the supreme court, as interpreted by *Smurthwaite* v. *Hannay*, [1894] A. C. 494, do not apply to admiralty practice. *The Maréchal Suchet*, 65 L. J., Adm. 94; [1896] P. 233; 74 L. T. 789; 45 W. R. 141; 8 Asp. M. C. 108.

c. Consolidation.

When allowed.]—Salvage suits may be consolidated on the motion of the plaintiffs and without the consent of the defendants. *The Melpomene*, 42 L. J., Adm. 45; L. R. 4 A. & E. 129; 28 L. T. 76; 21 W. R. 956; 1 Asp. M. C. 575. S. P., *The Jacob Landstrom*, 4 P. D. 191; 40 L. T. 36; 4 Asp. M. C. 58 (not followed in *The Strathgarry*, infra).

Wherever it appears to the court convenient to do so, salvage actions brought by different salvors against the same property in respect of services rendered upon the same occasion will be consolidated without regard to the consent of the parties. *The Jacob Landstrom*, supra, not followed; *The William Hutt* (Lush. 25) and *The Melpomene* (L. R. 4 A. & E. 129) followed. *The Strathgarry*, 64 L. J., Adm. 59; [1895] P. 264; 11 R. 732; 72 L. T. 202; 7 Asp. M. C. 573.

A salvor who saves life in addition to rendering other salvage services is not bound to consolidate against his will. *The Morocco*, 24 L. T. 598; 1 Asp. M. C. 46.

Motion to dismiss after Consolidation.]—When a vessel had been arrested in two causes of salvage, which upon motion by consent of all parties had been consolidated, and a petition was afterwards filed, a motion to dismiss the suit with costs and damages, as the value of the property saved was under 1,000*l.*, was rejected with costs. *The Herman Wedel*, 39 L. J., Adm. 30; 23 L. T. 876.

Counsel.]—When the interests of one of the parties in a consolidated salvage suit are adverse to the interests of the others, separate counsel on his behalf may be heard at the hearing of the consolidated cause. *The Scout*, 41 L. J., Adm. 42; L. R. 3 A. & E. 512; 26 L. T. 371; 20 W. R. 617; 1 Asp. M. C. 258.

d. Tender.

Tender.]—In a case where two actions of salvage were instituted against the same vessel, on behalf of plaintiffs having adverse interests, to recover salvage reward in respect of services rendered on the same occasion, the court on the plaintiffs refusing to consent to a consolidation order, allowed the defendants to make a single tender in respect of the claims in both actions. *The Jacob Landstrom*, 4 P. D. 191; 40 L. T. 38; 4 Asp. M. C. 58.

A defendant may, by act in court, tender a sum of money in satisfaction of the plaintiff's claim, and reserve the question whether he is liable to pay costs. *The Hickman*, 39 L. J., Adm. 7; L. R. 3 A. & E. 15; 21 L. T. 472; 18 W. R. 151.

Where no tender has been made in a salvage suit for services which were actually towage, the amount of claim could not be recovered. *The Strathnaver*, 1 App. Cas. 58; 34 L. T. 148; 3 Asp. M. C. 113—P. C.

Effect on Costs.]—*See* post, cols. 674, seq.

On Appeal against Award.]—The sum of 800*l.* had been awarded by the cinque port commissioners to salvors for services rendered to a brig and her cargo. The owners of the brig and cargo, pursuant to 1 & 2 Geo. 4, c. 76, instituted an appeal against this award in the court of admiralty, and afterwards tendered 100*l.* by act in court:—Held, on motion to direct the notice of tender to be taken off the file, that the appellants were entitled to make such tender by act in court, notwithstanding that no tender had been made prior to the institution of the appeal. *The Annette*, 42 L. J., Adm. 13; L. R. 4 A. & E. 9; 28 L. T. 372; 21 W. R. 552; 1 Asp. M. C. 577.

Tender upheld.]—Tender upheld, though the salvors took out a commission of appraisement, and the salved ship was appraised for considerably more than her stated value. Costs of appraisement allowed. *The Batavier*, 1 Spinks, 169.

Salvage claims by smacksmen and boatsmen rendering trivial services to ships in distress, offers of 30*l.* and 50*l.* having been made for the services, dismissed. *The Black Boy*, 3 Hag. Adm. 386, n.; *The Funchal*, 3 Hag. Adm. 386, n.

Tender without Payment into Court.]—See *The Nasmyth*, infra, col. 673.

Taxation of Costs after Tender pronounced for.]—A tender in respect of salvage services was made and pronounced for by the court, nothing being said as to costs. Upon a subsequent day the plaintiffs moved for an order for taxation and payment of their costs up to tender:—Held, that the defendants and their bail having been dismissed from the suit, no order could be made. *The Countess of Levin and Melville*, 5 L. T. 290.

Tender admits Salvage.]—A tender in a salvage suit is an admission that salvage services were rendered. *The Portia*, 9 Jur. 167.

e. Arrest and Sale—Bail.

Bail.]—When a ship has been found to blame in a cause of collision, and a cause of salvage has been instituted against the other (the injured) ship, the owners of the ship found to blame have a right to intervene in the salvage cause to protect their own interest; and if they choose to put in bail to answer the claim of the salvors in lieu of the bail given by the owners of the injured vessel, the court will give them the conduct of the defence of the salvage suit; under such circumstances the owners of the injured vessel are entitled to have their bail released, and to be paid their costs up to the time when the new bail is put in. *The Diana*, 31 L. T. 203; 2 Asp. M. C. 366.

What Liable to Arrest.]—Services were rendered, by means of which a vessel and the goods on board were saved from total loss, and the lives of a number of passengers also were saved. Suits were instituted on behalf of the persons who rendered the services, against the vessel and her cargo, to recover salvage reward:—Held, that the wearing apparel of the passengers, and other things belonging to them ejusdem generis, on board the vessel, were privileged from arrest. *The Willem III.*, L. R. 3 A. & E. 487; 25 L. T. 386; 20 W. R. 216; 1 Asp. M. C. 129.

Release of Property.]—A vessel which had been saved was valued by a receiver of wreck at less than 1,000*l.* The salvors obtained an order for a commission of appraisement, but did not execute it, and after three weeks gave notice that they proceeded no further in the suit:—Held, that they might, within four days of obtaining the order, have ascertained the value, and that therefore they must be condemned in damages for detention of the vessel during the rest of the three weeks. *The Margaret and Jane*, 38 L. J., Adm. 38; L. R. 2 A. & E. 345; 20 L. T. 1017; 17 W. R. 1064.

After release of salved property by the receiver of wreck upon security to his satisfaction, salvors have no right to detain the property, or to arrest it. *The Lady Katherine Barham*, Lush. 404; 5 L. T. 693.

Perishing Cargo—Order for Sale.]—When a ship and cargo are brought into port by salvors, and a suit is instituted in the court of admiralty to recover salvage reward, that court will, on the application of the salvors, acting with the assent of the owners of the cargo, order a sale of the cargo to prevent deterioration from damage done, although the shipowner, desirous of carrying on the cargo so as to earn freight, opposes the sale and offers to give substantial bail for both ship and cargo; but such sale will be ordered subject to all questions of right to freight. *The Kathleen*,

43 L. J., Adm. 39; L. R. 4 A. & E. 269; 31 L. T. 204; 23 W. R. 350.

—— **Derelict—Default Action.**]—Where in a salvage action, in which no appearance had been entered, it was alleged upon affidavit that the ship and cargo were daily deteriorating in value, and that large expenses were being incurred in respect of the charge of the property, and that the plaintiffs had been in communication with the owners as to a sale, the court, on motion by the plaintiffs prior to decree, ordered an appraisement and sale of the property. *The Anna Helena*, 48 L. T. 681; 5 Asp. M. C. 61.

Bringing in Account of Freight.]—A ship was arrested, after discharge of cargo, in a suit for salvage; bail was given for ship and freight:—Held, that the owners of the vessel proceeded against were bound to bring in an account of freight on oath, and to set forth when, and the names of the parties by whom, such freight had been paid. *The Peace*, Swabey, 85.

Action in rem—Judgment for an Amount in Excess of Bail—Liability for Balance.]—Owners who have appeared as defendants in an action in rem, and have given bail, are still personally liable for any amount which the judgment of the court may find to be due to the plaintiffs in excess of the amount for which bail has been given, and execution may be issued against them for such balance and costs. *The Dictator*, 61 L. J., Adm. 73; [1892] P. 304; 67 L. T. 563; 7 Asp. M. C. 251.

Monition to bring in Freight—Foreign Law.]—In a salvage suit a foreign ship was sold, no appearance being entered for her. The proceeds were insufficient to meet all the claims. The master applied for a monition to the consignees of cargo to bring in the freight, upon which by the foreign law the master had a lien for wages and primage; enforcement of the monition refused, upon the ground that under the circumstances application of the foreign law would be unjust. *The Johannes Christoph*, 2 Spinks, 93.

Appraisement.]—See *The R. M. Mills, Venus, Cargo ex*, supra, col. 633.

Excessive Bail.]—Disapprobation of court where excessive bail demanded. *The Earl Grey*, 1 Spinks, 180. And see *The George Gordon*, infra, col. 1023.

f. Pleadings.

Agreement with Shipowner—Suit against Cargo.]—In a cause of salvage against ship, freight and cargo, the shipowner, after the institution of the cause, paid a sum in settlement of the claim against him, which was accepted by the plaintiffs. The plaintiffs proceeded against the cargo, and pleaded in their petition the payment of this sum by the shipowner, and stated the amount:—Held, that they were not entitled to plead the amount so accepted by them, although they might plead the fact that they had so settled with the shipowner. *The Due Cheechi*, L. R. 4 A. & E. 35, n.; 26 L. T. 593; 20 W. R. 686; 1 Asp. M. C. 294.

—— **Amount Paid to Third Parties.**]—In a suit instituted on behalf of the owners, master and crew of a steam-tug, to recover salvage reward for salving a disabled vessel and her cargo, it appeared by the petition that persons other than the plaintiffs in the cause had assisted in the service, and in an article in the answer filed on behalf of the owners of the salved vessel and her cargo, the defendants alleged that they had been ordered by a court of competent jurisdiction to pay to such other persons 240*l.* in respect of the assistance so rendered by them. The plaintiffs moved to strike out this article. The court, holding that the article was relevant to the matters in issue in the suit, rejected the motion. *The Antelope*, 42 L. J., Adm. 42; L. R. 4 A. & E. 33; 28 L. T. 74; 21 W. R. 464; 1 Asp. M. C. 511. S. P., *The Due Cheechi*, supra.

Specific Expenses.]—When in a salvage cause the petition states expenses to have been incurred in rendering the services without stating their amount and the answer admits all the allegations of the petition, the court of admiralty will not allow evidence to be called by the plaintiff to shew the amount of the expenses. If specific amounts are claimed they must be pleaded so as to give the defendant the opportunity of admitting or denying them. *The Eintracht*, 29 L. T. 851; 2 Asp. M. C. 198.

Inferences.]—When in a salvage suit the defendants admit all the allegations of fact in the petition, but deny the inferences of fact made therefrom in the petition, the plaintiffs may call evidence to establish those inferences. *Ib.*

Separate Petitions—Repeating Allegations.]—Where in a cause of salvage against a derelict ship, rival salvors institute separate causes and file separate petitions, alleging misconduct against one another, the court of admiralty will not allow the defendants, in their answer to the petition of one set of salvors, to plead that in the petition of the other set there are allegations of misconduct, and that they, for the purpose of the cause, and not otherwise, adopt those allegations; they must either make the allegations of misconduct as their own statements, or omit them. *The Kathleen*, 43 L. J., Adm. 39; L. R. 4 A. & E. 209; 31 L. T. 204; 2 Asp. M. C. 367.

When rival salvors file separate petitions, alleging misconduct against each other, and the defendants in their separate answers repeat the charges of misconduct made by each salvor against the other, so that the answers are contradictory, the defendants will not be allowed, on the hearing of both causes at the same time, to cross-examine one set of salvors to shew that they and not the other set had been guilty of misconduct. *Ib.*

Negligence.]—Negligence, though not specifically pleaded in the answer, may be proved to negative a claim to salvage upon a simple traverse of salvage services; but if the defendants mean to charge the claimants with purposely having brought the ship in danger, such defence must be specifically pleaded in the answer. *The Minnehaha, Ward* v. *McCorkill*, Lush. 335; 15 Moore, P. C. 133; 30 L. J., Adm. 211; 7 Jur. (N.S.) 1257; 4 L. T. 810; 9 W. R. 925.

General Denial that Salvage Due.]—On a motion by salvors, on objection to certain articles of the defendants' answer, which averred,

that though the services rendered might be of the nature of salvage service, yet that because the owners of the salving and the charterers of the salved vessel were the same persons, no salvage was due; the court ordered the article denying that any salvage was due to be struck out, but not the other articles detailing the facts, which, if proved, might not bar the claim for salvage, but might affect the quantum. *The Collier*, L. R. 1 A. & E. 83; 12 Jur. (N.S.) 789; 16 L. T. 155.

Amending and Adding.]—The court refused to allow defendants to add to their pleas an allegation that the salvors, since the commencement of the suit, had assaulted some of the witnesses who were going to give evidence on behalf of the owners. *The Fielden*, 11 W. R. 156.

Statement of Claim.]—A statement of claim in a salvage action was drawn in the Form No. 6 of Appendix C. to the Rules of the Supreme Court, 1883; on motion by the defendants under Ord. XIX. r. 7, for a further and better statement of claim or particulars:—Held, that the plaintiffs must deliver a fuller statement of claim, and that in salvage actions a fuller form than that given in Appendix C. No. 6, should generally be followed. *The Isis*, 53 L. J., Adm. 14; 8 P. D. 227; 49 L. T. 444; 32 W. R. 171; 5 Asp. M. C. 155.

Plea of Tender—Payment into Court.]—A plea of tender without payment into court is bad. *The Nasmyth*, 54 L. J., Adm. 63; 10 P. D. 41; 52 L. T. 392; 33 W. R. 736; 5 Asp. M. C. 364.

g. Evidence.

Amount—Different Suit.]—In a salvage suit evidence of the amount in which another suit has been instituted in another court for services rendered at the same time is not admissible. *The Antelope*, 27 L. T. 663; 1 Asp. M. C. 477.

Agreed Value.]—When, in a salvage action, the defendants filed affidavits of value of their ship, freight and cargo, which values have been accepted and agreed to by the plaintiff, the defendants will not be allowed at the hearing to give evidence to decrease the values. *The Hanna*, 37 L. T. 364; 3 Asp. M. C. 503.

Deposition before Receivers of Wreck.]—A receiver of wreck, in taking depositions under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 448, should put down the facts deposed to as given by the deponent, and should not correct any statement made by the deponent which, within the personal knowledge of the receiver, is erroneous. *The Lancashire*, L. R. 4 A. & E. 198; 29 L. T. 927; 2 Asp. M. C. 202.

The examination of the crew of a salved vessel taken by the receiver of wreck under the Merchant Shipping Act, 1854, s. 448, is not admissible as evidence in a salvage suit for the purpose of proving the facts stated in the examination. *The Little Lizzie*, L. R. 3 A. & E. 56; 23 L. T. 84; 18 W. R. 960.

Contradictory.]—When the evidence is directly contradictory, the court considers only on whom the onus of proof lies, and whether that party has discharged it. The court seldom, if ever, attributes perjury to either side. *The Nymphe*, 5 L. T. 365.

Protest.]—In salvage suits the protest should always be brought in. *The Emma*, 2 W. Rob. 315.

On Appeal from Justices.]—Appeals from justices in salvage cases proceeded upon act on petition; further evidence admissible in admiralty on appeal. *The Thomas Wood*, 1 W. Rob. 18.

Facts Admitted.]—See *The Hardwick*, infra, col. 1000.

h. Costs.

Tender—Costs of Proceedings subsequent to.]—A salvage suit was brought, and a sum less by 18*l.* than the limit of 300*l.* of the county courts jurisdiction was recovered. The agreed value of the property saved was 2,200*l.*; the claim was for 700*l.*; there was considerable conflict of evidence as to the degree of meritoriousness of the services, and questions of some difficulty arose:—Held, having regard especially, though not solely, to the smallness of the difference between the sum awarded and the limit of the jurisdiction of the county court, that the case was proper for a certificate to entitle the plaintiffs to costs. *The Hickman*, 39 L. J., Adm. 7; L. R. 3 A. & E. 15; 21 L. T. 472; 18 W. R. 151.

When a tender is made in a salvage suit, it should state that it is a tender for salvage and costs, or should specify the ground upon which costs are not tendered, and refer the question of costs to the consideration of the court. *Ib.*

The master of the "London" agreed for 400*l.* to tow the "Waverley" into Lisbon, about twenty-five miles. The weather, which was bad at the time of the agreement, subsequently became worse, and much difficulty was experienced in performing the salvage. In a suit for salvage the owners of the "Waverley" tendered 400*l.*, the amount agreed upon for salvage, and 123*l.* 11*s.* 8*d.* for expenses and detention:—Held, that the agreement was equitable and must be upheld, with costs from the time of making the tender. *The Waverley*, 40 L. J., Adm. 42; L. R. 3 A. & E. 369; 24 L. T. 713; 1 Asp. M. C. 47.

See also XXVI. ADMIRALTY LAW AND PRACTICE, infra, col. 1019.

Sufficiency of Tender.]—If in an action for salvage services rendered in the United Kingdom a tender under 200*l.*, "with such costs (if any) as may be due by law," for the services rendered, is accepted, the court will not certify for costs, except for special cause shown. *The John*, Lush. 11; 1 L. T. 495.

Where a tender in a salvage suit is pronounced for, the usual practice is to condemn the plaintiffs in the costs incurred since the time of tender, but this practice is not invariable, and where the court is of opinion that the tender is not a liberal one, it will in its discretion make no order with regard to such costs. *The Lotus*, 7 P. D. 199; 47 L. T. 447; 30 W. R. 892; 4 Asp. M. C. 595.

One of several salvors sued for salvage services rendered in the United Kingdom. The defendants tendered, by act of court, 40*l.*, "with costs up to time of tender," which the plaintiff refused. The defendants then resisted the claim, partly on the question of amount, and partly on the ground (which they failed to support) that the plaintiff had been party to a settlement of the whole claim

with one of the co-salvors. The court overruled the tender, and gave 100*l.*:—Held, that, notwithstanding the question of agreement, the case was not a fit one to be tried in the superior court, and accordingly refused to certify for costs, under 17 & 18 Vict. c. 104, s. 460. *The Comte Nesselrood*, Lush. 454; 31 L. J., Adm. 77; 6 L. T. 57.

Held, also, that thereby, notwithstanding the form of tender, the plaintiff was not entitled to his costs up to the time of tender. *Ib.*

Whenever defendants intend to rely upon 17 & 18 Vict. c. 104, s. 460, as governing the question of costs, the facts material for that purpose should be distinctly pleaded and proved. When a tender is pronounced sufficient, costs do not, as a rule, follow the decision. *The Favourite*, 5 L. T. 773.

Although the ordinary practice of the court is to recognise only such tenders as are made in acts of court, provided they are of a fixed sum with costs, and without any condition, still if it should appear in any case that the salvors, before action brought, have, with a full knowledge of all the circumstances, rejected a liberal offer of remuneration, an actual tender of money, and a smaller sum is awarded, they will lose the costs of the suit. *The Sovereign*, Lush. 85; 29 L. J., Adm. 113; 6 Jur. (N.S.) 832; 2 L. T. 669.

When a tender of 200*l.* for the services has been made and accepted, the plaintiff is entitled to costs, notwithstanding the 17 & 18 Vict. c. 104, s. 460. *The Germ*, 15 W. R. 937.

Where in a salvage action the defendants with their defence tender and pay into court a sum of money in satisfaction of the plaintiff's claim, and plead such payment into court, and the sum paid in is held to be sufficient, the court will order the defendants to pay the plaintiff's costs up to the date of the delivery of the defence, unless the circumstances of the case render it just and expedient to order otherwise. *The William Symington*, 54 L. J., Adm. 4; 10 P. D. 1; 51 L. T. 461; 33 W. R. 371; 5 Asp. M. C. 293.

In a salvage action it is not necessary that a tender should be accompanied with an offer to pay the plaintiff's costs up to the date of tender. *Ib.*

Salvors rejected a tender which was afterwards pronounced for:—Held, that the salvors were entitled to no costs. *The John and Thomas*, 1 Hag. Adm. 157, n.

In order to escape paying salvors' costs, a tender in a salvage suit should be in regular form, as early as possible, by act of court. *The Vrouw Margaretha*, 4 C. Rob. 103.

Where a tender in a salvage action is upheld costs will be given. *The Emu*, 1 W. Rob. 15.

Costs of Appraisement.]—A salved vessel was valued by a receiver of wreck at 746*l.* on the 3rd of December. On the 8th the salvors instituted a suit in 2,500*l.*; on the 18th they applied for an appraisement of the vessel; on the 14th of January following they gave notice that they proceeded no further in the suit:—Held, that the salvors must have been aware within a short time of taking out the appraisement that the value fixed by the receiver was substantially correct, and that they must therefore be condemned in costs, and in damages from the 22nd of December to the 14th of January. *The Margaret and Jane*, 38 L. J., Adm. 38; L. R. 2 A. & E. 345; 20 L. T. 1017; 17 W. R. 1064.

Salvors are entitled to the costs of a commission of appraisement when it appears that there is a substantial difference between the appraised value and that alleged by the defendants. *The Paul*, 35 L. J., Adm. 16; L. R. 1 A. & E. 57; 14 L. T. 192.

The value of ship, as appraised by the officer of the court, was less, and of the cargo more, than the values tendered by the defendant. The court condemned the defendant in the costs of the appraisement. *The Magdalen*, 5 L. T. 692.

The owner alleged the value of a ship to be one-fifteenth less than it afterwards was found to be; the amount claimed was less than the sum for which the owners were willing to give security, but the costs of the suit would extend the claim beyond that sum:—Held, that the costs of the appraisement should be costs in the cause. *The Rapid*, 18 W. R. 150.

If salvors take out a commission of appraisement without cause, they will have to pay the costs; as where the owners put the value at 865*l.*, and upon appraisement it was found to be 880*l.* *The Commodore*, 1 Spinks, 175, n.; *The Wilhelmina*, 1 Not. of Cas. 376.

17 & 18 Vict. c. 104, ss. 458, 460—Salvage within Three Miles of Shore.]—Where the ancient jurisdiction of the admiralty is limited by statute, it is for those who deny the jurisdiction to prove the circumstances which limit it. Owners of a vessel salved claimed that no costs were due to the salvors, on the ground that the service was within three miles of the shore, and that under 17 & 18 Vict. c. 104, ss. 458, 460, the justices alone had jurisdiction. The locality of the salvage service not being proved, costs were allowed. *The Argo*, Swabey, 112.

Consolidated Actions.]—Where three separate salvage suits were instituted for services rendered on the same occasion, and not consolidated, full costs were not allowed to the third claimant. *The Belle of Lagos*, 20 L. T. 1019; 17 W. R. 899.

Where separate salvage actions against the same ship were consolidated, leave being given to the various plaintiffs to appear separately at the hearing, as their interests were conflicting, and the defendants with their defence tendered and paid into court a sum of money as being sufficient to satisfy all claims, but did not apportion it to the separate plaintiffs, the court, having upheld the tender, ordered all parties to pay their own costs incurred subsequently to the tender, the defendants paying the costs previous to the tender. *The Lee*, 60 L. T. 939; 6 Asp. M. C. 395.

Damages and Costs for Arresting in High Court.]—No general rule as to damages and costs for arresting property of less value than 1,000*l.* for salvage in the high court, contrary to 25 & 26 Vict. c. 63, s. 49. *The Eleonore*, Br. & Lush. 185; 33 L. J., Adm. 19; 9 L. T. 397; 12 W. R. 218.

Salvage out of United Kingdom.]—Salvage services were rendered to a vessel beyond three miles from the shore of the United Kingdom. The sum of 100*l.* only was awarded:—Held, that since the salvage was not in the United Kingdom, the provision in 17 & 18 Vict. c. 104, s. 460, did not apply so as to bar the salvors of their

costs. *The Actif*, Swabey, 237; 3 Jur. (N.S.) 893; 5 W. R. 547.

Proceedings through Default of other Side.]—The costs of salvors, incurred in taking affidavits before issue joined, are allowed when the defendants have not unreservedly admitted the facts pleaded in the petition, and supported by the affidavits. *The Fairlina*, 14 W. R. 869.

Where a master refuses to go on shore and refer to the local justices the amount of salvage due for services rendered in the United Kingdom, and removes the vessel from the local jurisdiction, and an action is thereon brought in the court of admiralty, the court, awarding only 50*l.*, will certify for the salvor's costs under 17 & 18 Vict. c. 104, s. 460. *The Alpha*, Lush. 89; 2 L. T. 521.

Interest.]—Although execution has not issued, interest upon a salvage award is recoverable from the date of the judgment, and interest on the solicitor's taxed bill of costs from the date of the allocatur of the taxing-master. *The Jones Brothers*, 46 L. J., Adm. 75; 37 L. T. 164; 3 Asp. M. C. 478.

The court has no power to refuse interest because the judgment recovered is for salvage. *Ib.*

Costs of Parties against whom no Claim made out.]—When parties have been summoned to appear against whom no claim to contribution is made out, the parties so summoned are entitled to their costs. *Sarpedon, Cargo ex*, 3 P. D. 28; 37 L. T. 505; 26 W. R. 374; 3 Asp. M. C. 509.

Award Reduced on Appeal.]—Award of Cinque Ports commissioners reduced; costs of appeal to be borne by the party incurring them. *The Henry of Philadelphia*, 1 Hag. Adm. 264.

Costs of Appeal.]—Where in an action of salvage the amount awarded is reduced on appeal, the general practice is to give no costs of the appeal, but this is not a hard-and-fast rule so as to deprive the court of all discretion in the matter. *The Gipsy Queen*, 64 L. J., Adm. 86; [1895] P. 176; 11 R. 766; 72 L. T. 454; 43 W. R. 359; 7 Asp. M. C. 586—C. A.

—— **Amount.**]—Although the sum awarded by the appellate court for salvage services is under 200*l.*, costs will be allowed if the case is a fit one to be brought before the appellate court. *The Minnehaha*, Lush. 335; 15 Moore, P. C. 133; 30 L. J., Adm. 211; 7 Jur. (N.S.) 1257; 4 L. T. 810; 9 W. R. 925.

—— **General Rule.**]—Though in appeals as to the amount of salvage the privy council generally did not give a successful appellant his costs of the appeal, such appeals under the Judicature Act form no exception to the general rule that a successful appellant is entitled to his costs. *The City of Berlin*, 47 L. J., Adm. 2; 2 P. D. 187; 37 L. T. 307; 25 W. R. 793; 3 Asp. M. C. 491—C. A.

Misconduct of Salvors.]—Punished by order to pay costs. *The Cadiz and The Boyne*, 35 L. T. 602; 3 Asp. M. C. 332.

Separate Appearances.]—Where in a salvage suit, where the mate appeared separately from the owners and rest of the crew, half costs only given to each. *The Nicolina*, 2 W. Rob. 175.

Two Actions for Salvage against the same Property.]—In a case where the defendants, in two actions of salvage instituted against the same property, were ordered to pay only one set of costs, to be apportioned between the plaintiffs in the two actions, the court directed that the apportionment should be made according to the amount of the plaintiff's respective bills of costs. *The Pasithea*, 5 P. D. 5.

Where separate salvage suits have been unnecessarily prosecuted, the court will only allow one set of costs, and direct the amount allowed to be distributed ratably amongst the plaintiffs in the separate suits. *The Sarah*, 3 P. D. 39; 37 L. T. 831; 3 Asp. M. C. 542.

Allowance and Taxation of Costs and Charges.]—The practice of bringing in on taxation in salvage suits two separate bills of costs—one containing the expenses incident to the employment of an agent at the out-port, and the other the remaining charges incurred in respect of the conduct of the suit—though formerly prevailing among the proctors of the court of admiralty, is no longer to be followed, and in future one bill only, containing all charges, whether out-port or otherwise, is to be delivered into the registry. *The City of Brussels*, 42 L. J., Adm. 72; L. R. 4 A. & E. 194; 29 L. T. 312; 22 W. R. 71; 2 Asp. M. C. 192.

A proctor retained to conduct a salvage suit may legally employ a person who is not a solicitor or proctor as his agent at the out-port, but for the performance of other than proctorial acts only; and charges for work done and disbursements made by such agent in the capacity of a clerk will, if unobjectionable in other respects, be allowed to the proctor on taxation. *Ib.*

A charge of 10*l.* 10*s.* for agency allowed in such a case. *Ib.*

Apportionment—Ship and Cargo.]—In apportioning the costs of the salvor, payable by the owners of the salved ship and cargo respectively, *The Peace* (Swabey, 115) followed. *The Elton*, [1891] P. 265; 65 L. T. 232; 7 Asp. M. C. 66.

Apportionment—Parties not Interested.]—On appeal against apportionment of salvage reward, the owners of the salved vessel were cited and asked for an indemnity for their costs, which the appellants refused, and gave notice that no relief would be applied for against the owners. The owners were held to be entitled to their costs up to the time of such notice. *The Castlewood*, 42 L. T. 702; 4 Asp. M. C. 278.

Paid out of Fund in Court.]—Costs of all parties were ordered to be paid out of fund in court, except a defendant's, in consequence of his misconduct to the salvors. *The Cadiz*, 35 L. T. 602; 3 Asp. M. C. 332.

Certificate for Costs.]—Although a suit for salvage might have been tried in a county court, the judge of the court of admiralty will certify for costs if it is less expensive to try there than in the county court. *The Beaumaris Castle*, 40 L. J., Adm. 41; 24 L. T. 448; 1 Asp. M. C. 19.

To enable a salvor who does not recover more

than 200*l.* to get his costs of suit in the court of admiralty, the court must certify that the case was proper to be brought there. Certificate granted where the claim was resisted by charges of misconduct or negligence in the salvors. *The Cherubim*, Ir. R. 2 Eq. 172. S. P., *The Avenir*, Ir. R. 2 Eq. 111; 1 L. T. 495.

Certificate for costs refused where the matter (salvage) might have been decided by justices under 17 & 18 Vict. c. 104, s. 460. *The John*, Lush. 11.

Where the master of a ship to which salvage services had been given refused to go on shore and refer the case to the justices under 17 & 18 Vict. c. 104, s. 460, and carried his ship out of the jurisdiction, and it is brought into the admiralty court, the costs will be certified for. *The Alpha*, Lush. 89; 2 L. T. 521.

Excessive Claim.]—Costs given against salvors where ship arrested for 5,000*l.* and 15*l.* awarded. *The Agamemnon*, 48 L. T. 383; 5 Asp. M. C. 92.

Inflated and exaggerated claims dismissed with costs. *The Towan*, 2 W. Rob. 259.

Trivial Claims.]—A trivial case of salvage brought in admiralty; 5*l.* and no costs awarded. *The Red Rover*, 3 W. Rob. 150.

Fraudulent Claim.]—Fraudulent salvage case dismissed with costs. *The Susannah*, 3 Hag. Adm. 345, n.

Several Issues.]—The plaintiffs having towed a vessel into greater comparative safety, the hawser then broke, and it was dangerous to take her again in tow. In an action for salvage:—Held, that the plaintiffs were entitled to the general costs of the action, but not to those of a special issue as to damage to machinery on which they had failed. *The Camellia*, 53 L. J., Adm. 12; 9 P. D. 27; 50 L. T. 126; 32 W. R. 495; 5 Asp. M. C. 197.

XIX. TOWAGE.

The Contract—Fitness of Tug.]—The plaintiff, a master mariner, contracted with the defendants for a lump sum to be paid him by the defendants, to take a certain specified steam tug of the defendants', towing six sailing barges, from Hull to the Brazils, the plaintiff paying the crew and providing provisions for all on board for seventy days. The engines of the steamtug were damaged and out of repair at the time of the contract, but neither the plaintiff nor defendants were then aware of this. The consequence, however, of the engines being so defective was that the time occupied in the voyage was increased, and the plaintiff's gain in performing his contract was much less than it would otherwise have been:—Held, by Brett and Cotton, L.JJ., that as the contract related to a specified vessel, there was no implied undertaking by the defendants that it should be reasonably efficient for the purposes of the voyage, and that therefore the defective state of the engines gave the plaintiff no cause of action, it not appearing that the engines were in a worse state when the plaintiff took possession of the vessel than they were at the time of the contract. *Robertson* v. *Amazon Tug and Lighterage Co.*, 51 L. J., Q. B. 68; 7 Q. B. D. 598; 46 L. T. 146; 30 W. R. 308; 4 Asp. M. C. 496—C. A.

Held, contra, by Bramwell, L.J., that the defective state of the engines gave the plaintiff a cause of action, as there was an implied undertaking by the defendants that the engines were not so defective. *Ib.*

There is an implied obligation in a contract of towage, that the tug shall be efficient and properly equipped for the service, and a proviso in the contract that the owners will not be responsible for the default of the master, does not release them from such implied obligation. *The Undaunted*, 55 L. J., Adm. 24; 11 P. D. 46; 54 L. T. 542; 34 W. R. 686; 5 Asp. M. C. 580.

Validity — Commission to Master.] — The master agreed with a tug for towage from Sea Reach, in the Thames, to a London wharf, and agreed to pay 6*l.* and give an order upon the owner of the wharf for the amount usually allowed by him (under the name of "towage") as a premium to vessels of the kind coming to his wharf. The service was performed by the tug, and the master paid the money, but refused to give the order on the owner of the wharf. The amount actually paid by the owner of the wharf, according to his practice, was proved; and it was also proved that if an order, signed by the master of the vessel towed, was presented by the master of the tug, the money would be (as a matter of practice) paid to him:—Held, that the master of the vessel had no authority to agree to transfer to the master of the tug an uncertain sum payable to the owners of the vessel; and that the court had no authority to enforce such a contract or give damages for the breach of it. *The Martha*, Lush. 314.

Evidence of Making.]—A master of a steam tug, of which the defendant was owner, was employed by the plaintiff to tow his smack out of a harbour. In so doing the smack was stranded, through the negligence of the master. The plaintiff had on previous occasions hired the defendant's steam tug, and on paying the charge had received a receipt, upon the back of which was printed a notice that the defendant would not be answerable for damage occasioned by any supposed negligence of his servants:—Held, that it was a question for the jury whether the contract was made on the terms printed on the back of the receipts. *Symonds* v. *Pain*, 6 H. & N. 709; 30 L. J., Ex. 256.

Concealment of Damage—Fraudulent Engagement of Ship to Tow.] — See *The Kingalock*, supra, col. 658.

Performance—Delay—Extra Pay.]—When a contract is entered into to tow a vessel from one point to another for a fixed sum, the tug cannot claim extra remuneration in the nature of payment for towage in respect of a delay which occurs during the transit without any fault on the part of the tug or the tow. *The Hjemmett*, 49 L. J., Adm. 66; 5 P. D. 227; 42 L. T. 514; 4 Asp. M. C. 274.

Towage Completed by another Tug.] — An agreement to tow from Dover to Gravesend; the tug broke down, and the towage completed by another tug of the same owners:—Held, that the original agreement was performed. *The Lady Flora Hastings*, 3 W. Rob. 118.

Agreement to Tow—Unsuccessful Attempt.] — See *The Benlarig*, supra, col. 597.

Indemnity to Hirer—Recovery against Underwriters — Insurance against Collision.] — The owner of a Thames tug agreed with the hirer of the tug to insure against damage she, or barges in tow of her, might suffer or do to other ships, and to indemnify the hirer in respect of any such damage to the extent of all moneys received by him under such insurance. The tug was sued for damage done to a steamship at anchor by a barge alleged to be in tow of the tug. The hirer admitted liability, and paid to the steamship owner the amount of the damage. He then applied to the tug-owner for the moneys payable under a policy which had been effected by the tug-owner in pursuance of the agreement. The tug-owner applied to the underwriters for the policy moneys, but they declined to pay, alleging that the damage was not done by a barge in tow of the tug. The tug-owner, having received nothing under the policy, refused to pay anything to the hirer. Thereupon the hirer sued the tug-owner for breach of the contract to indemnify:—Held, that as the burden of compelling the underwriters to pay did not rest on the tug-owner, the contract had not been broken. *The Lord of the Isles*, 64 L. J., Adm. 15; [1894] P. 342; 11 R. 736; 71 L. T. 92; 7 Asp. M. C. 500.

Agreement by Salving Steamship to Stand by—Payment for Unsuccessful Salvage Service—Authority of Master.]—The steamship "W." having found the steamship "A.," on the 12th February, off Cape Finisterre, in a disabled condition, towed her off in heavy weather until the 14th February, when, in consequence of the condition of the "A.," the master of the "W." proposed to abandon her. However, at the request of the master of the "A." it was agreed in writing that the "W." should "stand by the 'A.' as long as possible, and that the 'W.' and owners are to be paid for the time and towing already done and to be done from the 12th February, 1883." The "W." therefore again took the "A." in tow, but on the 16th February, owing to stress of weather, it was found necessary to abandon her, after which she was totally lost. In an action for towage against the owners of the "A.," the court held that the agreement entered into by the master of the "A." was a reasonable one, and one which in his position of agent ex necessitate for his owners, he had an authority to enter into; and awarded the plaintiffs the sum of 400*l.* in respect of the services rendered prior to and after the agreement. *The Alfred, Wellfield (Owners)* v. *Adamson*, 50 L. T. 511; 5 Asp. M. C. 214.

Condition Exempting from Liability—Negligence of Tug Owners or Servants.]—The master of a steam tug, who had contracted to tow a fishing smack out of the harbour of Great Yarmouth to sea on the terms that his owners should not be liable for damage arising from any negligence or default of themselves or their servants, after the towage had been in part performed, took in tow, in addition to the smack, six other vessels, and in consequence was unable to keep the fishing smack in her course, so that she went aground and was lost. By having more than six vessels in tow at once, the master of the tug disobeyed a regulation made by the harbour-master of Great Yarmouth under statutory authority. The owners of the fishing smack brought an action against the owners of the steam tug to recover damages:—Held, that the loss of the smack was occasioned by the negligence of the master of the tug; that the defendants were protected from liability by the terms of the towage contract, and that the action must be dismissed. *The United Service* or *Cole* v. *Great Yarmouth Steam Tug Co.*, 53 L. J., Adm. 1; 9 P. D. 3; 49 L. T. 701; 32 W. R. 565; 5 Asp. M. C. 170—C. A.

Collision—Implied Agreement as to Liability.] —A tug while towing the plaintiff's vessel came into collision with and sank her. The tug was chartered by the defendants, a company, to work with their own tugs, and one of the terms on which the company towed vessels was that they would not be answerable for loss or damage to any vessel in tow of their tugs (which were specified by name) whether occasioned by the negligence of their servants or otherwise. The tug in question was not one of those specified, but the plaintiff was a director of the defendant company, and was aware of the chartering of the tug:—Held, that the plaintiff must be taken to have impliedly agreed to employ the tug on the same terms as the other tugs of the company, and that his claim was therefore barred by the condition. *The Tasmania*, 57 L. J., Adm. 49; 13 P. D. 110; 59 L. T. 263; 6 Asp. M. C. 305.

Liability for Collision—Compulsory Pilot.]—Where a steam tug towing a vessel under a towage contract is so negligently navigated as to come into collision with a vessel belonging to third parties, the owners of the steam tug are liable for the damage done, even if at the time of the collision the vessel in tow was in charge of a duly-licensed pilot by compulsion of law, whose default solely occasioned the collision. *The Mary*, 48 L. J., Adm. 66; 5 P. D. 14; 41 L. T. 351; 28 W. R. 95; 4 Asp. M. C. 183.

—— **Liability of Vessel in Tow.**]—A tug with a vessel in tow came into collision with another vessel, which was seriously injured by the tug, but not injured by the vessel in tow. The collision might have been avoided had there been a good look-out on the vessel in tow, and had she warned the tug that the latter was in danger of collision by continuing on her course:—Held, that the owners of the vessel in tow were liable. *The Niobe*, 57 L. J., Adm. 33; 13 P. D. 55; 59 L. T. 257; 36 W. R. 812; 6 Asp. M. C. 300.

Under an ordinary contract of towage, the vessel in tow has control over the tug, and is therefore liable for the wrongful acts of the latter, unless they are done so suddenly as to prevent the vessel in tow from controlling them. *Ib.*

See also XX. COLLISION, post, cols. 754 seq.

Admiralty Jurisdiction.]—The court has jurisdiction to entertain a suit instituted by the owners of a vessel against a steam tug engaged to tow the vessel, for negligently towing the vessel so as to cause her to come into collision with and do damage to another vessel. *The Energy*, 39 L. J., Adm. 25; L. R. 3 A. & E. 48; 23 L. T. 601; 18 W. R. 1009.

A damage to a vessel whilst being towed, caused by the improper navigation of the tug which was towing it, is within the Merchant Shipping Act Amendment Act, 1862 (25 & 26

Vict. c. 63), s. 54, sub-s. 4, notwithstanding such damage occurred also through a breach of the towing contract, and the owner of the tug is therefore entitled to the limitation of liability given by that section if such damage occurred without his actual fault or privity. *Wahlberg* v. *Young*, 45 L. J., C. P. 783; 24 W. R. 846: 4 Asp. M. C. 27, n.

Semble, that if the damage occurred from a mere breach of the contract to tow, the owner of the tug would not be entitled to the benefit of such section. *Ib.*

Claim for Salvage—Negligence.]—A tug under contract to tow a ship is not entitled to salvage remuneration for rescuing the ship from danger brought about by the tug's negligent performance of her towage contract. A tug agreed to tow a ship from Liverpool to the Skerries for a fixed sum. The tug imprudently towed the ship in bad weather too near a lee shore, and the weather becoming worse during the performance of the agreed towage service, the hawser parted and the ship was placed in a position of danger and was compelled to let go her anchors to avoid being driven on shore. From this position she was rescued by the tug, having been compelled to slip her anchors and chains, which were lost: —Held, that the tug was not entitled to claim salvage remuneration, and that her owners were liable to pay for the loss of the anchors and chains. *The Robert Dixon*, 5 P. D. 54; 42 L. T. 344; 28 W. R. 716—C. A.

Tug bound to follow Directions, and not Liable for Consequent Danger.]—Semble, if a tug receives positive directions from the ship she is towing as to the course she is to steer, she is bound to obey them; and if the ship gets into danger in consequence of such directions the tug is not liable. *Ib.*

Damage by Tug—Jurisdiction.]—The words of 3 & 4 Vict. c. 65, s. 6, "claim in the nature of towage," do not include a claim by a towed vessel against her tug for misconduct. The damage referred to by that section and by 24 & 25 Vict. c. 10, s. 7, is that which results from a collision. *The Robert Pow*, Br. & Lush. 99; 32 L. J., Adm. 164; 9 L. T. 237.

Stranding of Tow—Responsibility for Course Set—Contributory Negligence.]—In a case of towage, where no directions are given by those on board the tow, the tug is responsible for the direction of the course; but the master or other person in charge of the tow is not justified in allowing the tug to continue unchecked upon a course which will lead the vessels into danger. *The Altair*, 66 L. J., Adm. 42; [1897] P. 105; 76 L. T. 263; 45 W. R. 622; 8 Asp. M. C. 224.

Contract to Tow—Demurrage of Tug.]—*New Steam Tug Co.* v. *M'Clew*, XIV. DEMURRAGE, supra, col. 490.

Duty to supply Efficient Tug—Harbour Authority.]—See *The Ratata*, infra; XXIV. PORTS, PIERS, &C., col. 896.

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Maritime Lien.]—Mere towage services are not the subject of a maritime lien. *Westrup* v. *Great Yarmouth Steam Carrying Co.*, 59 L. J., Ch. 111; 43 Ch. D. 241; 61 L. T. 714; 38 W. R. 505; 6 Asp. M. C. 443.

XX. COLLISION.

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1. Negligence.

a. Generally.

Contributory Negligence at Common Law.]—In an action for running down a ship neither party can recover when both are in the wrong; but the plaintiff may recover, although he might have prevented the collision, provided that he was in no degree in fault in not endeavouring to prevent it. *Vennall* v. *Garner*, 1 Car. & M. 21; 3 Tyr. 85.

A plaintiff cannot recover unless the injury is attributable entirely to the fault of the defendant; if he was partly in fault, but the plaintiff might with care have prevented the accident, he cannot maintain his action. *Vanderplank* v. *Miller*, M. & M. 169.

The question is, whether the plaintiff by his negligence or improper conduct substantially contributed to the occurrence of the injury of which he complains; not to the amount of it, but to its occurrence. *Sills* v. *Brown*, 9 Car. & P. 601. S. P., *The Lady Anne*, 15 Jur. 18.

If in an action for the negligence of the defendant's servants in managing a barge, so that the plaintiff's barge was run down, it appears that the accident happened from circumstances which persons of competent skill could not guard against, the plaintiff will not be entitled to recover; nor will he if his men had put his barge in such a place that persons using ordinary care would run against it; nor if the accident could have been avoided but for the negligence of the plaintiff's own men, in not being aboard his barge at the time when it was lying in a dangerous place. *Luck* v. *Seward*, 4 Car. & P. 106.

Before a plaintiff in a collision cause can be deprived of his right of recovery against a negligent defendant by reason of an act done by the plaintiff, without which the collision would not have occurred, it must be shown that such an act of the plaintiff was negligent. *The Sisters*, 45 L. J., Adm. 39; 1 P. D. 117; 34 L. T. 338; 24 W. R. 412; 3 Asp. M. C. 122—C. A. S. P., *The Hornet*, infra.

Negligence of Plaintiff—Question for Jury.]—In an action to recover damages for an injury occasioned by a collision between two vessels, the proper question for the jury is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened; in the first case the plaintiff would be entitled to recover; in the latter not, as, but for his own fault, the misfortune could not have happened. *Tuff* v. *Warman*, 5 C. B. (N.S.) 573; 27 L. J., C. P. 322; 5 Jur. (N.S.) 222; 6 W. R. 693—Ex. Ch.

—— **Verdict for Reduced Damages.**]—A jury found that the plaintiffs' barge was sunk partly by swell caused by the defendants' steamship navigating at too high a rate of speed, and partly because she was not properly trimmed, and gave damages for less than the total loss:—Held, that the verdict was properly entered for the plaintiffs, and new trial refused. *Smith* v. *Dobson*, 3 Man. & G. 59; 3 Scott (N.R.) 336.

—— **Overloading—Swell from Steamer.**]—In an action against the captain of a steam vessel for swamping a loaded wherry on the river, by a swell produced by a too rapid rate of passage, the jury, to find for the plaintiff, must be satisfied that the mischief was occasioned by the swell alone; and if they think it doubtful whether it was or not, or think that the plaintiff contributed to the injury he sustained by his own improper conduct, either in mismanaging or overloading the boat, they must find their verdict for the defendant. *Luxford* v. *Large*, 5 Car. & P. 421. See also *The Batavier*, *Netherlands Steamboat Co.* v. *Styles*, post, col. 691.

New Trial.]—If a vessel is damaged by another running foul of it, and the jury finds a verdict for the plaintiff, the court will not send the case for a new trial, because there may be some ground to believe that the plaintiff was negligent in navigating his vessel as well as the defendant. *Collinson* v. *Larkins*, 3 Taunt. 1.

Passenger—Whether he may Recover where his own Ship in Fault.]—One who sustains an injury from a collision with a vessel cannot maintain an action against the owners of such vessel, if negligence either on his own part or on the part of those having the guidance of the vessel in which he is a passenger conduced to the accident, and such injury might have been avoided by the exercise of reasonable care on his part or their part. *Thorogood* v. *Bryan*, 8 C. B. 115; 18 L. J., C. P. 336. Overruled, *The Bernina*, infra, col. 687.

One who sustains an injury in a collision cannot maintain an action against the owners of the vessel if negligence on his part or on the part of those in charge of the ship in which he is a passenger contributed to the collision. *Cattlin* v. *Hills*, 8 C. B. 115.

A passenger on board a steamboat was injured by an anchor falling upon him in a collision caused by the fault of the other ship:—Held, that the passenger could recover, although the injury was caused in part by his own negligence in being where he was, or by the negligence of

the people of his own ship in stowing the anchor where it was. *Greenland* v. *Chaplin*, 5 Ex. 243; 19 L. J., Ex. 293.

A passenger and an engineer on board the "Bushire" were killed in a collision between the "Bernina" and the "Bushire," caused by fault in both ships, but without fault on the part of the deceased:—Held, that their representatives could recover full damages against the owners of the "Bernina." *Thorogood* v. *Bryan*, supra, overruled. *The Bernina*, *Mills* v. *Armstrong*, 57 L. J., Adm. 65; 13 App. Cas. 1; 58 L. T. 423; 36 W. R. 870; 6 Asp. M. C. 257; 52 J. P. 212—H. L. (E.)

Remoteness of Plaintiff's Negligence.]—A plaintiff cannot recover for mischief done to his ship by its being struck by the defendant's ship in consequence of the latter being improperly managed, if it appears that the plaintiff's ship was improperly managed, and that such improper management directly contributed in any degree to the accident, however much the defendant may also be in fault; though, if there is negligence on the part of the plaintiff only remotely connected with the accident, the question is, whether the defendant by ordinary care and skill might have avoided the accident. *Dowell* v. *General Steam Navigation Co.*, 5 El. & Bl. 195; 26 L. J., Q. B. 59; 1 Jur. (N.S.) 800; 3 W. R. 492. And see *General Steam Navigation Co.* v. *Morrison*, 13 C. B. 581; 22 L. J., C. P. 178; 17 Jur. 673; 1 W. R. 330. *The Jane Bacon*, 27 W. R. 35.

Negligence where both Ships in Fault.]—As to whether such negligence would be negligence at common law, see *The Margaret*, 50 L. J., Adm. 67; 6 P. D. 76; 44 L. T. 291; 29 W. R. 533; 4 Asp. M. C. 375; *The Margaret*, *Cayzer* v. *Carron Co.*, 9 App. Cas. 873, infra; *The Fenham*, 6 Moore, P. C. (N.S.) 501; L. R. 3 P. C. 212; 23 L. T. 329; *The Friends*, infra; *The Meteor*, Ir. R. 9 Eq. 507.

Negligence—No Difference between Rules of Common Law and Admiralty as to.]—See. per Campbell, C., *The Friends*, *General Steam Navigation Co.* v. *Tonkin*, 4 Moore, P. C. 314. Per Lord Blackburn, *The Margaret*, *Cayzer* v. *Carron Co.*, 9 App. Cas. 873, 880; 54 L. J., Adm. 18; 52 L. T. 361; 33 W. R. 281; 5 Asp. M. C. 371.

Vessel Disabled by Prior Collision.]—When a ship seeks to excuse her failure to comply with the sailing regulations and with a seamanlike precaution, by showing that such a failure was in consequence of her being disabled in a prior collision, it is material to inquire whether the prior collision was due to her default or was the result of inevitable accident. *The Kjobenhavn*, 30 L. T. 136; 2 Asp. M. C. 213—P. C.

Semble, that if the prior collision was due to the default of the ship so seeking excuse, and if her subsequent failure to comply as aforesaid contribute to the collision proceeded for, she will be to blame. *Ib.*

The owners of a disabled vessel are answerable for damage done by its accidentally drifting, when so disabled, against another vessel. *Seccombe* v. *Wood*, 2 M. & Rob. 290.

When it is the duty of a ship to keep out of the way of another, but she is unable to do so by reason of being disabled in a former collision, and the other ship being unaware of her disabled condition continues her course, a collision ensuing is the result of inevitable accident. *The Aimo and The Amelia*, 29 L. T. 118; 21 W. R. 707; 2 Asp. M. C. 96—P. C.

Not taking a Tug.]—A vessel getting her anchors in Dover bay in bad weather neglected to employ a tug, until too late, when the tow rope parted, and she damaged some sewage works:—Held, that she was liable. *The Gertor*, 70 L. T. 703; 7 Asp. M. C. 47.

Dolphin Damaged owing to its own Weakness.]—A steamship, about to make fast alongside a pier, overturned a mooring dolphin. The dolphin ought to have been stronger:—Held, that the steamship was not liable. *The Albert Edward*, 44 L. J., Adm. 49; 24 W. R. 179.

Collision caused by Want of Look-out—Improper Position of other Craft Immaterial.]—In an action for damages brought by the widow of a man in a boat killed in a collision with a steamship, the jury found that the man had acted rashly in anchoring the boat where he did, and (2) that if a proper look-out had been kept on the steamship the boat might have been seen. Verdict for plaintiff. Motion for new trial on the ground that the deceased contributed by his negligence to the collision:—Held, that the verdict was not inconsistent with the findings of fact, the want of look-out being the cause of collision, and the earlier negligence of the deceased immaterial. *Carse* v. *North British Steam Packet Co.*, 22 Ct. of Sess. Cas. (4th ser.) 475.

Sudden Peril caused by Wrongful Act of the other Ship.]—Where one ship has by wrong manœuvres placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been manœuvred with perfect skill and presence of mind. *The Bywell Castle*, 4 P. D. 219; 41 L. T. 747; 28 W. R. 293; 4 Asp. M. C. 207—C. A. *The Nor*, 30 L. T. 576; 22 W. R. 30; 2 Asp. M. C. 264; *Hine Brothers* v. *Clyde Trustees*, 15 Ct. of Sess. Cas. (4th ser.) 498; *The Meanatchy*, infra, col. 696.

Negligence by Salving Vessels.] — When damage is inflicted upon a ship by another engaged in rendering salvage services to the former, the court regards the negligence of the salvor less severely than it does the negligence of a vessel wholly unconnected with the injured vessel, but will condemn the salvor in the damage where he has been guilty of gross negligence and want of proper navigation. *The C. S. Butler*, *The Baltic*, 43 L. J., Adm. 17; L. R. 4 A. & E. 178; 30 L. T. 475; 22 W. R. 759.

What Amounts to Negligence of Master.]—When the master of a ship takes all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger, his owners are not held responsible because he may have omitted some possible precaution which the event suggests that he might have resorted to. *The William Lindsay*, *Doward* v. *Lindsay*, L. R. 5 P. C. 338; 29 L. T. 355; 22 W. R. 6; 2 Asp. M. C. 118—P. C.

The master of a ship is bound to take all such precautions as a man of ordinary prudence and

skill, exercising a reasonable foresight, would use to avert danger in the circumstances in which he may happen to be placed. *Ib.*

Duty of Harbour-master—Damage caused by Sunken Vessel.]—The D., in consequence of the sole default of her master and crew, had sunk in the Thames, and had become a wreck obstructing the navigation of the river. Her mate sent a message to the harbour-master at G. to inform him of the accident, who said that he would cause the wreck to be lighted. A few hours afterwards, the wreck not having been lighted, a vessel, without any fault on the part of those on board her, came into collision with the wreck and sustained damage. An action of damage having been instituted on behalf of the owner of the damaged vessel against the owners of the D., the judge at the trial, refused to admit the evidence showing that the mate of the D. had sent a message to the harbour-master, and that the latter had promised to light the wreck:—Held, that the evidence was wrongly rejected, that the collision had not been caused by the negligence of the owners of the wreck, and that they were not liable for the damage done. *The Douglas*, 51 L. J., Adm. 89; 7 P. D. 151; 47 L. T. 15; 5 Asp. M. C. 15—C. A.

Negligence Causing Loss but not Collision.]—A bumb barge in the Thames by her own fault struck a schooner fast to a buoy. The schooner, contrary to the Thames Rules, had her anchor hanging from her hawse pipe in such a position that it pierced the barge, which filled and sank. But for the improper position of the anchor the barge would not have been injured:—Held, that both vessels were in fault. *The Margaret*, 50 L. J., Adm. 67; 6 P. D. 76; 44 L. T. 291; 29 W. R. 533; 4 Asp. M. C. 375—C. A.

A barge in the Thames came into collision with a brig, carrying away her anchor, in a position forbidden by by-laws, and in consequence of the anchor being in that position the barge was injured:—Held, that, notwithstanding the improper position of the anchor, the brig owners were not liable, if the barge substantially contributed to the collision, as distinguished from the amount of the loss. *Sills* v. *Brown*, 9 Car. & P. 601. And see *The Gipsy King*, 2 W. Rob. 537.

b. In Particular Cases.

i. *Sufficiency of Crew.*

For a sailing barge in the Thames two hands are enough. *The Minna*, L. R. 2 A. & E. 97.

In dock or harbour it is enough to have sufficient hands on board to tend her under ordinary conditions of weather. *The Excelsior*, 37 L. J., Adm. 54; L. R. 2 A. & E. 268; 19 L. T. 87; *The Patriotto and The Rival*, 2 L. T. 301.

A vessel on her trial trip is not required to have on board her full complement of officers and men, provided she has a crew sufficient to work her safely. *Clyde Navigation Co.* v. *Barclay*, 1 App. Cas. 790; 36 L. T. 379; 3 Asp. M. C. 390.

A new steamer, not yet out of the builders' hands, was sent on a trial trip, manned by a sufficient number of men to work the ship, but they were not regularly constituted officers and crew:—Held, not to amount to contributory negligence. *Ib.*

Duty of master or officer to be on board in bad weather though the ship is at moorings in the river. *The Kepler*, 2 P. D. 40, n.

And to take charge when a ship is approaching with risk of collision. *The Independence, Maddox* v. *Fisher*, 14 Moore, P. C. 103; Lush. 270; 4 L. T. 553; 9 W. R. 587; *The Khedive, Stoomvart Maatschappy Netherland* v. *P. & O. Co.*, 52 L. J., Adm. 1; 5 App. Cas. 876; 42 L. T. 610; 29 W. R. 173; 4 Asp. M. C. 567—H. L. (E.)

In fog there must be sufficient strength at the wheel to put it hard over at once. *The Europa*, 14 Jur. 627.

Whilst a barge was by night lying astern of a steamship, in a dock, the latter moved her propeller and cut a hole in the barge. It appeared that there was no one on board the barge at the time of the accident. In a collision action:—Held, that although the steamer was to blame, the barge was also to blame for not having anyone on board of her, as, had there been, the collision might have been avoided, and in any event the barge might have been beached before she sank; the plaintiffs therefore could only recover half their damages. *The Scotia*, 63 L. T. 324; 6 Asp. M. C. 541.

In an action for the negligence of the defendant's servants in managing a barge so that the plaintiff's barge was run down, the plaintiff will not be entitled to recover if the accident could have been avoided, but for the negligence of the plaintiff's own men in not being aboard his barge at the time when it was lying in a dangerous place. *Leech* v. *Seward*, 4 Car. & P. 106.

A collision occurred in a dock between a tug and a barge that was moored head and stern alongside the dock wall. It was contended, on behalf of the tug, that the barge was guilty of negligence in not having any person on board:—Held, that, whether that was so or not, the presence of a person on board would not have prevented the collision or minimized its effects, and that the tug was therefore liable. *The Scotia* (supra), distinguished. *The Hornet*, [1892] P. 361; 1 R. 549; 68 L. T. 236; 7 Asp. M. C. 262.

It is the duty of a sailing smack during the day to have more than one hand on deck, and where a collision occurs between her and another smack, the primary cause of which is the wrongful manœuvre of the other smack, she will also be held to blame if it appears that had she had two hands on deck they might have taken means to have obviated the other's wrongful manœuvre. *The General Gordon*, 68 L. T. 469; 7 Asp. M. C. 317—H. L. (E.)

ii. *Speed.*

Coast of Ireland.]—An Atlantic steamship proceeding at full speed on a dark night thirty-five miles off the coast of Ireland, came into collision with and sank a barque, which was sailing in the same course with itself. In an action for damages brought by the owners of the barque:—Held, that, having regard to the state of the night, and the probability of there being other vessels in the way, the steamship was proceeding at an unjustifiable rate of speed. *The City of Brooklyn*, 1 P. D. 276; 34 L. T. 932; 24 W. R. 1056—C. A.

Mersey.]—A steamer going ten knots an hour on a dark night up the Horse Channel, at the

entrance of the Mersey, saw a sail three points on her port bow, less than half a mile distant. She ported her helm, but did not ease her engines: —Held, that the steamer was in fault for the collision which ensued, for not having stopped or eased her engines when she made out the other vessel, and that maintaining such speed was unwarrantable. *The Despatch*, Swabey, 138.

Excuse—Carrying Mails.]—It is no excuse for a vessel steaming at the rate of twelve knots, on a dark night, through a fair way, where vessels are accustomed to anchor, that she was under contract to carry government mails at the rate of thirteen knots. *The Vivid*, Swabey, 88; 4 W. R. 504. *S. C.* in P. C., 10 Moore, P. C. 472; 4 W. R. 755.

General Rule.]—Those who navigate a public river at too great a speed, or negligently, are as much liable as if the death were caused by negligence on a highway on land. *Reg.* v. *Talor*, 9 Car. & P. 672.

Swell raised by Excessive Speed.]—A steamship held in fault for raising a swell by going too fast in the river and thereby sinking a barge. *The Batavier*, *Netherlands Steamship Co.* v. *Styles*, 1 Spinks, 378; 9 Moore, P. C. 286. S. P., *Luxford* v. *Large*, infra, col. 701.

Crowded Channel.]—A steamship, proceeding at an improper rate in a channel crowded with ships, incurs the responsibility of damage occasioned by her being unable to keep out of the way of the sailing vessel. *The Germania*, 21 L. T. 44—P. C. Affirming, 37 L. J., Adm. 59.

Fishing Ground.]—In the case of a cutter with her trawl down, and a ship under sail, the presumption is against the latter sailing at six and a half knots on a very dark night, and aware that she was crossing a fishing-ground. *The Pepperell*, Swabey, 12.

Clear Weather—North Sea.]—A steamer being in the North Sea, and the weather fine and clear, though the night was dark, was proceeding at the rate of eight to nine knots an hour:—Held, that she was not, under the circumstances, going at too high a rate of speed. *The Pacific*, 53 L. J., Adm. 67; 9 P. D. 124; 51 L. T. 127; 33 W. R. 124; 5 Asp. M. C. 263.

Steamship.]—A steamship going ten knots held in fault for not having seen a barque in time to avoid her. *The Ericsson*, Swabey, 38.

Speed in Fog.]—*See* 11. THE REGULATIONS, infra, cols. 799 seq.

iii. *Look-out.*

The greater the darkness or thickness of weather, the more vigilant must be the look-out. *The Mellona*, 3 W. Rob. 7.

The look-out should be in the bows. *The Diana*, *Stuart* v. *Tremonger*, 4 Moore, P. C. 11; *The Batavier*, supra; *The Glannibanta*, 1 P. D. 283; 34 L. T. 934; 24 W. R. 1033; 3 Asp. M. C. 339—C. A.

Or on the bridge, in case of ferry boats. *The Wirral*, 3 W. Rob. 56.

An anchor watch should be kept in frequented roadsteads, or in bad weather. See *Luck* v. *Seward*, 4 Car. & P. 106; *Vanderplank* v. *Miller*, M. & M. 169; *The Pladda*, 46 L. J., Adm. 61; 2 P. D. 34.

One hand not sufficient look-out for a steamship in thick weather off Dungeness. *The Germania*, supra.

Aliter, in the Clyde in daylight. *Clyde Navigation Co.* v. *Barclay*, 1 App. Cas. 790; 36 L. T. 379; 3 Asp. M. C. 390.

It is the duty of a ship dropping up the Thames in the neighbourhood of the docks at night to have a look-out astern, and to warn an approaching vessel bound down of her presence. *The Juno*, 11 R. 679; 71 L. T. 341; 7 Asp. M. C. 506.

Unless there is apparent danger, it is not the duty of a vessel ahead to look out for, or show a light to, vessels following in her wake, so as to make her guilty of contributory negligence in the event of a collision between her and one of such vessels. *The City of Brooklyn*, 1 P. D. 276; 34 L. T. 932; 24 W. R. 1056; 3 Asp. M. C. 230—C. A.

A tug with ship in tow must keep a look-out for her tow as well as for herself. *The Jane Bacon*, 27 W. R. 35.

It is not necessarily negligence for the look-out of a vessel up the river not to report a vessel coming out of dock. *The Calabar*, *Moss* v. *African Steamship Co.*, L. R. 2 P. C. 238; 19 L. T. 768.

Before going about a ship must see that she can do so without damage to other ships. *The Allan and The Flora*, 14 L. T. 860.

The master is not criminally responsible for a collision caused by want of look-out. *Rex* v. *Allen*, 7 Car. & P. 153.

Heavy responsibility of steamship going twelve or fourteen knots in frequented waters at night as to look out. *The Londonderry*, 4 Not. of Cas. Suppl. xxxi.

iv. *Coming to an Anchor.*

It is the duty of a ship before rounding to to bring up to see that she does not endanger ships under way in her neighbourhood. *The Ceres*, Swabey, 250; *The Shannon*, 1 W. Rob. 463; *The Philotaxe*, 37 L. T. 540; 3 Asp. M. C. 512.

A ship was held in fault for attempting to bring up in the Downs in heavy weather without the assistance of a tug which she might have taken; she having only one anchor available, from which she parted. *The Annot Lyle*, 55 L. J., Adm. 62; 11 P. D. 114; 55 L. T. 576; 34 W. R. 647; 6 Asp. M. C. 50.

Duty to shorten sail in time before bringing up in a crowded roadstead. *The Neptune the Second*, 1 Dods. 467; *The Secret*, 26 L. T. 670; 1 Asp. M. C. 318; *The Earl Spencer*, L. R. 4 A. & E. 431; 32 L. T. 370; 23 W. R. 661; 2 Asp. M. C. 523.

A ship delaying to bring up until night time when she might have brought up in the day time in safety, held in fault. *The Egyptian*, 1 Moore, P. C. (N.S.) 373; 9 Jur. (N.S.) 1159; 8 L. T. 776.

A ship held in fault for attempting to bring up with one anchor chain unshackled, where, if the second anchor had been ready to let go, the collision would have been avoided. *The City of Peking*, 58 L. J., P. C. 64; 14 App. Cas. 40; 61 L. T. 136; 6 Asp. M. C. 396—P. C.

Ship under way must keep clear of Ship at Anchor.]—*The Batavier*, 2 W. Rob. 407; 10 Jur.

19; *The Secret*, 26 L. T. 670; 1 Asp. M. C. 318; *The Kjobenhavn*, 30 L. T. 136; 2 Asp. M. C. 213—P. C. *And see* cases infra, cols. 703, 704.

Bringing up in a Fairway.]—A ship will not necessarily be held in fault for a collision caused by her having improperly brought up in a fairway, if fog or other reasonable cause compelled her to do so. *The Kjobenhavn*, 30 L. T. 136; 2 Asp. M. C. 213—P. C. *The Agwadillana* (fog), 60 L. T. 897; 6 Asp. M. C. 390.

It is not negligence to bring up in the Mersey directly in the track of the ferry steamers. *The Lancashire*, L. R. 4 A. & E. 198; 29 L. T. 927; 2 Asp. M. C. 202.

—— **In Exposed Position.**]—A barge in the Thames brought up in a place where she was exposed to the swell of steamships, and was thereby sunk:—Held, that she was alone in fault. *The Duke of Cornwall*, 1 Pritch. Ad. Digest, 301.

A ship brought up in an exposed position does not thereby contribute to a collision caused by another ship driving in to her. *The Despatch*, 14 Moore, P. C. 83; Lush. 98; 3 L. T. 219.

Stopping in Fairway—Whistle.]—Where a steamship under way at night in the Firth of Clyde stops her way and puts herself across the line of navigation for the purpose of coming to an anchor, she is to blame for not warning vessels coming up behind her of her manœuvres. *The Queen Victoria*, 64 L. T. 520; 7 Asp. M. C. 9—C. A.

v. *Anchor ready to let go.*

During a very violent gale a brig adrift in the Tyne drove down on a steamer which was lying properly moored to mooring-buoys placed there by the harbour authorities. On the brig striking the steamer, the ring of one of the buoys was carried away, and the steamer got adrift and drove down the river, and ultimately came in contact with and did damage to a barque, whose owners instituted a cause of damage against the steamer in the county court, to recover for the damage done to their vessel by the steamer. At the hearing it was proved that the chain cables of the steamer had been unbent at the time she got adrift, and that no look-out had previously been kept on deck, though it was known that the weather was getting worse:—Held, that a defence of inevitable accident, set up by the owners of the steamer, was not sustained, and that the steamer was alone to blame for the collision. *The Pladda*, 46 L. J., Adm. 61; 2 P. D. 34.

When the captain of a steamer, upon a vessel being reported ahead, immediately gives orders to stop and reverse, but is unable to stop the way of his ship in time to prevent a collision, he is not proved to have been guilty of negligence because he did not immediately drop his anchor. *The C. M. Palmer and Larnax, Tyne Steam Shipping Co.* v. *Smith*, 29 L. T. 120; 21 W. R. 702; 2 Asp. M. C. 94—P. C.

Where a ship, having been moored to a buoy, under the sanction of the authorities in the port where she was, broke loose in consequence of a latent defect in the buoy, and, being prevented by an inevitable accident from letting go her anchor, came into collision with another ship:—Held, that no negligence could be imputed to the master. *The William Lindsay*, L. R. 5 P. C. 338; 29 L. T. 355; 2 Asp. M. C. 118—P. C.

Where collision was attributable to the effect of an exceptional current, known to be a possible though improbable contingency, but it was shown that the port anchor of the steamer was not in readiness, and that delay arose in dropping the starboard anchor:—Held, that the steamer had neglected ordinary precautions and could not be absolved from blame. *The City of Peking*, 58 L. J., P. C. 64; 14 App. Cas. 40; 61 L. T. 136; 6 Asp. M. C. 396—P. C.

In the absence of any regulation or custom, there is no duty on the part of a keel or barge drifting up river to keep out of the deep water navigation and navigate in the shallow water, even though by remaining in the deep water she obstructs the passage of steamships which can only navigate in the deep water. A keel with her mast lowered may drive up on a flood tide in any part of a river lashed to another keel, but it is her duty in such circumstances to go up dredging with her anchor down, in order that she may thereby have the means in an emergency of bringing herself up if necessary; and whilst two keels may drive up lashed together there is no less duty imposed on them to dredge. *The Ralph Creyke*, 55 L. T. 155; 6 Asp. M. C. 19.

A steamship in the Thames at night passed a schooner, and when three hundred yards ahead of her ran ashore; the schooner ran into her:—Held, that the schooner was not in fault for not having dropped her anchor to avoid the collision. *The Elizabeth and The Adalia*, 22 L. T. 74. S. P., *The C. M. Palmer and The Larnax*, supra.

Duty to have Chains bent and Anchor ready to let go.]—*The Kepler*, 2 P. D. 40, n.

vi. *Foul Berth.*

If one ship has given another a foul berth, the owners of the ship giving the foul berth have no right to demand that extraordinary precaution should be taken on board the other ship to avoid a collision. *The Vivid*, 42 L. J., Adm. 57; 28 L. T. 375; 1 Asp. M. C. 601.

The "Victor" gave the "Vivid" a foul berth, and the "Vivid," in swinging, came into collision with and damaged the "Victor." The usual and ordinary precautions had been taken on board the "Vivid":—Held, that the "Vivid" was not answerable for the collision. *Ib.*

The "W. A." in charge of a pilot came to anchor in the Mersey, and gave the "B. T." a foul berth. Various remonstrances were from time to time made by those on board the "B. T.," and after a few days the vessels, in swinging to the tide, came into collision:—Held, that the owners of the "W. A." were liable. *The Woburn Abbey*, 38 L. J., Adm. 28; 20 L. T. 621.

One ship brought up during a gale in a fair berth in the Downs, and another ship coming up, anchored within a cable's length of her, riding at one anchor. The gale increasing, drove both ships from their anchors, when the last ship came into collision with the first ship, so that the first ship had to be taken to the roads in a sinking state and beached:—Held, that the ship last coming up was solely liable for the collision, from having given the first ship a foul berth in riding so close to her at single anchor. *The Maggie Armstrong* v. *The Blue Bell*, 14 L. T. 340.

"B." took up a berth in the Tyne, with the view of discharging cargo. "C." took up a berth close alongside, and, as the tide fell, heeled over upon "B.," and damaged her :—Held, that "C." was responsible for the damage so received by "B." *The Lidskjalf*, Swabey, 117.

The proximate cause of collision was the parting of a steamer's cable while anchoring :—Held, that the steamer was to blame, for if she had not delayed taking measures for anchoring till so late at night, the collision would not have been inevitable. *The Egyptian*, 1 Moore, P. C. (N.S.) 373 ; 9 Jur. (N.S.) 1159 ; 8 L. T. 776.

A vessel gave another a foul berth, but got into collision with her because of a hurricane, that caused her to drive :—Held, inevitable accident. *The Innisfail and The Secret*, 35 L. T. 819 ; 3 Asp. M. C. 337.

A vessel that grounds alongside another against which she falls over and so injures her :—Held, in fault. *The Indian and The Jessie*, 12 L. T. 586 ; *The Lidskjalf*, Swabey, 117 ; *The Patriotto and The Rival*, 2 L. T. 301 ; and see *The Vivid*, supra.

A vessel bringing up so as not to swing clear of another will be held in fault for fouling her. *The Northampton*, 1 Spinks, 152 ; *The Vivid*, 42 L. J., Adm. 57 ; 29 L. T. 375 ; 1 Asp. M. C. 601.

In the Mersey a cable's length is a clear berth. *The Princeton*, 47 L. J., Adm. 33 ; 3 P. D. 90 ; 38 L. T. 260 ; 3 Asp. M. C. 562.

A ship should not, without necessity, bring up directly ahead of another, so that if she parts or drives she cannot clear the latter. See *The Egyptian*, supra ; *The Volcano*, 2 W. Rob. 337 ; *The Maggie Armstrong and The Blue Bell*, 14 L. T. 340.

A ship brought up too near another, and with one anchor only, held in fault for a collision with the other to leeward. *The Volcano*, 2 W. Rob. 337.

vii. *When at Anchor or Moored.*

In Heavy Weather.]—A ship that drives when at anchor because her yards have not been sent down, or because she was not properly tended, will be held in fault for a collision so caused. *The Excelsior*, 37 L. J., Adm. 54 ; L. R. 2 A. & E. 268 ; 19 L. T. 87 ; *The Christiana*, 7 Moore, P. C. 160 ; *The Peerless*, Lush. 30 ; *The Ruby Queen*, Lush. 266.

Or where the collision is caused by her not having moored, when she ought to have done so. *The Gipsy King*, 2 W. Rob. 537.

Insufficient Ground Tackle.]—A ship will be held in fault for a collision so caused. *The Massachusetts*, 1 W. Rob. 371 ; *The Despatch*, Lush. 98 ; 14 Moore, P. C. 83 ; 3 L. T. 219 ; *The Volcano*, 2 W. Rob. 337 ; *Allen* v. *Quebec Warehouse Co.*, 56 L. J., P. C. 6 ; 12 App. Cas. 101 ; 56 L. T. 30 ; *The William Tell*, 13 L. T. 13.

Duty to Shift Berth where another Ship Endangered.]—See *The Woburn Abbey*, 38 L. J., Adm. 28 ; 20 L. T. 621 ; *The Despatch*, supra.

Duty to Avoid Collision, if possible — Duty of Colliding Vessel.]—When a vessel under way comes into collision with a vessel at anchor exhibiting a proper light, the onus is on her to justify her conduct. She cannot be excused when it is shown that she had not a sufficient look-out. The vessel at anchor is also bound to keep a competent person on watch, whose duty it is to see that the anchor light or lights are properly exhibited, and to do everything in his power to avert or minimise a collision. If that person acts in error of judgment, when placed by the colliding vessel in a position of difficulty calling for instant decision, he is entitled to favourable consideration and it must be shown that any alternative course would have prevented or mitigated the collision. *The Meanatchy*, 66 L. J., P. C. 92 ; [1897] A. C. 351—A. C.

Slipping to avoid Collision.]—A vessel drove against the breakwater at Falmouth and damaged it. She might have avoided the damage by slipping from her anchor in time :—Held, that she was in fault. *The Uhla*, 37 L. J., Adm. 10, n. ; L. R. 2 A. & E. 29 ; 19 L. T. 89.

viii. *Getting under Way.*

Coming out of Dock.]—A ship coming out of dock improperly allowed herself to be caught by the tide and carried against another proceeding down the river. She was held in fault for not having her jib to keep her head straight. *The Ulster*, 1 Moore, P. C. (N.S.) 31 ; 6 L. T. 736.

Hauling Out of Tier.]—A vessel coming into a tier at Constantinople, and not hauling out when bad weather came on, by which means alone damage to the vessel alongside could be prevented :—Held, in fault for damage done in collision with her. *The Patriotto and The Rival*, 2 L. T. 301.

A vessel casting off from her moorings at night held in fault for not exhibiting a light to an approaching vessel. *The John Fenwick*, 41 L. J., Adm. 38 ; L. R. 4 A. & E. 500 ; 26 L. T. 322 ; 1 Asp. M. C. 249.

In Bad Weather.]—A vessel getting under way unnecessarily in bad weather or darkness and thereby doing damage, will be held in fault. *The Carrier Dove*, Br. & Lush. 113 ; 2 Moore, P. C. (N.S.) 260 ; 19 L. T. 768 ; *The Borussia*, Swabey, 94.

Obstruction by Ship at Wharf.]—A. was possessed of a wharf and of a ship lying there, whose mast projected over the river. B. moored his ship at an adjoining wharf with her bowsprit overhanging A.'s wharf. On the tide falling, B.'s bowsprit struck A.'s mast, and carried it away : Held, that B. was not liable. *Dalton* v. *Denton*, 1 C. B. (N.S.) 672.

ix. *At a Launch.*

Where a launch is about to take place, reasonable notice must be given to vessels navigating the river. *The Blenheim*, 2 W. Rob. 421 ; 4 Not. of Cas. 393 ; *The Vianna*, Swabey, 405.

Persons in charge of a launch are bound to take the utmost precautions to avoid injury to passing vessels, such precautions being in the circumstances, no more than reasonable. It is their duty to have a tug in attendance on a launch in the Mersey, decorated so as to indicate that a launch is imminent, and, if necessary, to warn approaching vessels. *The George Roper* or *Bentinck Steamship Co.* v. *Potter*, 52 L. J., Adm. 69 ; 8 P. D. 119 ; 49 L. T. 185 ; 31 W. R. 953 ; 5 Asp. M. C. 134.

In the river Mersey, to give notice of a launch taking place, it is customary to have the ship dressed in flags for an hour or more before high water (about which time the launch takes place); to have tugs, one at least also dressed in flags, plying about some time before the launch in front of the yard where the ship is lying. When in launching a vessel the usual precautions and the usual general notice have been given, the persons in charge of the launch have done all they are required to do by law. *The Glengarry*, 43 L. J., Adm. 37; 2 P. D. 235; 30 L. T. 341; 23 W. R. 110; 2 Asp. M. C. 230.

When a vessel is launched in a river, the law casts upon the persons in charge of the launch the obligation of conducting the launching operations with the utmost precautions, and of giving such notice as is reasonable and sufficient to prevent any injury to passing vessels. *The Andalusian*, 46 L. J., Adm. 77; 2 P. D. 231.

The "Angerona," proceeding down the river in tow of a tug, came into collision with the "Andalusian," which was being launched from a shipbuilding yard. The yard had not been in use for some time. The "Andalusian" was properly decorated, but gave no other warning to vessels passing during the launch: — Held, that the "Andalusian" was alone to blame. *Ib.*

Where a launch was about to take place in the river Mersey at high water, and the usual general notice had been given, and the launch was dressed with flags and all usual precautions taken, and in due time before the launch a tug proceeded to a vessel lying at anchor off the place where the launch was about to take place and warned her thereof, and subsequently in sufficient time offered to tow her out of the way; but, owing to the conduct of those on board the vessel at anchor, whose pilot was aware before she anchored that the launch was about to take place, that vessel was still in the way, when the launch, which was delayed as long as it was prudent to do so, took place, and the launch struck the vessel and sank her:—Held, that the owners of the launch had taken every possible precaution and were not to blame for the collision, and that the vessel at anchor was alone to blame. *The Cachapool*, 7 P. D. 217; 46 L. T. 171; 4 Asp. M. C. 502.

Semble, a vessel at anchor in the track of a vessel about to be launched is bound to get out of the way of the launch if she has had warning of the launch in due time and facilities for moving out of the way in time (such as a tug offering and being ready to tow her) are afforded by those in charge of the launch. *Ib.*

A tug steamer, when being launched in the river Tyne, ran stern foremost into the starboard side of a steamer passing down the river, and negligently being at that place:—Held, notwithstanding the steamer's negligence, the tug might, by ordinary care, such as giving a signal before launching, have avoided the consequences of such negligence, and therefore, both being to blame, half the damage only was payable by the tug. *The United States*, 12 L. T. 33—P. C.

x. *Going About.*

Duty of a ship not to go about so as to embarrass or damage other ships. See *The Sea Nymph*, Lush. 23; 15 L. T. 103; *The Allan and The Flora*, 14 L. T. 860. But see *The Palatine*, 27 L. T. 631; 1 Asp. M. C. 468.

And to stay rather than wear, if possible. *The Falkland and The Navigator*, 1 Moore, P. C. (N.S.) 379; Br. & Lush. 204; 9 Jur. (N.S.) 113—P. C.

If she misses stays it is the duty of those on board to get her under command as soon as possible. *The Kingston-by-the-Sea*, 3 W. Rob. 152; *The Lake St. Clair and The Underwriter*, 2 App. Cas. 389; 36 L. T. 155; 3 Asp. M. C. 361—P. C.

A ship whose duty it is to keep out of the way must not stand so close to the other before going about that, if she misses stays, a collision is inevitable. *The Kingston-by-the-Sea*, 3 W. Rob. 152; *The Mobile*, Swabey, 69, 127; 10 Moore, P. C. 467; nom. *Bates* v. *Don Pablo Sora*, 4 W. R. 708.

As to the duty of a ship working to windward, in company with another, to watch for the other going about, so as to be ready to go about at the same time. *The Priscilla*, L. R. 3 A. & E. 125; 23 L. T. 566; 1 Asp. M. C. 468. And see *The Lake St. Clair and The Underwriter*, supra.

xi. *Wrong Act of other Ship.*

When one ship is, by the improper navigation of a second ship compelled to alter her course, and so does damage to a third ship, the ship which compelled the alteration of course is liable for the damage; and that liability remains if the damaged ship was not actually negligent, even though by taking another course she might have avoided the collision. *The Sisters*, 45 L. J., Adm. 39; 1 P. D. 117; 34 L. T. 338; 24 W. R. 412.

A steamship meeting three barges was compelled by the negligent management of the foremost barge to take a course which brought her into collision with the other two barges:—Held, that the owners of the first barge were liable to those of the other two barges for the damage done by the collision. *Ib.*

A vessel which, having performed her own duty, is thrown into immediate danger of collision by the wrongful act of another, is not to be held liable if at that moment she adopts a wrong manœuvre. *The Nor*, 30 L. T. 576; 22 W. R. 30; 2 Asp. M. C. 264—P. C. *The Bywell Castle*, 4 P. D. 219; 41 L. T. 747; 28 W. R. 293; 4 Asp. M. C. 207—C. A.

—— **Does not Excuse.**]—One who can avoid a collision made imminent by the fault of another is bound to do so. *The Jane Bacon*, 27 W. R. 35.

Other Ship crossing Bows.] — A steamship striking a barge held not to blame, her manœuvre having been caused by a third ship wrongly crossing her bows. *The Thames*, 32 L. T. 343; 2 Asp. M. C. 512. S. P., *The Schwan and The Albano*, infra, col. 706.

xii. *Various Cases.*

Small Craft and Heavy Ships.]—Heavy ships have no right in law to require small craft to keep out of their way. See *The La Plata*, Swabey, 220, 298; *The Independence*, Lush. 270; 14 Moore, P. C. 103; 4 L. T. 563; 9 W. R. 582.

Moving Propeller in Dock.]—A steamship was held in fault for damaging a barge improperly

moored astern of her by moving her propeller. *The Scotia*, 63 L. T. 324; 6 Asp. M. C. 541.

On Fishing Grounds.]—Extra precautions are required when passing over. *Murphy* v. *Palgrave*, 21 L. T. 209; *The Margaret and The Tusear*, 15 L. T. 86. See also *The Pacific*, 53 L. J., Adm. 67; 9 P. D. 124; 51 L. T. 127; 33 W. R. 124; 5 Asp. M. C. 263.

Warping down the Thames against the Flood.]—See *The Hope*, 2 W. Rob. 8; *The Trident*, 1 Spinks, 217.

Dredging with Anchor.]—Duty as to under certain circumstances. *The Aguadillana*, 60 L. T. 897; 6 Asp. M. C. 390; *The Ralph Creyke*, 55 L. T. 155; 6 Asp. M. C. 19.

Duty to show a light astern when dredging. *The Indian Chief*, 58 L. J., Adm. 25; 14 P. D. 24; 60 L. T. 240; 6 Asp. M. C. 363.

Duty to wait under the Point when Navigating a winding River against Tide or Stream.]—In an action for collision between two vessels under steam in the river Scheldt, it appeared that the vessels were proceeding in opposite directions, the one up and the other down the river, and that the vessel going up the river had the tide against her. The collision took place at a strong bend of the river. It did not appear that any positive rule had been printed and circulated with regard to the navigation of the river; but, by the practice of navigation there, it was the duty of a vessel navigating against the tide to wait until a vessel coming in the opposite direction had cleared her at the bend:—Held, upon proof that the vessel navigating against the tide had disregarded this practice, that she must be taken to have been to blame for the collision. *The Talabot*, 15 P. D. 194; 63 L. T. 812; 6 Asp. M. C. 602. S. P., *The Smyrna*, 2 Moore, P. C. (N.S.) 447; 10 Jur. (N.S.) 977; 11 L. T. 74.

Assisting Helm with Sail.]—A ship held in fault for not setting an outer jib to assist in turning. *The Ulster*, 1 Moore, P. C. (N.S.) 31; 6 L. T. 736.

Where the helm alone will not take a ship clear of the other it must be assisted by handling sheets and braces. *The Lady Anne*, 15 Jur. 18; *The Stranger*, 6 Not. of Cas. 36; *The Marpesia*, 8 Moore, P. C. (N.S.) 468; L. R. 4 P. C. 212; 26 L. T. 338; 1 Asp. M. C. 261; *The Zadok*, 53 L. J., Adm. 72; 9 P. D. 114; 50 L. T. 695; 32 W. R. 1003; 5 Asp. M. C. 252; *The James*, Swabey, 55, 60; 4 W. R. 353—P. C.

Two Vessels making for same Port—Dangerous Manœuvre by Foremost Vessel—Liability.]—When two vessels are making for the same port, and that which is in front, regardless of the position of that which is behind, executes a manœuvre which is under the circumstances dangerous, the result of which is a collision, she is not free from liability, although if the hindermost vessel had reversed her engines at once on seeing the object of the manœuvre the collision would probably have been avoided. *SS.* "*Nord Kap*" v. *SS.* "*Sandhill*," [1894] A. C. 646; 11 R. 144—P. C.

Coming Alongside to Speak.]—A trader undertaking to speak a fishing coble, both being under sail in the North Sea, held in fault for attempting to do so without heaving to. *The Thames*, 5 C. Rob. 345.

A ship approaching another for the purpose of speaking her, or for other purposes, does so at her own risk. *The Bellerophon*, 44 L. J., Adm. 7; 33 L. T. 412; 3 Asp. M. C. 58.

Where Risk of Smelling the Ground.]—Where a steamer is navigating a reach in which there is a risk of her smelling the ground, it is her duty to be under such control by occasionally stopping her engines or otherwise, so that she may be able to avoid collision with other craft in case she does smell the ground and fails to answer her helm. *The Ralph Creyke*, 55 L. T. 155; 6 Asp. M. C. 19.

Unusual Mode of Navigating—Warping down River.]—A vessel navigating in an unusual manner—warping down a river against tide—does so at her own risk in case of collision. *The Hope*, 2 W. Rob. 8.

Ship ashore in a fairway—Duty to warn others.]—Those in charge of a vessel ashore at night in a fairway are bound to warn others approaching her. *The Industrie*, 40 L. J., Adm. 26; L. R. 3 A. & E. 303; 19 W. R. 728; 1 Asp. M. C. 17.

Standing too close to other Craft.]—A ship held in fault for approaching another so close that she could not see a third ship in time to avoid her. *The Zollverein*, Swabey, 96; 2 Jur. (N.S.) 429.

So close in squally weather that, on being struck by a squall, a collision was inevitable. *The Globe*, 6 Not. of Cas. 275.

A steamer met at night in the river Thames, two brigs advancing in parallel courses from fifty to sixty fathoms apart from each other. The steamer, instead of porting her helm, attempted to pass between them, and thereby caused a collision, by which one of the brigs was lost. The steamer held to blame. *The Schwalbe*, 14 Moore, P. C. 241; Lush. 239; 4 L. T. 160.

Duty to bring up or lie fast in thick weather.]—In weather so thick that other ships cannot be seen in time to avoid them a ship should bring up or lie fast. *The Lancashire*, L. R. 4 A. & E. 198; 29 L. T. 927; 2 Asp. M. C. 202; *The Otter*, L. R. 4 A. & E. 203; 30 L. T. 43; 22 W. R. 557; 2 Asp. M. C. 208; *The Aguadillana*, 30 L. T. 897; 6 Asp. M. C. 390. But as to dumb barges, see *The Rose of England*, infra. And see 11. THE REGULATIONS, infra, col. 804.

Eddy Tide.]—Must be known and guarded against. *The La Plata*, Swabey 220, 298; *The City of Peking*, 58 L. J., P. C. 64; 14 App. Cas. 40; 61 L. T. 136; 6 Asp. M. C. 396—P. C. But see *The Rhondda*, 8 App. Cas. 549; 49 L. T. 210; 5 Asp. M. C. 114, where it is unexpected and unusual.

Dumb Barges.]—In the Thames have a right to navigate all over the river in the deep water channel as well as elsewhere. *The Ralph Creyke*, 55 L. T. 155; 6 Asp. M. C. 19.

And in fog are not necessarily in fault because, not having anchors, they cannot at once bring up. *The Rose of England*, 59 L. T. 262; 6 Asp. M. C. 304.

Swell raised by Excessive Speed.]—A ship that by going too fast in narrow waters raises a swell that damages other craft will be held liable for the damage. *The Batavier*, 1 Spinks, 378. *S. C.* on App., 9 Moore, P. C. 286; *Smith* v. *Dobson*, 3 Man. & G. 59; 3 Scott. (N.R.) 336. But see *Luxford* v. *Large*, 5 Car. & P. 421, as to the other craft being overladen.

Fog—Alteration of Helm.]—There is no general rule that a vessel when proceeding in a fog is not entitled to act with her helm, but each case must depend upon the special circumstances. *The Vindomora*, [1891] A. C. 1; 63 L. T. 749; 6 Asp. M. C. 569—H. L. (E.)

The plaintiffs' vessel while proceeding in a dense fog heard the whistle of the defendants' vessel about 3½ points on her starboard bow, and thereupon starboarded her helm. A collision, however, occurred, as the defendants' vessel struck her on her starboard quarter:—Held, that, under the circumstances, the plaintiffs' vessel was not to blame for starboarding her helm. *Ib.*

Vessel Dangerous to Others.]—A ship of war with a projecting ram under water, held in fault for not warning another approaching her to speak of the danger. *The Bellerophon*, supra; and see *The Batavier*, 1 Spinks, 378; 9 Moore, P. C. 286; 28 L. T. 429; *The Underwriter*, 2 App. Cas. 389; 36 L. T. 155; 3 Asp. M. C. 361.

c. Proof of Negligence.

The burden of proof lies on a party seeking to recover compensation for damage occasioned by a collision, and that party must establish that the loss was attributable to the neglect or default of the other party. *The London* or *City of London, Morgan* v. *Sim.* 11 Moore, P. C. 307; Swabey, 300; 5 W. R. 678.

The plaintiff in a collision cannot recover where the defendant was not negligent, or where there is doubt as to the cause of collision—Per Lord Stowell. *The Catherine of Dover*, 2 Hag. Adm. 145.

If the evidence does not satisfy the court that one or both vessels are in fault for the collision, the suit will be dismissed. *The Maid of Aukland*, 6 Not. of Cas. 240.

A vessel, whilst being towed into a harbour by a steam-tug, got aground, and the defendant's vessel, which was being towed in at the same time by the same tug, astern of the plaintiff's vessel, without any active default on the defendant's part, struck and damaged the plaintiff's vessel:—Held, no evidence of negligence for which the defendant was liable. *Harris* v. *Anderson*, 14 C. B. (N.S.) 499.

The owners of a ship that has been damaged by collision are not entitled to recover in admiralty damages against the owners of the other ship unless the collision is proved to have been caused by the fault of the other ship. *The Ligo*, 2 Hag. Adm. 356. S. P., *The Itinerant*, 2 W. Rob. 236.

Burden of Proof.]—In an action of damage by collision, the plaintiffs, in their statement of claim, in substance alleged that their vessel was at anchor when the defendants' steamer ran into her in broad daylight. The defendants, in their pleading, made no charge of negligence against the plaintiffs, but alleged that the collision was caused by the steering gear of their vessel not acting in consequence of some latent defect or obstruction, which could not have been ascertained or prevented by the exercise of any reasonable care or skill on their part, and that the collision and damage were caused by inevitable accident:—Held, that the onus to disprove negligence lay on the defendants, and, therefore, that they must begin. *The Merchant Prince*, [1892] P. 9; 67 L. T. 251; 7 Asp. M. C. 208—C. A.

Where the issue is, whether a collision was caused by defective look-out or insufficient moorings, the burden of proving the sufficiency of the look-out or moorings is upon the vessel, which alone can do so. *The John Harley and The William Tell*, 13 L. T. 413.

In a damage cause, brought by the owners of a sailing vessel against a steam vessel, it is not incumbent upon them to plead that the sailing vessel, after observing the steam vessel, kept her original course. The burden of proof, and therefore of plea, is in this respect upon the defendant, to show that the course of the sailing vessel was altered, and the collision caused thereby. *The West of England*, 36 L. J. Adm. 4; L. R. 1 A. & E. 308.

Plea, that a steamer overtaking a sailing vessel could not comply with the 17th Art. in consequence of the state of the weather, and the neglect on the part of those on board the sailing vessel to take proper precautions to avoid a collision:—Held, that the proof of such a plea was entirely on the steamer, who must make out in her defence that it was impracticable for her, in consequence of the state of the weather, to have seen the sailing ship in time to avoid her; and that the steamer was pursuing her course at a reasonable speed, such weather considered. *The Hannah Park and The Lena*, 14 L. T. 675.

The onus of proving negligence in the ship proceeded against is on the plaintiff; if the defendant alleges "inevitable accident" the onus still rests on the plaintiff; it is not shifted until he shews a primâ facie case of negligence in the defendant. *The Bolina*, 3 Not. of Cas. 208.

Where the plaintiff proves facts which would lead to the conclusion that the other ship is in fault, the burden of proof is shifted, and it lies on the defendant to show that his ship was not in fault. This applies in the case of a collision between a ship under way and another at anchor. *The Secret*, 26 L. T. 670; 1 Asp. M. C. 318.

Failure of Proof—Cross Actions.]—Where there were cross actions and each party failed to prove negligence against the other, both actions were dismissed with costs. *The Gabriel*, 4 W. R. 91.

—— **Lights—Infringement of Rules as to.**]—A vessel that has infringed a rule as to lights made by competent authority must show that the infringement did not contribute to the collision. *The Swansea and The Condor*, 48 L. J., Adm. 33; 4 P. D. 115; 40 L. T. 442; 27 W. R. 748; 4 Asp. M. C. 115.

—— **Ship at Anchor.**]—In an action, a collision between a vessel at anchor and one in motion, the burden of proof is upon the owners of the latter to prove that the collision was not occasioned by any negligence on their part. *The*

Annot Lyle, 55 L. J., Adm. 62; 11 P. D. 114; 55 L. T. 576; 34 W. R. 647; 6 Asp. M. C. 50—C. A.

In an action for damage by collision it appeared that the defendants' vessel while in motion came into collision with the plaintiffs' vessel which was at anchor:—Held, that the fact that the plaintiffs' vessel at the time of the collision was at anchor and could be seen was primâ facie evidence of negligence on the part of the defendants, and that the burden of proof was then upon them to rebut the presumption of liability, by showing either that the collision was occasioned by no fault on their part, or that it was due to inevitable accident, or that it was solely the fault of a pilot who was on board their vessel by compulsion of law. *Clyde Navigation Co.* v. *Barclay* (1 App. Cas. 790) considered. *The Indus*, 56 L. J., Adm. 88; 12 P. D. 46; 56 L. T. 376; 35 W. R. 490; 6 Asp. M. C. 105—C. A.

A plaintiff, whose vessel has been run down at anchor, may charge negligence generally, and the burden of proof, the collision proved, is thrown upon the defendant to establish his defence. *The Bothnia*, Lush. 52.

Vessels A. and B. coming into collision while B. is at anchor, the burden of proof is upon A. to account for the collision, and the burden is not shifted by the fact that at such time A. was drifting in consequence of a prior collision. *The Annapolis*, 5 L. T. 326. S. P., *The George Arkle*, 5 L. T. 290.

Where a vessel under steam runs down a ship at her moorings in broad daylight, that fact is by itself primâ facie evidence of fault, although such steamer is well equipped, and both officers and men are shown to have been at their posts and on the outlook. *The City of Peking*, 58 L. J., P. C. 64; 14 App. Cas. 40; 61 L. T. 136; 6 Asp. M. C. 396—P. C.

The burden is upon a ship that is under way to prove that she was not negligent for a collision with another at anchor. *The George*, 2 W. Rob. 386; 9 Jur. 670.

Collision at night between ship under way and ship at anchor. Upon proof that the latter was brought up in a proper place and had a proper light up, the burden shifts to the other ship to show that she was not negligent. *The Telegraph*, 1 Spinks, 427.

A collision occurred between a ship under way and another at anchor. The latter was carrying a bull's eye lantern showing a light only in one direction:—Held, under 25 & 26 Vict. c. 63, s. 29, that the burden was upon her to show that the collision was not caused by the infringement of the statute. She discharged this burden and recovered full damages. *The Palestine*, 13 W. R. 111.

On Part of Ship at Anchor.] — See *The Meanatchy*, supra, col. 696.

Semble. In the absence of a charge of negligence against a ship at anchor (plaintiff), run down by a ship under way (defendant), the latter is entitled to begin. *The Bottle Imp*, 42 L. J., Adm. 48; 28 L. T. 286; 21 W. R. 600; 1 Asp. M. C. 571.

d. Inevitable Accident.

Definition of.]—Inevitable accident is where the collision could not possibly have been prevented by proper care and seamanship. So that where the defence of inevitable accident is set up on behalf of a vessel primâ facie to blame for a collision, the defence, to succeed, must be supported by proof that everything was done which could and ought to have been done to avoid the collision; and this, though the vessel is in some degree disabled, and so less manageable than she would otherwise have been. *The Calcutta*, 21 L. T. 768—P. C.

Inevitable accident is that which the party charged with the damage could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. *The Marpesia*, 8 Moore, P. C. (N.S.) 468; L. R. 4 P. C. 212; 26 L. T. 333; 1 Asp. M. C. 261.

When in a cause of collision the defence of inevitable accident is raised, the onus of proof lies, in the first instance, on those who bring the suit against the vessel and seek to be indemnified for damage; and does not attach to the vessel proceeded against until a primâ facie case of negligence and want of due seamanship is shown. *Ib.*

Two sailing vessels approaching stem on in such a manner as that, under the sailing rules, each would be bound to port, being in a dense fog, only sighted each other at a distance of about two hundred yards. The defendant's vessel, having been close-hauled on the port tack, was then preparing to go about, and had eased off her head sheets. Both vessels immediately ported, but came into collision. Only one minute elapsed between the time of sighting and the collision. The plaintiff's petition alleged, that the defendant's vessel neglected to port, and it was stated, in answer to a question by the judge of the admiralty court, that the head sheets of the defendant's vessel were not again hauled aft. On this evidence that vessel was held to blame by the admiralty court, on the ground that she had not executed all the proper manœuvres which she might have executed after sighting the other vessel:—Held, that the collision was the result of an inevitable accident, the defendant's vessel having done all that could be effected by ordinary care, caution, or maritime skill in the short space of time that elapsed; and that the plaintiff, if he meant to rely upon the fact that the head sheets had not been again hauled back, ought to have alleged that fact in his petition as to the case of the collision; the allegation of neglect to port not sufficiently indicating the nature of such omission. *Ib.*

Inevitable accident is where the collision could not have been prevented by proper care and seamanship in the particular circumstances of the case. *The Secret*, 26 L. T. 670; 1 Asp. M. C. 318.

A defendant, in order to support a defence of inevitable accident, is bound to show that everything was done which could and ought to have been done to avoid a collision. *Ib.*

Inevitable accident is that which a party could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. It is not enough to show that the accident could not be prevented by the party at the very moment it occurred, but the question is, what previous measures have been adopted to render the occurrence of it less probable. *The Uhla*, 37 L. J., Adm. 16, n.; L. R. 2 A. & E. 29, n.; 19 L. T. 89.

Where damage might have been avoided by shipping cable and setting sail:—Held, that it was not an inevitable accident, but the result either of negligence or the absence of proper nautical skill. *Ib.*

Tempestuous weather is an excuse for the failure to exercise proper nautical skill which should be received with the greatest possible caution. *Ib.*

A schooner ran foul of a ship, whereby the latter became unmanageable. Her anchor was let go, when she swung round upon and came in collision with a brig lying at anchor:—Held, that the collision was inevitable, those on board the ship having done what they could to avoid it. *The Hibernia*, 4 Jur. (N.S.) 1244.

An inevitable accident is such as could not have been prevented by the exercise of ordinary care, caution and maritime skill. *The Pladda*, 46 L. J., Adm. 61; 2 P. D. 34.

Latent Defect.]—The owners of a vessel are not liable for damage caused to another vessel in a collision occasioned by the sudden breaking down of an apparatus in which there was an inherent latent defect, in the absence of any negligence in the user of the apparatus. *The Virgo*, 35 L. T. 519; 25 W. R. 397; 3 Asp. M. C. 285.

Disabled Vessel.]—When a ship seeks to excuse her failure to comply with the sailing regulations, and with a seamanlike precaution, by shewing that such a failure was in consequence of her being disabled in a prior collision, it is material to inquire whether the prior collision was due to her default or was the result of inevitable accident. *The Kjobenhavn*, 30 L. T. 136; 2 Asp. M. C. 213—P. C.

When it is the duty of a ship to keep out of the way of another ship, but she is unable to do so by reason of being disabled in a former collision, and the other ship being unaware of her disabled condition continues her course, a collision ensuing is the result of inevitable accident. *The Aimo*, *The Amelia*, 29 L. T. 118; 21 W. R. 707; 2 Asp. M. C. 96—P. C. And cp. *Seecombe* v. *Wood*, 2 M. & Rob. 290.

Ring of Buoy Carrying Away.]—A vessel in port was moored to a buoy, the use of which was sanctioned by the authorities, and, a storm being expected, she also had her anchor ready to drop. The mooring buoy broke and the vessel drifted. She attempted to cast anchor, but was prevented by inevitable accident. She came into collision with another vessel which was properly moored:—Held, that the first vessel had not contributed by negligence to the collision. *The William Lindsay, Doward* v. *Lindsay*, L. R. 5 P. C. 338; 29 L. T. 355; 22 W. R. 6; 2 Asp. M. C. 118. S. P., *The Toward and The Turkistan*, 13 Ct. of Sess. Cas. (4th ser.) 342.

Jamming of Wheel Chains.]—In an action of damage by collision, it appeared that the plaintiff's vessel was at anchor in the Mersey when the defendant's steamer ran into her in broad daylight. The defence was that the steam steering gear of the defendants' vessel failed to act in consequence of some latent defect, or obstruction, which could not have been ascertained or prevented by the exercise of any reasonable care or skill on the part of the defendants, and that the collision and damage were caused by inevitable accident. The steam steering gear in question was good of its kind; it had never previously failed to act, and the cause of the defect in the machine, or of the obstruction in the working, could not be discovered by competent persons. Part of the gear, including some portion of the chain running between the wheel and the rudder, had been recently renewed, and it was admitted that new chain is liable to stretch, but it was proved that before the vessel left her anchorage to proceed on her voyage, the whole of the gear had been tested and found in good order, and that the chain had been tightened up as occasion seemed to require:—Held, that the defendants were liable, as they had not satisfied the burden of proof, for, in order to support the defence of inevitable accident, and disprove the primâ facie evidence of negligence, it was necessary for them to shew that the cause of the accident was one not produced by them, and the result of which they could not avoid, but the defendants knew of the tendency of new chain to stretch, and therefore that an accumulation of links at the leading wheels might possibly cause jamming, and considering the crowded condition of the river where the accident occurred, the use—or readiness for immediate use—of hand, instead of steam, steering gear, was a means by which the result could have been avoided.—Per Fry, L.J.: The defendants had failed to sustain the plea of inevitable accident, as it was necessary for them either to shew what was the cause of the accident, and that, though exercising ordinary care, caution and maritime skill, the result of that cause was unavoidable, or to enumerate all the possible causes, one or other of which might have produced the effect, and shew with regard to every one, that the result was unavoidable. The definition of inevitable accident in *The Marpesia*, supra, col. 704, approved. *The Merchant Prince*, [1892] P. 179; 67 L. T. 251; 7 Asp. M. C. 208—C. A.

The jamming of the cable on the windlass may occur without negligence. *The Peerless*, Lush. 30. S. P., *The William Lindsay*, L. R. 5 P. C. 338; 29 L. T. 355; 22 W. R. 6; 2 Asp. M. C. 118.

Third Ship crossing Defendants' Bows.]—By reason of the improper navigation of the "S." in crossing the bows of the "A.," the latter sustained damage by coming into collision with the "M." In an action by the "M." against the "A." it was held that the collision was an inevitable accident; by Esher (Lord), M.R., because it had been proved that something happened over which those in charge of the "A." had no control, and the effect of which could not be avoided by the "greatest" care and skill; by Fry and Lopes, L.JJ., because the accident being one which those in charge of the "A." could not possibly prevent by the exercise of "ordinary" care, caution and maritime skill, it was inevitable with the definition given in *The Marpesia*, supra, col. 704. *The Schwan, The Albano*, [1892] P. 419; 69 L. T. 34; 7 Asp. M. C. 347—C. A.

Steam Steering Gear Breaking Down.]—A steamship fitted with a patent steam steering gear ran into a vessel at anchor in the Thames, owing to the steering gear suddenly not acting; every effort was unavailingly made to avoid the collision. A few days before, on the previous voyage of the same steamship, the same apparatus had similarly refused to act, but no cause for it so doing could be seen on examination. Large numbers of the gears were in use on steamers. In an action of damage:—Held, first, that the defendants were not liable for damage caused by the use of this apparatus

without negligence. Secondly, that the use of this apparatus on the Thames after it had acted wrongly on a previous occasion, was evidence of negligence, and that the defendants were liable for the damage caused thereby. *The European*, 54 L. J., Adm. 61; 10 P. D. 99; 52 L. T. 868; 33 W. R. 937; 5 Asp. M. C. 417.

If the defence of inevitable accident is relied on, and the allegation is that the ship's steam steering gear failed to act and she failed to answer her helm and so came into collision, without negligence on the part of those on board, the shipowner is liable. *The Indus*, 56 L. J., Adm. 88; 12 P. D. 46; 56 L. T. 376; 35 W. R. 490; 6 Asp. M. C. 105. And see *The Warkworth*, 53 L. J., Adm. 65; 9 P. D. 145; 51 L. T. 558; 33 W. R. 112; 5 Asp. M. C. 326—C. A.

Whistle not Heard.]—It was proved at the trial that a fog-horn was blown on the "Z." but not heard on the "I.":—Held, that this was not primâ facie evidence of negligence of those on the "I." *The Elysia*, 46 L. T. 840; 4 Asp. M. C. 540.

The fact of a steam-whistle alleged to have been blown in a fog not being heard by those on an approaching ship is not necessarily proof that there was a bad look-out on the approaching ship, as the direction in which and the distance from which the sound would be heard is uncertain. *The Rosetta*, 59 L. T. 342; 6 Asp. M. C. 310.

Vessel Disabled by prior Collision.]—Where a vessel whose duty it is under the regulations to keep out of the way is unable to do so by reason of damage received in a prior collision, and a collision occurs with a third ship, it is inevitable accident. *The Aimo and The Amelia*, 29 L. T. 118; 21 W. R. 707; 2 Asp. M. C. 96. And see *The Kjobenhavn*, supra.

Darkness of Night.]—A collision between a sailing ship rounding to before anchoring and a steamship:—Held, an inevitable accident "from the darkness of the night alone." Both actions dismissed, each party paying his own costs. *The Shannon*, 1 W. Rob. 463.

Vessel Forging over Sand.]—A collision between a vessel that had been ashore on the Nore Sand and having forged over it with the flood tide struck another at anchor in the channel just clear of the sand:—Held, an inevitable accident. *The Thornley*, 7 Jur. 659.

2. Presumption of Fault.

a. Infringement of the Regulations.

i. *Under* 14 *&* 15 *Vict. c.* 79.

Collision between ship under way and another at anchor. The latter had not the statutory light exhibited. The jury found that the absence of the light contributed to the collision:—Held (under 14 & 15 Vict. c. 79, s. 28), that the owners of the ship at anchor could not recover. *Morrison* v. *General Steam Navigation Co.*, 8 Ex. 733; 22 L. J., Ex. 233—Ex. Ch.

Under 14 & 15 Vict. c. 79, s. 28, neither ship could recover if the statutory rules for preventing collisions were not observed; and although neither ship alleged in her pleading against the other that she had no lights, it being proved that neither ship had lights:—Held, that neither could recover anything. *The Aliwal*, 18 Jur. 296.

Under 14 & 15 Vict. c. 79, if a ship failed to comply with the admiralty regulations as to lights, she was not held in fault for collision unless it was caused by her non-compliance. *The Telegraph*, 1 Spinks, 427.

Under 14 & 15 Vict. c. 79, if a collision occurred by the fault of both ships, and the fault of one was the not having the statutory lights, she could recover half her loss, but no more, although the deficient lights did not contribute to the collision. *The Swanland*, 2 Spinks, 107.

If there was in fact risk of collision, a ship was in fault, under 14 & 15 Vict. c. 79, for not porting her helm, even if the master did not "perceive" the risk and ought to have perceived it. *General Steam Navigation Co.* v. *Mann*, 14 C. B. 127.

In summing-up in a case of collision between a barque and a brig at anchor, the judge told the jury that if the collision was caused wholly or in part by the brig not having a light at the mast-head in accordance with the admiralty regulations, the defendants, the owners of the barque, were not liable; and that the substantial question was, whether the brig had a light exhibited or not. Verdict for the plaintiff, the owner of the brig. Upon an application for a new trial:—Held, that the judge's direction was right. *Whittel* v. *Crawford*, 4 W. R. 654—Ex. Ch.

ii. *Under* 17 & 18 *Vict. c.* 104.

A ship, "A.," was held in fault for a collision caused partly by her infringement of the law as to lights; the other ship, "B.," was held in fault for bad look-out:—Held, under 17 & 18 Vict. c. 104, ss. 295, 298, that "A." could recover nothing, and that "B." could recover half her loss. *The Robert Ingram*, Lush. 327.

A vessel infringing the regulations as to lights could under 17 & 18 Vict. c. 104, recover nothing for a collision, though the other ship was also in fault. *The Urania*, Swabey, 253.

The penal consequences of not porting the helm in accordance with 17 & 18 Vict. c. 104, s. 269, do not follow where the master was not able to make out the course of the other ship. *The Inflexible*, 6 Jur. (N.S.) 782.

The effect of 17 & 18 Vict. c. 104, s. 298, was to prevent either of two ships, both being in fault for the collision, from recovering anything. *The James, Lawson* v. *Carr*, 10 Moore, P. C. 162; Swabey, 60; 4 W. R. 563. S. P., *The City of Carlisle*, Br. & Lush. 363; 11 L. T. 33.

A vessel not carrying the lights required by 17 & 18 Vict. c. 104, held in fault for the collision. *The Livingstone*, Swabey, 519.

iii. *Under* 25 *&* 26 *Vict. c.* 63.

Where there has been a breach of the regulations, and a collision ensues, the presumption is that it was occasioned thereby; and it lies on the ship that infringed the law to shew that it did not in fact occasion the damage. *The Palestine*, 13 W. R. 111; 1 Asp. M. C. 468.

iv. *Under* 36 *&* 37 *Vict. c.* 85.

Materiality of Regulation Infringed.]—The infringement must be one having some possible connection with the collision; or, in other words, the presumption of culpability may be met by proof that the infringement could not by any

possibility have contributed to the collision; and the burden of shewing this lies on the party guilty of the infringement; proof that the infringement did not in fact contribute to the collision being excluded. *The Fanny M. Carvill* (infra) approved. *The Duke of Buccleuch* [1891] A. C. 310; 65 L. T. 422; 7 Asp. M. C. 68—H. L. (E.)

The presumption of fault created by s. 17 of the Merchant Shipping Act, 1873, does not arise where the infringement could not by possibility have contributed to the collision. Thus: Where a ship infringed art. 3 of the sailing regulations by carrying her side-lights with screens shorter than the length prescribed thereby, but it was proved that such breach of the regulation could not possibly have contributed to the collision:—Held, that the ship could not be deemed to be in fault. *The Fanny M. Carvill*, 44 L. J., Adm. 34; 13 App. Cas. 455, n.; 32 L. T. 646; 24 W. R. 62; 2 Asp. M. C. 569—P. C. Approved, *The Hochung and The Lapwing*, 51 L. J., P. C. 92; 7 App. Cas. 512; 47 L. T. 485; 31 W. R. 303.

Where the regulation infringed could by no possibility have contributed to the collision, the ship will not be held in fault under 36 & 37 Vict. c. 85, s. 17. *The Duke of Sutherland*, L. R. 4 A. & E. 422; 32 L. T. 129; 2 Asp. M. C. 478.

Presumption of Fault, not of being Alone in Fault.]—Although a ship must be deemed to be in fault for an infringement of the regulations preceding but not occasioning the collision under the Merchant Shipping Act, 1873, s. 17, she is not necessarily wholly in fault; but if the other ship has been guilty of negligence or a breach of the regulations, the latter will also be held to blame and the damages divided between them. *The Hibernia*, 31 L. T. 803; 24 W. R. 60; 2 Asp. M. C. 454—P. C.

Vessel Towing deemed in Fault for Infringement by Vessel in Tow.]—A pilot boat in tow of a brigantine had a masthead light and no side lights up:—Held, that the brigantine was in fault under 36 & 37 Vict. c. 85, s. 17, for the infringement of the law as to lights by the pilot boat. *The Mary Hounsell*, 48 L. J., Adm. 54; 4 P. D. 204; 40 L. T. 368; 4 Asp. M. C. 101.

Wrong Lights—No Look-out on other Ship.]—Where there was no look-out on the other ship:—Held, that the absence of side-lights in the plaintiff's ship could not have contributed to the collision, and that 36 & 37 Vict. c. 85, s. 17, did not apply. *The Englishman*, 47 L. J., Adm. 9; 3 P. D. 181; 37 L. T. 412; 3 Asp. M. C. 506.

Stern Light.]—See *The Palinurus*, 37 W. R. 266—C. A.

There must be an opportunity of applying the Regulations.]—A ship failing to obey one of the regulations for preventing collisions whereby a collision occurs, is not to be deemed to be in fault within the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), s. 17, if the circumstances were such that a competent seaman exercising reasonable care could not have discovered that the regulation was in fact applicable. *The Theodore H. Rand, Baker* v. *The Theodore H. Rand*, 56 L. J., Adm. 65; 12 App. Cas. 247; 56 L. T. 343; 35 W. R. 781; 6 Asp. M. C. 122—H. L. (E.)

Of two sailing ships approaching one another, the "S." was running free, and the "T." was close-hauled on the port tack. It was therefore the duty of the "T." to keep her course in accordance with arts. 14, 22, of the Regulations for Preventing Collisions at Sea (1884), but those navigating the "T.," in the belief that the "S." was close-hauled on the starboard tack, ported, whereby a collision occurred:—Held, that since with ordinary skill and by the exercise of reasonable care those navigating the "T." could not have ascertained that the "S." was running free, the "T." was not to be deemed to be in fault within the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), s. 17. *Ib.*

Short Screens.]—See *The Fanny M. Carvill*, supra.

Light Intercepted by Sails.]—Where a ship's side-light was fixed in the rigging, but was not proved to have been intercepted by the foresail or otherwise:—Held, that there was no infringement of art. 3 (b) of the regulations, and no presumption of fault. *The Glamorganshire*, 13 App. Cas. 454; 59 L. T. 572; 6 Asp. M. C. 344—P. C.

Lights not Burning.]—Where there has been a departure from an important rule of navigation, if the absence of due observance of the rule can by any possibility have contributed to the accident, then the party in default cannot be excused. Where the lights of the complaining vessel were not properly burning, and were not visible on board the other vessel:—Held, that in the absence of proof that this latter was also to blame, the suit must be dismissed. *The Arklow, Emery* v. *Cichero*, 53 L. J., P. C. 9; 9 App. Cas. 136; 50 L. T. 305; 5 Asp. M. C. 219—P. C.

Wrong Light of Trawler not seen by other Ship.]—Where a steamship having come into collision with a trawler, which, in violation of the regulations for preventing collisions at sea, was carrying a white masthead light in addition to side-lights, and it appeared that those on board the steamship had not seen the white light, the court refused to hold the trawler to blame for the breach of the regulations, on the ground that it could not possibly have contributed to the collision. *The Chusan*, 53 L. T. 60; 5 Asp. M. C. 476.

Slight Obscuration of Light.]—The starboard light of the plaintiffs' vessel was obscured by the cathead to an extent of from two-and-a-half to three degrees; but with this exception her side lights shewed an unbroken light over ten points of the horizon:—Held, that there was no such infringement of art. 3 of the Regulations for Preventing Collisions at Sea as to oblige the court, under the Merchant Shipping Act, 1873, s. 17, to hold the vessel to blame for the collision. *The Fire Queen*, 56 L. J., Adm. 90; 12 P. D. 147; 57 L. T. 312; 36 W. R. 15; 6 Asp. M. C. 146.

Only Chance of avoiding Collision.]—A steamship, approaching another vessel, so as to involve risk of collision, may be justified in keeping her engines going full speed ahead, where she is placed in a position of danger by the neglect of the other vessel to exhibit one of her lights whilst shewing the other and there is no other

chance of escaping collision. *The Benares*, 53 L. J., Adm. 2; 9 P. D. 16; 49 L. T. 702; 32 W. R. 268; 5 Asp. M. C. 171—C. A.

Presumption of Fault though no Negligence in Fact.]—The Regulations for Preventing Collisions at Sea, made under the authority of the Merchant Shipping Acts, 1854 to 1873, must under the 17th section of the 36 & 37 Vict. c. 85, be strictly followed. Actual necessity, not considerations of discretion and expediency, even though skilfully acted on, can alone excuse their non-observance. *The Khedive, Stoomvart Maatschappy Nederland* v. *P. and O. Steam Navigation Co.*, 52 L. J., Adm. 1; 5 App. Cas. 876; 43 L. T. 610; 29 W. R. 173; 4 Asp. M. C. 567—H. L. (E.)

The Court must Decide whether the Infringement could have caused Collision.]—In considering whether a breach of the regulations for preventing collisions could possibly have contributed to a collision, the court must take into consideration the whole of the evidence, even where there is a conflict, subject to the qualification that the onus of proof lies on those infringing the regulations; and if upon such evidence the court comes to the conclusion that the breach could not possibly have contributed to the collision, the ship committing it is not to be deemed to blame in respect thereof. *The Hermod*, 62 L. T. 670; 6 Asp. M. C. 509.

In an action of collision it was proved that the lights carried by one of the vessels were so fixed as to be partially obscured, and that there was therefore an infringement of art. 6 of the regulations:—Held, by the court below, that, under the Merchant Shipping Act, 1873, s. 17, the vessel whose lights were thus obscured must be held to have been in fault, without any inquiry as to whether such obscuration could possibly have been a cause of the collision:—But held, by the court of appeal, that, in the circumstances, it was the duty of the court to inquire into the facts in order to ascertain whether the infringement of the regulations could possibly have contributed to the collision, and that inasmuch as it appeared from inquiry into the relative positions of the two vessels that the obscuration of the lights could not possibly have caused the accident, the vessel carrying such lights was not to blame. *The Duke of Buccleuch*, [1891] A. C. 310; 65 L. T. 422; 7 Asp. M. C. 68—H. L. (E.)

Reckless Negligence by one Ship—Slight Infringement of Regulations by other Ship.]—Where in a collision it appeared that one vessel had been navigated with reckless negligence, and the other had committed a comparatively venial error in not slackening speed in good time:—Held, that a regulation for preventing collisions at sea having been infringed by the latter vessel without necessity, it could not be absolved from the consequences prescribed by statute, and must be held to be liable. *The Arratoon Apcar, Ocean Steamship Co.* v. *Apcar*, 59 L. J., P. C. 49; 15 App. Cas. 37; 62 L. T. 331; 38 W. R. 481; 6 Asp. M. C. 491—P. C.

Infringement of Mersey Rules.]—An infringement of the rules in force in the Mersey sea channels, under 37 & 38 Vict. c. 52, is within the penalty of 36 & 37 Vict. c. 85, s. 17. *The Lady Downshire*, 48 L. J., Adm. 41; 4 P. D. 26; 39 L. T. 236; 27 W. R. 648; 4 Asp. M. C. 25.

Obscuration of Lights.]—A brig was carrying her lights aft in a position in which they were obscured to the extent of a point in a point and a half on either bows. She came into collision with a barque on the other tack. The brig was in fault, under 36 & 37 Vict. c. 85, s. 17. *The Tirzah*, 48 L. J., Adm. 15; 4 P. D. 33; 39 L. T. 547; 27 W. R. 584; 5 Asp. M. C. 55.

Foreign Ships.]—A foreign ship held in fault for a collision on the high seas, her lights having been partially obscured, under 36 & 37 Vict. c. 85, s. 17. *The Magnet*, L. R. 4 A. & E. 417; 32 L. T. 129; 2 Asp. M. C. 478.

b. Not standing by, after Collision.

Failure to render Assistance.]—The Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), s. 16, having imposed upon the master of every ship, in case of collision with another ship, a duty, "if and so far as he can do so without danger to his own vessel, crew and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew and passengers (if any), such assistance as may be practicable and as may be necessary to save them from any danger caused by such collision"; this duty is not discharged by a steamship where, it being practicable and safe to lower a boat to render assistance, although possibly dangerous to stay by the injured ship, she continues her voyage without lowering her boat, and merely hails and signals for other vessels to go to the assistance of the injured ship. *The Adriatic*, 33 L. T. 102; 3 Asp. M. C. 16.

A ship failing to render assistance to another with which she has been in collision, and shewing no reasonable cause for such failure, will be held to blame for the collision, unless proof is given to the contrary on her behalf. *Ib.*

When a collision takes place which might probably endanger life, it is the duty of the vessel to stay by until the extent of the damage is ascertained. *The Queen of the Orwell*, 7 L. T. 839; 11 W. R. 499.

If it does not stay by, the burden of proof that the collision did not take place by its default is thrown upon the owners. *Ib.*

The first duty of any vessel that by collision injures another vessel, is to wait to ascertain the extent of that injury, and to render what assistance it may be able to protect life and property. *The Germania*, 21 L. T. 44—P. C.

—— **When Risk of Capture Imminent.**]—Although it is the duty of every vessel, whether British or foreign, to render assistance to another which she has injured in collision, the rule will not compel a ship to remain alongside another so injured so as to run risk of capture by an enemy's fleet. *The Thuringia*, 41 L. J., Adm. 44; 26 L. T. 446; 1 Asp. M. C. 283.

Compulsory Pilotage.]—Under 25 & 26 Vict. c. 63, s. 33, in the case of collision between two ships it was declared to be the duty of the person in charge of each ship to render assistance to the other, and in case he failed to do so without reasonable excuse, the collision in absence of proof to the contrary was to be deemed to have been caused by his wrongful act. Two steamships, the "Queen" and "Lord John Russell," each under the charge of a compulsory pilot, came into collision in the Thames. The "Queen"

was solely to blame, and after the collision she rendered no assistance to the other vessel, and shewed no excuse for having failed to do so :—Held, that the mere fact of her having a pilot on board did not exempt her from liability. *The Queen*, 38 L. J., Adm. 39 ; L. R. 2 A. & E. 354 ; 20 L. T. 855.

The person in charge intended by that section is the master. *Ib.*

Salvage.]—A vessel which has caused a collision is not entitled to salvage services for assistance rendered after such collision. *The Glengaber*, 41 L. J., Adm. 84 ; L. R. 3 A. & E. 534; 27 L. T. 386; 21 W. R. 168; 1 Asp. M. C. 401.

Standing-by Rule applies to Collision with Open Sea-going Boat—What is a "Ship."]—A collision took place between a steamship and a fishing coble. The coble sank, and three men on board were lost. The coble was of ten tons burden, twenty-four feet in length, decked forward only, with two movable masts and a sail for each. She was accustomed to go twenty miles out to sea, and to remain out for some hours at a time, and was usually under sail, but was sometimes propelled by oars when convenient. An inquest was held on the body of one of the men who were lost, and a solicitor appointed by the board of trade took notes of the evidence, and forwarded them to the board, who applied to two justices to hold an inquiry into the collision. The justices held the inquiry, decided that the coble was a sea-going ship, that there was a collision between two ships, and that the master and mate of the steamer did not duly render assistance to save life, and ordered that the certificates of the master and mate of the steamer should be suspended for three months :—Held, first, that if the coble was a ship, one ship had caused loss to another ; and even if she was not, there was a casualty to the steamship, and therefore there was a case for investigation by the justices under 17 & 18 Vict. c. 104 (the Merchant Shipping Act, 1854), s. 433. *Ferguson* or *Hutchinson, Ex parte*, 40 L. J., Q. B. 105 ; L. R. 6 Q. B. 280 ; 24 L. T. 96 ; 19 W. R. 746 ; 1 Asp. M. C. 8.

Held, secondly, that the word "ship" applied to all craft which substantially went to sea, and only used oars as an auxiliary power, and that there had been a collision between two ships within the 25 & 26 Vict. c. 63, s. 33, and that therefore the order was good. *Ib.*

Not answering Blue Lights of other Ship.]—The "E. H.," after a collision with the "M.," burnt rockets and blue lights as signals of distress, but the "M." did not, as she might have done, reply to these signals :—Held, a breach of the statutory duty of rendering assistance under 36 & 37 Vict. c. 85, s. 16, and that the "M." was therefore to be deemed to blame. *The Emmy Hause*, 53 L. J., Adm. 43 ; 9 P. D. 81 ; 50 L. T. 372 ; 32 W. R. 880 ; 5 Asp. M. C. 216.

Application to Foreign Ships.]—The rule contained in the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 33, that the omission by any ship, after a collision, to render all practicable assistance to another, shall be presumptive evidence against the former that she is in fault, does not apply to United States ships, because that rule has not been adopted by the United States. *The Nevada*, 27 L. T. 720 ; 1 Asp. M. C. 477.

3. Liability.

a. Personal Liability of Shipowner.

Ship must be in Fault.]—The shipowner is not liable unless his ship is in fault for the collision. *The Catherine of Dover*, 2 Hag. Adm. 154. *And see* 1. Negligence, supra, cols. 685 seq.

Owner not Liable quâ Owner.]—Owner not liable quâ owner ; only as employer of wrongdoer or as wrongdoer himself. Per Lord Cairns. *Wear River Commissioners* v. *Adamson*, 47 L. J., Q. B. 193 ; 2 App. Cas. 743, 751 ; 37 L. T. 543 ; 26 W. R. 217 ; 3 Asp. M. C. 521—H. L. (E.)

And see *Simpson* v. *Thompson*, 3 App. Cas. 279 ; 38 L. T. 1 ; 3 Asp. M. C. 567. *Hibbs* v. *Ross*, 9 B. & S. 655 ; 35 L. J., Q. B. 193 ; L. R. 1 Q. B. 534 ; 12 Jur. (N.S.) 812 ; 15 L. T. 67.

Ship or Owner may be sued in Admiralty.]—In admiralty the shipowner may be sued personally, or the ship in rem. Per Dr. Lushington. *The Griefswald*, Swabey, 430, 435.

Master Towing Ship without Authority.]—Where a master without express authority from his owners took a disabled ship in tow and damaged her by collision :—Held, that his owners were liable. *The Thetis*, 38 L. J., Adm. 42 ; L. R. 2 A. & E. 365 ; 22 L. T. 276.

Malicious Act of Master.]—Owners are not liable for collision caused by malicious act of the master. *The Druid*, 1 W. Rob. 391. *The Ida*, Lush. 6. See also *McGhee* v. *Anderson*, supra, col. 72. *The Dunlossit*, *Currie* v. *McKnight*, infra, col. 924.

—— **Of Crew.**]—If one of a ship's crew does a wilful act of injury to another ship, without any direction from or privity of the master, an action cannot be maintained against the master, although he was on board at the time. *Bowcher* v. *Noidstrom*, 1 Taunt. 568 ; 10 R. R. 608.

Infringement of the Regulations by Master—Owners Liable.]—The owner is liable for a breach of the regulations by his servants. *Grill* v. *General Iron Screw Collier Co.*, 37 L. J., C. P. 205 ; L. R. 3 C. P. 476 ; 18 L. T. 485 ; 16 W. R. 796. *The Franconia*, 2 P. D. 8 ; 35 L. T. 721; 25 W. R. 197 ; 3 Asp. M. C. 295—C. A. *The Seine*, Swabey, 411.

Damage by Tug hired by Harbour Authority.]—Action against a harbour authority by owner of ship injured by the fault of her tug, whose owners had contracted with the harbour authorities to tow vessels in at a reduced rate :—Held, that the harbour authorities were not liable. *Cuthbertson* v. *Parsons*, 12 C. B. 304 ; 21 L. J., C. P. 165.

Lessee of Ferry.]—The lessee of a ferry hired a tug to work the ferry, and a passenger was injured by the negligence of the tug's crew :—Held, that although the ferryman paid the tug's crew, they were the servants of her owner, and that he was liable. *Dalyell* v. *Tyrer*, El. Bl. & El. 899.

Barge Lent to One who Navigates her by his own Servants.]—The owners of a barge lent to one who navigates her by his own servants are

not liable for damage done by her. Per Best, J. *Scott* v. *Scott*, 2 Stark. 438; 20 R. R. 711.

Ship Damaging Harbour Works.]—Notwithstanding the Harbours, Docks and Piers Act, 1847 (10 & 11 Vict. c. 27, s. 74), the owners of a ship that damages harbour works without negligence of those on board are not liable. *Wear River Commissioners* v. *Adamson*, 46 L. J., Q. B. 83; 2 App. Cas. 743; 37 L. T. 543; 24 W. R. 872; 3 Asp. M. C. 521—H. L. (E.) Overruling *The Merle*, 31 L. T. 447, and *Dennis* v. *Tovell*, 42 L. J., M. C. 33; L. R. 8 Q. B. 10; 27 L. T. 482; 21 W. R. 170; 2 Asp. M. C. 402.

Ship worked by Skipper—Owner sharing Profits.]—Where the ship was worked entirely by the skipper, under an agreement with the owner that the latter should take one-third of the profits, the owner held liable for damage done by the ship. *Steel* v. *Lester*, 47 L. J., C. P. 43; 3 C. P. D. 121; 37 L. T. 642; 26 W. R. 212; 3 Asp. M. C. 537. And see *McGhee* v. *Anderson*, 22 Ct. of Sess. Cas. (4th ser.) 274.

Towage Contract—Condition exempting from Liability for Negligence of Servants.]—The master of a steam tug, who had contracted to tow a fishing smack out of the harbour of Great Yarmouth to sea on the terms that his owners should not be liable for damage arising from any negligence or default of themselves or their servants, after the towage had been in part performed, took in tow in addition to the smack six other vessels, and in consequence was unable to keep the fishing smack in her course, so that she went aground and was lost. By having more than six vessels in tow at once the master of the tug disobeyed a regulation made by the harbour-master of Great Yarmouth under statutory authority. The owners of the fishing smack brought an action against the owners of the steam tug to recover damages:—Held, that the loss of the smack was occasioned by the negligence of the master of the tug; but that the defendants were protected from liability by the terms of the towage contract, and that the action must be dismissed. *The United Service* (or *Cole*) v. *Great Yarmouth Steam Tug Co.*, 53 L. J., Adm. 1; 9 P. D. 3; 49 L. T. 701; 5 Asp. M. C. 170—C. A.

Personal Remedy where Res Insufficient.]—If the value of the defendant's vessel and freight is not equal to the damage done, the plaintiff may, after judgment, obtain a monition against the defendant personally to satisfy the deficiency. *The Zephyr*, 11 L. T. 351.

Liability for Fault of Waterman.]—The owner of a barge employed M., a freeman of the Waterman's Company, and W., an apprentice of a freeman, to navigate it from the Pool to Lambeth and back, and they were to receive 7*s.* each for the voyage. By the Waterman's Act, none but freemen and apprentices of freemen or of the widows of freemen are allowed to act as watermen or lightermen on the river Thames within certain limits. While under the care and management of M. and W., and by their misconduct, the barge injured another barge:—Held, that the owner was liable, M. and W. being in point of law his servants; and that he was not protected from his primâ facie liability in respect of the injury occasioned by their misconduct, by the Waterman's Act restraining him to select his servants in the particular trade from a privileged class. *Martin* v. *Temperley*, 4 Q. B. 298; 3 G. & D. 497; 12 L. J., Q. B. 129; 7 Jur. 150.

Harbour-Master.]—Where a master and crew are bound by statute to obey the directions of a harbour-master in going into dock, and a collision is occasioned by the ship being conducted according to the harbour-master's directions, the ship is not liable. *The Bilbao*, Lush. 149; 3 L. T. 338.

Shipowner liable though his Ship is sunk.]—The shipowner is not discharged of liability by the sinking of his ship. *The Normandy*, 39 L. J., Adm. 48; L. R. 3 A. & E. 152; 23 L. T. 631; 18 W. R. 903.

Ship under Charter.]—A steam vessel was under charterparty for six months, the owners to keep it in order, for the conveyance of goods from Newcastle and Goole, or such other coasting station as the charterer might from time to time employ it in. The crew was appointed by the owners, but paid by the charterer, who was also to pay all disbursements. The charterer did not interfere with the navigation of the vessel; but while he was on board, through the negligence of the crew, it ran against and injured the plaintiff's keel:—Held, that the owners were liable. *Fenton* v. *Dublin Steam Packet Co.*, 1 P. & D. 103; 8 A. & E. 835; 8 L. J., Q. B. 28.

Vessel Chartered to the Navy Commissioners.]—If a ship is chartered to the commissioners of the navy as an armed vessel, and an injury is done to another vessel by the misconduct of the persons on board the former, while a commander of the navy and a king's pilot are on board, an action for the injury may be sustained against the owners of the chartered ship. *Fletcher* v. *Braddick*, 2 Bos. & P. (N.R.) 182; 9 R. R. 633.

—— **Master Obeying Orders.**]—A. and B. were respectively owners of vessels which, with many others, were taken up by government for the conveyance of troops upon an expedition of war in the Black Sea. The transports were towed by steamers to their destination, each steamer having attached to her two transports, the masters of which were under her immediate order and control. The commander of the steamer to which B.'s vessel and another were attached, on reaching the anchoring ground in the evening, having dropped his anchor, desired the masters of his tows to hold on by their warps or hawsers; but, in the course of the night, a storm arose, which caused B.'s vessel to swing with violence against A.'s vessel, whereby it was considerably damaged. In an action for the damage so caused, the judge told the jury that B. would not be responsible if the injury complained of resulted from a strict obedience on the part of the master to the orders of the officer in command of the steamer; but that, assuming that the master was justified by the orders he received in abstaining from anchoring in the first instance, it was for them to consider whether he had not been guilty of negligence and want of good seamanship in continuing to hold on by his warp under the altered state of circumstances, there being some evidence to shew that the accident might have been averted if he had

dropped his anchor when the storm came on :—Held, no misdirection. *Hodgkinson* v. *Fernie*, 2 C. B. (N.S.) 415 ; 26 L. J., C. P. 217 ; 3 Jur. (N.S.) 818.

Shipowner Liable by Maritime Law.]—A British and a Spanish ship were in collision on the high seas. The British owners sued the Spanish owners, who had an office in England. The Spanish owners pleaded that by Spanish law shipowners are not personally liable in such case :—Held, that the plea was bad, as by the general maritime law, which was the law applicable, the shipowners are liable. *The Leon*, 50 L. J., Adm. 59 ; 6 P. D. 148 ; 44 L. T. 613 ; 29 W. R. 916 ; 4 Asp. M. C. 404.

Ship in Charge of Compulsory Pilot.]—*See* 10. COMPULSORY PILOTAGE, infra.

b. Liability of Ship in Admiralty—Maritime Lien.

Damage Lien.]—All civilised nations recognise the validity of maritime lien, and will enforce it when it has been declared by a foreign court ; but it is essential that it should appear from the proceedings of the foreign court that the object of the suit was the sale of the ship, and not a personal remedy against the captain or owners. *The Bold Buccleugh* (infra) considered. *The City of Mecca*, 50 L. J., Adm. 53 ; 6 P. D. 106 ; 44 L. T. 750 ; 4 Asp. M. C. 412—C. A.

Damage creates a lien on the ship causing the collision. *The Bold Buccleugh*, *Harmer* v. *Bell*, 7 Moore, P. C. 267.

A Scotch steamer ran down an English vessel in the Humber. An action was commenced in the court of admiralty in England by the owners of the English vessel against the owners of the steamer, and a warrant of arrest issued against the ship ; but before the ship could be arrested she had sailed for Scotland. A suit was then commenced by the owners of the English vessel against the owner of the steamer, in the court of session in Scotland, for the damage, and the steamer was arrested under process of that court, but subsequently released upon bail. Afterwards, and pending these proceedings, the steamer was sold, without notice to the purchaser of this unsatisfied claim against her. The proceedings in the court of session were still pending, when the steamer, having come within the jurisdiction of England, was again arrested under process of the high court of admiralty in England, and an action for damage commenced in that court for the same cause of action as was still pending in Scotland, instructions being sent to Scotland to abandon the proceedings in the court of session. The owner of the steamer appeared under protest in the admiralty court, and pleaded, first, lis alibi pendens ; and, secondly, that he was a purchaser for value without notice :—Held, first, that the plea of lis alibi pendens was bad, as the suit in Scotland was, in the first instance, in personam, the proceedings being commenced by process against the persons of the owners of the vessel, and the arrest of the steamer only collateral to secure the debt, while the proceedings in the admiralty court in England were, in the first instance, in rem, against the vessel, and therefore the two suits being in their nature different, the pendency of one suit could not be pleaded in suspension of the other. Secondly, that as, by the civil law, a maritime lien does not include or require possession, but being the foundation of proceedings in rem (a process requisite only to perfect a right inchoate from the moment the lien attaches), such lien travels with the thing into whosesoever possession it may come, and when carried into effect by a proceeding in rem, relates back to the period when it first attached ; the steamer was liable for the damage committed by her, though in the hands of a purchaser without notice of the damage, or the proceedings instituted against her. *Ib.*

—— **Scotch Law—Semble.**]—The maritime law of Scotland is the same as that of England as regards lien for damage. *The Bold Buccleugh* (supra) approved. *The Dunlossit, Currie* v. *McKnight*, 66 L. J., P. C. 19 ; [1897] App. Cas. 97 ; 75 L. T. 457 ; 8 Asp. M. C. 193—H. L. (Sc.)

Cutting the other Ship Adrift—Wilful Act of Crew.]—In order to render the ship liable, she must herself be the instrument with which the damage is done. Thus, where the crew of one ship, in order to facilitate her getting under way, wilfully cut the moorings of another, whereby the latter subsequently went ashore and was damaged, it was held that no damage lien attached to the former. *Ib.*

Lien follows Ship.]—A maritime lien for damage caused by a collision follows the ship causing the damage, into whosesoever hands she may go, and can be enforced at any time, provided there has been no improper delay, or laches, in enforcing such lien. *The Europa*, *Dean* v. *Richards*, 2 Moore, P. C. (N.S.) 1 ; Br. & Lush. 89 ; 32 L. J., Adm. 188 ; 9 Jur. (N.S.) 690 ; 8 L. T. 368. *The Mellona*, 3 W. Rob. 16. *The Nymph*, Swabey, 86.

Lien Attaches on Collision.]—The damage lien attaches at the instant of collision ; per Dr. Lushington. *The Mary Anne* or *Ann*, 35 L. J., Adm. 6 ; L. R. 1 A. & E. 8, 11 ; 12 Jur. (N.S.) 31 ; 13 L. T. 384 ; 14 W. R. 136.

Laches in Enforcing Lien.]—A delay of three years to arrest the ship was held not to be an unreasonable delay, the owners of the damaged vessel having used reasonable diligence to discover her whereabouts. *The Europa*, supra.

Reasonable diligence means not doing everything possible, but doing that which, under ordinary circumstances, and having regard to expense and difficulty, could be reasonably required. *Ib.*

A collision having occurred between a foreign vessel and an English vessel, the master of the foreign vessel admitted his liability, and gave, in satisfaction of the damage, a bill of exchange, payable on the arrival of his vessel at her port of destination in Scotland. Her master, however, took her to France, where, her owner becoming bankrupt, she was sold by the assignees of his estate to the defendants, who brought her to England, where she was arrested by the owners of the English vessel in respect of the collision, the bill of exchange never having been paid :—Held, that the owners of the English vessel had not lost their lien for damage by reason of laches, or by the subsequent sale of the vessel. *The Charles Amelia*, 38 L. J., Adm. 17 ; L. R. 2 A. & E. 330 ; 19 L. T. 429 ; 17 W. R. 624. And see *The Europa*, supra.

In a collision action in rem the plaintiffs are not limited to any specified time during which they must institute their action, but where there has been a long lapse of time between the collision and the institution of the action, and the defendants seek to have the action dismissed on the ground of laches and delay, the question for the court in each case is whether it is inequitable to allow the action to proceed, and in determining this question, the court will consider the opportunities the plaintiffs have had of arresting the defendants' ship, the availability of the defendants' witnesses, and all other circumstances affecting the possibility of securing a fair trial, and should the action be allowed to proceed, every reasonable presumption will be made at the hearing in favour of the defendants. *The Kong Magnus*, [1891] P. 223; 63 L. T. 715; 6 Asp. M. C. 583.

Damage, but no Collision.]—The damage lien attaches, though there is no collision with the ship arrested, if she causes damage to another. Semble. *The Sisters*, 45 L. J., Adm. 39; 1 P. D. 117; 34 L. T. 338; 24 W. R. 412; 6 Asp. M. C. 583. But see *The Dunlossit*, supra.

—— **Damage by Fault of Third Ship.**]—The "Intrepide," entering Sunderland harbour under sail, was overtaking the "Wheatsheaf," in tow of a tug. The "Intrepide" struck the tow-rope, and the tug to save herself cast off the "Wheatsheaf," which went ashore and was damaged:—Held, that the "Intrepide" was liable in admiralty in rem. *The Wheatsheaf and The Intrepide*, 13 L. T. 612. And see *The Industrie*, 40 L. J., Adm. 26; L. R. 3 A. & E. 303; 24 L. T. 446; 19 W. R. 728; 1 Asp. M. C. 17.

Damage to Harbour Works.]—To a ship that damages harbour works the damage lien attaches by virtue of 10 & 11 Vict. c. 27. *The Merle*, 31 L. T. 447; 2 Asp. M. C. 402.

Order of Damage Claimants.]—Claimants for damage rank in the order of their judgments. *The Clara*, Swabey, 1. S. P., *The Union*, Lush. 128; 30 L. J., Adm. 17; 3 L. T. 280.

Damage Lien—Priority over Wages.]—The owners of a vessel, who have recovered judgment against another ship in an action for damage by collision, have a prior right against the proceeds of such ship to seamen who have recovered judgment against the same ship for wages earned before and after the collision. *The Elin*, 52 L. J., Adm. 55; 8 P. D. 129; 49 L. T. 87; 31 W. R. 736; 5 Asp. M. C. 120—C. A. S. P., *The Benares*, 7 Not. of Cas. Suppl. 50. *The Linda Flor*, Swabey, 309; 4 Jur. (N.S.) 172; 6 W. R. 197. *The Duna*, 5 L. T. 217. *The Chimæra*, cited, 4 Jur. (N.S.) 172; 8 P. D. 46, 131.

—— **Priority over Mortgage, Bottomry and Repairs.**]—The lien for damage has priority over the claim of a mortgagee or bondholder under an instrument of prior date to the collision. But a lender in good faith has a prior lien to the extent of the increased value of the ship effected after the collision. *The Aline*, 1 W. Rob. 111.

As to increase of value by repairs, see *The St. Olaf*, 38 L. J., Adm. 41; L. R. 2 A. & E. 360; 20 L. T. 758; 17 W. R. 743.

—— **Ship Liable in rem where Owners not Liable at Law.**]—A ship chartered by her owners to another person who has, under the charter, the sole control and management of the ship and crew, whom he employs and pays, is liable in a proceeding in rem for damage done to another ship by collision caused by the fault of the crew. *The Lemington*, 32 L. T. 69; 23 W. R. 421; 2 Asp. M. C. 475. *See also*, per Selwyn, L.J., *The Halley*, 5 Moore, P. C. (N.S.) 263; 37 L. J., Adm. 33; L. R. 2 P. C. 193, 201; 18 L. T. 879; 16 W. R. 998. And per Brett, M.R., *The Parlement Belge*, 5 P. D. 197, 218; 42 L. T. 273; 28 W. R. 642; 4 Asp. M. C. 234.

—— **Yacht in Hands of Agent for Sale.**]—A yacht was intrusted to yachting agents for sale, and, by their servants, moored in the winter season without striking her top gear, whereby, on a gale occurring, the yacht drifted and fouled another yacht:—Held, that she was liable in a proceeding in rem in the court of admiralty. *The Ruby Queen*, Lush. 266.

—— **Ship under Charter.**] — The "Ticonderoga," under charterparty to the French government, was towed by a steamer athwart the hawse of the "Melampus." The "Ticonderoga" alleged that she was not liable for the damage done, as her charterparty obliged her to obey orders and put herself in tow of the steamer:—Held, that such obligation was no compulsion, so as to lay the ground for exemption from liability for damage done, as it arose from a voluntary stipulation entered into by the owners themselves. *The Ticonderoga*, Swabey, 215.

—— **Damage by Tug to Tow—Ship not Liable where her Owners are not.**]—A tug damaged the ship in tow by the negligence of the master of the tug. It was a term of the towage contract that the owners (charterers) of the tug were not to be liable for damage to ships in tow, whether caused by the negligence of the servants of the tug owners or not:—Held, that the tug was not liable in rem. *The Ticonderoga* (supra) explained. *The Tasmania*, 57 L. J., Adm. 49; 13 P. D. 110; 59 L. T. 263; 6 Asp. M. C. 305.

To what the Lien attaches.]—The lien attaches to the ship's apparel, furniture and fishing-gear. *The Dundee*, 1 Hag. Adm. 109.

And to the fragments of the ship, if wrecked. *The Neptune*, 1 Hag. Adm. 227, 238.

—— **To what Craft.**]—The lien does not attach to a Thames lighter for collision in the body of a county. *Everard* v. *Kendall*, col. 941.

But it attaches to all craft for damage at sea. *The Sarah*, Lush. 549. See *Purkis* v. *Flower*, 43 L. J., Q. B. 33; L. R. 9 Q. B. 114; 30 L. T. 90; 22 W. R. 239; 2 Asp. M. C. 226.

—— **It attaches to Freight, but not to Cargo.**]—A cargo laden on board a vessel at the time of collision is in no case liable to be sued for the damage. *The Victor*, Lush. 72; 29 L. J., Adm. 110; 2 L. T. 331.

A cargo arrested for freight will be released upon payment of the freight into court, with an affidavit of value. *Ib.*

Where a cargo is improperly detained under arrest, the owner is entitled to costs and damages. *Ib.*

The owner of cargo on board a ship sued for

collision is only compellable to pay into court the freight due from him to the shipowner. *The Leo*, Lush. 444; 31 L. J., Adm. 78; 6 L. T. 58. And see *The Flora*, 35 L. J., Adm. 15; L. R. 1 A. & E. 45; 14 L. T. 192.

Deductions, as by charter, from gross freight will be allowed; and if the cargo is delivered at a place short of destination by reason of the collision, such reasonable deduction as may have been agreed upon between the shipowner and the owner of cargo. *Ib.*

Costs of paying freight into court may also be deducted. *Ib.*

—— **Collision on Outward Voyage—Freight for Homeward Voyage Liable.**]—A vessel under charterparty as to both her outward and homeward cargo, whilst on the outward voyage came into collision with another vessel:—Held, that the freight for the homeward voyage was liable to arrest for the damage. *The Orpheus*, 40 L. J., Adm. 24; L. R. 3 A. & E. 308; 23 L. T. 855.

—— **Part of Cargo Discharged when Arrested.**]—All the cargo on board a vessel at the time of a collision belonged to the same owner, but only a part of the cargo was on board when the vessel was arrested:—Held, that the lien for the whole freight extended to every part of the cargo on board at the time of the collision. *The Roecliff*, 38 L. J., Adm. 56; L. R. 2 P. 363; 20 L. T. 586; 17 W. R. 745.

Sale of Cargo to pay Marshal's Fees.]—The cargo will be detained by the court as security for payment of freight, and, if necessary, sold to realise the amount of freight. *The Gettysburg*, 52 L. T. 60; 5 Asp. M. C. 347.

c. Damage by Sunken Ship.

Damage by Vessel Sunk by her own fault—Duty to Light—Warning to Harbour-master.]—The "D.," in consequence of the sole default of her master and crew, had sunk in the Thames, and had become a wreck obstructing the navigation of the river. Her mate sent a message to the harbour-master at G. to inform him of the accident, who said that he would cause the wreck to be lighted. A few hours afterwards, the wreck not having been lighted, a vessel, without any fault on the part of those on board her, came into collision with the wreck, and sustained damage. An action of damage having been instituted on behalf of the owner of the damaged vessel against the owners of the "D," the judge at the trial refused to admit the evidence shewing that the mate of the "D." had sent a message to the harbour-master, and that the latter had promised to light the wreck:—Held, that the evidence was wrongly rejected, that the collision had not been caused by the negligence of the owners of the wreck, and that they were not liable for the damage done. *The Douglas*, 51 L. J., Adm. 89; 7 P. D. 151; 47 L. T. 502; 5 Asp. M. C. 15—C. A. Reversing 30 W. R. 692.

Maritime Lien.]—In order to fix the owners of a wreck with liability, two things must be shewn: first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them; and secondly, that they have, in the discharge of their legal duty, been guilty of wilful misconduct or neglect. *The Utopia* (*Owners*) v. *The Primula* (*Owners*), 62 L. J., P. C. 118; [1893] A. C. 492; 1 R. 394; 70 L. T. 47; 7 Asp. M. C. 408—P. C.

Where the owners of a wreck had not abandoned possession, but had properly transferred the control of the lighting thereof to the harbour authority, and, by reason of imperfect lighting, a ship entering the harbour had collided with the wreck:—Held, (i.) that the owners of the wreck were not guilty of negligence, and therefore not to blame; and further, no negligence at the time of the collision having been proved against the owners or their servants, no maritime lien arose; (ii.) the colliding ship having been navigated with reasonable care and skill in circumstances of instant peril, was also not to blame. *Ib.*

See also *Parnaby* v. *Lancaster Canal Co.*, post, col. 893.

See also as to the duty of an owner of a ship sunk to mark her position. *Brown* v. *Mallet*, 5 C. B. 599. *White* v. *Crisp*, 10 Ex. 312. *Rex* v. *Watts*, 2 Esp. 675. *White* v. *Phillips*, 15 C. B. (N.S.) 245; 33 L. J., C. P. 33. *Dimes* v. *Petley*, 15 Q. B. 276.

Liability of Harbour Authority.]—A harbour authority having power to remove wrecks, and taking tolls for the use of their harbour, is liable for damage done by a sunken ship which they have neglected to remove or mark. *Dormont* v. *Furness Ry.*, 52 L. J., Q. B. 331; 11 Q. B. D. 496; 49 L. T. 134; 5 Asp. M. C. 127.

Damage by Grounding.]—See *The Mooreock* and cases, post, col. 880. *The Rhosina* and cases, post, cols. 910, seq.

d. Liability of Pilotage and Harbour Authorities.

Negligence of Pilot—Liability of Pilotage Authority.]—A pilotage authority is not liable for a collision caused by the fault of a pilot licensed but not employed by them. *Dudman* v. *Brown and Dublin Port and Docks Board*, Ir. Rep. 7 C. L. 518.

The Harbours Act, 1878, by s. 49, empowers the harbour board to appoint a harbour-master, pilots, and other officers to assist in the execution of the act. Sect. 76 empowers the board to appoint or license pilots to act within the districts attached to the harbour. The appellants employed a licensed pilot, who was also deputy harbour-master, to navigate their ship, which was sunk through want of due care in navigating:—Held, first, that the sole duty of the board as constituted by the statute in respect of pilots was to license pilots; secondly, that the board had no power to enter into pilotage contracts, and was not responsible for the default of their officer in respect of pilotage. *Shaw, Savill & Co.* v. *Timaru Harbour Board*, 59 L. J., P. C. 77; 15 App. Cas. 429; 62 L. T. 913; 6 Asp. M. C. 521—P. C.

Harbour authority held liable for damage by boatman employed by them to pilot ship. *Holman* v. *Irvine Harbour Trustees*, 4 Ct. of Sess. Cas. (4th ser.) 406.

—— **Vessel under Orders of Dock or Harbour-master.**]—When a vessel enters docks with the permission and under the general directions of the dock-master, and within the space over which his authority by statute extends, they who are on board of her are bound to use diligence

and care to carry out the directions of the dock-master in such a manner as to avoid doing damage to other vessels. *The Cynthia*, 46 L. J., Adm. 58; 2 P. D. 52; 36 L. T. 184; 3 Asp. M. C. 378.

A steamship under the directions of the dock-master, and within the limits of his jurisdiction when entering the St. Katharine docks, came into collision with two barges, and drove them against a steamship lying alongside the wharf, which steamship crossed a skiff and sunk it. In the City of London court, where a cause of damage was instituted, it was found by the judge as a fact that the steamship was not liable for the damage to the skiff, because she was bound by statute to obey the dock-master, and could not do anything but under his orders. The owner of the skiff appealed, and the court held that the master contributed to the damage by negligence in carrying out the orders of the dock-master, and therefore that the steamship was liable for the damages proceeded for. *Ib.*

A vessel leaving dock with a pilot on board and within the space over which the dock-master's authority extends by statute, is responsible for damage resulting from the use of a tug of insufficient power by her master, even when such tug is in the general employment of the dock company, there being no obligation on the dock company to supply a tug. *The Belgic*, 2 P. D. 57, n.; 35 L. T. 929; 3 Asp. M. C. 348. See also *The Rhosina*, and cases infra, col. 910.

e. Damage by Queen's Ship.

Actual Wrongdoer alone Liable.]—Where a Queen's ship is in collision the actual wrongdoer is alone liable. *The Birkenhead*, 3 W. Rob. 75.

Commander and Officers.]—Commander of a Queen's ship condemned in a collision cause. *The Volcano*, 2 W. Rob. 337.

The captain of a sloop of war is not answerable for damage done by her to another vessel; the mischief appearing to have been done during the watch of the lieutenant, who was upon deck, and had the actual direction and management of the steering and navigating of the sloop at the time, and when the captain was not upon deck, nor was called by his duty to be there. *Nicholson* v. *Mouncey*, 15 East, 384; 13 R. R. 501. And see *Huggett* v. *Montgomery*, 2 Bos. & P. (N.R.) 446; *Rose* v. *Miles*, 4 M. & S. 101; 16 R. R. 405.

Lords of the Admiralty.]—The lords of the admiralty cannot be sued for a collision by the owners of a merchant vessel that has been in collision with one of H.M. ships. *The Athol*, 1 W. Rob. 374.

Government Transport.]—No action is maintainable against an owner of a transport vessel employed by the government for damage done in the execution of positive orders of an officer of the royal navy under whose command she was. *Hodgkinson* v. *Fernie*, 2 C. B. (N.S.) 415; 26 L. J., C. P. 217; 3 Jur. (N.S.) 818.

Where a vessel of the royal navy towing two transports, anchored by the order of the admiral, and the captain ordered the vessels in tow to hold on by their warps, and afterwards a breeze sprang up, and one of the transports, swinging to it, came into collision with another transport in another column; and the captain stated, that after the order to hold on by the warps, it would have been proper for the master of the transport to let go his anchor if anything occurred which would have made it dangerous to his own ship if he did not do so:—Held, that in an action against the owner of the transport for damage done by the collision, the judge was right in leaving it to the jury to say whether the master was not guilty of negligence in not dropping his anchor on the wind changing. *Ib.* And see *Fletcher* v. *Braddick*, supra, col. 716.

Pilot.]—The pilot of a king's ship is liable for a collision caused by his fault, although he is subject to the orders of a superior officer. *Stort* v. *Clements*, Peake, 144.

f. Damage by Ship of Foreign Sovereign.

Jurisdiction of Court of Admiralty.]—A steam vessel belonging to the Khedive of Egypt had come to England to be repaired, with a cargo on board. She was not a man-of-war. Upon her trial trip she came into collision with and sunk the "Batavier"; the owners of the "Batavier" caused her to be arrested by a warrant of the court of admiralty. An application having been made for a prohibition:—Held, that the court of admiralty was the proper tribunal to determine whether the steam vessel was entitled to the immunity allowed to the vessels of a sovereign state, and that a prohibition ought not to issue. *Charkieh, In re*, 42 L. J., Q. B. 75; L. R. 8 Q. B. 197; 28 L. T. 190; 21 W. R. 437.

The "Charkieh" belonging to the Khedive of Egypt, and usually employed in carrying mails and passengers, came to England with merchandise and for repairs. Having completed her repairs, and whilst on a trial trip down the Thames, she came into collision with the "Batavier." On arrest by the owners of the "Batavier":—Held, first, that his highness the Khedive is not entitled to the privileges of a sovereign prince. *The Charkieh*, 42 L. J., Adm. 17; L. R. 4 A. & E. 59; 28 L. T. 513.

Held, secondly, that even the privileges of a sovereign prince would not extend to immunity from arrest in a suit for damage by collision. *Ib.*

Held, thirdly, that if the privileges did extend to such an immunity, they would have been waived in this case by the employment of the ship at the time as a trader. *Ib.*

—— **Exemption from Arrest.**]—A vessel of war commissioned by the government of a foreign state, and engaged in the national service of her government was stranded on the coast of England. She had a cargo of machinery on board her alleged to belong to private individuals of which her government had for public purposes charged itself with the care and protection. Important and efficient salvage services were rendered to the ship and cargo. A suit was instituted on behalf of certain of the salvors against the ship and her cargo. The court refused to order a warrant to issue for the arrest of the ship or cargo, and held that it had no jurisdiction to entertain the suit. *The Constitution*, 48 L. J., Adm. 13; 4 P. D. 39; 40 L. T. 219; 27 W. R. 739; 4 Asp. M. C. 79.

A steam packet conveying mails and carrying on commerce, and which belongs to the sovereign of a foreign state, and is officered by officers

commissioned by him, comes within the category of vessels which are exempt from process of law, and cannot therefore be arrested so as to give a British subject a right to proceed against her. *The Parlement Belge*, 5 P. D. 197 ; 42 L. T. 273 ; 28 W. R. 642 ; 4 Asp. M. C. 234—C. A.

4. Persons Entitled to Recover.

Shipowners.]—Owners of the injured ship, whether registered as owners or not. *The Ilos*, Swabey, 100.

Passengers and Crew.]—Passengers or crew in respect of baggage or clothes lost. *The Cumberland*, 5 L. T. 496.

Posthumous Child.]—A posthumous child for the loss of his father lost in the collision. *The George and Richard*, L. R. 3 A. & E. 460 ; 24 L. T. 717 ; 1 Asp. M. C. 50.

For Personal Injury.]—Seamen hurt in the collision. *The Borodino*, 5 L. T. 291 ; *Taylor* v. *Dewar*, 2 B. & S. 58. *And see* infra, col. 925.

Indorsee of Bill of Lading.]—Indorsee of bill of lading of cargo. *The Marathon*, 40 L. T. 163 ; 4 Asp. M. C. 75.

Loss of Life.]—*See* infra, cols. 876, 925.

Bailees of Injured Barge.]—In a cause of collision instituted by the bailees of a barge against a steamship, they were competent to sue in rem in the admiralty court ; but in order to protect the defendants from the possibility of another suit by other parties on the same subject, the court directed that the money awarded as compensation for the damage should not be paid until it should be satisfactorily established that such payment would release the defendants from all claims by the owners of the barge in respect of the collision. *The Minna*, L. R. 2 A. & E. 97.

Cargo Owners.]—Can recover half their loss although the carrying ship is also in fault. *The Milan*, Lush. 388 ; 31 L. J., Adm. 105 ; 5 L. T. 590 ; *The City of Manchester*, 49 L. J., Adm. 81 ; 5 P. D. 221 ; 42 L. T. 521 ; 4 Asp. M. C. 412—C. A.

Underwriters.]—Can sue in the name of the owner of the injured ship after payment of the insurance, but not in their own names. *Simpson* v. *Thompson*, 3 App. Cas. 279 ; 38 L. T. 1 ; 3 Asp. M. C. 567.

In the case of a collision between two ships belonging to the same owner, by which one was totally lost through the exclusive fault of the other :—Held, that the underwriters could make no claim against the sum paid into court, under the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63, s. 54), the insured being himself the person who had caused the damage. *Ib.*

Passengers and Others on Board Wrongdoing Ship.]—A passenger on board the "Bushire" and one of the crew lost their lives by drowning in consequence of a collision with the "Bernina." Both vessels were to blame, but neither of the deceased had anything to do with the negligent navigation of the "Bushire" :—Held, that their representatives could maintain actions under Lord Campbell's Act against the owners of the "Bernina," and could recover the whole of the damages ; s. 25, sub-s. 9, of the Judicature Act, 1873, not being applicable to such actions. *Thorogood* v. *Bryan* (8 C. B. 115), and *Armstrong* v. *Lancashire and Yorkshire Ry.* (L. R. 10 Ex. 47) overruled. *The Bernina*, *Mills* v. *Armstrong*, 57 L. J., Adm. 65 ; 13 App. Cas. 1 ; 58 L. T. 423 ; 36 W. R. 870 ; 6 Asp. M. C. 257 ; 52 J. P. 212—H. L. (E.)

Collision between two Ships belonging wholly or in part to same Owners.]—See *Chartered Mercantile Bank of India, China and London* v. *London and Netherlands India Steam Navigation Co.*, infra, col. 737 ; *Simpson* v. *Thompson*, supra.

Master.]—The master of a ship that has been damaged by collision abroad has power to institute an action in a foreign court for recovery of damages on behalf of ship and cargo owners. *The Reinbeck*, 60 L. T. 209 ; 6 Asp. M. C. 366—C. A.

Damage by Tug.]—*See* 8. Tug and Tow, infra, cols. 754, seq.

Common Employment.]—A compulsory pilot is not fellow servant of crew, and may recover against the shipowner for injury suffered in collision through fault of crew. *Smith* v. *Steele*, 44 L. J., Q. B. 60 ; L. R. 10 Q. B. 125 ; 32 L. T. 195 ; 23 W. R. 388 ; 2 Asp. M. C. 487.

Where the captain is the wrongdoer. See *Hedley* v. *Pinkney and Sons' Steamship Co.*, ante, col. 73 ; *Ramsay* v. *Quinn*, ante, col. 73.

Purchase of Ship—Damage done before Purchase.]—A., the purchaser of a ship from B., sued C. in his own name and as assignee from B. for damage done to the ship before the purchase. The day after the summons was served, B. assigned to A. all his claims against C. :—Held, that the action would not lie. *Symington* v. *Campbell*, 21 Ct. of Sess. Cas. (4th ser.) 434.

5. Damages.

a. Generally.

Full Compensation.]—The sufferer by collision is entitled to full compensation. Mode of estimating the value of the injured vessel. *The Ironmaster*, Swabey, 441.

Increased Value by Repairs.]—The owners of a ship damaged by collision are entitled to the full expenses of repairing her and fitting her for sea, though such repairs may make her more valuable than she was before the collision. *The Pactolus*, Swabey, 173 ; 5 W. R. 167.

—— No Deduction of "One-third New for Old."]—There is no deduction of "one-third new for old" in the cost of repairs of damage by collision, as in the case of insurance. The wrongdoer pays in full. *The Gazelle*, 2 W. Rob. 279.

In assessing the value of seamen's clothes lost in collision, one-third deducted off cost price. *The Cumberland*, 5 L. T. 496.

Objection to registrar's report in respect of amount allowed for repairs. *The Alfred*, 3 W. Rob. 232.

Cost of Repairs—Restitution in integrum—Lloyd's Survey.]—A successful plaintiff in a

collision action is entitled to have his ship put into the same condition in which it was previous to the collision at the cost of the wrongdoer, irrespective of the fact that some of the repairs necessitated by the collision would shortly have been necessary to enable the ship to pass her classification survey, and in estimating the amount of the wrongdoer's liability, no deduction can be made on this account. *The Bernina*, 55 L. T. 781 ; 6 Asp. M. C. 65.

Consequential Damage — Rotten Wood.]—Where a ship is damaged by collision, and on opening her up to effect the repairs rendered necessary by the collision, certain parts of her not injured by the collision are found to be rotten, and to require renewing, the cost of such renewal cannot be charged to the collision damage, although such parts but for such opening up would have lasted for some years. *The Princess*, 52 L. T. 932 ; 5 Asp. M. C. 451.

Condition of Injured Vessel.]—If a portion only of the damage is clearly attributable to the wrongdoer, and that portion cannot be distinguished from the rest, the wrongdoer is responsible for the whole damage. *The Egyptian*, 10 L. T. 910.

Even though the injured vessel may have been at the time of collision in such a condition that the collision occasioned an unusual amount of damage, a wrongdoer is nevertheless responsible for all the consequences. *Ib.*

Ship Sunk—Total Loss—No further Damages.]—Where a vessel is sunk in collision, and damages are awarded upon the footing of a total loss, nothing further by way of demurrage or loss of wages will be allowed as damages. *The Columbus*, 3 W. Rob. 158.

Damage to Reputation of Ship.]—A yacht belonging to the plaintiff having been sunk in a collision, and evidence having been given that her marketable value was depreciated :—Held, that, in addition to the claims made for repairs, the plaintiff was entitled to be paid such sum as would compensate for the impaired value. *The Georgiana* v. *The Anglican*, 21 W. R. 280.

Ship Sunk and Raised.]—Where a ship carrying cargo was sunk in a collision, and afterwards raised and repaired, and the costs of repairs exceeded the original value of the ship, which might have been ascertained before the repairs were commenced :—Held, that the owner could not recover upon a principle of partial loss, but that the measure of damages was the value of the ship before the collision, with interest from the date when the cargo would, in ordinary course, have been delivered, together with the costs of raising, and the cost of placing the ship in dock for inspection, less the value of the wreck as raised. *The Empress Eugénie*, Lush. 138. See also *The Emerald*, *The Greta Holme*, infra, cols. 735, 894.

Improper Abandonment.]—Where, in a collision action for which the defendants were held to blame, the court found that, after the collision, the plaintiff's vessel had been improperly abandoned, and it appeared that, in consequence thereof, she sank and was afterwards raised by the plaintiffs, whereas she might have been beached, the court directed the registrar in assessing the damages, that, as the only ascertainable extra cost arising from the abandonment was the cost of raising, he was to disallow that amount. *The Hansa*, 58 L. T. 530 ; 6 Asp. M. C. 268.

When a collision takes place between two vessels by the negligence of the crew of the defendant's vessel, whereby the plaintiff's vessel is injured, and afterwards and before any effort has been made to save the plaintiff's vessel her master and crew unjustifiably abandon her, and she is consequently totally lost, the defendant will not be liable for such total loss of the plaintiff's ship, but only for the expense which would have been incurred in making good the actual damage occasioned by the collision. *The Thuringia*, 41 L. J., Adm. 44 ; 26 L. T. 446 ; 1 Asp. M. C. 283.

The master and crew of a vessel injured by collision are bound to shew ordinary courage and nautical skill in endeavouring to save their vessel from total loss, and the defendant will not, on a reference to the registrar and merchants to assess the damages, be held liable for any loss which might have been avoided by the exercise of such ordinary skill and courage. *Ib.*

The wrongdoer in a collision is liable for loss arising from the abandonment of the injured ship, under reasonable fear of danger. *The Blenheim*, 1 Spinks, 285.

If, in consequence of the collision, the crew of the injured ship abandon her under a reasonable fear of their lives, and she is totally lost, the owners of the wrongdoing ship are liable for damage and salvage expenses. *The Pensher*, Swabey, 211.

A vessel, after collision, was abandoned by her crew, under reasonable fear of their lives, and lost ; the wrongdoing ship doing nothing to assist :—Held, that damages for the total loss could be recovered against the other ship. *The Lindsay*, Ir. R. 1 Eq. 259.

Where the injured ship was abandoned by her crew, after the collision, unjustifiably, and she was afterwards salved, the salvage cannot be recovered as damages in the collision action. *The Linda*, 4 Jur. (N.S.) 146 ; 6 W. R. 196.

Jettison of Cargo—Claim for General Average.]—In a collision between a Dutch and an English steamer, the former was sunk, and the latter so injured that she had to jettison cargo to keep the part of the ship damaged out of the water whilst making for a port of refuge. In an action in rem for damage by collision brought by the owners of the Dutch steamer against the English steamer, to which the owners of the latter appeared and counter-claimed, the Dutch steamer was found alone to blame. On the reference as to damages, the owners of the English steamer claimed (inter alia) to recover against the owners of the Dutch steamer the balance due in general average contribution from ship to cargo in respect of the jettison, after deducting the amount due from cargo to ship, in respect of the damage to the ship :—Held, that the claim must be disallowed, as the loss sustained by the ship in having to make the general average contribution was not directly due to the collision, but arose from the obligation to contribute, resulting from the relation between ship and cargo. *The Marpessa*, 61 L. J., Adm. 9 ; [1891] P. 403 ; 66 L. T. 356 ; 40 W. R. 239 ; 7 Asp. M. C. 155.

Insurance does not Affect.]—The defendants condemned in damages in a collision action are not entitled to deduct from such damages the amount received by the plaintiff in respect of such damage, under a policy. *Yates* v. *Whyte*, 4 Bing. (N.C.) 272; 5 Scott, 640; 7 L. J., C. P. 116.

—— **Plaintiff paid by Insurers.**]—The injured party is entitled to full compensation, although the jury find that he has been paid by insurers for part of the damage; the insurers having assigned to him their rights against the defendants. *Morrison* v. *Bartolomeo*, 5 Ct. of Sess. Cas. (3rd ser.) 848.

Expense of Detaining Witnesses.]—Costs of detaining witnesses until the trial, agency and interpretation, are allowed to the successful party in a collision suit. *The Karla*, Br. & Lush. 367; 13 W. R. 295.

Lien for Cost of Repairs—Bankruptcy of Shipowner.]—Where, in the registrar's report in a collision action, it appears that the claimant claims (inter alia) as part of his damages the cost of repairing his ship, but has not paid the shipwright, and has, since the repairs were effected, become insolvent, and the registrar allows such item, the court has no power to do anything to ensure the money being paid over by the claimant to the shipwright, and will not retain the money in the registry until the claimant has given satisfactory evidence that he has paid the shipwright. *The Endeavour*, 62 L. T. 840; 6 Asp. M. C. 511.

Specific Agreement for Liquidation of Damages.]—The ship "G.," having come into collision with the ship "W.," the owner of the ship "W." caused the ship "G." to be arrested, but, in consideration of the insurers agreeing to pay to the owners the amount of damage which the ship "W." had received by the collision, her owners released the ship "G." from arrest:—Held, that the word "damage" included not only the damage to the ship itself, but consequential damage, such as loss of freight and costs in the admiralty court. *Heard* v. *Holman*, 19 C. B. (N.S.) 1; 34 L. J., C. P. 239; 11 Jur. (N.S.) 544; 12 L. T. 455; 13 W. R. 745.

Interest on Damages.]—In a collision action in rem not instituted till twelve years after the collision, the court allowed interest for twelve years on the damages awarded. *The Kong Magnus*, [1891] P. 223; 65 L. T. 231; 7 Asp. M. C. 64.

Interest upon money paid for repairs of the injured ship allowed from the date of payment, not only from the date of decree. *The Hebe*, 2 W. Rob. 530; 5 Not. of Cas. 176. *And see cases* infra, col. 742.

Loss of Cargo after Transhipment, in consequence of Collision.]—See *The Bernina*, supra, col. 561.

Loss of Life and Personal Injury.]—See *The Beta* and cases, infra, col. 925.

Assessment of Damages—Lord Campbell's Act.]—See *The Orwell*, infra, col. 989.

Limit of Damages.]—*See* 7. LIMITATION OF LIABILITY, infra, cols. 738, et seq.

b. Plaintiff's Negligence after Collision.

Loss by Plaintiff's Negligence after Collision.]—If a collision takes place between two vessels by the negligence of the crew of the defendant's vessel, whereby the plaintiff's vessel suffers damage and is necessarily run aground, and afterwards and before any expenses are incurred, by the negligence of the plaintiff's servants, a total loss of his ship ensues, the defendant is not liable for such total loss of the ship, but is liable for the expense which would have been incurred in making good the partial damage. *H.M.S. Flying Fish*, 2 Moore, P. C. (N.S.) 77; Br. & Lush. 436; 34 L. J., Adm. 113; 12 L. T. 619.

Cargo not Unloaded.]—Damage to cargo on board a ship run ashore after collision:—Held, not recoverable from the wrongdoing ship, because it might have been avoided by unloading the cargo sooner. *The Eolides*, 3 Hag. Adm. 367.

Subsequent Stranding—Remoteness.]—The defendants' ship, which was admitted to have been solely to blame, collided with the plaintiffs' barque, cutting off her starboard quarter, the captain of the barque losing his usual means of navigating his ship—namely, his steering compass, log-line and charts—and being left with an inefficient compass and chart. The captain, in order to save his ship, made for the Thames, and, without any want of care or skill in navigating his ship, mistook a certain lightship which he saw, and, the course of his ship being altered, she almost immediately afterwards stranded:—Held, that the defendants were liable for the ultimate loss of the plaintiffs' ship, and that the damages claimed in respect thereof were not too remote, as the stranding was the natural and reasonable result of the defendants' wrongful act, and was such a consequence as, in the ordinary course of things, would flow from their act. *The City of Lincoln*, 59 L. J., Adm. 1; 15 P. D. 15; 62 L. T. 49; 38 W. R. 345; 6 Asp. M. C. 475—C. A.

Where a ship, after receiving damage in a collision, goes ashore, the loss is primâ facie to be attributed to the collision. *The Mellona*, 3 W. Rob. 7.

Loss of Life.]—A brig, by the negligence of those on board her, came into collision with a barque in January, about 5 a.m. off the Lizard. In the collision the main rigging of the barque was carried away, and shortly afterwards her fore and main masts went by the board. Towards evening the wind increased in violence, and about two the next morning the barque was driven on shore, and some of her crew were drowned:—Held, that the loss of life was occasioned by the collision. *The George and Richard*, L. R. 3 A. & E. 466; 24 L. T. 717; 20 W. R. 246; 1 Asp. M. C. 50.

c. Salvage Expenses.

Salvage Expenses.]—Salvage expenses incurred, by reason of the collision, are recoverable as damages against the wrongdoer. *The Pensher*, Swabey, 211.

Costs of Action for Salvage.]—In an action for running down a vessel, it appeared that the

plaintiff had been compelled to employ a steam-tug, the owners of which demanded 150*l.* for salvage, and commenced a suit in the admiralty court for its recovery, in which suit the plaintiff paid 20*l.* into court, and a decree was ultimately made, awarding 45*l.* and costs. The question of the liability of the defendant to pay these costs, and also the costs of the plaintiff in defending that suit, having been reserved upon these facts for the opinion of the court:—Held, that the plaintiff was not entitled to recover them. *Tindall* v. *Bell*, 11 M. & W. 228; 12 L. J., Ex. 160.

The vessels "C." and "L." came into collision, in consequence of which salvage services were rendered to the "C." The salvors brought a suit, and recovered 50*l.* The "L." was condemned in a suit for damage brought by the "C.," and on reference to the registrar and merchants as to the amount, they struck out the costs of the salvage suit incurred by the "C.," because her owners had made no tender to the salvors:—Held, that such costs are, by the practice of the court, a proper item in the amount to be accorded in a suit for damage, and that there is no general principle laid down (in *Tindall* v. *Bell*, supra, which had been relied upon to induce the court to depart from its usual practice. *The Legatus*, Swabey, 168; 5 W. R. 154.

Commission on Bail—Salvage Action.]—Commission paid for bail in a salvage action will not be allowed as part of the damages recoverable by the salved vessel in an action of damage. *The British Commerce*, 53 L. J., Adm. 72; 9 P. D. 128; 51 L. T. 604; 33 W. R. 200; 5 Asp. M. C. 335.

d. Demurrage.

Demurrage is allowed to the owners of a ship damaged by collision during the time that she has been necessarily delayed for the purpose of effecting the repairs rendered requisite by the collision, and of transacting business unquestionably connected with the collision. *The City of Buenos Ayres*, 25 L. T. 672; 1 Asp. M. C. 169.

As the master has, in some circumstances, the duty cast upon him of acting as agent for the cargo as well as the ship, the making a protest and obtaining the necessary official documents in a foreign port relating to the damage done to both ship and cargo is business unquestionably connected with the collision. Delay in their preparation caused by the dilatoriness of the foreign authorities, and by no default of the master, is chargeable to the collision. *Ib.*

The rate of demurrage allowed to steam vessels of the ordinary class, carrying cargo, is 6*d.* per ton on the gross tonnage, or 9*d.* per ton on the nett tonnage, per day. This estimate is arrived at by doubling the amount of the wages of the crew and of the cost of their provisions, so as to include both expenditure and loss of trade. *Ib.*

To entitle the owners of a ship injured in collision to damages for detention during repairs, it must be shewn that actual, not probable, loss of freight or earnings occurred. *The Clarence*, 3 W. Rob. 283.

Demurrage or payment for detention of the ship during repairs and loss of probable earnings; towage to London in consequence of collision; detention of Lascar crew of ship engaged in East India trade; all allowed as damages for collision. *H.M.S. Inflexible*, Swabey, 200.

In the case of a steamship that was one of a class sailing at fixed intervals, damages for demurrage was allowed during the time she was detained by the repairs beyond the date for her sailing in regular course. *The Black Prince*, Lush. 568.

The appellant ship being found to blame for a collision with the respondents' ship, the respondents claimed demurrage in respect of the time their ship was under repair. It appeared that during repair the respondents substituted another ship of the company in the place of the damaged ship, and that the company sustained no actual loss by demurrage:—Held, that the respondents were not entitled to demurrage, there being no actual loss. *The Black Prince*, supra, considered and approved. *The City of Peking*, 59 L. J., P. C. 88; 15 App. Cas. 438; 63 L. T. 722; 39 W. R. 177; 6 Asp. M. C. 572—P. C.

e. Loss of Freight, Profits, or Charterparty.

Hire of another Ship.]—Hire of another vessel in the place of the injured ship, which was engaged to perform a contract to bring lobsters, allowed. *The Yorkshireman*, 2 Hag. Adm. 30, n.

—— **Increased Freight.**]—The "K.," which was on a voyage under charter from Cardiff to Bombay with coals, was run into by the "B." shortly after leaving Penarth Docks. The "K.," which was considerably damaged, returned to Cardiff, where her cargo was taken out of her in order that she might be repaired. The owners of the cargo proposed that the coals, which were also damaged, should be sold and a fresh cargo shipped. The shipowner, however, refused to ship a fresh cargo except "on fresh terms as to freight, &c.," and the charterer, without inquiring what the fresh terms would be, reshipped the damaged cargo, which was carried to Bombay:—Held, that the shipowner, having a lien on the cargo for freight, was entitled to insist on the original cargo being reshipped if it was capable of being carried to its destination, and that the cargo-owner was not entitled to insist on its delivery without payment of freight:—Held, further, that in order to ascertain the amount to be paid by the owners of the wrongdoing ship, it was necessary to estimate what the increased freight would have been, before comparing the loss on the damaged cargo at Bombay with the loss which would have arisen on the sale of the cargo at Cardiff and shipping a fresh one. *The Blenheim*, 54 L. J., Adm. 81; 10 P. D. 167; 53 L. T. 916; 34 W. R. 154; 5 Asp. M. C. 522.

Measure of Damages as to Loss of Freight.]—Where the ship and freight are lost, the measure of damages, in respect of freight, is the amount of the freight, less the cost of earning it saved to the shipowner by the collision. *The Canada*, Lush. 585.

Loss of Market.]—A ship having been damaged by a collision with another ship, the owners of cargo on the former claimed damages from the owners of the latter ship. The cargo-owners claimed, inter alia, for damages in respect of the loss of market in consequence of a portion of the cargo having been delayed in its arrival at the port of destination:—Held, that loss of market was too remote a consequence to be considered as an element of damage, and that there was no difference in the principles which regulate the measure of damages in an action of collision, and an action for a breach of duty under a

shipping contract. *The Notting Hill*, 53 L. J., Adm. 56; 9 P. D. 105; 51 L. T. 66; 32 W. R. 764; 5 Asp. M. C. 241—C. A.

Fishing Interrupted.]—A French fishing brig of 142 tons, employed in the cod fishery off the banks of Newfoundland, came into collision on the 6th of July, 1881, with an Italian barque, and in consequence of the collision was compelled to put into port for repairs, but her repairs having been completed, returned to the fishing ground before the close of the fishing season. In an action for damages instituted on behalf of the owners of the brig against the barque, the court pronounced the barque solely to blame for the collision, and referred the question of damages to the registrar and merchants. At the reference the plaintiffs claimed 1,200*l.* for demurrage of their vessel from the date of the collision to the 26th August, 1881, the date of her return to the fishing ground; and of the amount so claimed, the registrar, by his report, allowed the plaintiffs 880*l.* as the loss sustained by the interruption of their fishing. The defendants moved the court in objection to the report:—Held, that the motion must be dismissed. *The Risoluto*, 52 L. J., Adm. 46; 8 P. D. 109; 48 L. T. 909; 31 W. R. 657; 5 Asp. M. C. 93.

A claim for loss of fishing by a fishing boat whose fishing year was lost in the collision, upheld. *The Gleaner*, 38 L. T. 650; 3 Asp. M. C. 582.

Loss of Salvage.]—Loss of salvage, the injured vessel was engaged in earning, allowed as damages. *The Betsey Caines*, 2 Hag. Adm. 28.

Loss of Charterparty.]—In estimating the loss sustained by a ship in a collision, a charterparty entered into contingently on the arrival of the ship at a fixed date at another place should be taken into consideration, the amount recoverable being the freight that would have been earned under the charterparty, less any expenses which would naturally be incurred in the performance of it. *The Star of India*, 45 L. J., Adm. 102; 1 P. D. 466; 35 L. T. 407; 25 W. R. 377; 3 Asp. M. C. 261.

The "Star of India" and the "Cheviot" came into collision on the 1st of May, by which the latter vessel was unable to load cargo by the time stipulated for in the charterparty, which was accordingly cancelled. She was not sufficiently repaired to obtain another charterparty until the 4th of July. The collision was the fault of the "Star of India":—Held, first, that the owners of the "Cheviot" were entitled to some compensation for loss of the charterparty. *Ib.*

Held, secondly, that such compensation was not included in the usual allowance of fourpence per ton a day for demurrage. *Ib.*

Damages for loss of a beneficial charterparty may be recovered in a collision action. *The Matchless*, 10 Jur. 1017.

The vessel, "C.," which was proceeding in ballast to Montreal to load a cargo of grain for the United Kingdom, pursuant to charterparty, was injured by collision with another vessel, and compelled to put into port to repair. The repairs necessarily occupied so long a time that it was not reasonably possible for the "C." to have arrived at Montreal in time to fulfil her charter before the navigation of the St. Lawrence was stopped by ice for the winter. In these circumstances the owners of the "C." abandoned the charter, and it was found that they acted prudently in so doing:—Held, that the loss arising from the abandonment of the charter was a loss caused by the collision. *The Consett*, 5 P. D. 229; 5 Asp. M. C. 34, n.

Claim for Loan on Security for Freight.]—The master of the ship "C.," bound from Philadelphia to Antwerp, obtained at Philadelphia from M. a loan of money on freight upon the security of an instrument signed by him, by which it was stipulated that the loan should be repaid after arrival of the "C." at Antwerp or other intermediate port at which the voyage should end, and that if there should be no payment of freight the loan should not be paid back. The "C.," whilst on the course of her voyage to Antwerp, came into collision with another ship and sank, and her cargo was lost. The collision was occasioned by the negligence of those in charge of the other ship, and her owners instituted an action for limitation of their liability. In such action a sum of money was awarded out of the proceeds paid into court to the owners of the "C." for loss of freight. M. claimed a portion of this sum in respect of his loan:—Held, that his claim was well founded. Semble, where, in an action for limitation of liability a sum of money is awarded as compensation for loss of freight to the owners of a vessel run down by the plaintiff's ship, the holder of a bottomry bond on the freight of the vessel run down, is entitled to claim, in respect of the loan of bottomry, a portion of the sum awarded for loss of freight. *The Empusa*, 48 L. J., Adm. 36; 5 P. D. 6; 41 L. T. 383; 28 W. R. 263; 4 Asp. M. C. 185.

Loss of Profits—Agreement to provide Vessel for particular Voyage—Remoteness.]—A collision occurred between two vessels, the "A." and the "G.," shortly after a contract had been made by the owners of the "A." that upon the completion of her then voyage she should proceed upon another voyage. The repairs to the "A." made necessary by the collision could not be completed in time to enable her to fulfil the contract. In an action by the owners of the "A." against the owners of the "G.," the former claimed damages in respect of the loss of the earnings which would have been derived from the employment contracted for:—Held, that the damages claimed were not too remote, but flowed directly and naturally from the collision, and that such damages should be allowed as would represent the loss of ordinary and fair earnings of such a ship as the "A.," having regard to the fact that the contract had been entered into. *The Argentino, The Gracie (Owners)* v. *The Argentino (Owners)*, 59 L. J., Adm. 17; 14 App. Cas. 519; 61 L. T. 706; 6 Asp. M. C. 433—H. L. (E.) Affirming 37 W. R. 210—C. A.

Advanced Freight—Security on Cargo.]—A ship, "A.," and her cargo, belonged to the same owners, and the plaintiffs advanced 1,000*l.* as a loan to such owners, and received as security the bill of lading, on which the master indorsed the receipt for 1,000*l.* as advanced freight, and also a policy of insurance on advanced freight. Ship "A." was lost through a collision with the defendant's vessel, whose negligence was admitted. It was proved that the difference between the value of the cargo at the port of destination and at the port of loading would have considerably exceeded 1,000*l.* In an action by the holders of the bill of lading for 1,000*l.* against the defen-

dant's ship:—Held, that the plaintiffs were entitled to recover the sum, though it was not, strictly speaking, advanced freight, but a prospective increase in the value of the cargo, and that the insurers were subrogated to the rights of the plaintiffs. *The Thyatira*, 52 L. J., Adm. 85; 8 P. D. 155; 49 L. T. 406; 32 W. R. 276; 5 Asp. M. C. 147.

Freight in Captain's hands.]—Freight in the captain's hands, lost in the collision, allowed as damages. *The Cumberland*, 5 L. T. 496.

Cost of Raising Wreck—Public Body.]—A public body, with statutory public duties to discharge and power to levy rates for the purpose of discharging those duties, is entitled, though it is not a profit-earning body, to substantial damages in respect of the loss of the use of property injured by the negligence of another; and for the recovery of such damages it is not necessary to prove direct pecuniary loss. *The Greta Holme*, 66 L. J., Adm. 166; [1897] A. C. 596; 77 L. T. 23; 8 Asp. M. C. 317—C. A.

A dredger, the property of the Mersey docks and harbour board, the conservancy authority of the port of Liverpool, was sunk by the negligence of those in charge of the "Greta Holme." The wreck was raised, and in addition to other items the board claimed 1,500*l.* damages for the loss of the use of the dredger during the fifteen weeks she was under repair. There was evidence that the dredger might have been let at the rate of 100*l.* a week, and that during its disablement the work of deepening the river had been retarded:—Held (Lord Morris dissenting), that the board were entitled to substantial damages, which the house of lords assessed at 500*l.* *Ib.*

Wreck-raising Plant.]—See *The Crystal* and cases, post, col. 893.

6. Division of Loss.

Statement of the Rule.] — Statement of admiralty law as to the four cases of collision, by fault of one ship, both ships, or neither ship, and the liability for damages in each case. Loss is divided where both ships in fault. *The Lord Melville*, cited, 2 Shaw's Sc. App. 395. *The Woodrop*, 2 Dods. 83.

Its Justice questioned.]—The justice of the rule questioned. See per Denman, C.J., *De Vaux* v. *Salvador*, 4 A. & E. 420; 6 N. & M. 713; 5 L. J., K. B. 134. Per Selborne, C., *The Khedive*, infra.

Reason for the Rule.]—The reason for the rule is to avoid interminable litigation. See per Lord Blackburn, *The Khedive*, infra.

Equal Division—One Ship more in Fault than the Other.]—Rule of equal division of loss applied. *The Petersfield* and *The Judith Randolph*, cited in *Hay* v. *Le Neve*, 2 Shaw's Sc. App. 395.

The rule of admiralty is that if there is blame causing the accident on both sides, they are to divide the loss equally . . . however small the blame may be on one side. Per Lord Blackburn, *The Margaret*, *Cayzer* v. *Carron Co.*, 54 L. J., Adm. 18; 9 App. Cas. 873, 881; 52 L. T. 361; 33 W. R. 281; 5 Asp. M. C. 371—H. L. (E.) *Hay* v. *Le Neve*, supra. *The Woodrop*, supra.

Principle of the Rule.]—The principle of the rule is equality of participation in a loss arising from a common fault. See per Lord Stowell, *The Woodrop*, supra. Cf. per Selborne, C., *The Khedive*, infra.

The Common Fault.]—May be partly on shore and partly afloat; as where one ship was negligently launched and the other negligently placed in her way. *The United States*, 12 L. T. 33.

The common fault need not conduce to the collision if it conduces to the damage; as where one ship was negligently navigated and the other holed her with her anchor, which was a cock-bill. *The Margaret*, 50 L. J., Adm. 67; 6 P. D. 76; 44 L. T. 291; 29 W. R. 533; 4 Asp. M. C. 375—C. A.

Whilst a barge was by night lying astern of a steamship, in a dock, the latter moved her propeller and cut a hole in the barge. It appeared that there was no one on board the barge at the time of the accident. In a collision action:—Held, that although the steamer was to blame, the barge was also to blame for not having any one on board of her, as, had there been, the collision might have been avoided, and in any event the barge might have been beached before she sank; the plaintiffs therefore could only recover half their damages. *The Scotia*, 63 L. T. 324; 6 Asp. M. C. 541.

Difficulty of applying Common Law Definition of Negligence.]—See *The Monte Rosa*, 62 L. J., Adm. 20; [1893] P. 23; 68 L. T. 299; 41 W. R. 304; 7 Asp. M. C. 326.

Fault of not standing by.]—The rule formerly did not apply where one ship was in fault for the collision and the other for not standing by to assist. *The Celt*, 3 Hag. Adm. 321. *But see, as to present law*, 57 & 58 Vict. c. 60, s. 422.

Both or one Ship Foreign.]—The rule applies where one or both ships are foreign. *The North American* and *The Tecla Carmen*, Swabey, 358; Lush. 79. *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 52 L. J., Q. B. 220; 10 Q. B. D. 521; 48 L. T. 546; 31 W. R. 445; 5 Asp. M. C. 65; 47 J. P. 260—C. A. *The Washington*, 5 Jur. 1067. *The Monarch*, 1 W. Rob. 21. *The Khedive*, *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.*, 52 L. J., Adm. 1; 7 App. Cas. 795; 47 L. T. 198; 31 W. R. 249; 5 Asp. M. C. 360, 567. *The Seringapatam*, 3 W. Rob. 38. *Chapman* v. *Royal Netherlands Steam Navigation Co.*, 49 L. J., Ch. 449; 4 P. D. 157; 40 L. T. 433; 27 W. R. 554; 4 Asp. M. C. 107—C. A.

Cargo-owner suing Owner of carrying Ship.]—Rule of division of loss where both ships in fault does not apply to an action by the owner of cargo against the owner of the carrying ship upon the contract to carry. *The Bushire*, 52 L. T. 740; 5 Asp. M. C. 416.

The Rule applied.]—Both vessels being in fault for a collision, a moiety of the damage suffered by each pronounced for. *The Immaganda Sara Clasina*, *Vaux* v. *Sheffer*, 8 Moore, P. C. 75. *The Independence*, 14 Moore, P. C. 103; Lush. 270; 4 L. T. 503; 9 W. R. 582.

Insurance—Running Down Clause.]—Liability of underwriters where both ships in fault. See

London Steamship Association v. *Grampian Steamship Co.*, post, col. 1084.

Fault of one Ship that of her Compulsory Pilot.]—The "A." and the "H." were in collision by the fault of the crew of the "A." and the compulsory pilot of the "H.":—Held, that the rule of division of loss applied; but that the "A." owners could recover 4,000*l.* (half her loss being 8,000*l.*), and not only 2,500*l.*, the balance between 4,000*l.* and 1,500*l.* (half the loss of the "A."). *The Hector*, 52 L. J., Adm. 51; 8 P. D. 218; 48 L. T. 890; 31 W. R. 881; 5 Asp. M. C. 101—C. A. See also *The Demetrius*, 41 L. J., Adm. 69; L. R. 3 A. & E. 523; 26 L. T 329; 20 W. R. 761; 1 Asp. M. C. 251.

Both Ships in Fault by Agreement of Shipowners — Cargo Owners not bound by Agreement.]—An agreement between the shipowners that both ships were in fault does not prevent the owner of cargo on board one ship from asserting in an action by the owner of the other ship to limit his liability that the last-mentioned ship was alone in fault. *The Karo*, 57 L. J., Adm. 8; 13 P. D. 24; 58 L. T. 188; 6 Asp. M. C. 245.

Collision between Ships of same Owners—Rights of Cargo Owners.]—Where a collision occurred between ships belonging to the same owners, and the shipowner was protected by bill of lading against collision, and also against negligence of those navigating the carrying ship:—Held, that he was liable in tort for the negligence of those on board the other ship to the extent of half the loss of the cargo owner; and that he was protected by the bill of lading from further liability. *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 52 L. J., Q. B. 220; 10 Q. B. D. 521; 48 L. T. 546; 31 W. R. 445; 47 J. P. 260; 5 Asp. M. C. 65—C. A.

Collision between Tug and Third Ship — Liability of Owners of Tug and Tow.] — A tug with a ship in tow struck and injured a third ship, the ship in tow not touching her. All three vessels were found to blame for proceeding at an improper speed:—Held, that the owners of the tug and of the tow were jointly and severally liable to the owners of the third vessel for one-half of the damage that vessel had sustained, less one-half of the tug's damage:—Held, also, that the total liability of tug and tow was not limited to the statutory amount on the tonnage of the tug. *The Englishman and The Australia*, 63 L. J., Adm. 133; [1894] P. 239; 6 R. 743; 70 L. T. 846; 43 W. R. 62; 7 Asp. M. C. 603.

Cargo Owner can recover only Half his Loss—Both Ships in Fault.]—In admiralty the owner of cargo on board one of two ships both of which are in fault for the collision could recover only half his loss. *The Milan*, Lush. 388; 31 L. J., Adm. 105; 5 L. T. 590. But see *The Bernina*, 57 L. J., Adm. 65; 13 App. Cas. 1; 58 L. T. 423; 36 W. R. 870; 6 Asp. M. C. 257; 52 J. P. 212—H. L. (E.)

One Ship deemed in Fault for Infringement of Regulations.] — The rule of division of loss applies where fault is presumed under 36 & 37 Vict. c. 85, s. 17, by reason of infringement of the regulations. *The Khedive*, supra; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, supra; *The Hochung and The Lapwing*, 51 L. J., P. C. 92; 7 App. Cas. 512; 47 L. T. 455; 31 W. R. 303; 5 Asp. M. C. 39—P. C.

Action under Lord Campbell's Act.] — The rule does not apply to actions under Lord Campbell's Act. *The Bernina*, *Mills* v. *Armstrong*, supra.

Division of Loss where Liability Limited.]—See *The Khedive*, *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.*, infra, col. 743. See also *Chapman* v. *Royal Netherlands Steam Navigation Co.*, infra, col. 743. Overruling *The Khedive*, supra.

7. Limitation of Liability.

a. By General Law, no Limitation.

Liability Unlimited by General Law.]—By the maritime law the shipowner was liable to the full extent of damage done by the negligence of his servants. *The Wild Ranger*, Lush. 553; 32 L. J., Adm. 49; 7 L. T. 724. See also *The Dundee*, 1 Hag. Adm. 109, 120; *The Aline*, 1 W. Rob. 111; *The Volant*, 1 W. Rob. 283; *The Mellona*, 3 W. Rob. 16, 20; *Gale* v. *Laurie*, 5 B. & C. 156, 164; 7 D. & R. 711; 4 L. J. (o.s.) K. B. 149; *The Khedive*, 7 App. Cas. 795, 814; infra, col. 743.

b. Under 53 Geo. 3, c. 159.

Under 53 Geo. 3, c. 159, the owners of a ship that sank after wrongfully damaging another were not exempt from liability. *Brown* v. *Wilkinson*, 15 M. & W. 391; 16 L. J., Ex. 34.

The harpoons and fishing gear of a whaler went to augment the sum to which shipowners' liability was limited by 53 Geo. 3, c. 159. *Gale* v. *Laurie*, 5 B. & C. 157; 7 D. & R. 711; 4 L. J. (o.s.) K. B. 149. S. P., *The Dundee*, 1 Hag. Adm. 109.

The shipowner was liable for costs of a collision suit beyond the value of his ship. *Rayne*, *Ex parte*, 1 G. & D. 374; 10 L. J., Q. B. 354; 1 Q. B. 982. S. P., *The Dundee*, 2 Hag. Adm. 137.

A ship having been wrongfully sold by the master so that the voyage was not completed, the liability of the shipowner was held to be the value of the ship when sold, together with the freight she would have earned. *Cannan* v. *Meaburn*, 1 Bing. 465; 8 Moore, 127; 2 L. J. (o.s.) C. P. 60.

The liability of shipowners for collision was the value of the ship before, not after, collision. *The Mary Caroline*, 3 W. Rob. 101.

As to the form and date of affidavits required to be filed by the above act, see *Walker* v. *Fletcher*, 1 Ph. 115; 12 Sim. 420; 11 L. J., Ch. 103; 6 Jur. 4.

The value of the ship to which by the above act and by 14 & 15 Vict. c. 104, the shipowner's liability is limited is the price at which she could be sold; and that price must be ascertained, not by making deductions from her cost price, proportioned to her age, but by a valuation and appraisement, and such value must be ascertained as at the time of the accident. *Dobree* v. *Schreiber*, 2 Myl. & Cr. 489. Affirming 6 Sim. 291.

As to the mode of calculating the ship's value, prepaid freight, and the liability, where the master, one of the part owners, caused the loss. See *Wilson* v. *Dickson*, 2 B. & Ald. 2; 20 R. R. 331.

c. Under 17 & 18 Vict. c. 104.

When damage is done by a ship both to persons and goods, the ship is to be estimated at not less than 15*l.* per ton, for the purpose of adjusting the compensation to be paid to claimants in respect of loss of life or personal injury. *Nixon* v. *Roberts*, 1 J. & H. 739; 30 L. J., Ch. 844; 7 Jur. (N.S.) 820; 4 L. T. 679; 9 W. R. 890.

But where all demands in respect of personal injury or loss of life have been settled, and the only claimants against the ship are the owners of property which has been damaged, the ship is not to be estimated at more than her actual value, notwithstanding the fact that loss of life or personal injury has occurred. *Ib.*

Where claimants of both kinds appear, the owners of property are entitled to have the compensation for loss of life and personal injury marshalled, so as to throw it primarily on the excess (if any) of the value of 15*l.* per ton over the actual value of the ship. *Ib.*

The 17 & 18 Vict. c. 104, did not repeal, but only modified, the 9 & 10 Vict. c. 93 (Lord Campbell's Act), so far as the latter created liability for the loss of life by collision at sea. *Glaholm* v. *Barker*, 35 L. J., Ch. 259; L. R. 1 Ch. 223; 12 Jur. (N.S.) 82; 13 L. T. 653; 14 W. R. 296—C. A.

By the joint operation of the 9 & 10 Vict. c. 93, and the 25 & 26 Vict. c. 63, s. 54, the liability of the owner of a sailing vessel for loss of life occasioned by collision with another vessel at sea is limited to 15*l.* per ton of the registered tonnage of his vessel. *Ib.*

The liability of a shipowner in respect of loss of life to the seamen of a vessel run down by his ship is not limited to 30*l.* for damages payable in each case of death; and this rule applies to all cases, whether the board of trade does or does not institute proceedings in respect of such loss of life. *Glaholm* v. *Barker*, 35 L. J., Ch. 657; L. R. 2 Eq. 598; 12 Jur. (N.S.) 764; 14 L. T. 880; 14 W. R. 1006.

The amount of damages being paid by order of the court into the registry, the party finally adjudged to receive the same was not allowed interest from the date of such payment into court. *The North American and the Teela Carmen*, Lush. 79; 5 Jur. (N.S.) 659.

The owners of a ship causing a collision are liable, in chancery as well as in admiralty, to pay interest upon the sum payable as damages, although such damages may amount to the maximum sum limited by 25 & 26 Vict. c. 63, s. 54, and if the ship injured is in ballast at the time of the accident, such interest will be calculated from the date of the collision. *Straker* v. *Hartland*, 2 H. & M. 570; 34 L. J., Ch. 122; 10 Jur. (N.S.) 1143; 11 L. T. 622.

Where a sum is awarded as damages for collision, the liability to have paid such sum dates from the time at which the loss is considered to have arisen, and the sum awarded bears interest from that date. *The Amalia*, 34 L. J., Adm. 21; 13 W. R. 111; 5 N. R. 164, n.

The value of a ship within the meaning of the 17 & 18 Vict. c. 104, s. 504, was what she would have fetched if sold immediately before the collision, without deduction in respect of costs of sale. *Leycester* v. *Logan*, 4 K. & J. 725; 6 W. R. 849. S. P., *African Steamship Co.* v. *Swanzy*, 2 K. & J. 660; 25 L. J., Ch. 870; 4 W. R. 210, 692; *The Europa*, Br. & Lush. 210; 9 L. T. 781.

The provisions of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 503, limiting shipowners' liability, did not apply to foreign ships. *General Iron Screw Collier Co.* v. *Schurmanns*, 29 L. J., Ch. 877; 6 Jur. (N.S.) 883; 8 W. R. 732. S. P., *The Wild Ranger*, infra, col. 747; *Cope* v. *Doherty*, 2 De G. & J. 614; 27 L. J., Ch. 600; 4 Jur. (N.S.) 699; 6 W. R. 695.

In a bill filed under the provisions of the Merchant Shipping Act, 1854, to stay actions in other courts for damages occasioned by a collision with the plaintiff's ship, and to have the alleged damage ascertained, the plaintiff must aver that he has incurred liability. *Hill* v. *Audus*, 1 K. & J. 263; 3 Eq. R. 422; 24 L. J., Ch. 229; 3 W. R. 230; aliter *Miller* v. *Powell*, 2 Ct. of Sess. Cas. (4th ser.) 976. And see *The Amalia*, Br. & Lush. 151; *The Sisters*, infra, col. 749.

Form of order made on motion for injunction in a suit by shipowner to restrain actions for damage occasioned by loss of the ship and cargo under the provisions of the Merchant Shipping Act, 1854, part 9. *African Steamship Co., In re*, 1 K. & J. 326; 3 W. R. 316.

In a suit instituted by a shipowner, under the 514th section of the Merchant Shipping Act, to determine the amount of his liability in respect of the losses there mentioned, to have such amount distributed ratably amongst the several claimants, and to stop actions at law in relation to the same subject-matter, there being no adverse litigation amongst the claimants themselves, nor any other special circumstance occasioning an increase of costs, and over which the plaintiff has no control, the shipowner, as the party eased by the proceedings, must pay all the costs of all claimants whose claims are established, including the costs of actions at law commenced by any of such claimants, but stayed by injunction in the suit. *African Steamship Co.* v. *Swanzy*, supra.

In such a suit, the court has no power to give interest upon money ordered to be paid into court. *Ib.*

The provisions of the 504th section of the 17 & 18 Vict. c. 104, limiting the liability of a shipowner to the value of his ship and freight, and the provisions of the 514th section, giving the court of chancery jurisdiction to stop actions and suits pending in any other court in relation to the same subject-matter, are applicable notwithstanding the circumstance that the adverse claimant has obtained a definitive sentence or judgment of the court of admiralty condemning the ship; and the utmost to which the latter is entitled under such a judgment, in respect of the loss he has sustained, is to share ratably with the other claimants in the value of the ship and freight. *Leycester* v. *Logan*, 3 K. & J. 446; 26 L. J., Ch. 306; 5 W. R. 334.

d. Under subsequent Acts, and Generally.

To what Damages Limitation extends—Loss of Goods—Delay.]—A railway company, known to be also shipowners, contracted to carry passengers and goods from London to Guernsey. The passengers and goods were taken by railway from London to Southampton, and were there put on board a ship which belonged to the company. The ship, on her way to Guernsey, came into collision with another ship and sank with several of the passengers and all the goods. Actions were brought against the company by surviving

passengers for loss of luggage and for delay, by shippers of goods for loss of goods, and by the administrators of lost passengers for damages:—Held, that, as to all the damages (except those for delay), the liability of the company was, by the Merchant Shipping Acts, limited to the amount of 15*l.* per ton on the tonnage of the ship; that the amount so payable should be distributed by the court of chancery, and that all the actions against the railway company (except those for delay) should be restrained. *The Andalusian*, 47 L. J., Adm. 65; 3 P. D. 182; 39 L. T. 204; 27 W. R. 172; 4 Asp. M. C. 22.

Two Vessels Injured by same Act.]—By reason of the improper navigation of a steamship she ran into and damaged a ship, and immediately afterwards ran into and sank a steam-tug which was near the ship, and about to take the ship in tow. In a suit for limitation of liability, instituted on behalf of the owner of the steamship, it was held that the whole of the damage so caused by such improper navigation as aforesaid to the ship and steam-tug and goods on board the ship and steam-tug was caused substantially at the same time and on the same occasion, and that the plaintiff, who was entitled to have his liability limited according to s. 54 of the Merchant Shipping Act Amendment Act, 1862, was entitled to have his liability in respect of the whole of such damage limited to an amount not exceeding 8*l.* per ton for each ton of his steamship's tonnage. *The Rajah*, 41 L. J., Adm. 97; L. R. 3 A. & E. 539; 27 L. T. 102; 21 W. R. 14.

Damage "arising on distinct occasions."]—By improper navigation the "S." in starboarding across the bows of the "A.," caused the "A." to come into collision with the "M.," and by reason of the "S." continuing under a starboard helm, she came into collision with the "D." In an action by the "D." against the "S.," the latter was found to blame, and her owners obtained a decree limiting their liability for damage. The owners of the "A." commenced an action against the "S." for the damage caused by the collision between the "A." and the "M.:" the owners of the "S." contended that the only remedy of the "A." was against the fund paid into court under the decree limiting their liability:—Held, that the onus was on the "S." to shew that it was the same act of improper navigation; that the evidence established that there was time and opportunity to have corrected the starboarding, and by the use of ordinary care and skill to have avoided the collision with the "D.," and that therefore the damage to the "D." was caused on a "distinct occasion" from the starboarding across the bows of the "A.," and that the "S." was liable to the "A." to the same extent as if no other damage had arisen. *The Schwan, The Albano*, [1892] P. 419; 69 L. T. 34; 7 Asp. M. C. 347—C. A.

—— **Collision with Two Ships.**]—Where a ship comes into collision with two vessels one after the other, there being a short interval between the two collisions, the shipowner will be entitled to limit his liability to 8*l.* per ton (there being no loss of life) if the first collision is the substantial cause of the second, and there is no separate act of negligence on the part of those in charge of the plaintiff's ship in respect of the second collision. *The Creadon*, 54 L. T. 880; 5 Asp. M. C. 585.

Settled Claims—Whether to be taken as subsisting.]—The owner of the wrongdoing ship settled out of court his liability to the owners of the other ship, and then petitioned to limit his liability. The other claimants, owners of cargo in the innocent ship, claimed to be entitled to the whole amount of the statutory liability, on the ground that the claim of the owner of the injured ship was no longer subsisting:—Held, that for the purpose of calculating the amount of the petitioner's liability the settled claim must be taken as subsisting. *Rankine* v. *Raschen*, 4 Ct. of Sess. Cas. (4th ser.) 725.

Interest on Statutory Amount.]—The owners of a ship, though their liability to damages in respect of the loss of goods owing to a collision is confined, by the Merchant Shipping Act Amendment Act, 1862, s. 54, to an aggregate amount not exceeding 8*l.* per ton of the ship's tonnage, are liable to pay interest on that amount from the date of the collision. *Smith* v. *Kirby*, 1 Q. B. D. 131; 24 W. R. 207; *and see* cases, col. 729.

The owners of a ship claiming in the court of admiralty to have their liability limited, under 25 & 26 Vict. c. 63, s. 54, in respect of damages occasioned by collision, to an aggregate amount not exceeding 8*l.* for each ton of the ship's tonnage, are liable to pay interest on such aggregate amount from the date of the collision. *The Northumbria*, 39 L. J., Adm. 3; L. R. 3 A. & E. 6; 21 L. T. 681; 18 W. R. 188.

Under 17 & 18 Vict. c. 104, interest and costs payable in addition to statutory amount. *African Steamship Co.* v. *Swanzy*, supra, col. 740.

Claims in respect of Loss of Life.]—In actions for limitation of liability for a collision where loss of life has occurred, the wrongdoer is liable, in addition to the 7*l.* per ton payable in respect of such loss of life, to pay interest thereon from the date of the collision until payment into court. *The Crathie*, 66 L. J., Adm. 93; [1897] P. 178; 76 L. T. 534; 45 W. R. 631.

Compulsory Pilotage.]—Sect. 54 of the Merchant Shipping Amendment Act, 1862, which limits the liability of a shipowner to a certain amount per ton, does not apply to a case where two ships are to blame for a collision, and where the owners of one ship are relieved from all liability by the owners of the other, under s. 388 of the Merchant Shipping Act, 1854, on the ground that the damage done to the other ship was caused by the fault of a compulsory pilot; but under the admiralty rules, inasmuch as both ships are to blame, the owners of the ship so relieved from liability are only entitled to be paid by the owners of the other ship a moiety of the damage caused to their ship. *The Hector*, 52 L. J., Adm. 51; 8 P. D. 218; 48 L. T. 890; 31 W. R. 881; 5 Asp. M. C. 101—C. A.

Mode of Distribution—Rule of Division of Loss.]—Two ships, "V." and "K.," having come into collision, the owners of the "V." brought an action in rem in the admiralty division against the owners of the "K.," who counter-claimed, and both ships were held to blame. The owners of the "K." brought an action in the admiralty division to limit their liability under the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 54, and paid the amount of their liability into court. The damage to the "V." was greater than that to the "K.," and the fund in court was

not sufficient to satisfy all the claims for which the owners of the "K." were answerable in damages:—Held (Lord Bramwell doubting), that the owners of the "V." were entitled to prove against the fund for a moiety of their damage, less a moiety of the damage sustained by the "K.," and to be paid in respect of the balance due to them after such deduction pari passu with the other claimants out of such fund. *Chapman* v. *Royal Netherlands Steam Navigation Co.* (infra) overruled. *The Khedive, Stoomvaart Maatschappy Nederland* v. *P. & O. Steam Navigation Co.*, 52 L. J., Adm. 1; 7 App. Cas. 795; 47 L. T. 198; 31 W. R. 249; 4 Asp. M. C. 567—H. L. (E.)

In an action of collision in the admiralty division, where both ships have been injured and both ships have been held to blame, and have accordingly been condemned to pay the moiety of each other's damage, and either of the parties to the collision has applied to have his liability limited under the Merchant Shipping Act, 1862, s. 54, no set-off is allowed between the two amounts for which they are liable in damages until the limitation of liability imposed by that statute has been applied. The "S." and "V." came into collision, both ships were damaged, but the "V." was sunk with her cargo and lost. In an action by the owners of the "V.," and counter-claim by the owners of the "S.," both ships were held to blame, and condemned to pay the moiety of each other's damage. Under this judgment the damage payable by the "S." was 14,000*l.*, and that payable by the "V." was 2,000*l.* The owners of the "S." then brought an action in the chancery division for limitation of their liability, and paid into court 5,212*l.*, the aggregate amount of 8*l.* a ton on her registered tonnage:—Held (Brett, L.J., dissenting), that the owners of the "V." must prove for 14,000*l.* against the fund in court, and must pay the 2,000*l.* in full to the owners of the "S." *Chapman* v. *Royal Netherlands Steam Navigation Co.*, 48 L. J., Ch. 449; 4 P. D. 157; 40 L. T. 433; 27 W. R. 554; 4 Asp. M. C. 107—C. A.

Mode of Distribution.]—Where the damage sustained by all the claimants exceeds in the aggregate the whole amount for which the shipowner is liable (viz. at the rate of 15*l.* per registered ton of his ship), the fund must be distributed ratably amongst all the claimants in proportion to the damages sustained by them respectively; but where the whole amount of damages is less than the whole amount for which the shipowner is liable, the amount of damages sustained by each claimant is to be paid in full. *Glaholm* v. *Barker*, 35 L. J., Ch. 657; L. R. 2 Eq. 598; 12 Jur. (N.S.) 764; 14 L. T. 880; 14 W. R. 1006. See *Leycester* v. *Logan*, infra, col. 745.

"Improper Navigation."]—The words "improper navigation" in 25 & 26 Vict. c. 63, s. 54, sub-s. 4, are not to be restricted to the negligent navigation of a vessel by her master and crew, for the statute includes all damage wrongfully done by a ship to another whilst it is being navigated where the wrongful action is due to the negligence of a person for whom the owner is responsible. Therefore, when a vessel, owing to the negligence of a person on shore in overlooking the machinery, steered so badly that she came into collision with another vessel, in an action for limitation of liability the court gave a decree in her favour on the ground that the statute applied to such a case. *The Warkworth*, 53 L. J., Adm. 65; 9 P. D. 145; 51 L. T. 558; 33 W. R. 112; 5 Asp. M. C. 326—C. A.

Expenses of Salvage of Cargo.]—The payment into court of 8*l.* a ton under 25 & 26 Vict. c. 63, s. 54, does not place the shipowner in the position of a person who has not done wrong. The owner of a ship sunk by a collision in the Thames admitted it to be his fault, and paid into court 8*l.* a ton in a suit to limit his liability. The Thames conservators having powers under the Removal of Wrecks Act, 1877, and the Thames conservancy acts, raised the ship and delivered the ship and cargo to the owner, he undertaking to pay the expenses of raising. Part of the cargo was some wool, which was damaged by being sunk:—Held, that the shipowner was bound to deliver the wool to the owner of the wool without claiming from him by way of contribution to salvage any part of the expenses of raising the ship and cargo. *The Ettrick*, *Prehn* v. *Bailey*, 6 P. D. 127; 45 L. T. 399; 4 Asp. M. C. 465—C. A. Affirming 50 L. J., Adm. 65.

Parties—Master—Part Owner.]—In a cause of limitation of liability, one of the owners of the vessel sued, being master as well as part owner, but not having been on deck at the time of the collision:—Held, that there was no obligation upon the master to be upon deck; that the fact of the master being part owner was no reason for charging the other owners with blame; and that there was no evidence to shew that the collision took place by the fault or with the privity of the master. *The Obey*, L. R. 1 A. & E. 102; 12 Jur. (N.S.) 817.

The ground of forfeiture of the statutory exemption from unlimited liability is personal blame; the fault of one owner does not, therefore, involve in its consequences a forfeiture by his co-owners. *The Spirit of the Ocean*, 34 L. J., Adm. 74; 12 L. T. 239.

The owners of a ship, who are entitled to the privilege of limited liability, are not necessarily those whose names appear upon the ship's register. *Ib.*

A master, also part owner of a ship, sold his shares, but before the transfer had been registered the ship, through his default, came into collision with and damaged another vessel:—Held, that the master was not an owner so as to affect the privilege of limited liability. *Ib.*

In an action by shipowners to limit their liability in respect of a collision with their vessel, and where it appears that the master, who was on board at the time of the collision, was a part owner, and the collision occurred without the negligence or privity of the remainder of the owners, they have a right to have their liability limited, with a reservation of any right of action there may be against the master personally in respect of his negligence. *The Cricket*, *The Endeavour*, 48 L. T. 535; 5 Asp. M. C. 53.

Where in a collision suit it was sought to make the part owner personally liable beyond the amount to which the shipowner's liability was limited by statute upon the ground that he was in charge of the vessel at the time of collision:—Held, that to fix him with such liability he must be sued personally as master in the first instance. *The Volant*, 1 W. Rob. 383.

Monition against master who was part owner of a ship that had negligently damaged another in collision, the proceeds of the wrongdoing ship

and her freight being insufficient to satisfy the damages; the liability of the master, by whose fault the collision occurred, not being limited by the statute then in force. *The Triune*, 3 Hag. Adm. 114.

Damage Claimants Paid Pari Passu.]—After a judgment for limitation of liability, the injured party is entitled, after payment out of the fund of the costs of a collision action in which he has obtained judgment, to share the residue of the fund ratably with other claimants for damage. *Leycester* v. *Logan*, 3 K. & J. 446; 26 L. J., Ch. 306; 5 W. R. 334. S. P., *Glaholm* v. *Barker*, supra, col. 743.

Life Claimants and Damage Claimants—Priorities.]—Claimants in respect of loss of life or personal injury are entitled to the 7*l.* per ton, and other claimants to the 8*l.* per ton, subject as to the latter to the right of the former claimants to have recourse ratably to the 8*l.* per ton. *Nixon* v. *Roberts*, 1 J. & H. 739; 30 L. J., Ch. 844; 7 Jur. (N.S.) 820; 4 L. T. 679; 9 W. R. 870 (a decision on 17 & 18 Vict. c. 104, s. 504).

The plaintiffs in an action to limit their liability paid into court the sum of 7,862*l.* 0*s.* 10*d.*, being the amount of their statutory liability at the rate of 15*l.* per ton. The amount so paid into court being insufficient to satisfy in full claims against the plaintiffs in respect of loss of life and loss of goods, the registrar, by his report, found that the claimants in respect of loss of life were entitled to be paid out of the sum in court an amount equal to 7*l.* per ton, and that they and the claimants in respect of loss of goods should rank pari passu against the balance representing 8*l.* per ton. On objection to the report:—Held, that the report was right, as the court had power to marshal the assets, and that the claimants in respect of loss of goods had no right in priority to the claimants in respect of loss of life against the sum representing 8*l.* per ton. *The Victoria*, 57 L. J., Adm. 103; 13 P. D. 125; 59 L. T. 728; 37 W. R. 62; 6 Asp. M. C. 335.

Claims for Loss of Life Settled.]—In an action for limitation of liability, where it appeared that all the claims in respect of loss of life had been settled, the court ordered that upon payment in of 8*l.* per ton all persons having any claim either in respect of loss of life or damage to ship, goods, or merchandise, should be restrained from bringing any action in respect of the collision. *The Foscolino*, 52 L. T. 866; 5 Asp. M. C. 420.

Life Claims—Payment into Court.]—See *The Dione*, infra, col. 752.

Sale of Ship by Foreign Court—Receipt of Proceeds—Right to claim against Fund in Court.]—Where in the limitation proceedings the fund paid into court in respect of loss of ship, goods, &c., amounts to the full 8*l.* per ton of the ship's tonnage, persons who have taken proceedings in respect of those matters in a foreign court and received the proceeds of the sale of the wrongdoer's ship in those proceedings, but whose claims have not been thereby satisfied, are not debarred from claiming against the fund in court, but will be compelled to give credit for any sums they have received in the proceedings abroad. *The Crathie*, 66 L. J., Adm. 93; [1897] P. 178; 76 L. T. 534; 45 W. R. 631.

Yacht Race—Contract to pay "all damages."]—Where a person enters into a contract embodied in rules by which he agrees to be liable for "all damages" arising from a breach of those rules, he cannot claim the benefit of a statutory limitation of liability. In a yacht race sailed subject to rules by which the owner of any yacht infringing a rule was to be "liable for all damages arising therefrom," the appellant's yacht, by reason of a breach of the rules, ran down and sank the respondent's yacht:—Held, that the appellant's liability was not limited by s. 54 of the Merchant Shipping Act, 1862, to 8*l.* per ton, but that he must make good the whole value of the yacht. *The Satanita*, 66 L. J., Adm. 1; [1897] A. C. 59; 75 L. T. 337; 8 Asp. M. C. 190—H. L. (E.)

Vessel not a Registered British Ship—Vessel newly Launched.]—A newly-built vessel, exceeding fifteen tons burden, on being launched, ran into and damaged a passing ship. The owners of the damaged ship thereupon instituted an action against the newly-built vessel to recover for the damage done to their ship, and the court pronounced the vessel proceeded against solely to blame for the collision. Afterwards an action of limitation of liability was instituted by the owner of the newly-built vessel, a natural-born subject, who therein claimed a declaration that he was entitled to a limitation of liability in respect of the damage occasioned by the collision. At the hearing of the action it appeared that the newly-built vessel, though registered as a British ship at the time of the institution of the action, was not so registered at the time of the collision:—Held, that the vessel was not a registered British ship when the collision occurred, and that the owner was not entitled to have his liability limited. *The Andalusian*, 47 L. J., Adm. 65; 3 P. D. 182; 39 L. T. 204; 27 W. R. 172; 4 Asp. M. C. 22.

British Owners of a Dutch Ship.]—See *The Brinio*, infra, col. 747.

When Ship Sunk.]—The "Normandy" and "Mary" came into collision, and the "Normandy" was sunk. Cross causes of damages were instituted, but had not been heard, nor the liability for the collision determined; but the owners of the "Normandy" paid into court the amount of their liability, as limited by statute:—Held, first, that the court had jurisdiction in a suit for limitation of liability, even though the "Normandy" had been sunk, and therefore could not be arrested. *The Normandy*, 39 L. J., Adm. 48; L. R. 3 A. & E. 152; 23 L. T. 631; 18 W. R. 903.

Railway Company carrying by Sea.]—A railway company carrying passengers and goods partly by railway and partly by its own ships is entitled to the limitation on the liability of shipowners imposed by the merchant shipping acts. *L. & S.-W. Ry.* v. *James*, 42 L. J., Ch. 337; L. R. 8 Ch. 241; 28 L. T. 48; 21 W. R. 151; 1 Asp. M. C. 526.

British and Foreign Vessels.]—Collision in the Mediterranean Sea, beyond British jurisdiction, between an English and a Belgian vessel, whereby the latter with her cargo was sunk:—Held, that the 25 & 26 Vict. c. 63, s. 54, with respect to limited liability, applied equally to

British and foreign vessels. *The Amalia*, 1 Moore, P. C. (N.S.) 471 ; Br. & Lush. 151 ; 2 N. R. 533 ; 32 L. J., Adm. 191 ; 9 Jur. (N.S.) 1111 ; 8 L. T. 805 ; 12 W. R. 24.

The 17 & 18 Vict. c. 104, ss. 504, 514, did not apply to a collision on the high seas between foreign ships of which the owners were foreigners. *Cope* v. *Doherty*, 2 De G. & J. 614 ; 27 L. J., Ch. 600 ; 4 Jur. (N.S.) 699 ; 6 W. R. 695. S. P., *The Wild Ranger*, Lush. 553 ; 32 L. J., Adm. 49 ; 9 Jur. (N.S.) 134 ; 7 L. T. 725 ; 11 W. R. 255.

But where a British ship damaged a foreign ship by a collision within the distance of three miles from the shore of the United Kingdom, the provisions of that statute, limiting the liability of the owner to the value of the ship, applied. *General Iron Screw Collier Co.* v. *Schurmanns*, 1 J. & H. 180 ; 29 L. J., Ch. 877 ; 6 Jur. (N.S.) 883 ; 4 L. T. 138 ; 8 W. R. 732.

The British owners of a Dutch ship held entitled to limit their liability. *The Brinio*, 90 L. T. Jour. 249.

Foreign Ship—Wages Postponed to Damage Lien.]—See *The Linda Flor*, infra, col. 761.

e. Measurement of Tonnage.

Crew Spaces.]—The owners of a German steam vessel instituted an action under the Merchant Shipping Act, 1862, s. 54, to limit their liability for damages occasioned by a collision. The vessel had three decks, and her crew was berthed below the spar deck. By an order in council, dated the 26th June, 1873, made under s. 60, it was directed that German steamships measured after the 1st of January, 1873, should be deemed to be of the tonnage mentioned in their registers in the same manner, and to the same extent, as the tonnage denoted in the certificate of registry of British ships was deemed to be their tonnage. In the register of this ship the crew space was deducted :—Held, that the order in council of the 26th of June, 1873, did not make the certificate of registry conclusive evidence of the tonnage or of the propriety of deducting the space solely appropriated for berthing the crew. *The Franconia*, 3 P. D. 164 ; 39 L. T. 57 ; 27 W. R. 128 ; 4 Asp. M. C. 1—C. A.

Held, also, that under the Merchant Shipping Act, 1854, s. 21, sub-s. 4, a closed-in space, solely appropriated to the berthing of the crew, is to be excepted in estimating the tonnage only when it is on the upper deck, and not when it is between the spar deck and the tonnage deck. *Ib.*

Held, also, that the crew space cannot in the case of a foreign, any more than of a British, ship, be deducted under the Merchant Shipping Act, 1867, s. 9, unless the provisions of that section as to inspection by a surveyor appointed by the board of trade, and the other conditions therein contained, have been complied with ; and, therefore, that, as in the present case these conditions had not been complied with, the space appropriated for berthing the crew must not be deducted. *Ib.*

The owners of a foreign ship with a closed-in space on the upper deck solely appropriated to the berthing of the crew are entitled, in limiting their liability, to deduct such space under the Merchant Shipping Act, 1854, s. 21, sub-s. 4, though the provisions of the Merchant Shipping Act, 1867, s. 9, have not been complied with. *The Franconia*, supra, explained. *The Palermo*, 54 L. J., Adm. 46 ; 10 P. D. 21 ; 52 L. T. 390 ; 33 W. R. 643 ; 5 Asp. M. C. 369.

In an action for limitation of liability, the plaintiffs sought, in computing the tonnage of their steamship for the purposes of the action, to deduct the spaces mentioned in s. 3 of the Merchant Shipping (Tonnage) Act, 1889 (52 & 53 Vict. c. 43) :—Held, that the deductions could not be made, as the enactment in question only applied to the computation of the register tonnage of vessels, and not to the gross tonnage, upon which the owners' liability in the case of steamships is calculated. *The Umbilo*, 60 L. J., Adm. 7 ; [1891] P. 118 ; 64 L. T. 328 ; 39 W. R. 336 ; 7 Asp. M. C. 26.

If at the time of a collision the deduction in respect of crew space authorised by 30 & 31 Vict. c. 124, s. 9, has not been made from the registered tonnage and does not appear on the register, the owners cannot afterwards limit their liability on the basis of a deduction made subsequently to the collision, but the register as it existed at the time of the collision is conclusive. *The John Ormston* or *John McIntyre*, 50 L. J., Adm. 76 ; 6 P. D. 200 ; 30 W. R. 276.

In order to arrive at the "gross tonnage" (without deduction for engine-room space) on which the owner of a British registered steamship, measured under the Merchant Shipping Acts, 1854 to 1889, is entitled to calculate the amount of his limited liability for collision under the Merchant Shipping Act, 1862, such owners may legally deduct from the total tonnage appearing on the register in force at the time of collision any deduction or deductions shewn on such register in respect of certified spaces solely appropriated to the crew. *The Petrel*, 62 L. J., Adm. 92 ; [1893] P. 320 ; 1 R. 651 ; 70 L. T. 417 ; 7 Asp. M. C. 434.

The provisions as to deducting crew spaces apply in calculating gross tonnage. *Burrell* v. *Simpson*, 4 Ct. of Sess. Cas. (4th ser.) 177.

Double Bottom.]—In ascertaining the gross tonnage, for the purpose of limitation of liability, of a steamship constructed with a double bottom for water ballast, the space between the inner and the outer plating is not to be taken into account, but the measurements for depth are to be taken to the upper side of the inner plating only. *The Zanzibar*, 61 L. J., Adm. 81 ; [1892] P. 233 ; 68 L. T. 297 ; 40 W. R. 702 ; 7 Asp. M. C. 258.

Sailing Ship—Navigation Spaces.]—In calculating the tonnage of a sailing ship for the purpose of arriving at the liability of her owners for damages, the spaces mentioned in s. 3 of 52 & 53 Vict. c. 43, are to be deducted. *The Pilgrim*, 64 L. J., Adm. 78 ; [1895] P. 117 ; 11 R. 57.

Covered Spaces above Main Deck.]—A vessel had an upper deck above her main deck, but such upper deck was not continuous from stem to stern of the vessel, and the hatches and other fittings in it were not watertight ; —Held, that such upper deck was not a third deck or spar deck within the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 21, sub-s. 5 ; and that the space between it and the main deck was not space available for cargo, or

for accommodation of passengers or crew, within sub-s. 4, and consequently should not be reckoned in estimating her tonnage. *Lord Advocate* v. *Clyde Steam Navigation Co.*, L. R. 2 H. L. (Sc.) 409; 32 L. T. 287; 2 Asp. M. C. 502.

Incorrect Register—Evidence.]—In an action of limitation of liability, the defendants by their defence denied that the registered tonnage of the plaintiffs' ship was the correct tonnage, and at the hearing tendered evidence in support of their defence:—Held, that the evidence was admissible. *The Recepta*, 58 L. J., Adm. 70; 14 P. D. 131; 61 L. T. 698; 6 Asp. M. C. 433.

Registered Tonnage at Date of Collision.]—The tonnage in respect of which shipowners are entitled to limit their liability under s. 54 of the Merchant Shipping Act Amendment Act, 1862, is the tonnage appearing on the ship's register which was in force at the time of the collision. *The Dione*, 52 L. T. 61; 5 Asp. M. C. 347.

f. Limitation Actions—Practice.

Order for Release on Payment into Court.]—The defendants in a collision cause, in which their ship was under arrest, having instituted a suit for limitation of liability, the court, upon the motion of the plaintiff in the limitation suit, ordered the ship to be released on payment into court in that suit of the aggregate amount of 15*l.* per ton of the registered tonnage of the ship, and of a sum to cover interest and costs, and did not require that the plaintiff in the limitation suit should admit liability before ordering the release. *The Sisters*, 32 L. T. 837; 2 Asp. M. C. 589.

Transfer of Fund Paid in to Credit of Limitation Suit.]—A vessel which had been arrested in a cause of damage was released on payment into court of the amount to which the liability of her owners was limited by statute, together with a sum to cover interest and costs. *The Sisters*, 1 P. D. 281; 35 L. T. 36; 3 Asp. M. C. 224.

Subsequently the vessel was pronounced solely to blame for the collision, and her owners, who had instituted a cause of limitation of liability, moved the court to decree for a limitation of their liability, and to order that the sum in court should be transferred to the credit of the limitation of the liability suit. The court decreed a limitation of liability, but considered it unnecessary to order that the amount in court should be transferred to the credit of the limitation of the liability suit. *Ib.*

Staying Proceedings.]—Where owners of cargo have recovered judgment in a collision action brought by them, and the owners of the ship carrying the cargo subsequently bring an action against the same ship to recover damages in respect of the same collision, and the damages in both actions would exceed the value of the defendants' ship at 8*l.* per ton, and the damage in the cargo action alone would not exceed that amount, the court will not stay proceedings in the cargo's action until after judgment in the ship's action, on the ground that without such stay the defendants have to institute a limitation of liability action, which would be unnecessary if the defendants obtained judgment in the ship's action. *The Alne Holme* (No. 2), 47 L. T. 309; 4 Asp. M. C. 593.

Prohibition—Order staying Proceedings in other Courts.]—A steam vessel having, through negligence, come into collision with another ship, and having been sunk and totally lost, the owners instituted a suit in the court of admiralty to limit their liability. Cross causes of damage had previously been instituted between the owners of the vessels, and the defendants had, in the cause instituted against them by the owners of the other ship and her cargo, paid into court 5,000*l.* (being an amount less than 15*l.* per ton on each ton of the vessel's registered tonnage) as security to enable them to prosecute the cause in which they were the plaintiffs. A passenger, who had sustained personal injury from the collision, sued the owners of the steam vessel for damages in the court of exchequer, whereupon the judge of the court of admiralty made an order in the limitation suit that all actions pending in any other court in relation to the subject-matter should be stopped; and he afterwards decreed that the owners were entitled to limited liability, and were only answerable to the extent of 6,376*l.*, being the full amount of 15*l.* per ton, which he directed them to pay into court:—Held, that, under these circumstances, neither the ship nor the proceeds thereof were "under arrest of the court of admiralty" within s. 13 of the 24 Vict. c. 10, and that the court of admiralty had no jurisdiction under the Merchant Shipping Act, 1854, or the amending act of 1862, to entertain the suit, and that a prohibition might accordingly issue to that court from the court of exchequer. *James* v. *L. & S.-W. Ry.*, 41 L. J., Ex. 186; L. R. 7 Ex. 287; 27 L. T. 382; 21 W. R. 25; 1 Asp. M. C. 226—Ex. Ch.

The court could have granted an injunction to restrain actions at common law in respect of the same collision, even though the goods were to be carried partly by sea and partly by land. *The Normandy*, 39 L. J., Adm. 48; L. R. 3 A. & E. 152; 23 L. T. 631; 18 W. R. 903.

The power to stop actions and suits pending in any other court applies notwithstanding the circumstance that the adverse claimant has obtained a definitive sentence or judgment of the court of admiralty condemning the ship; and the utmost to which the latter is entitled under such a judgment, in respect of the loss he has sustained, is to share ratably with the other claimants in the value of the ship and freight. *Leycester* v. *Logan*, 3 K. & J. 446; 26 L. J., Ch. 306; 5 W. R. 334.

But a court of equity has no control over the ship itself, and cannot prevent the party who has obtained such a judgment from proceeding to a sale of the ship and retaining out of the proceeds such costs as he may be entitled to retain under the order of the admiralty court. *Ib.*

Proceedings in other Court not Stayed on Production of Order.]—An order made by the court of admiralty under 24 Vict. c. 10, s. 13 (which confers on that court the same powers of stopping proceedings as were conferred on the court of chancery by the Merchant Shipping Act, 1854, s. 514), is not a "writ of injunction, rule, or order of either of the superior courts of common law or equity at Westminster," within the Common Law Procedure Act, 1852, s. 226; and, therefore, proceedings in an action in the court of exchequer will not be stayed upon the production of such an order made by the court of admiralty. *Milburn* v. *L. & S.-W. Ry.*, 40

L. J., Ex. 1; L. R. 6 Ex. 4; 23 L. T. 418; 19 W. R. 105.

Reference as to Distribution of Amount after Stay.]—In a collision cause, although the defendant is entitled, upon admission of liability and payment into court of the amount of his liability under the Merchant Shipping Act, 1862, s. 54, to a stay of proceedings as against himself, plaintiffs having separate interests may, at the defendant's cost, proceed to a reference to settle the respective amounts due to them, and may tax their costs. *The Expert*, 36 L. T. 258; 3 Asp. M. C. 381.

Discontinuance—Claim against Fund in Court—Estoppel.]—An action having been brought by the owners of the ship "K." against the owners of ship "A." for damages arising out of a collision, an agreement was drawn up between the parties that the action be "discontinued without costs on the ground of inevitable accident," and an order in those terms was drawn up in the admiralty registry. The owners of the cargo of ship "K." having afterwards brought an action against the owners of ship "A." for damages arising out of the same collision, both ships were held to blame, and the cargo owners were held entitled to half their damages. The owners of ship "A." having obtained a decree limiting their liability and having paid a sum into court, the cargo owners filed their claim in the limitation action. The owners of ship "K." having afterwards, with the consent of the owners of ship "A.," obtained a rescission of the order for discontinuance, claimed against the fund in the limitation action. The cargo owners having objected to this claim:—Held, that the agreement and order for discontinuance (upon their true construction) did not amount to a release of all claims, and that the owners of ship "K." were not precluded from claiming against the fund. *The Bellcairn* (10 P. D. 161) distinguished. *The Kronprinz* or *The Ardandhu*, 56 L. J., Adm. 49; 12 App. Cas. 256; 56 L. T. 345; 35 W. R. 783; 6 Asp. M. C. 124—H. L. (E.)

When Bail given, though no actual arrest.]—In suits for limiting the liability of the owners of a wrongdoing vessel the court has jurisdiction if bail has been given by the owners, even though there has been no actual arrest. *The Northumbria*, 39 L. J., Adm. 24; L. R. 3 A. & E. 24; 21 L. T. 683; 18 W. R. 356.

Actions by Shipowners and Cargo Owners—Compromise by Shipowners—Right of Cargo Owners to prove for Whole Amount of Damage.]—The defendants' vessel came into collision with and sank another vessel carrying cargo belonging to the plaintiffs. Actions were commenced by the plaintiffs and by the owners of the carrying vessel, but in the action between the latter and the defendants' vessel the parties filed in the registry an agreement to a decree that both vessels were to blame, and for the usual reference as to the damages. The defendants then brought an action for the limitation of their liability, and paid into court the amount of their liability under the merchant shipping acts. In their statement of claim they referred to the above-mentioned agreement, and in terms admitted that the collision was "in part caused by the improper navigation of their vessel." The plaintiffs, in their defence, did not notice this admission, or otherwise refer to the cause of the collision. The usual decree was made for limitation of liability, and the staying of the plaintiffs' action:—Held, first, that the agreement between the owners of the two vessels, having been filed in the registry, was, under Ord. LII. r. 23, equivalent to a decree of the court, and that the owners of the carrying vessel were not entitled to have such agreement rescinded for the purpose of proving against the fund in court for more than half the damage sustained by them; secondly, that there was no admission on the pleadings by the plaintiffs as defendants in the limitation action which precluded them from claiming to prove against the fund for the whole amount of the damage sustained by them, and that in support of their proof an issue might be directed between them and the owners of the carrying vessel to determine whether the defendants' vessel was alone to blame for the collision. *The Karo*, 57 L. J., Adm. 8; 13 P. D. 24; 58 L. T. 188; 6 Asp. M. C. 245.

Stay of Proceedings.]—In an action of limitation of liability, the plaintiffs claimed a stay of proceedings in respect of claims for damage to ship and goods, and in respect of claims for personal injuries and loss of life on paying into court a sum representing 8*l.* per ton in respect of damage to ship and goods, and on giving security for the difference between 8*l.* and 15*l.* in respect of claims for personal injuries and loss of life:—Held, that the stay of proceedings might be ordered in respect of the claims for damages to ship and goods, but not in respect to the claims for personal injuries and loss of life. *The Nereid*, 58 L. J., Adm. 51; 14 P. D. 78; 61 L. T. 339; 37 W. R. 688; 6 Asp. M. C. 411.

Life Claims—Payment into Court.]—In an action of limitation of liability, where the plaintiffs have paid into court, or are willing to pay in, 8*l.* per ton in respect of damage to ship, goods, and merchandise, but seek in respect of the life claims to pay into court or give bail for an amount less than their total liability under the Merchant Shipping Act, the court, before fixing such amount, will require the plaintiffs to state on affidavit the names of the persons killed and injured, their condition in life, the number of those who are legally entitled to claim, the number of claims that have been settled, and the amounts paid in settlement. *The Dione*, 52 L. T. 61; 5 Asp. M. C. 347.

Limitation Claimed by Defence.]—The benefit of the statutory limitation of liability may be claimed by defence on counter-claim in the collision action. *Wahlberg* v. *Young*, infra; *The Clutha*, infra.

Facts entitling to Limitation must be stated.]—To entitle a defendant to the limitation of liability, the facts which entitle him to limitation must, since the Judicature Act, 1873, be stated in the defence. *Wahlberg* v. *Young*, 45 L. J., C. P. 783; 24 W. R. 846; 4 Asp. M. C. 27, n.

Order for Stay on Payment into Court and Bail.]—The defendants admitted liability in respect of damage to property and loss of life, but no claim had been asserted in respect of loss of life. The court ordered all proceedings against the ship to be stayed upon the defendants paying in the value of the ship at the rate of 8*l.* per ton, and giving bail for the rest of the value at 15*l.* per ton. *The Clutha*, 45 L. J., Adm. 108; 35 L. T. 36; 3 Asp. M. C. 225.

Admission of Liability.]—A bill filed in chancery to obtain the benefit of 17 & 18 Vict. c. 104, ss. 504, 505, limiting liability, was required to contain an admission of liability. *Hill* v. *Andus*, 1 K. & J. 263; 3 Eq. R. 422; 24 L. J., Ch. 229; 3 W. R. 230.

Aliter, in Scotland, *Miller* v. *Powell*, 2 Ct. of Sess. Cas. (4th ser.) 976.

It is not necessary that owners of a vessel and cargo preferring their claim in the court of admiralty to limited liability, should acknowledge, in the first instance, that their vessel was to blame. *The Amalia*, 1 Moore, P. C. (N.S.) 471; Br. & Lush. 151; 32 L. J., Adm. 191; 9 Jur. (N.S.) 1111; 8 L. T. 805; 12 W. R. 24; 2 N. R. 533; and see *The Sisters*, col. 749.

Security for Costs.]—A foreign shipowner residing out of the jurisdiction in an action for limiting his liability must give security for costs *The Wild Ranger*, Lush. 553; 32 L. J., Adm. 49; 6 L. T. 164.

Costs of Action.]—The plaintiff in an action for limitation of liability must pay the costs of the action, other than costs occasioned by special issues raised by the defendant, in which he fails, or by disputes between the claimants. *African Steamship Co.* v. *Swanzy*, 2 K. & J. 660; 25 L. J., Ch. 870; 4 W. R. 210. *The City of Buenos Ayres*, 25 L. T. 672; 1 Asp. M. C. 169. *The Creadon*, 54 L. T. 880; 5 Asp. M. C. 585. *The Empusa*, 48 L. J., Adm. 36; 5 P. D. 6; 41 L. T. 383; 28 W. R. 263; 4 Asp. M. C. 185. *The Warkworth*, 53 L. J., Adm. 65; 9 P. D. 145; 51 L. T. 558; 33 W. R. 112; 5 Asp. M. C. 326—C. A.

A vessel was arrested for losses exceeding 300*l.*, the amount of their statutory liability at 8*l.* per ton:—Held, that the plaintiffs were entitled to the costs of the proceeding in the court. *The Young James*, 39 L. J., Adm. 1; L. R. 3 A. & E. 1; 21 L. T. 397; 18 W. R. 52.

Priorities of Claimants.]—The plaintiffs in an action to limit their liability paid into court the sum of 7,862*l.* 0*s.* 10*d.*, being the amount of their statutory liability at the rate of 15*l.* per ton. The amount so paid into court being insufficient to satisfy in full claims against the plaintiffs in respect of loss of life and loss of goods, the registrar, by his report, found that the claimants in respect of loss of life were entitled to be paid out of the sum in court an amount equal to 7*l.* per ton, and that they and the claimants in respect of loss of goods should rank pari passu against the balance representing 8*l.* per ton. On objection to the report:—Held, that the report was right, as the court had power to marshal the assets, and that the claimants in respect of loss of goods had no right in priority to the claimants in respect of loss of life against the sum representing 8*l.* per ton. *The Victoria*, 57 L. J., Adm. 103; 13 P. D. 125; 59 L. T. 728; 37 W. R. 62.

Claim against Fund—Right of Crown—Time.]—The crown may claim against a fund paid into court by the owners of a ship in order to limit their liability under the Merchant Shipping Acts, 1854 and 1862, by the general law, and also under the Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78), s. 3. A claim against a fund paid into court in a suit for limitation of liability under the Merchant Shipping Acts, 1854 and 1862, is not necessarily excluded by the fact that the time fixed by the order of the court for entering claims has elapsed. *The Zoe*, 55 L. J., Adm. 52; 11 P. D. 72; 54 L. T. 879; 35 W. R. 61; 5 Asp. M. C. 583.

Motion to set aside Verdict—Shipowner and Cargo Owner.]—Motion to set aside a verdict in favour of the plaintiff in an action for damage to his ship by collision, upon the ground that the damages (being the total amount of the defendant's liability by statute) were apportionable between the owner of the injured ship and the owner of cargo on board her, refused. *Flensburg Steam Shipping Co.* v. *Seligmann*, 9 Ct. of Sess. Cas. (3rd ser.) 1011.

8. Tug and Tow.

Vessels in Tow.]—A vessel in tow of a tug, and the tug towing, are to be considered as one vessel, for the conduct of which the vessel towed is responsible. *The Cleadon*, 14 Moore, P. C. 92; Lush. 158; 4 L. T. 157.

Governing Power with Ship Towing.]—The steamship "Aracan" found, at a foreign port, the "Syria" totally disabled in her machinery; both vessels belonged to the same owner. The "Aracan" took the "Syria" in tow, and, whilst so engaged, came into collision with a sailing ship. The damage done by the "Aracan" caused the sailing vessel to sink, but before she sank the "Syria" ranged up alongside of her and came into contact with her:—Held, that the governing as well as the motive power being wholly with the "Aracan," the "Syria" was not liable to be condemned in damages occasioned by the collision. The "Syria" could not be deemed, in intendment of law, to be one vessel with the "Aracan," or liable for her negligence. *The American and The Syria, Union Steamship Co.* v. *The Aracan*, 43 L. J., Adm. 30; L. R. 6 P. C. 127; 31 L. T. 42; 22 W. R. 927; 2 Asp. M. C. 350.

Tug is the Servant of the Tow.]—A tug is deemed to be in the service of the tow, and the owners of the tow are responsible for the acts of the tug. *The Sinquasi*, infra. *The Kingston-by-Sea*, 3 W. Rob. 152. S. P., *The Mary*, 48 L. J., Adm. 66; 5 P. D. 14, 16; 41 L. T. 351; 28 W. R. 95; 4 Asp. M. C. 183. *The American and The Syria*, supra.

—— **Duty of Tow to direct Tug.**]—It is the duty of those on board the vessel in tow to give general directions to the master of the tug as to the towage. But the master of the tug should exercise his discretion as to the proper manœuvres to be employed, especially where he is more competent to form an opinion on this point than the master of the vessel in tow. *The Isca*, 56 L. J., Adm. 47; 12 P. D. 34; 55 L. T. 779; 35 W. R. 382; 6 Asp. M. C. 63.

Under an ordinary contract of towage, the vessel in tow has control over the tug, and is therefore liable for the wrongful acts of the latter, unless they are done so suddenly as to prevent the vessel in tow from controlling them. *The Niobe*, infra.

It is not the duty of those in charge of a tow which is being towed with a long scope of hawser by night at sea to direct the movements of the tug—the circumstances being different to towing by day in a river. *The Stormcock*, 53 L. T. 53; 5 Asp. M. C. 470.

Encumbered Condition of Tug with Ship in Tow.]—A steam tug in charge of a ship cannot be considered as a free steamer, so as to be bound, under all circumstances, to give way to a sailing ship close-hauled. *The Independence*, Lush. 270; 14 Moore, P. C. 103; 4 L. T. 563; 9 W. R. 582—P. C.

Action against Tug for Damage—Contributory Negligence of Compulsory Pilot.]—In case of a mischief occurring to the vessel in tow, occasioned directly by the conduct of the steam tug, the tug cannot, in an action brought by the owners of the tow for damage, set up as a legal defence contributory negligence upon the ground that if the pilot in charge of the tow when the mischief was about to happen had done a certain thing the mischief might possibly have been avoided. *The Julia, Bland* v. *Ross* (Lush. 231; 14 Moo. P. C. 210) commented on and approved. *Spaight* v. *Tedcastle*, 6 App. Cas. 217; 44 L. T. 589; 29 W. R. 761; 4 Asp. M. C. 406—H. L. (E.)

Slipping Tow Rope.]—It is the duty of the vessel in tow in frequented waters to have the tow rope fast in such a way that it may be slipped or cut to avoid collision. *The Jane Bacon*, 27 W. R. 35.

Tow must follow in Wake of Tug.]—A smack was capsized by the tow rope between a steamship and a vessel in tow being spread in consequence of the tow not following in the wake of the steamship:—Held, that the tow was liable. *Ib.*

Vessel towed in Charge of Pilot.]—When a steam tug is engaged to tow a vessel which is in charge of a pilot, the tug is bound to obey the orders of the pilot, and the pilot is bound to give the tug proper directions and to superintend her navigation. *The Energy*, 39 L. J., Adm. 25; L. R. 3 A. & E. 48; 23 L. T. 601; 18 W. R. 1009.

Where a ship in charge of a pilot, whose employment is compulsory, is being towed by a steam tug, and the steam tug, without waiting for orders from the pilot, suddenly adopts a wrong manœuvre, and so causes the ship to come into collision, the owners of the ship are responsible. *The Sinquasi*, 50 L. J., Adm. 5; 5 P. D. 241; 43 L. T. 768; 4 Asp. M. C. 383.

Where a vessel is under the charge of a licensed pilot, the employment of whom is compulsory, and is at the same time in tow of a steam tug, the latter is bound to obey the orders of the pilot. *Spaight* v. *Tedcastle*, supra.

When a steam tug towing a vessel under a towage contract is so negligently navigated as to come into collision with a vessel belonging to third parties, the owners of the steam tug are liable for the damage done, even if at the time of the collision the vessel in tow was in charge of a licensed pilot, by compulsion of law, whose default solely occasioned the collision. *The Mary*, 48 L. J., Adm. 66; 5 P. D. 14; 41 L. T. 351; 28 W. R. 95; 4 Asp. M. C. 183.

A steam tug towing a sailing ship controls the course of both vessels so long as no directions are given by the person in charge of the ship in tow. The steam-tug is the moving power, but it is under the control of the master or pilot on board the ship in tow. *Smith* v. *St. Lawrence Towboat Co.*, L. R. 5 P. C. 308; 28 L. T. 885; 21 W. R. 569; 2 Asp. M. C. 41.

When a ship in tow of a steam tug, and in charge of a licensed pilot who has the control over and directs the course of both vessels, is navigating a river in a fog so dense that the banks of the river cannot be seen, and those on board the tug and ship in tow do not know in what direction they are going, it is negligence on the part of both vessels to proceed; but as it is the duty of the pilot in charge to give orders to the tug to stop so as to enable the ship in tow to come to an anchor, the neglect on the part of the pilot to give such orders is contributory negligence, which will preclude the owners of the sailing ship from recovering against the owner of the steam tug for negligently running the sailing ship ashore by proceeding during the fog. *Ib.*

It is a want of due caution to move, by means of a steam tug, a ship from one dock to another at nighttime; under such circumstances, a pilot on board the ship being towed has no such charge or control over her movements as to exculpate the owners. *The Borussia*, Swabey, 94; 4 W. R. 503.

A tug is bound to obey the orders of the pilot or person in charge of the tow. Claim for towage remuneration dismissed because the tug disobeyed the orders from the tow. *The Christina*, 3 W. Rob. 27. *S. C.*, nom. *Petly* v. *Catto*, 6 Moore, P. C. 371.

A tug towing a ship in charge of a compulsory pilot was in collision with a third ship without fault on the part of those on board the tug, and by the fault of the pilot of the tow:—Held, that the tug owners were not liable. *The Duke of Sussex*, 1 W. Rob. 270; 1 Not. of Cas. 161.

Two Ships in Tow of same Tug—Collision between them.]—A vessel while being towed into a harbour by a steam tug, got aground, and the defendant's vessel, which was being towed in at the same time by the same tug, astern of the plaintiff's vessel, without any active default on the defendant's part, struck and damaged the plaintiff's vessel:—Held, no evidence of negligence for which the defendant was liable. *Harris* v. *Anderson*, 14 C. B. (N.S.) 499.

Contract of Hirer of Tug to insure against Damage by Collision.]—See *The Lord of the Isles*, ante, col. 681.

Tug and Tow—Joint Tortfeasors—Contribution.]—In a collision action in rem, where a tug and tow are both pronounced to blame for a collision with another vessel, the owner of the latter vessel may enforce the judgment for the whole of his damages against either or both the defendants, and the defendants are not entitled to have the decree so drawn up that half only of the total damages is recoverable from each defendant. *The Thomas Joliffe* or *The Avon*, [1891] P. 7; 63 L. T. 712; 39 W. R. 176; 6 Asp. M. C. 605.

Damage to Tow by Grounding—Admiralty Jurisdiction.]—The admiralty court has not jurisdiction under 3 & 4 Vict. c. 65, s. 6, or 24 & 25 Vict. c. 10, s. 7, or otherwise, to entertain a claim against a steam tug for damage occasioned to the vessel towed by negligence in towing, if the damage arises not by collision but by the vessel taking the ground. *The Robert Pow*, Br. & Lush. 99; 32 L. J., Adm. 164; 9 L. T. 237.

Aliter, where the damage is by collision. See *The Night Watch*, 32 L. J., Adm. 47; 8 Jur. (N.S.) 1161; 7 L. T. 396; 11 W. R. 189.

Collision caused by Tug—Payment on account of Damage by Tow—Subsequent Action against Tug.]—The schooner "J. M. S." having come into collision with a tug and her tow, a damage action in rem was instituted by the owners of the schooner against the tug to recover all the damages occasioned by the collision. Subsequently to the collision the plaintiffs received from the owners of the tow a sum of money described in an agreement entered into between these parties "as an advance on account of the damages to be recovered from the owners of the tug." By the agreement it was agreed that the owners of the tow should give the plaintiffs all information and assistance necessary to bring the action to a successful issue; that if the schooner and the tug should both be held to blame, the plaintiffs should repay any sum by which the money already paid exceeded the moiety of damages recoverable against the tug; and that, as a basis of the arrangement, it was understood that the schooner should be found blameless for the collision. The court, having found the tug alone to blame, held that the above payment was not such a payment by the tow in satisfaction of the damages occasioned by the collision as amounted to a settlement in discharge of the action, and was consequently no bar to the action; and that, notwithstanding the advance paid by the tow, the plaintiffs were entitled to recover from the defendants all the damages occasioned by the collision. *The Stormcock*, 53 L. T. 53; 5 Asp. M. C. 470.

Tug, Tow, and Third Ship—Tug and Third Ship damaged—Assignment of Judgment.]—A collision occurred between a tug with a ship in tow and a third ship. The third ship sued the tow, and the tug brought a cross-action against the third ship. The actions were consolidated and tried together, and all the ships were found to blame. Judgment was given for the third ship against the tug and the tow, declaring them to be jointly and severally liable to the third ship for half her damage; and judgment was given for the tug against the third ship for half the damage sustained by the tug. Upon motion by the owners of the tow that, upon payment by them to the owners of the third ship of the difference between the sums due upon the two judgments, with interest, the owners of the third ship should, under s. 5 of the Mercantile Law Amendment Act, 1856, be ordered to assign to the owners of the ship in tow the judgment in favour of the tug owners against the owners of the third ship:—Held, that the statute had no application, and motion refused. *The Englishman and The Australia*, 64 L. J., Adm. 74; [1895] P. 212; 11 R. 757; 72 L. T. 203; 43 W. R. 670; 7 Asp. M. C. 605.

Claim to Indemnity by the Owners of a Tow sued for Collision with a Third Ship against Owners of the Tug.]—In an action of damage between two vessels, the court has jurisdiction, under Ord. XVI., to determine whether or not the defendants' vessel is entitled to indemnity against a tug by which she was being towed at the time of the collision. A collision took place between the vessels "S." and "C." The "C." at the time was being towed by a tug. The owners of the "S." instituted an action of damage against the "C." and alleged in their statement of claim that the collision was caused by the negligence of the "C." and her tug, or of one of them. The owners of the "C." obtained leave to issue a notice to the tug that they claimed to be entitled to indemnity, and the court made an order that the owners of the tug be at liberty to appear and defend, being bound by any decision the court might come to as to the cause of the collision. At the hearing the owners of the tug appeared, but the defendants did not, and the court pronounced that the "C." was alone to blame for the collision, and that her owners were not entitled to indemnity over against the owners of the tug:—Held, that the last portion of the judgment should be struck out. *The Curtsburn*, 5 P. D. 59; 41 L. T. 710; 28 W. R. 378; 4 Asp. M. C. 202—C. A.

Third Party Order against Tug Owner.]—A ship in tow fouled another at anchor:—Held, that, in an action brought by the ship at anchor against the ship that fouled her, the latter was not entitled to bring in the owners of her tug, against whom they claimed indemnity, as third parties. *The Bianca*, 52 L. J., Adm. 56; 8 P. D. 91; 48 L. T. 440; 31 W. R. 954; 5 Asp. M. C. 60. And see *The Jacob Christensen*, infra, col. 840.

Collision—Liability of Vessel in tow.]—A tug with a vessel in tow came into collision with another vessel, which was seriously injured by the tug, but not injured by the vessel in tow. The collision might have been avoided had there been a good lookout on the vessel in tow, and had she warned the tug that the latter was in danger of collision by continuing on her course:—Held, that the owners of the vessel in tow were liable. *The Niobe*, 57 L. J., Adm. 33; 13 P. D. 55; 59 L. T. 257; 36 W. R. 812; 6 Asp. M. C. 300.

Action in rem against Tug—Maritime Lien.]—A steam tug under charter came into collision with the smack which she was towing, through the sole negligence of a servant of the charterers, who was in charge of the tug. The towage was on the terms that the charterers were not to be answerable for damage occasioned by the negligence of their servants:—Held, that an action in rem would not lie against the tug, for the maritime lien arising from collision is not absolute, and the owners not being personally liable for this collision, and the charterers being exempted by the terms of their contract with the plaintiff, the primâ facie liability of the vessel was rebutted. *The Ticonderoga* (Swabey, 215) explained. *The Tasmania*, 57 L. J., Adm. 49; 13 P. D. 110; 59 L. T. 263; 6 Asp. M. C. 305.

Towage—Liability of Tow for Negligence of Tug.]—The "C. D." came into collision with a hopper barge, which was in tow of a steam tug. The collision was caused by the joint negligence of those on board the "C. D." and the steam tug:—Held, that the owners of the hopper barge were not liable. *The Quickstep*, 59 L. J., Adm. 65; 15 P. D. 196; 63 L. T. 713; 6 Asp. M. C. 603—D.

Duty of Pilot as to employing Tug.]—*The Strathspey* and *The Islay*, supra, col. 772; of shipowner, see *The Gertor*, 70 L. T. 703; 7 Asp. M. C. 47.

9. Foreign Ships—Foreign Law.

Limitation of Liability — Lex fori.] — The stat. 6 Geo. 4, c. 125, ss. 2, 14, is a law relating to remedies, and therefore applicable to a foreign

shipowner suing for collision in this country. *The Vernon*, 1 W. Rob. 316.

Collision Abroad—Admiralty Jurisdiction.]—The admiralty court had jurisdiction in an action brought by a British subject against a foreign ship for collision in the Dardanelles. *The Griefswald*, Swabey, 430.

The jurisdiction of the admiralty in collision cases, where the ships are both foreign, and the collision in foreign waters, considered. Collision cases are communis juris. *The Johann Friederich*, 1 W. Rob. 35. *The Vivar*, 2 P. D. 29; 35 L. T. 782; 25 W. R. 433; 3 Asp. M. C. 308.

Under 24 Vict. c. 10, s. 7, the admiralty court had jurisdiction in case of a collision between foreign ships in foreign waters. *The Courier*, Lush. 541.

Right of Aliens to Sue for Collision Abroad.]—Aliens may sue in this country other aliens for personal injuries done to them abroad, if such injuries are actionable by the law of England and also by the law of the foreign country—per Selwyn, L.J. *The Halley*, 5 Moore, P. C. (N.S.) 263; 37 L. J., Adm. 33; L. R. 2 P. C. 193, 202; 18 L. T. 879; 16 W. R. 998—P. C.

Foreign Ship detained under 1 & 2 Geo. 4, c. 75.]—Foreign ship detained under 1 & 2 Geo. 4, c. 75, for injury done to a British ship. *The Christiana*, 2 Hag. Adm. 183.

Detention of Foreign Ship under 17 & 18 Vict. c. 104, s. 527.]—A foreign ship cannot be detained under 17 & 18 Vict. c. 104, s. 527, in respect of loss of life or personal injury caused by her. *Harris* v. *Franconia* (*Owners*), 46 L. J., C. P. 363; 2 C. P. D. 173.

Negligence — Rules of Seamanship common to all Nations.]—In collision actions, where foreign ships are concerned, the test of negligence, apart from the regulations, is the common practice of seamen of all nations. See *The Dumfries*, Swabey, 63, 125.

Injury to Telegraph Cable by Foreign Ship.]—The English owners of a telegraph cable recovered damages from the owners of a foreign ship, the crew of which had injured a telegraph cable at the bottom of the sea. *Submarine Telegraph Co.* v. *Dickson*, 15 C. B. (N.S.) 759; 33 L. J., C. P. 139.

Collision between British and Foreign Vessel—Law applicable.]—In an action in personam, brought by the owners of a British vessel against the owners of a Spanish vessel to recover damages caused to the British vessel by collision with the Spanish vessel on the high seas, the defendants pleaded that they were Spanish subjects, and that if there was any negligence on the part of those in charge of the Spanish vessel it was negligence for which the master and crew alone, and not the defendants, were liable according to the law of Spain:—Held, bad on demurrer. *The Leon*, 50 L. J., Adm. 59; 6 P. D. 149; 44 L. T. 613; 29 W. R. 916; 4 Asp. M. C. 404.

Damage by Ship sailing under Foreign Flag but owned in England.]—Semble, an English company, trustee for a foreign company, owning a ship sailing under the foreign flag, is liable in this country to cargo owners for damage done by the ship in collision. *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 52 L. J., Q. B. 220; 10 Q. B. D. 521, 545; 48 L. T. 546; 31 W. R. 445; 5 Asp. M. C. 65; 47 J. P. 260—C. A.

Damage by French Ship on High Sea—Plea—French Law.]—In a common law action for collision, a plea that the collision was upon the high seas out of British jurisdiction; that it was not caused by the defendant, but by the master of the ship, which was French; that the defendant was a French subject, and that, by French law, the defendant was not liable, but a French corporation who owned the ship was liable:—Held, good. *General Steam Navigation Co.* v. *Guillon*, 11 M. & W. 877; 13 L. J., Ex. 168.

Action for Wrongful Act committed Abroad.]—No action can be maintained in the courts of this country on account of a wrongful act, either to a person or to personal property, committed within the jurisdiction of a foreign country unless the act is wrongful by the law of the country where it is committed, and also by the law of this country—per Mellish, L.J. *The M. Moxham*, 46 L. J., Adm. 17; 1 P. D. 107, 111; 34 L. T. 559; 24 W. R. 650; 3 Asp. M. C. 191—C. A.

Damage to Pier Abroad.]—An English company possessed of a pier in Spain, instituted an action in the admiralty court against a British ship for negligently injuring the pier. Plea, that, by the law of Spain the shipowner is not liable for negligence of his crew:—Held, that, assuming that the court had jurisdiction, the plea was good. *Ib.*

Presumption of Fault—36 & 37 Vict. c. 85, s. 17—Foreign Ships.]—The statutory rules as to presumption of fault in case of infringement of the regulations apply to foreign ships. *The Englishman*, 47 L. J., Adm. 9; 3 P. D. 18; 27 L. T. 412; 3 Asp. M. C. 506. *The Khedive*, *Stoomvaart Maatschappy Nederland* v. *P. and O. Steam Navigation Co.*, 52 L. J., Adm. 1; 7 App. Cas. 795; 47 L. T. 198; 31 W. R. 249; 5 Asp. M. C. 360, 567—H. L. (E.) *The Vera Cruz*, 53 L. J., Adm. 33; 9 P. D. 88; 51 L. T. 104; 32 W. R. 783; 5 Asp. M. C. 270. *The Love Bird*, 6 P. D. 80; 44 L. T. 650; 4 Asp. M. C. 427.

Compulsory Pilot—Foreign Ship not liable for Fault of—6 Geo. 4, c. 125, s. 55.]—The stat. 6 Geo. 4, c. 125, s. 55, exempting owners from liability for the fault of a compulsory pilot, applied to foreign ships. *The Christiana*, 2 Hag. Adm. 183.

—— **Collision Abroad—Foreign Law—Liability.**]—The owners of a British ship in collision in the Scheldt with a foreign ship are not liable in the courts of this country for the fault of their compulsory pilot, although, by the law of the place of collision (Belgium), they are so liable. *The Halley*, 5 Moore, P. C. (N.S.) 263; 37 L. J., Adm. 33; L. R. 2 P. C. 193; 18 L. T. 879; 16 W. R. 998.

Limitation of Liability—25 & 26 Vict. c. 63, s. 54.]—The liability of a British ship in collision with a foreign ship in the Mediterranean is limited by 25 & 26 Vict. c. 63. *The Amalia*, Br. & Lush. 151; 1 Moore, P. C. (N.S.) 471;

2 N. R. 533; 32 L. J., Adm. 191; 9 Jur. (N.S.) 1111; 8 L. T. 805; 12 W. R. 24.

—— **17 & 18 Vict. c. 104.**]—Under this act the liability of owners of a British ship in collision with a foreign ship within three miles of the United Kingdom was limited. *General Iron Screw Collier Co.* v. *Schurmann*, 1 J. & H. 180; 29 L. J., Ch. 877; 6 Jur. (N.S.) 883; 8 W. R. 732. But see *The Saxonia*, Lush. 410; 15 Moore, P. C. 262; 31 L. J., Adm. 201; 8 Jur. (N.S.) 315; 10 W. R. 431.

The liability of owners of foreign ships in collision beyond the three-mile limit was, under 17 & 18 Vict. c. 104, unlimited. *Cope* v. *Doherty*, 2 De G. & J. 614; 27 L. J., Ch. 600; 4 Jur. (N.S.) 699; 6 W. R. 695—L.JJ. Affirming 4 K. & J. 367; *The Wild Ranger*, Lush. 553; 32 L. J., Adm. 49; 9 Jur. (N.S.) 134; 7 L. T. 725; 11 W. R. 255.

—— **53 Geo. 3, c. 159, s. 1.**]—A municipal law limiting the liability of shipowners for collision is not applicable to foreign ships and shipowners unless expressly so enacted. A foreign shipowner held liable beyond the value of his ship and freight, notwithstanding 53 Geo. 3, c. 159, s. 1. *The Carl Johann*, cited 3 Hag. Adm. 186; 1 Hag. Adm. 113.

—— **17 & 18 Vict. c. 104, s. 512.**]—The above enactment as to proceedings by the board of trade, in case of loss of life, did not apply to foreign ships (semble). *The Vera Cruz*, 53 L. J., Adm. 33; 9 P. D. 96; 51 L. T. 104; 32 W. R. 783; 5 Asp. M. C. 270. Reversed on another point, 54 L. J., Adm. 9, infra, col. 838.

Foreign Ships on the High Sea formerly not bound by British Statutory Sailing Rules.]—Before the adoption of regulations common to all maritime nations, foreign ships on the high sea were not bound by statutory rules for preventing collisions contained in British statutes. *The Dumfries*, Swabey, 63, 125; 4 W. R. 708. S. P., *The Saxonia* and *The Eclipse*, Lush. 410. *The Cleadon*, Lush. 158; 14 Moore, P. C. 92; 4 L. T. 157. *The Elizabeth*, 3 L. T. 159. *The Chancellor, Williams* v. *Gutch*, 14 Moore, P. C. 202; 4 L. T. 627.

—— **Could not set up Infringement by British Ship.**]—Before 25 & 26 Vict. c. 63, ss. 57, 58, a foreigner could not set up against a British vessel, with which she had been in collision, the British vessel's violation of British statute law on the high seas, for the foreigner could not herself be bound by it, as it was beyond the power of the legislature to make rules applicable to foreign vessels beyond British waters. *The Zollverein*, Swabey, 96; 2 Jur. (N.S.) 429; 4 W. R. 555.

Cross-action against Foreign Ship — Non-appearance—Both to blame—Deduction of Half Damages.]—See *The Seringapatam*, 3 W. Rob. 38, post, col. 842.

Damage Lien—Foreign Ship—Wages have no Priority.]—Where in a collision suit judgment is given against a foreign ship, and her proceeds are insufficient to meet the damages, her crew have no prior right against the ship for wages. *The Linda Flor*, Swabey, 309; 4 Jur. (N.S.) 172; 6 W. R. 197.

Foreign Plaintiff—Security for Damages.]—A foreign plaintiff, in a collision action, held not liable to give security for payment of damages for wrongful arrest beyond the usual security for costs, it being suggested that he had arrested the wrong ship. *The Peri*, 32 L. J., Adm. 46; 8 Jur. (N.S.) 1230; 11 W. R. 44.

Foreign Sovereign suing for Collision—Bail.]—Where one of the ships in collision is a public ship of a foreign sovereign, and the foreign sovereign sues for damages in the courts of this country, proceedings will be stayed until the foreign claimant gives bail to answer a counter-claim by the defendant. *The Newbattle*, 54 L. J., Adm. 16; 10 P. D. 33; 52 L. T. 15; 33 W. R. 318; 5 Asp. M. C. 356.

Ship of Foreign Sovereign—Liability in rem—Salvage.]—An American ship of war, with cargo on board for public purposes, was stranded on the shore of England, and received salvage service from an English vessel:—Held, that she was not liable to arrest. *The Constitution*, 48 L. J., Adm. 13; 4 P. D. 39; 40 L. T. 219; 27 W. R. 739; 4 Asp. M. C. 79.

—— **Non-liability to Arrest.**]—As to the non-liability to arrest of a public vessel belonging to a foreign sovereign, see *The Parlement Belge*, 5 P. D. 197; 42 L. T. 273; 28 W. R. 642; 4 Asp. M. C. 234—C. A.: *The Charkieh*, 42 L. J., Adm. 17; L. R. 4 A. & E. 59; 28 L. T. 513; 1 Asp. M. C. 581. And see *S. C.*, supra, col. 724.

Foreign Judgment.]—A foreign judgment is a bar to an action in this country between the same parties for the same collision. *The Delta* and *The Erminia Foscolo*, 45 L. J., Adm. 111; 1 P. D. 393; 35 L. T. 376; 25 W. R. 46; 3 Asp. M. C. 256.

But not if it went by default. *Ib.*

Foreign Judgment in personam.]—A foreign judgment in personam for a collision is not enforceable by arrest of the ship in this country. *The City of Mecca*, 50 L. J., Adm. 53; 6 P. D. 106; 44 L. T. 750; 4 Asp. M. C. 412—C. A.

Foreign Ship Sunk—Both in Fault—Reference.]—In a collision suit where both ships have been found to blame, and the owners of the ship arrested have brought no cross-action, the damage to the plaintiff's ship only will be referred to the registrar, although she was sunk and her owners reside out of the jurisdiction. *The North American*, Swabey, 466.

Re-arrest—Damage greater than Bail.]—A foreign ship was arrested and bailed in a collision suit promoted by the owners of the other ship and her cargo, and the damage pronounced for. After claim for the damage to cargo had been preferred before the registrar it was found that the damage was greater than supposed, and the ship was re-arrested:—Held, that the ship could not be re-arrested in a new action for the same cause and between the same parties. *The Kalamazoo*, 15 Jur. 885.

—— **Of Foreign Ship — Appeal.**]—In cross actions for collision the judge of the county court found that one of the ships, a foreigner, was not to blame and ordered her to be released. There

was an appeal to the high court. Upon motion by the appellant she was ordered to be re-arrested. *The Freir, The Albert*, 44 L. J., Adm. 49 ; 32 L. T. 572 ; 2 Asp. M. C. 589.

10. Compulsory Pilotage.

a. Generally.

Former Uncertainty of Law as to Liability for Compulsory Pilot's Fault.]—The law as to the liability of a shipowner for a collision caused by the fault of a compulsory pilot was formerly doubtful. *Longridge* v. *Dorville*, 5 B. & Ald. 117.

Ship held Liable in rem for Fault of Compulsory Pilot.]—A ship in charge of a compulsory pilot held liable in rem for a collision caused by the pilot's fault. *The Baron Holberg*, 3 Hag. Adm. 214. S. P. (under 5 Geo. 2, c. 20), *The Neptune the Second*, 1 Dods. 467.

Whether Pilot was in Charge—Question for Jury.]—Whether a pilot taken on board by compulsion of law was in charge of the ship at the time of collision is a question for the jury. *Catts* v. *Herbert*, 3 Stark. 12 ; 23 R. R. 752.

Contributory Negligence of Pilot in charge of Injured Vessel—Effect of.]—Count to recover damages for injuries sustained by the plaintiffs' ship through the negligence of the defendants ; plea, contributory negligence ; replication, that the contributory negligence was that of a pilot licensed by the defendants, and compulsorily employed by the plaintiffs ; rejoinder, that the pilot was not the servant of the defendants ; demurrer to the rejoinder allowed. *Dudman* v. *Dublin Port and Docks Board*, Ir. R. 7 C. L. 518. But see *Spaight* v. *Tedcastle*, 6 App. Cas. 217 ; 44 L. T. 589 ; 29 W. R. 761 ; 4 Asp. M. C. 406. *The Hector*, 52 L. J., Adm. 51 ; 8 P. D. 218 ; 48 L. T. 890 ; 31 W. R. 881 ; 5 Asp. M. C. 101.

A barque, in charge of a pilot who was on board her, was being towed by a tug in waters where the employment of a pilot was compulsory. The tug ported her helm and passed across the bows of a brig, there was no room for the barque to follow in her wake, and the barque came into collision with the brig. The pilot gave no orders to the tug before or after she ported ; if he had given proper orders, even after the tug had ported, the collision might have been avoided :—Held, that the tug was to blame for attempting to tow the barque across the bows of the brig ; but that the owners of the barque could not, on account of the neglect of the pilot to give proper orders, recover against the tug damages in respect of the collision. *The Energy*, 39 L. J., Adm. 25 ; L. R. 3 A. & E. 48 ; 23 L. T. 601 ; 18 W. R. 1009.

General Rule as to Shipowner's Liability.]—Shipowners not liable for collision caused entirely by the fault of a compulsory pilot ; aliter, if the crew are also in fault. *The Atlas*, 3 W. Rob. 502. *The Admiral Boxer*, Swabey, 193 ; *The Lochlibo, Pollok* v. *McAlpin*, 7 Moore, P. C. 427.

The shipowners are liable for a collision caused by fault of crew and also of compulsory pilot. *The Diana*, 1 W. Rob. 131 ; nom. *Stuart* v. *Isemonger*, 4 Moore, P. C. 11.

Master not Liable.]—The master of a passenger vessel within a district where pilotage is compulsory was summoned for not navigating his vessel in a careful and proper manner. There was a pilot in charge of the vessel :—Held, that the summons was properly dismissed, since the pilot, who was compulsorily on board, must be assumed to have been in charge of the vessel. *Oakley* v. *Speedy*, 40 L. T. 881 ; 4 Asp. M. C. 134.

For a collision caused by the pilot's fault the master is not liable in damages. *The Octavia Stella*, 57 L. T. 632 ; 6 Asp. M. C. 182.

Owners Liable though Pilot in Charge.]—A ship with a compulsory pilot on board lying in the Downs in bad weather was held in fault for a collision caused by her driving in consequence of her yards not having been sent down :—Held, that the owners were liable, it being the master's duty to see that the yards were sent down. *The Christiana, Hammond* v. *Rogers*, 7 Moore, P. C. 160. Cf. *The Girolamo*, 3 Hag. Adm. 169.

Where the evidence establishes that from want of an efficient lookout, the pilot was not warned in time to enable him to give orders so as to avoid a collision, the defence of compulsory pilotage is not established, and the owners of the vessel causing damage are liable therefor. *The Schwan, The Albano*, [1892] P. 419 ; 69 L. T. 34 ; 7 Asp. M. C. 347—C. A.

Although the pilot has charge of the ship the owners are responsible for the sufficiency of the ship and her equipments, the competency of the master and crew, and their obedience to the orders of the pilot. Under ordinary circumstances his commands are to be implicitly obeyed ; to him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only. See per Parke, B., *The Christiana*, 7 Moore, P. C. 160, 171. *The City of Cambridge, Wood* v. *Smith*, 43 L. J., Adm. 11 ; L. R. 5 P. C. 451, 457 ; 30 L. T. 439 ; 22 W. R. 578 ; 3 Asp. M. C. 739.

Change of Pilots.]—A collision occurred in the Humber Dock, Hull, between a fly-boat and a foreign schooner bound to the Prince's Dock. The schooner was in charge of a duly licensed Humber pilot, who had taken over the charge of the schooner while she was moored at a pier in the Humber from the pilot who had brought her in from sea. One sum was paid for the services of the two pilots :—Held, that the schooner was in charge of a pilot whose employment was compulsory by law. *The Rigborgs Minde*, 52 L. J., Adm. 74 ; 8 P. D. 132 ; 49 L. T. 232 ; 5 Asp. M. C. 123—C. A.

Neglect to render Assistance.]—Under 25 & 26 Vict. c. 53, s. 33, it was declared to be, in case of collision between two ships, the duty of the person in charge of each ship to render assistance to the other, and in case he failed to do so without reasonable excuse, the collision, in absence of proof to the contrary, was to be deemed to have been caused by his wrongful act. Two steamships, the "Queen" and the "Lord John Russell," each under the charge of a compulsory pilot, came into collision in the Thames. The "Queen" was solely to blame, and after the collision she rendered no assistance to the other vessel, and shewed no excuse for having failed to do so :—Held, that the mere fact of her having a pilot on board did not exempt her owners from liability.

The Queen, 38 L. J., Adm. 39 ; L. R. 2 A. & E. 354 ; 20 L. T. 855.

Semble, that if the collision had been caused solely by the neglect of the pilot on board the "Queen," the subsequent misconduct of the master in not rendering assistance would not have made her owners liable for the collision. *Ib.*

Pilot in Permanent Employ of Owners.]—In a cause of collision, the mischief was found to have arisen from the fault of a duly licensed pilot in charge of the vessel doing the damage. The pilot had been in the permanent employ of the owners, and engaged in navigating the ship for many years :—Held, that notwithstanding such permanent employ, the owners were exonerated. *The Batavier*, 2 W. Rob. 407 ; 10 Jur. 19.

Pilot selected by Master—Liability.]—The Canadian statutes, 27 & 28 Vict. c. 13, and 27 & 28 Vict. c. 58, are to be read and construed together as being in pari materiâ ; and, therefore, the owner of a Canadian ship, navigated in Canadian waters, under the directions of a pilot taken on board in compliance with the provisions of these statutes, is expressly exonerated from all liability for damage caused by obedience to such directions ; and this is not affected by the fact that the pilot is one selected by the master, if selected only out of a particular qualified class. *The Hibernian, Redpath* v. *Allan*, 9 Moore, P. C. (N.S.) 340 ; 42 L. J., Adm. 8 ; L. R. 4 P. C. 511 ; 27 L. T. 725 ; 21 W. R. 276 ; 1 Asp. M. C. 491.

Damage to Property of Thames Conservators.]—The owner of a vessel navigating the Thames is not responsible for damage done by her to property belonging to the conservators through the fault of a pilot compulsorily in charge of her ; for, though the words of s. 96 of the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), are general, they are not to be read as including pilots, and do not by implication repeal the provisions as to pilotage in 17 & 18 Vict. c. 104. *Thames Conservators* v. *Hall*, 37 L. J., C. P. 163 ; L. R. 3 C. P. 415 ; 18 L. T. 361 ; 16 W. R. 971.

Proof of Compulsion.]—Owners are not exonerated from responsibility for the default of a pilot whom they have selected and placed in charge when there was no obligation imposed on them to take such pilot and put him in charge. *The Lion*, 6 Moore, P. C. (N.S.) 163 ; 38 L. J., Adm. 51 ; L. R. 2 P. C. 525 ; 21 L. T. 41 ; 17 W. R. 993.

When there is no proof that the pilotage was compulsory, no exemption can be claimed by the owners, on the ground of the vessel having been in charge of a pilot. *The Peerless*, Lush. 103 ; 13 Moore, P. C. 444 ; 30 L. J., Adm. 89 ; 3 L. T. 125.

When Pilotage is Compulsory.]—Pilotage is compulsory when the pilotage charge can be recovered whether the pilot is employed or not. *Carruthers* v. *Sidebotham*, 4 M. & S. 77. *The Maria*, 1 W. Rob. 95, 109. *The Arbutus*, 11 L. T. 208. *The Hibernian*, supra.

Principle of Statutory Non-liability of Shipowner for Fault of Compulsory Pilot.]—The leading principle of the legislature in exempting owners from any liability for damage occasioned by their vessels having pilots on board is this :—That the owners are not responsible for the acts of the persons to whom they are thus forced to commit the management of their property, and over whom they have no control—per Dr. Lushington. *The Maria*, 1 W. Rob. 95, 99. And see *The Bilbao*, Lush. 149, 154 ; 3 L. T. 338.

Statutory Exemption is declaratory of Common Law.]—The statutory exemption of shipowners from liability for the fault of a compulsory pilot is declaratory of the common law—see per Brett, M.R. *The Hector*, 52 L. J., Adm. 51 ; 8 P. D. 218, 224 ; 48 L. T. 890 ; 31 W. R. 881 ; 5 Asp. M. C. 101—C. A. S. P., *General Steam Navigation Co.* v. *British Colonial Steam Navigation Co.*, 38 L. J., Ex. 97 ; L. R. 4 Ex. 238 ; 20 L. T. 581 ; 17 W. R. 741.

Apart from any statute, an owner is not responsible in proceedings in rem for damage done to his ship, occasioned solely by default of a licensed pilot employed by compulsion of law. *The Annapolis. The Johanna Stoll*, Lush. 295 ; 30 L. J., Adm. 201 ; 4 L. T. 417.

—— Either at law or in admiralty. *The Maria*, 1 W. Rob. 95.

By the Liverpool Pilot Act, the master of every vessel inward bound is compellable to take a licensed pilot, unless the vessel be in ballast and in the coasting trade ; but there is not, as in 6 Geo. 4, c. 125, s. 55, any express exemption of the liability of owners of a vessel for damage done by such vessel whilst in charge of a licensed pilot :—Held, that the 55th section of the 6 Geo. 4, c. 125, was merely declaratory of the common law, and did not confer any independent exemption from legal responsibility ; and that, as by the common law no person is responsible for the negligent acts of a party in the performance of any work, when by law he is compelled to employ that party to do such work, the owners of a vessel entering the port of Liverpool, and in obedience to the local act taking a licensed pilot on board, were not responsible for mischief done by their vessel, but occasioned by the sole neglect of the pilot. *The Agricola*, 2 W. Rob. 10 ; 7 Jur. 157.

Ship liable in Admiralty for Fault of Pilot—6 Geo. 4, c. 125, s. 55.]—A foreign ship, though in charge of a compulsory pilot, held liable in admiralty for a collision caused by the pilot's fault, notwithstanding 1 & 2 Geo. 4, c. 75, and 6 Geo. 4, c. 125, s. 55, which enactments do not apply to proceedings in admiralty. *The Girolamo*, 3 Hag. Adm. 169.

Damage to Other Ships—52 Geo. 3, c. 39.]—Shipowners were exonerated by 52 Geo. 3, c. 39, s. 30, from liability for damage done to other ships as well as to their own by the fault of a compulsory pilot. *Ritchie* v. *Bowsfield*, 7 Taunt. 309 ; 18 R. R. 490.

Where by Foreign Law the Shipowner is liable.]—In a cause of collision promoted by the owners of a Norwegian barque, against a British steamer, in the court of admiralty in England, for damage done in Belgian waters, alleged to have been occasioned by the negligent and improper navigation of the steam vessel, the owners of the steamship pleaded, that the vessel was in charge of a pilot whom they were compelled by the Belgian law to employ. The owners of the barque replied that by the Belgian law it is provided that the owners of a ship which has done damage to another by collision are liable for the damage notwithstanding the vessel was in charge of a compulsory pilot, and although the damage was occasioned by his

negligence or want of skill:—Held, that the claim being founded on a tort committed in the territory of a foreign state, the party claiming reparation in a British court was not entitled to the benefit of the foreign law against the admitted provisions of the statute law of England and the practice of the court of admiralty in respect of compulsory pilotage, by which no such liability as provided by the Belgian law existed, as it is contrary to principle and authority to hold that an English court will enforce a foreign municipal law, and give a remedy in the shape of damage, in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed. *The Halley*, 5 Moore, P. C. (N.S.) 263; 37 L. J., Adm. 33; L. R. 2 P. C. 193; 18 L. T. 879; 16 W. R. 998.

Power of British Legislature as to Pilotage on the High Seas.]—The legislature has no authority over foreign vessels on the high seas out of British jurisdiction, but may impose any conditions on foreign vessels entering a British port, and consequently an obligation on foreign ships inward bound to take a pilot at a convenient station beyond three miles from the British shore. *The Annapolis, The Johanna Stoll*, Lush. 295; 30 L. J., Adm. 201; 4 L. T. 417.

A statute imposing in general terms on all inward-bound vessels the obligation to take a pilot at a convenient station beyond three miles from the British shore is binding on foreign vessels, such construction being justified on grounds of public policy. *Ib.*

Collision in Suez Canal solely caused by Negligence of Pilot.]—Where a collision in the Suez Canal has been caused by the negligence of a Suez Canal Company's pilot, compulsorily taken on board the wrongdoing ship, the owner of such ship is not exempt from liability for the damage arising out of the collision. The effect of the regulations for the navigation of the Suez Canal is to constitute a pilot taken on board a ship traversing the canal the adviser of the master, and to leave the control of the navigation of the ship solely with the master. *The Guy Mannering*, 51 L. J., Adm. 57; 7 P. D. 132; 46 L. T. 905; 30 W. R. 835; 4 Asp. M. C. 553—C. A.

Pilotage in the Danube.]—By arts. 85, 89 and 92 of the International Rules for the Navigation of the Danube, pilotage is compulsory in the case of a vessel navigating the Danube, but the master of such a vessel is not required to give up the navigation of it to the pilot. Where, therefore, the master of such a vessel has in fact given up the navigation of it to a pilot, the owners remain answerable for damage caused by the improper navigation of the pilot. *The Agnes Otto*, 56 L. J., Adm. 45; 12 P. D. 56; 56 L. T. 746; 35 W. R. 550; 6 Asp. M. C. 119.

Pilotage on the Seine—Havre.]—Although the employment of a pilot by a vessel entering the port of Havre is by French law compulsory, such pilot does not as of right, as is the case in England, supersede the master and take charge of the ship, but according to French decisions the master remains in charge, the pilot being merely his adviser. Hence, though the master may allow such pilot to take charge in fact, the owners are not exempted from liability for damage done to another ship by the negligence of the pilot. *The Augusta*, 57 L. T. 326; 6 Asp. M. C. 161—C. A.

Pilotage Certificate applied for, but not in Possession of Master.]—The master of a ship applied for a certificate enabling him to pilot his ship under 17 & 18 Vict. c. 104, s. 340. The certificate was signed and sealed by the pilotage authority, and had not been taken away by the master:—Held, that the ship was liable to compulsory pilotage. *The Killarney*, Lush. 202; 30 L. J., Adm. 41; 5 L. T. 21.

Damage to Pier—Person having the care of Ship.]—A local act enacts that if "any person having the care of" any craft should damage the New Brighton pier, the shipowner shall be liable:—Held, that the shipowner was not liable for damage to the pier caused by a compulsory pilot in charge of his ship. *The Clan Gordon*, 7 P. D. 190; 46 L. T. 490; 30 W. R. 691; 4 Asp. M. C. 513.

Pilot taken on Board by Compulsion—No Compulsion at Place of Collision.]—A ship bound for London took a pilot off Dungeness where pilotage was compulsory. A collision occurred in the Thames by the pilot's fault at a place where his employment was not compulsory, but where his right and duty as pilot were not at an end:—Held, that the shipowner was not liable. *General Steam Navigation Co.* v. *British Colonial Steam Navigation Co.*, 38 L. J., Ex. 97; L. R. 4 Ex. 238; 20 L. T. 581; 17 W. R. 741.

A qualified pilot having taken charge of a ship at Bristol to pilot her to Cardiff, negligently got her into collision at a place in the Bristol Channel outside the port of Bristol, but where his duty as pilot under his engagement was not at an end:—Held, that the shipowners were not liable. *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (supra) followed. *The Charlton*, 11 R. 825; 73 L. T. 49; 8 Asp. M. C. 29—C. A.

Held, also, that for pilotage purposes the port of Bristol is bounded on the north by a straight line joining the westernmost point of the Holms to Aust in Gloucestershire. *Ib.*

Division of Loss—Fault of Pilot.]—A shipowner can only recover half his loss against the other ship if his own ship was in fault through the negligence of his compulsory pilot. *The Hector*, 52 L. J., Adm. 51; 8 P. D. 218; 48 L. T. 890; 31 W. R. 881; 5 Asp. M. C. 101.

Ship in Bad Trim—Liability of Owner or Pilot.]—The shipowner is not liable for a collision caused partly by the ship being in bad trim if the compulsory pilot in charge of her could with ordinary care have avoided the collision. *The Argo*, Swabey, 462. See also *The Meteor*, Ir. R. 9 Eq. 567.

Damage to Oyster Beds.]—A ship in charge of a compulsory pilot was at high water brought into and anchored by the pilot in a river in which there were oyster beds, the existence of which was known to the pilot. The place where she was anchored was not the usual and customary place for vessels of her size and draught to anchor in. At low water she grounded, and thereby did damage to an oyster bed. On notice of the

existence of the oyster bed being given to the master, he took all reasonable means to remove the ship as speedily as possible. In an action by the lessee of the oyster bed against the ship-owner and the pilot:—Held, that the act of the pilot in anchoring the ship where he did was negligence which made him liable, but that the ship was not liable because the master's duty on receiving notice of the existence of the oyster bed was to take all reasonable measures—not extraordinary measures—to remove his ship, and this he had done. *The Octavia Stella*, 57 L. T. 632; 6 Asp. M. C. 182.

Costs in Case of Defence of Compulsory Pilotage.]—*See* infra, col. 856.

b. Ship in Tow.

Where a tug towing a vessel under a towage contract is so negligently navigated as to come into collision with a vessel belonging to third parties, the owners of the tug are liable for the damage done, even if at the time of the collision the vessel in tow was in charge of a duly-licensed pilot by compulsion of law whose default solely occasioned the collision. *The Mary*, 48 L. J., Adm. 66; 5 P. D. 14; 41 L. T. 351; 28 W. R. 95.

A tug is under the control of the pilot on boad the ship in tow, and is not liable for his negligence where his employment is compulsory. *Smith* v. *St. Lawrence Tow-boat Co.*, L. R. 5 P. C. 308; 28 L. T. 885; 21 W. R. 569; 2 Asp. M. C. 41.

Where a ship in charge of a pilot, whose employment is compulsory, is being towed by a tug, and the tug, without waiting for orders from the pilot, suddenly adopts a wrong manœuvre, and so causes the ship to come into collision, the owners of the ship are responsible. *The Sinquasi*, 50 L. J., Adm. 5; 5 P. D. 241; 43 L. T. 768; 4 Asp. M. C. 383.

Semble, where a pilot is in charge of a ship in tow in a crowded river, it is not necessarily incumbent upon him to direct every movement of the tug. *Ib.*

Where a vessel is under the charge of a licensed pilot, the employment of whom is compulsory, and is, at the same time, in tow of a tug, the latter is bound to obey the orders of the pilot. *Spaight* v. *Tedcastle*, 6 App. Cas. 217; 44 L. T. 589; 29 W. R. 761; 4 Asp. M. C. 406—H. L. (E.)

In a case of damage by collision occasioned by a vessel while in tow of a steam-tug, having a licensed pilot on board, in pursuance of 17 & 18 Vict. c. 103, s. 388, and no blame attached to the master or crew:—Held, that the owners of such vessel were not liable, being protected by s. 388. *The Ocean Wave*, *Marshall* v. *Moran*, 6 Moore, P. C. (N.S.) 492; L. R. 5 P. C. 205; 23 L. T. 218.

It is negligence to move, by means of a steam-tug, a ship from one dock to another at night time; under such circumstances, a pilot on board the ship being towed has no such charge or control over her movements as to exculpate the owners. *The Borussia*, Swabey, 94.

As to whether negligence of a compulsory pilot in charge of a ship in tow is contributory negligence on the part of her owners, see *Spaight* v. *Tedcastle*, supra, col. 755; *The Energy*, supra, col. 763.

And see XIX. TOWAGE, supra, cols. 679, seq.

c. Proof of Pilot's Fault.

Onus of Proof of Negligence of Pilot.]—If a licensed pilot is on board a vessel, in order to exempt the owner from liability for damage occasioned by collision, the onus probandi lies upon the owner to establish that the collision was occasioned solely by the negligence of the pilot, and it is the duty of the owner relying upon such a defence to call the pilot as a witness. *The Carrier Dove*, 2 Moore, P. C. (N.S.) 261; Br. & Lush. 113; 19 L. T. 768.

When a collision is caused by a vessel in charge of a licensed pilot, the owners, in order to exonerate themselves from liability must prove not merely that the crew was under the pilot's orders at the time, but that the order which caused the damage was actually given by the pilot, the onus probandi being on them. *The Schwalbe*, 14 Moore, P. C. 241; Lush. 239; 4 L. T. 160. And see *The Ripon*, 6 Not. of Cas. 245.

To entitle the owners of a ship under the compulsory charge of a licensed pilot to the benefit of the provisions of a statute which exempts them from liability, when a collision has occured by the fault of the pilot, it lies on them to prove that it was occasioned solely by the pilot. *The Velasquez*, 4 Moore, P. C. (N.S.) 426; 36 L. J., Adm. 19; L. R. 1 P. C. 494; 16 L. T. 777; 16 W. R. 89.

If the master and crew have contributed to the accident by not keeping a sufficient look-out, so as to give the pilot the earliest possible information of an approaching vessel, although the pilot is also to blame, the owners are not exempted from liability. *Ib.*

Where, by the mismanagement of a vessel which is proceeding to sea, damage is done, the owners will not be exonerated, unless they shew that the damage was occasioned exclusively by the fault of the pilot. *Rodrigues* v. *Melhuish*, 10 Ex. 110; 24 L. J., Ex. 26; 2 W. R. 518.

A collision took place between two vessels, and the defendants admitted that their vessel was to blame, but alleged by way of defence that they had a pilot on board by compulsion of law, and that they were therefore exempt from liability:—Held, that as there was no evidence of contributory negligence on the part of the defendant owners they were exempt from liability. *The Daioz*, 47 L. J., Adm. 1; 37 L. T. 137; 3 Asp. M. C. 477—C. A.

In order to entitle the owner of a ship, having, by compulsion of law, a pilot on board, to the benefit of the exemption from liability for damage by default of the pilot, it is not enough to prove that there was fault or negligence on the pilot's part, but the owner must shew that there was no default on the part of the master and crew, which might have in any degree been conducive to the damage. *The Iona*, 4 Moore, P. C. (N.S.) 336; L. R. 1 P. C. 426; 16 L. T. 158; not followed in *Clyde Navigation Co.* v. *Barclay*, infra.

In a cause of collision occasioned by a vessel under compulsory pilotage, where no contributory negligence on the part of the master and crew is proved, the pilot in charge is solely responsible, and the owners are exempt from the consequences of his neglect or default. *The Calabar*, L. R. 2 P. C. 238; 19 L. T. 768.

Defective Steering Power of Vessel in charge of Pilot—Onus.]—In a cause of damage by collision, where the defence relied upon is compulsory

pilotage only, and the defendants prove that the vessel was in charge of a licensed pilot by compulsion of law, and that he gave orders for the purpose of avoiding the collision, and that these orders were obeyed, and the plaintiffs seek to shew that the collision was due to the defective steering power of the defendants' vessel, it lies upon the plaintiffs to prove such defective steering power by substantive evidence. *The Livia*, 25 L. T. 887; 1 Asp. M. C. 284. See also *The Warkworth*, ante, col. 744.

Where the plaintiffs make out a primâ facie case, and the answer is that the defendants are exempt from liability on the ground of compulsory pilotage, and they give evidence which primâ facie proves that the accident was [caused by] the fault of a pilot who was on board by compulsion of law, the burden of proof is then shifted back on the plaintiffs if they allege that the defendants are guilty of some other act of negligence—Per Lord Esher, M.R. *The Indus*, 56 L. J., Ad. 88; 12 P. D. 46, 49; 35 W. R. 490; 6 Asp. M. C. 105.

The burden of proof is on the vessel causing damage to shew that the fault was that of the pilot alone; but where the evidence establishes that from want of an efficient look-out, the pilot was not warned in time to enable him to give orders so as to avoid a collision, the defence of compulsory pilotage is not established, and the owners of the vessel causing damage are liable therefor. *The Schwan, The Albano*, [1892] P. 419; 69 L. T. 34; 7 Asp. M. C. 347—C. A.

When shipowners have proved fault on the part of the pilot sufficient to cause, and in fact causing the calamity, they must be held to have satisfied the condition on which their exemption from liability depends, and they are not to be called upon to adduce proof of a negative character to exclude the mere possibility of contributory fault. But if, in the course of the evidence, certain acts or omissions on the part of the crew come out, it will then be incumbent on the owners to shew satisfactorily that those acts or omissions in no degree contributed to the damage. *Clyde Navigation Co.* v. *Barclay*, 1 App. Cas. 790; 36 L. T. 379; 3 Asp. M. C. 390—H. L. (Sc.)

Where a compulsory pilot was on board it was, under 52 Geo. 3, c. 39, s. 30, held that primâ facie the master was not liable for a collision in which their ship was in fault. *Bennet* v. *Moita*, 7 Taunt. 258.

Where a defendant alleges that the collision was caused entirely by the fault of his compulsory pilot, the burden is on him to prove it. *The Atlas*, 2 W. Rob. 246.

Pleading.]—The party intending to take advantage of the statutory exemption from liability for the fault of a compulsory pilot (6 Geo. 4, c. 105) should so plead. *The Canadian*, 1 W. Rob. 343.

d. Duties of Pilot.

It is the duty of the pilot to decide in bad weather whether to get under way or to lie fast. *The Lochlibo, Pollok* v. *McAlpin*, on appeal, 7 Moore, P. C. 427. S. P., *The Carrier Dove*, Br. & Lush. 113; 2 Moore, P. C. C. 238; 19 L. T. 768; but see *The Girolamo*, 3 Hag. Adm. 169; *The Borussia*, Swabey, 94; *The Ocean Wave, Marshall* v. *Moran*, 6 Moore, P. C. (N.S.) 492; L. R. 3 P. C. 205, 209; 23 L. T. 218; *The Strathspey and The Islay*, infra; *The Oakfield*, 55 L. J., Adm. 11; 11 P. D. 34; 54 L. T. 578; 34 W. R. 687; 5 Asp. M. C. 575.

To give orders as to setting canvas. *The Ocean Wave*, supra.

To give orders as to the use of warps and check ropes when docking. *The Rigborgs Minde*, 52 L. J., Adm. 74; 8 P. D. 132; 49 L. T. 23; 5 Asp. M. C. 460.

To give orders to the helm. *The Schwalbe*, 14 Moore, P. C. 241; 4 L. T. 160; Lush. 329; *The Winston*, 53 L. J., Adm. 69; 9 P. D. 85; 51 L. T. 183; 5 Asp. M. C. 274—C. A.

To decide whether or no it is necessary to depart from the regulations. *The Argo*, Swabey, 462.

To decide when, where, and how to bring up. *The Agricola*, 2 W. Rob. 10; 7 Jur. 157; *The George*, 9 Jur. 670; 2 W. Rob. 386; 4 Not. of Cas. 161; *The Lochlibo*, supra; *The Christiana*, 7 Moore, P. C. 160; *The Rhosina, Edwards* v. *Falmouth Harbour Commissioners*, 54 L. J., Adm. 72; 10 P. D. 24; 53 L. T. 210; 5 Asp. M. C. 114.

To give orders as to the catting, letting go, and mode of carrying the anchor. *The Gipsy King*, 2 W. Rob. 537; *The Rigborgs Minde*, supra; *The Agricola*, supra; *The Monte Rosa*, 62 L. J., Adm. 20; [1893] P. 23; 1 R. 557; 68 L. T. 299; 41 W. R. 304; 7 Asp. M. C. 326.

To tend the ship whilst at anchor, to let go a second anchor if necessary, and to manœuvre her if she parts. *The City of Cambridge*, infra; *The Northampton*, 1 Spinks, 152; *The Princeton*, 47 L. J., Adm. 33; 3 P. D. 90; 38 L. T. 260; 3 Asp. M. C. 562.

To shift his berth, if necessary. *The Cachapool*, 7 P. D. 217; 46 L. T. 171; 4 Asp. M. C. 502.

To determine the speed of the ship and what canvas to carry. *The Calabar*, L. R. 2 P. C. 238; 19 L. T. 768; *The Maria*, 1 W. R. 95; *The Julia*, Lush. 224; 14 Moore, P. C. 210; *The Batavier*, 9 Moore, P. C. 286.

To advise as to the employment of a tug. *The Julia*, supra.

Shortly after leaving dock the "Strathspey" came into collision in the Clyde, whilst in charge of a compulsory pilot, with the "Islay." The collision was due to the "Strathspey" not having steerage way owing to the boisterous state of the weather and her slow rate of speed through the water in order to comply with the by-laws:—Held, that the pilot was in charge before leaving the dock, and that it was for him to decide whether to sail or to lie fast, and whether the employment of a tug was necessary or not; and that the owners were not liable for the collision. *The Strathspey and The Islay, Burrell* v. *Macbrayne*, 18 Ct. of Sess. Cas. (4th ser.) 1048.

To give orders as to the navigation of the tug, and as to casting off the tow rope. See *The Energy*, and cases cited, supra, col. 755.

Ship at Anchor.]—When a ship in charge of a licensed pilot is anchored in pilotage waters, the length of cable at which the ship rides is a matter entirely within the province of the pilot, and it is his duty when the ship swings to the tide to superintend that manœuvre, and to regulate the helm, and it is negligence on his part to go below before the ship is fully swung, leaving the helm amidships without orders as to its regulation; and if, through want of length of cable and of regulation of the helm, the ship sheers and so parts from her anchor in swinging

during his absence, the pilot will be alone responsible, provided that the watch on deck takes the right manœuvre to counteract the sheering. *The City of Cambridge*, or *Wood* v. *Smith*, 43 L. J., Adm. 11; L. R. 5 P. C. 451; 30 L. T. 439; 22 W. R. 578. And see *The Woburn Abbey*, post, col. 774.

When a ship at anchor in pilotage waters and in charge of a licensed pilot parts her cable, the necessity for letting go another anchor is a matter within the discretion of the pilot, and the manœuvre should be directed by him; and if the pilot is below at the time, the officer of the watch will be justified before giving any orders to bring up the ship in calling the pilot on deck to take charge, provided that there is no immediate necessity for action, as for instance to prevent a collision which is imminent. *Ib.*

Getting under Way—Suggestions by Master.]—Where a vessel is in charge of a pilot by compulsion of law, there is no duty on the master to prevent her from being got under way in obedience to an order of the pilot, unless such a proceeding is manifestly dangerous. The defendants' vessel was compulsorily in charge of a duly licensed pilot, and was got under way when the weather was thick and hazy, but vessels could be seen at 300 yards' distance:—Held, that the defendants were not responsible for damage caused by the vessel being under way. While the defendants' vessel was approaching that of the plaintiffs, the master expressed his opinion that the helm should be starboarded. The pilot gave the order, and in consequence of it a collision occurred:—Held, that the defendants were not responsible for the damage caused by the collision. *The Lochlibo* (3 W. Rob. 310) approved. *The Oakfield*, 55 L. J., Adm. 11; 11 P. D. 34; 54 L. T. 578; 34 W. R. 687; 5 Asp. M. C. 575.

Semble. The responsibility for being under way unnecessarily in a dense fog is with the pilot. *The North American and The Wild Rose*, 14 L. T. 68. See also *The Lochlibo*, 7 Moore, P. C. 427.

The pilot is responsible for getting the ship under way in improper circumstances. *The Peerless*, Lush. 30; 6 L. T. 107.

Carrying Anchor at Hawse-pipe.]—Whether the anchor of a steamer in the Thames should be carried at the hawse-pipe with the stock above water is a matter within the province of the pilot, notwithstanding that the carrying of the anchor in such a position may be an infringement of r. 20 of the Thames Conservancy by-laws; and therefore owners are not liable for damage caused thereby. *The Ripon* (10 P. D. 65) explained. *The Monte Rosa*, 62 L. J., Adm. 20; [1893] P. 23; 1 R. 557; 68 L. T. 299; 41 W. R. 304; 7 Asp. M. C. 326.

The damage was done by the fluke of the schooner's anchor piercing the side of the flyboat. The court found that there was no want of care in the crew in lowering the anchor. The other allegations against the schooner were that the anchor was improperly slung; that she came too fast up the dock and without a check rope:—Held, that the damage was caused by the fault of the pilot in the course of his duty. *The Rigborgs Minde*, 52 L. J., Adm. 74; 8 P. D. 132; 49 L. T. 332; 5 Asp. M. C. 460.

When in Charge of a Ship in Tow.]—*See* supra, col. 755.

e. Duties of Shipowner, Master, and Crew.

Look-out.]—A steamship held in fault for sinking a barge with her swell, although in charge of a compulsory pilot, because the barge and a dangerous swell caused by other passing steamships were not reported by the look-out. *The Batavier*, 9 Moore, P. C. 286. S. P., *The Iona*, 4 Moore, P. C. (N.S.) 336; L. R. 1 P. C. 426; 16 L. T. 158; *The Velasquez*, 4 Moore, P. C. (N.S.) 426; 36 L. J. Adm. 19; L. R. 1 P. C. 494; 16 L. T. 777; 16 W. R. 89; *The Julia*, Lush. 224; 14 Moore, P. C. 210; *The Atlas*, 2 W. Rob. 502; *The Minna*, L. R. 2 A. & E. 97.

The owners held liable for a collision caused partly by negligent look-out, and partly by the fault of a compulsory pilot; 6 Geo. 4, c. 125, s. 55, did not exempt the owners in such cases. *The Diana*, *Stuart* v. *Isemonger*, 1 W. Rob. 131; 4 Moore, P. C. 11; 6 Jur. 157.

Anchor.]—The anchor must be clear and ready to let go at the pilot's order. *The Peerless*, Lush. 103; 13 Moore, P. C. 484; 30 L. J., Adm. 89; 3 L. T. 125; *The Atlas*, 2 W. Rob. 502; *The Rigborgs Minde*, supra.

Tow-line.]—The shipowner is liable if the tow-line is not cast off at the pilot's order. *The Energy*, 39 L. J., Adm. 25; L. R. 3 A. & E. 48; 23 L. T. 601; 18 W. R. 1009.

Vessel at Anchor.]—The "W. A.," in charge of a pilot, came to anchor in the Mersey, and gave the "B. T." a foul berth. Various remonstrances were from time to time made by those on board the "B. T.," and after a few days the vessels in swinging to the tide came into collision:—Held, that the owners of the "W. A." were responsible for the damage, first, because, while the vessel was at anchor, the employment of the pilot was not compulsory; and secondly, because, even if the pilot had not properly moored the "W. A.," her master was not relieved from responsibility, and therefore her owners were liable for the damage. *The Woburn Abbey*, 38 L. J., Adm. 28; 20 L. T. 621. And see *The City of Cambridge*, 43 L. J., Adm. 11; L. R. 5. P. C. 451; 30 L. T. 439; 22 W. R. 578; 2 Asp. M. C. 239.

Ordinary Precautions to be Taken without Express Orders from Pilot.]—The shipowner is responsible for the ordinary work of the ship being properly carried on, and usual precautions being taken, without express orders from the pilot. *The Christiana*, 7 Moore, P. C. 160; *The Sinquasi*, 50 L. J., Adm. 5; 5 P. D. 241; 43 L. T. 768; 4 Asp. M. C. 383.

Sufficiency of Tug.]—The shipowner is liable for the sufficiency of the tug. *The Ocean Wave* 6 Moore, P. C. (N.S.) 492; L. R. 3 P. C. 285; 23 L. T. 218; *and see* supra, col. 679.

Wrong Light Exhibited by Pilot's Orders.]—The steamship "R.," in tow of a steamship which was turning her in the River Humber, was, under the directions of a pilot, who was on board her by compulsion of law, exhibiting, in addition to her masthead light and red and green side lights, an anchor light which was hoisted at the main peak. In these circumstances she was run into by the steamship "E.":—Held, that the exhibition of the anchor light was a breach of the Humber rules which might by possibility have contributed to the collision; that the master of the "R." was

responsible for such breach of a statutory regulation as to lights, and that the owners could not therefore escape liability on the ground of compulsory pilotage. *The Ripon*, 54 L. J., Adm. 56; 10 P. D. 65; 52 L. T. 438; 33 W. R. 659; 5 Asp. M. C. 365.

Duty to warn Pilot of Ship's Peculiarities.]—Evidence was given of the steamer having been inadequately manned and out of trim on the occasion of the collision, and that the pilot, who had only came on board a short time before, had not been told of these latent defects. The judge, holding that it was not open to the plaintiff on his pleadings to rely on such defects and that their existence had not been in fact proved, dismissed the petition:—Held, on appeal, that the plaintiff was entitled to rely on such defects, though he had neither pleaded them originally nor by special replication; that they had been actually proved, and that their non-disclosure to the pilot invalidated the defendants' plea of compulsory pilotage. *The Meteor*, Ir. R. 9 Eq. 567. S. P., *The Oakfield*, supra.

Pilot Below.]—Where a collision occurred when the pilot was unavoidably below for a few minutes, the owners were held liable. *The Mobile, Bates* v. *Don Pablo Sora*, Swabey, 127; 10 Moore, P. C. 467—P. C.

Pilot Intoxicated.]—If the pilot is manifestly incapable or intoxicated, it is the duty of the master to take charge of the ship. *The Lochlibo, Pollock* v. *McAlpin*, 7 Moore, P. C. 427.

Not Giving more Chain—Not Taking Tug—Not Getting Sail on Ship—After Collision.]—A ship in charge of a compulsory pilot, after fouling one ship, drove on board another. Her owners held liable for not giving her more chain to bring her up, and for not taking a tug, and for not getting sail on her. *The Annapolis and The Golden Light*, Lush. 355; 5 L. T. 37.

Interference with Pilot.]—The master has no right to interfere with the pilot except in case of manifest incapacity or intoxication. *The Argo*, Swabey, 462; *The Christiana*, supra; *The Maria*, 1 W. Rob. 95; *The Hibernia*, 4 Jur. (N.S.) 1244.

Even when the pilot is breaking the law by navigating on the wrong side of the river. *The Argo*, supra.

It is not improper interference with the pilot to make suggestions or to offer advice. *The Lochlibo*, supra; *The Oakfield*, supra.

It is the master's duty to point out manifest danger, if the order of the pilot is clearly wrong. *The Duke of Manchester, Sherby* v. *Hibbert*, 5 Not. of Cas. 470; 6 Moore, P. C. 90.

Not sending down Yards in Heavy Weather.]—Shipowner held liable, because the master of a ship in charge of a compulsory pilot riding in the Downs in heavy weather did not send down his yards, whereby she drove and fouled another ship. *The Christiana*, supra.

Waterman Employed by Pilot.]—A French vessel upon the Thames took a pilot, and, as her crew did not understand English, a waterman to take the wheel. The waterman put her helm up, instead of luffing, as the pilot ordered, whereby a barge was run into and damaged:—Held, that the owners and not the pilot were answerable for the waterman's fault. *The General de Caen*, Swabey, 9.

Warps and Check Lines.]—The omission to run out a check line or warps when docking is negligence of the shipowner or his crew. *The Cynthia*, 46 L. J., Adm. 58; 2 P. D. 52; 36 L. T. 189; 3 Asp. M. C. 378; but see *The Rigborgs Minde*, as to the pilot's duty in this case, 52 L. J., Adm. 74; 8 P. D. 132; 49 L. T. 23; 5 Asp. M. C. 460—C. A.

Engines.]—Owners are liable if the engines are not stopped at the pilot's order. *The Ripon*, 6 Not. of Cas. 245.

f. When Compulsory.

i. *Generally.*

Passenger Ships in the United Kingdom—17 & 18 Vict. c. 104, s. 353.]—Pilotage is compulsory for ships carrying passengers between places in the United Kingdom. *The Temora*, Lush. 17; 2 L. T. 418.

Ship within Home Port — Passengers.]—A vessel navigating within the port to which she belongs must take a pilot if she is carrying passengers. *Dublin Port and Docks Board* v. *Shannon*, Ir. R. 7 C. L. 116.

Ships shifting Moorings.]—As to the exemption of ships changing moorings in port, see *The Victoria*, Ir. R. 1 Eq. 336; *The Maria*, L. R. 1 A. & E. 358; 16 L. T. 717; 15 W. R. 143; *Thornton* v. *Boland*, 2 Bing. 219. As to a similar exemption under 5 Geo. 2, c. 20, see *McIntosh* v. *Slade*, 6 B. & C. 657; 5 L. J. (O.S.) K. B. 345; 30 R. R. 494; *Rex* v. *Lamb*, 5 Term Rep. 76; *Rex* v. *Neale*, 8 Term Rep. 241.

ii. *Under 6 Geo. 4, c. 125.*

General operation of 6 Geo. 4, c. 125.]—The provisions of 6 Geo. 4, c. 125, are not confined to the London Trinity House pilotage. *Tyne Improvement Commissioners* v. *General Steam Navigation Co.*, 8 B. & S. 66; 36 L. J., Q. B. 22; L. R. 2 Q. B. 65; 15 L. T. 487; 15 W. R. 178; *The Killarney*, Lush. 427; 6 L. T. 908. But see *The Eden*, 2 W. Rob. 442; 10 Jur. 296; *Att.-Gen.* v. *Case*, 3 Price, 302; 17 R. R. 566; *The Maria*, 1 W. Rob. 95.

Exemption from Liability Under 6 Geo. 4, c. 125.]—The exemption from liability of shipowners under the 6 & 7 Geo. 4, c. 125, extended to cases where the pilot was acting in charge of the ship under the provisions of the act, whether by compulsion of law or by the shipowners' appointment. *Lacey* v. *Ingram*, 6 M. & W. 302; 9 L. J., Ex. 196. *And see*, per Romilly, M.R., *The Lion*, 6 Moore, P. C. (N.S.) 163; 38 L. J., P. C. 51; L. R. 2 P. C. 525; 21 L. T. 41; 17 W. R. 993.

Admiralty Action in rem.]—6 Geo. 4, c. 125, s. 14, applied in Admiralty, and prevented one injured by a collision caused by the fault of a compulsory pilot from recovering damages. *The Protector*, 1 W. Rob. 45.

Owners of Foreign Ship exempt from Liability.]—The statute 6 Geo. 4, c. 125, s. 55, exempting shipowners from liability for the fault of a compulsory pilot applied to foreign ships. *The Christiana*, 2 Hag. Adm. 183.

Master Commanding his own Ship.]—Pilotage is compulsory under 6 Geo. 4, c. 125, for a master commanding his own vessel on a foreign voyage from London. *Williams* v. *Newton*, 14 M. & W. 747; 15 L. J., Ex. 11.

Change of Mooring.]—A vessel had to deliver part of her cargo at the London Docks, and part at a wharf higher up the river. She went to the docks, under the charge of a pilot, who left her there, where she remained some time without discharging any of her cargo, as the part to be left at the wharf was uppermost. She then went under the charge of another pilot up the river to the wharf, and by the neglect of the pilot ran down a barge:—Held, that under 6 Geo. 4, c. 125, s. 55, the pilot alone was answerable, and not the owners, as they were bound to have a pilot on board at the time, and that it was not a mere chance of mooring. *M'Intosh* v. *Slade*, 6 B. & C. 657; 9 D. & R. 738; 5 L. J. (O.S.) K. B. 345; 30 R. R. 494.

When Compulsory.]—Under the 6 Geo. 4, c. 125, s. 55, if the ship was within a district to which the act applied, the statutory protection existed not only in those cases in which it was compulsory to take a pilot on board, but also where a pilot had been taken on board and was forced to serve if called upon, but the master was not bound to employ him. *The Fama*, 2 W. Rob. 184.

Other decisions under 6 and 7 Geo. 4, c. 125, are: *Carruthers* v. *Sidebotham*, 4 M. & S. 77; *Dodds* v. *Embleton*, 9 D. & R. 27; 5 L. J. (O.S.) K. B. 65; *Belby* v. *Scott*, 7 M. & W. 93; 10 L. J., Ex. 149; *The Agricola*, 2 W. Rob. 10; 7 Jur. 157.

iii. *At Various Places.*

Belfast.]—Pilotage is compulsory at Belfast under 10 & 11 Vict. c. ii. *The De Brus*, Ir. R. 1 Eq. 72; *The Arbutus*, 11 L. T. 208.

Cork.]—Where the judgment of the court was, that the collision was occasioned by the mismanagement and incompetency of the pilot in charge of the vessel proceeded against, such pilot being duly appointed under the Cork pilot act:—Held, that the owners were not protected from their liability in respect of the injury occasioned by the act of the pilot, the employment of such pilot not being compulsory upon them by that act, and 6 Geo. 4, c. 125, not extending to the local act. *The Eden*, 2 W. Rob. 442; 10 Jur. 296.

Dublin.]—A steam tug, carrying passengers between Kingstown Harbour and the North Wall, Dublin (both of which places are under the provisions of the Dublin Port and Docks Act, 1869, within the limits of the port of Dublin), is within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 354, and obliged to carry a pilot. *Dublin Port and Docks Board* v. *Shannon*, Ir. R. 7 C. L. 116. See also *The Meteor*, Ir. R. 9 Eq. 567.

Glasgow and Clyde.]—*Clyde Navigation Co.* v. *Barclay*, 1 App. Cas. 791; 36 L. T. 379; 3 Asp. M. C. 390—H. L. (Sc.)

Goole, Hull, and Humber.]—The employment of a Humber pilot is not compulsory upon a vessel which is being towed from one dock to another in the port of Hull, as a vessel is not, in such circumstances, either passing into or out of the port, within the terms of s. 22 of the Hull pilot act, or bound to or from the port, within the terms of s. 89. *The Maria*, L. R. 1 A. & E. 358; 16 L. T. 717; 15 W. R. 1113.

The employment of a licensed Goole pilot is generally compulsory upon vessels inward bound to Goole, including vessels belonging to that port; not, however, by the Hull pilot act, but by 6 Geo. 4, c. 125, ss. 58, 59, and 17 & 18 Vict. c. 104, s. 353. *The Killarney*, Lush. 427; 6 L. T. 908.

A collision occurred in the Humber Dock, Hull, between a fly-boat and a foreign schooner bound to the Prince's Dock. The schooner was in charge of a duly licensed Humber pilot, who had taken over the charge of the schooner while she was moored at a pier in the Humber from the pilot who had brought her in from sea. One sum was paid for the services of the two pilots:—Held, that the schooner was in charge of a pilot whose employment was compulsory by law. *The Rigborgs Minde*, 52 L. J., Adm. 74; 8 P. D. 132; 49 L. T. 232; 5 Asp. M. C. 123—C. A.

See also as to Humber pilotage, *Beilby* v. *Raper*, 3 B. & Ad. 284; *Hull Dock Co.* v. *Browne*, 2 B. & Ad. 43.

Ipswich.]—By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 353, the employment of pilots shall continue compulsory in all districts where it is compulsory at the time the act passed. By s. 379, ships employed in the coasting trade of the United Kingdom, when not carrying passengers, shall be exempted from compulsory pilotage in the Trinity House outport districts, which by s. 370, comprise any pilotage district for the appointment of pilots within which no particular provision is made by any act of parliament or charter. By the Ipswich Dock Act, 1852 (15 Vict. c. cxvi. s. 3), a former act, by which special provision was made for the appointment of pilots in the port of Ipswich, is repealed, and s. 91 enacts, as to the appointment of sub-commissioners for examining pilots, &c., in the words of s. 5 of 6 Geo. 4, c. 125, except that they are described as persons "resident within" the port of Ipswich, instead of "at":—Held, that s. 91 was not a "particular provision"; and that Ipswich was therefore a Trinity House outport district, and a coasting vessel not carrying passengers navigating that port was exempt from compulsory pilotage. *Hadgraft* v. *Hewith*, 44 L. J., M. C. 140; L. R. 10 Q. B. 350; 32 L. T. 720; 23 W. R. 911; 2 Asp. M. C. 573.

Leith.]—As to the powers of the Leith Trinity House to grant licences from Orfordness to the Nore, see *Hossack* v. *Gray*, 6 B. & S. 598; 34 L. J., M. C. 209; 11 Jur. (N.S.) 966; 12 L. T. 701; 13 W. R. 859.

Llanelly and River Burry.] — By by-laws made by the Commissioners for the Improvement of the Navigation of the River Burry under the provisions of the local acts (53 Geo. 3, c. clxxxiii. and 6 & 7 Vict. c. clxxxviii.), pilotage was made compulsory in the River Burry and the port of Llanelly. These by-laws were in force at the time of the coming into operation of the Merchant Shipping Act, 1854, and were acted upon by vessels trading to the port of Llanelly:—Held, that pilotage was compulsory. *The Ruby*, 59 L. J., Adm. 68; 15 P. D. 164; 63 L. T. 735; 39 W. R. 42; 6 Asp. M. C. 577—C. A.

Liverpool and Mersey.]—When a ship ready and about to proceed to sea leaves one of the Mersey docks at night in charge of a licensed pilot, and casts anchor in the river so as to be ready to cross the bar at the mouth of the river on the next morning's tide at an earlier hour than she could if she left the dock in the morning, the going into and casting anchor in the river is a step in the "proceeding to sea," within the meaning of the Mersey Docks and Harbour Board Act, 1858 (21 & 22 Vict. c. xcii. s. 139), and the employment of the pilot is compulsory under that section from the time of leaving dock, and if the ship breaks away from her moorings, and damages another vessel through the pilot's sole default, the owners will not be responsible. *The City of Cambridge* or *Wood* v. *Smith*, 43 L. J., Adm. 11; L. R. 5 P. C. 451; 30 L. T. 439; 22 W. R. 578; 2 Asp. M. C. 239.

When a vessel leaves a dock in the Mersey on her voyage to sea, and receives slight injuries to a yard-arm, necessitating repairs, and in consequence is anchored under the directions of the pilot in the river, intending to go to sea on the next day, the pilot remaining in charge, but on the next morning, before resuming her voyage and whilst still at anchor, she gets into collision, and does damage to another vessel, she is not "proceeding to sea" within the meaning of the 139th section of the Mersey Docks Act Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), and the pilot is not in charge by compulsion of law. *The Cachapool*, 7 P. D. 217; 46 L. T. 171; 4 Asp. M. C. 502.

By the Liverpool Pilot Act (5 Geo. 4 c. lxxiii. s. 37), in case the master of any ship outward bound shall proceed to sea, and shall refuse to take on board a pilot, he shall pay the pilot who shall first offer his service at a certain rate as if the pilot had piloted the vessel. On the 2nd of December a vessel left the Liverpool Docks with a pilot on board; on the 3rd the boat of the plaintiff, who was then employed by the owners in raising the vessel's anchor, was lost, through the carelessness of those on board the ship; at this time the master was not on board, and the vessel being employed by the post-office, was not to sail till the 4th of December, and her rigging was being completed:—Held, assuming an outward-bound vessel to be liable when proceeding to sea to take a pilot on board, still that this vessel was not proceeding to sea. *Rodrigues* v. *Melhuish*, 10 Ex. 110; 24 L. J., Ex. 26; 2 W. R. 518.

A foreign vessel bound for Liverpool took a pilot off Point Lynas, was brought to anchor in the Mersey, and there lay two or three days, waiting for want of water to dock. She was then conducted by the same pilot into dock. In proceeding towards the dock, a collision was occasioned by the pilot's default:—Held, that the vessel was not liable for the damage. *The Annapolis and The Johanna Stoll*, Lush. 295; 30 L. J., Adm. 201; 4 L. T. 417.

A duly-qualified Liverpool pilot having been employed to pilot a ship from sea into the Mersey and take her into dock, piloted her over the bar, but owing to the state of the tide being unable to dock her that day, anchored her in a clear berth in the river. The pilot remained in charge of the ship, and the next day the state of the weather being such as to render it unadvisable to take her into dock that day, she remained at anchor. In the course of that day, and whilst the pilot was in charge, the ship dragged her anchor and came into collision with a barque. In an action instituted by the owner of the barque against the ship, the court decided that the collision was caused solely by the negligence of the pilot in charge of the ship:—Held, that the owners of the ship were not answerable for the damage, for it was occasioned by the fault of a pilot acting in charge of the ship within a district where the employment of such pilot was compulsory by law. *The Princeton*, 47 L. J., Adm. 33; 3 P. D. 90; 38 L. T. 260; 3 Asp. M. C. 562.

Pilotage compulsory under 5 Geo. 4, c. lxxiii., s. 25, at Liverpool. *The Montreal*, 17 Jur. 538.

See also other Cases of Liverpool pilotage, *The Ocean Wave*, 6 Moore, P. C. (N.S.) 492; L. R. 3 P. C. 205; 23 L. T. 218. *Carruthers* v. *Sidebotham*, 4 M. & S. 77; 16 R. R. 392. *Att.-Gen.* v. *Case*, 3 Price, 302; 17 R. R. 566. *The Northampton*, 1 Spinks, 152. *The Agricola*, 2 W. Rob. 10; 7 Jur. 157.

London (Trinity House) and Outport Districts—No Compulsion at Place of Collision.]—A.'s vessel, belonging to the port of London, having taken on board a pilot from Dungeness to Gravesend, came in collision, through the pilot's negligence, with B.'s vessel, at a spot in the river Thames between Yantlett Creek and Gravesend:—Held, that, for pilotage purposes, Gravesend is the eastern limit of the port of London, and that the spot where the collision took place is therefore within the district where pilotage is compulsory; that A. was not liable to answer for the damage which B. sustained; and that the relation of master and servant did not exist between A. and the pilot. *General Steam Navigation Co.* v. *British Colonial Steam Navigation Co.*, 38 L. J., Ex. 97; L. R. 4 Ex. 238; 20 L. T. 581; 17 W. R. 741—Ex. Ch.

—— **Foreign Ship.**]—A Norwegian vessel, the "Hanna," bound from Sweden to London, and in charge of a duly licensed pilot, came wrongfully into collision with another vessel, off the Nore lightship:—Held, that there was no compulsion to take the pilot, and that therefore the owners of the "Hanna" were responsible for the damage. *The Hanna*, 36 L. J., Adm. 1; L. R. 1 A. & E. 283; 15 L. T. 334; 15 W. R. 263.

—— **Differential Dues.**]—Pilotage is compulsory on a foreign ship carrying passengers and trading between London and ports between Boulogne and the Baltic. The order in council of the 18th February, 1854, extending the exemptions from compulsory pilotage, applies only to British vessels. A charge for a compulsory pilotage on a foreign ship is not a differential due within the meaning of the Harbours and Passing Tolls Act, 1861, and is therefore not abolished by that act. *The Vesta*, 51 L. J., Adm. 25; 7 P. D. 240; 46 L. T. 492; 30 W. R. 705; 4 Asp. M. C. 515.

—— **Thames—Pilot licensed for Vessels of Lighter Draft.**]—The steamship "C.," drawing more than fourteen feet of water, was subject to compulsory pilotage in the river Thames. There being no fully qualified pilot available, the "C." took a pilot who was licensed to take charge of vessels drawing not more than fourteen feet of water, and in these circumstances came into collision with the "A." The collision was occasioned solely by the negligence of the pilot in charge of the "C.":—Held, that he was a "qualified pilot," within the meaning of s. 388 of the

Merchant Shipping Act, 1854, and that the owners of the "C." were therefore exempt from liability. *The Carl XV.*, [1892] P. 324; 61 L. J., Adm. 111—C. A.

Semble, a pilot qualified to conduct ships drawing more than fourteen feet water would have a right to supersede the pilot in charge who was not so qualified; but the latter would be entitled to a fair proportion of the pilotage fees. *Ib.*

—— **Trinity Outport District—Evidence as to Falmouth being.**]—See *The Juno*, 45 L. J., Adm. 105; 1 P. D. 135; 34 L. T. 741; 24 W. R. 902.

—— **"Qualified Pilot"—Exempted and Unexempted Ships.**]—A pilot licensed only to pilot ships exempt from compulsory pilotage is not entitled to supersede an unqualified pilot in charge of an unexempted ship, and is not a "qualified pilot" for this purpose within the meaning of s. 353 of the Merchant Shipping Act, 1854. *Stafford* v. *Dyer*, 64 L. J., M. C. 194; [1895] 1 Q. B. 566; 15 R. 287; 72 L. T. 114; 7 Asp. M. C. 568.

—— **Coasting Vessels.**]—An Irish vessel with a general cargo, trading between Belfast and London, and not laden with corn or grain, as specified in 46 Geo. 3, c. 97, s. 2, was not exempted under 52 Geo. 3, c. 39, s. 2, from taking a pilot on board, as such vessel could not be considered as a coasting vessel, or an Irish trader, using the navigation of the River Thames as a coaster. *Davidson* v. *Mekibben*, 6 Moore, 387; 3 Br. & B. 112.

The only reason why coasting vessels are exempted from the obligation of taking a pilot, is, that, from that frequent egress and ingress to the particular port, their masters must be presumed to be perfectly acquainted with the locality. *The Agricola*, 2 W. Rob. 10; 7 Jur. 157.

A vessel ordinarily occupied in the foreign trade, going from Liverpool to London in order to sail from London under advertisement for foreign parts, not carrying passengers, but having on board a cargo shipped at Liverpool and deliverable at London, is not a ship employed in the coasting trade of the United Kingdom within 17 & 18 Vict. c. 104, s. 379; and is compellable by s. 376 to take a pilot in the London district of the Trinity House. *The Lloyds* or *Sea Queen*, Br. & Lush. 359; 32 L. J., Adm. 197; 9 L. T. 236.

—— **London District—"Ship trading" to Place North of Boulogne.**]—By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 379, ships trading to any place in Europe north of Boulogne are, when not carrying passengers, exempted from compulsory pilotage in the London district. A British ship was one of a line of vessels making regular voyages from London to Japan and ports in the East, and back to London, and thence to ports in Europe north of Boulogne and back to London. On a return voyage from the East, she went as usual to London. She there discharged part of her cargo and her crew, and then with the bulk of her cargo and a crew of runners, but without passengers, proceeded to Holland:—Held, that she was a ship "trading to" a place north of Boulogne, and therefore exempted from compulsory pilotage in the London district. *Courtney* v. *Cole*, 56 L. J., M. C. 141; 19 Q. B. D. 447; 57 L. T. 409; 36 W. R. 8; 6 Asp. M. C. 169; 52 J. P. 20.

By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 379, sub-s. 3, the following ships when not carrying passengers shall be exempted from compulsory pilotage in the London district—that is to say, ships trading to Boulogne, or to any place in Europe north of Boulogne. A vessel while on a voyage from Liverpool to Hamburg was obliged by an accident to put into the Thames for repairs:—Held, that she was exempted by s. 379 from taking a pilot in the London district. *The Sutherland*, 56 L. J., Adm. 94; 12 P. D. 154; 57 L. T. 631; 36 W. R. 13; 6 Asp. M. C. 181.

In 17 & 18 Vict. c. 108, s. 379, the description, "ships trading to any place in Europe north of Boulogne," extends to vessels coming from a place north of Boulogne to the port of London. *The Wesley*, Lush. 268.

A vessel, not carrying passengers, on a voyage from Cronstadt to London, is exempted from compulsory pilotage in the Thames. *Ib.*

—— **"Ship trading from any Port in the London District to any Port of Europe north and east of Brest.**]—A ship carrying a cargo from a foreign port to London, and thence without taking any fresh cargo on board, proceeding to Rotterdam, is a "ship trading from" a "port in Great Britain within the London district to" a "port in Europe north and east of Brest," within the meaning of s. 625 of the Merchant Shipping Act, 1894, and therefore exempt from compulsory pilotage. *The Rutland*, 66 L. J., Adm. 105; [1897] A. C. 333; 76 L. T. 662—H. L. (E.)

—— **Ship Navigating within Limits of Port to which she belongs—Passengers—Distressed Seamen.**]—Distressed seamen taken on board a ship to be brought home under the provisions of the Merchant Shipping Act, 1894, are not "passengers" within the meaning of s. 625 of that act, and therefore a vessel which is in other respects within the provisions of that section, is not by reason of having such persons on board excluded from the exemptions from compulsory pilotage contained therein. *The Clymene*, 66 L. J., Adm. 152; [1897] P. 295; 76 L. T. 811; 46 W. R. 109.

—— **"Navigating within."**]—The words "navigating within," in 17 & 18 Vict. c. 104, s. 379, mean being within, and therefore a vessel belonging to the port of London, and coming from a foreign port, is exempt from the employment of a licensed pilot on the Thames. *The Stettin*, Br. & Lush. 199; 31 L. J., Adm. 208; 6 L. T. 613—P. C.

—— **"Loading"—25 & 26 Vict. c. 63, s. 41.**]—The word "loading" in 25 & 26 Vict. c. 63, s. 41, does not refer to the taking on board of cargo only. Therefore when a steamer anchored in Dartmouth Harbour, and took on board twenty tons of coal for the purposes of the voyage, and was bound for a place out of the outport district to a destination also out of it:—Held, that she was not exempt from the obligation to employ a pilot. *The Winston*, 53 L. J., Adm. 69; 9 P. D. 85; 51 L. T. 183; 5 Asp. M. C. 274—C. A. Affirming 31 W. R. 892.

—— **Cinque Ports.**]—By 6 Geo. 4, c. 125, s. 62, the master or mate of a vessel, being owner or part owner, and residing at Dover, Deal, or the Isle of Thanet, was exempt from a penalty for piloting his own ship from any of the places aforesaid up or down the rivers Thames or Medway, or into or out of any port within the jurisdiction of the Cinque Ports:—Held, that the clause limited the exemption to vessels navigated from Dover, Deal, or the Isle of Thanet. *Peake* v. *Skreech*, 7 Q. B. 603; 14 L. J., Q. B. 317. S. P., *Williams* v. *Newton*, 14 M. & W. 747; 15 L. J., Ex. 11.

See also as to pilotage in the London Trinity House districts, supra, cols. 780 seq.

—— **Passengers.**]—The master of a vessel belonging to the port of London and bound up the Thames, on a voyage from Australia to London with passengers on board, is required by law to employ a licensed pilot within the limits of the port of London. *The Hankow*, 48 L. J., Adm. 29; 4 P. D. 197; 40 L. T. 335; 4 Asp. M. C. 97.

A steamship carrying cargo and passengers from Boulogne to London is not bound, under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), to employ a pilot whilst navigating the river Thames, the general exemption continued from 6 Geo. 4, c. 125, s. 59, and the order in council of 18th February, 1854, by the Merchant Shipping Act, 1854, s. 353, not being overriden by s. 379, relating to Trinity House pilotage, and exempting such a ship only when not carrying passengers. *The Moselle*, 32 L. T. 570; 2 Asp. M. C. 586.

A British vessel carrying goods and passengers between Rotterdam and London, having a licensed pilot on board, ran down a ship. The collision took place in the Thames, within the Trinity House district, and was duly occasioned by the fault of the pilot:—Held, that the exemption from compulsory pilotage given by 6 Geo. 4, c. 125, s. 59. and 17 & 18 Vict. c. 104, s. 353, applied, and that the fact of the vessel having a licensed pilot on board, whose act alone occasioned the damage, did not exempt the owners from liability. *The Earl of Auckland*, Lush. 387; 15 Moore, P. C. 304; 5 L. T. 558; 10 W. R. 124.

The fifth exemption from compulsory pilotage in 17 & 18 Vict. c. 104, applies to vessels confining their voyages within the limits of the port to which they belong. As, however, all the exemptions under 6 Geo. 4, c. 125, were continued by 17 & 18 Vict. c. 104, the more extensive words used in the former act must be held to exempt from the necessity of taking a pilot any master of a ship so long as his vessel is within the limits of her port. In such case, therefore, if a collision occurs, the presence of a pilot gives no immunity to the owners. *The Stettin*, Br. & Lush. 199; 31 L. J., Adm. 208; 6 L. T. 613—P. C.

By 17 & 18 Vict. c. 104, s. 353, which continues all exemptions from compulsory pilotage existing immediately before the time when that act came into operation, the exemptions contained in 6 Geo. 4, c. 125, are continued, notwithstanding ss. 376, 379, and notwithstanding that 6 Geo. 4, c. 125, is repealed by 17 & 18 Vict. c. 120. *Reg.* v. *Stanton* or *Stanton* v. *Banks*, 8 El. & Bl. 445; 27 L. J., M. C. 105; 4 Jur. (N.S.) 10, 332; 6 W. R. 39.

At the time of a collision a man was on board the vessel in fault, to whom the master had agreed to give a free passage, and who messed with him and also assisted in working the ship:—Held, that the vessel was not carrying passengers so as to render it compulsory to take a pilot. *The Hanna*, 36 L. J., Adm. 1; L. R. 1 A. & E. 283; 15 L. T. 334; 15 W. R. 263.

An Irish trader (as described by 6 Geo. 4, c. 125, s. 59), carrying passengers, is compelled to employ a licensed pilot in the Thames. *The Temora*, Lush. 17; 2 L. T. 418.

It is not compulsory on a passenger ship to take a licensed pilot on board when she is not carrying passengers, and the owners are responsible for the negligence of the pilot, where they were not compellable to put him in charge of their vessel. *The Lion*, 6 Moore, P. C. (N.S.) 163; 38 L. J., Adm. 51; L. R. 2 P. C. 525; 21 L. T. 41; 17 W. R. 993.

The payment of a fare is necessary to constitute a passenger within the meaning of the compulsory pilotage sections of the Merchant Shipping Act (17 & 18 Vict. c. 104). *Ib.*

Where, therefore, the wife and father-in-law of the captain were on board a vessel (usually carrying passengers, but not on a passage voyage at the time), by invitation from the captain, without the privity of the owners, and they had neither paid, or agreed to pay, any fare, before a collision took place, such persons were held not to be passengers within the meaning of the act, so as to exonerate the owners from damage occasioned by the pilot's default. *Ib.*

Distressed seamen. See *The Clymene*, supra, col. 782.

—— **Vessel engaged in the Coasting Trade.**]—Pilotage held to be compulsory in the Thames for a steamship with part of her cargo on board bound from London to Venice by way of Cardiff, where she was to take in the remainder of her cargo. *The Winestead*, 64 L. J., Adm. 51; [1895] P. 170; 11 R. 720; 72 L. T. 91; 7 Asp. M. C. 547.

Tyne.]—The provisions of the 6 Geo. 4, c. 125, s. 55, do not extend to British vessels in the Tyne, and therefore the owner of a British vessel in that river in charge of a qualified pilot appointed by the Trinity House of Newcastle-upon Tyne, under the local act of 41 Geo. 3, c. lxxxvi., is not protected from liability for damage occasioned by the negligence of the pilot. *Tyne Improvement Commissioners* v. *General Steam Navigation Co.*, 8 B. & S. 66; 36 L. J., Q. B. 22; L. R. 2 Q. B. 65; 15 L. T. 487; 15 W. R. 178—Ex. Ch. S. P., *Dodds* v. *Embleton*, 9 D. & R. 27; 5 L. J. (O.S.) K. B. 65.

—— **Foreign Vessels.**]—Under the Tyne Pilotage Order Confirmation Act, 1865, Sched., s. 16, pilotage is not compulsory on foreign vessels entering the Tyne. *The Johann Sverdrup*, 56 L. J., Adm. 63; 12 P. D. 43; 56 L. T. 256; 35 W. R. 300; 6 Asp. M. C. 73—C. A.

—— **As to Pilotage in the Tyne for Foreign Ships under 41 Geo. 3, c. lxxxvi.**]—See *The Maria*, 1 W. Rob. 95.

Waterford.]—Under the Waterford Harbour Act, 9 & 10 Vict. c. ccxcii., it is not necessary to employ a pilot to shift a vessel from one berth to another. *The Victoria*, Ir. R. 1 Eq. 336.

Indian Rivers.]—A collision took place in the Cowcolly Roads, one of the channels in the

Hooghly River, near Calcutta. By an act of the Indian legislature, it is made compulsory upon the master to take a pilot on board in every port subject to the provisions of that act:—Held, first, that the Cowcolly Roads, the place of the collision, was not a port within the meaning of the act. *The Peerless*, Lush. 103; 13 Moore, P. C. 484; 30 L. J., Adm. 89.

11. THE REGULATIONS.

a. Generally.

Port Helm Rule of 1840.]—See *The Friends*, 1 W. Rob. 484; on appeal, 4 Moore, P. C. 314; *The Unity*, Swabey, 101; *The Duke of Sussex*, infra; *The Hope*, 1 W. Rob. 154; *The Immaganda Sara Clasina*, 7 Not. of Cas. 582.

Free and Close-hauled Ship—Rule in 1828.]—See *Handayside* v. *Wilson*, 3 Car. & P. 528.

Object of the Regulations.]—To prevent collisions and also to minimise their effect—per Lord Watson. *The Khedive, Stoomvaart Maatschappy Nederland* v. *P. & O. Steam Navigation Co.*, 52 L. J., Adm. 1; 5 App. Cas. 876, 903; 43 L. T. 610; 29 W. R. 173; 4 Asp. M. C. 567—H. L. (E.)

How Construed.]—The regulations, being intended for seafaring people, are to be construed literally—per Jessel, M. R. *The Libra*, 6 P. D. 139, 142; 45 L. T. 161; 4 Asp. M. C. 429. And see *The Margaret*, 9 P. D. 47; *The Dunelm*, 53 L. J., Adm. 81; 9 P. D. 164; 51 L. T. 214; 32 W. R. 570; 5 Asp. M. C. 304; *The Beryl*, 53 L. J., Adm. 75; 9 P. D. 137; 51 L. T. 554; 33 W. R. 191; 5 Asp. M. C. 321.

Departure from the Regulations.]—See 2. PRESUMPTION OF FAULT, supra, cols. 707 seq., and Art. 27, infra, cols. 816 seq.

Application of the Regulations—Risk of Collision.]—The regulations apply before risk exists, if it is manifest that risk is about to arise. *The Beryl*, supra.

Cases where risk was held to exist. *The Jesmond and The Earl of Elgin*, 8 Moore, P. C. (N.S.) 179; L. R. 4 P. C. 1; 25 L. T. 514; 1 Asp. M. C. 150; *The Bougainville and The James C. Stevenson*, L. R. 5 P. C. 316; 28 L. T. 822; 2 Asp. M. C. 1—P. C.; *The Franconia*, 2 P. D. 8; 35 L. T. 721; 25 W. R. 197; 3 Asp. M. C. 295—C. A.; *The Seaton*, 53 L. J., Adm. 15; 9 P. D. 1; 49 L. T. 747; 32 W. R. 600; 5 Asp. M. C. 191.

Case in which it was held not to exist (semble). *The Banshee*, 57 L. T. 841; 6 Asp. M. C. 221.

In an action for collision, where both vessels were held to blame for breach of the provisions of article 18, the court of appeal asked the nautical assessors the questions asked in *The Beryl* (53 L. J., Adm. 75; 9 P. D. 137), and upon their being answered in the negative dismissed the appeal. *The Oporto*, 66 L. J., Adm. 49; [1897] P. 249—C. A.

—— **Narrowing of Lights.**]—Where two steamships are approaching one another at sea in such a position as to pass in safety, the closing in and coming more into line of the masthead and a side light is not necessarily such an indication that the ship is altering her course so as to cause risk of collision and to impose upon the other ship the duty to obey article 18 of the regulations. *The Albis*, 73 L. T. 664; 8 Asp. M. C. 92.

—— **What constitutes Risk of Collision.**]—See *The Mangerton*, Swabey, 120; 2 Jur. (N.S.) 420; *The Cleopatra*, Swabey, 135; *The Ericsson*, Swabey, 38; *The Duke of Sussex*, 1 Not. of Cas. 161; 1 W. Rob. 274; *The Dumfries*, Swabey, 63, 125; 4 W. R. 708; *The Rose*, 2 W. Rob. 1.

The regulations only apply at a time when two vessels have approached so near to one another that, if either of them does anything contrary to the regulations, risk of collision will be involved. *The Banshee*, 57 L. T. 841; 6 Asp. M. C. 221—C. A.

The regulations are not applicable until the other ship's course and distance can with ordinary care be approximately ascertained. *The Roma and The Ava*, 2 Asp. M. C. 182; *The James Watt*, 2 W. Rob. 270; *The Bougainville and The James C. Stevenson*, L. R. 5 P. C. 316; 28 L. T. 822; 21 W. R. 653; 2 Asp. M. C. 1; *The Great Eastern*, 3 Moore, P. C. (N.S.) 31; 11 L. T. 5.

Instantaneous Compliance.]—A steamship did not stop and reverse as soon as she might have done:—Held, that she was to blame, but that a reasonable time for compliance with the regulations must be allowed. *The Emmy Haase*, 53 L. J., Adm. 43; 9 P. D. 81; 50 L. T. 372; 32 W. R. 880; 5 Asp. M. C. 216; *The Ngapoota*, 66 L. J., P. C. 88; [1897] A. C. 391; infra, col. 818.

Alteration of Helm in Fog.]—An alteration of the helm in fog upon a guess as to the distance, course, and speed of the other ship is not necessarily negligence. *The Vindomora*, [1891] A. C. 1; 63 L. T. 749; 6 Asp. M. C. 569—C. A.

Alteration of Helm for Greater Safety.]—An alteration of the helm for greater safety where there is no risk of collision is not negligence. *The Sylph*, Swabey, 233; and see *The Franconia*, 2 P. D. 8; 35 L. T. 721; 25 W. R. 197; 3 Asp. M. C. 295—C. A.

Regulations must be obeyed in Time.]—If you adopt a measure at an improper time, it does not take away the culpability of not having done it before—per Dr. Lushington. *The Stadacona*, 5 Not. of Cas. 371.

Close Shaving.]—Is negligence. *The John Brotherick*, 8 Jur. 276; *and see Cases* supra, col. 700.

Regulations to be complied with until Ships Clear.]—A ship that by porting had apparently determined risk of collision held in fault for not stopping and reversing when the other ship by perverse starboarding created fresh risk. *The Arratoon Apcar*, 59 L. J., P. C. 49; 15 App. Cas. 37; 62 L. T. 331; 38 W. R. 481; 6 Asp. M. C. 491—P. C.

Practice Contrary to Regulations is Illegal.]—*The Sylph*, 2 Spinks, 75; *The Unity*, Swabey, 101; *The Hand of Providence*, Swabey, 107; *The Black Prince*, 15 Moore, P. C. 122; *The Velocity*, 6 Moore, P. C. (N.S.) 263; 39 L. J., Adm. 20; L. R. 3 P. C. 44; 21 L. T. 686; 18 W. R. 264.

Darkness of Night no Excuse.]—Darkness of the night is no excuse for disobeying the rules of navigation. *The Flint*, 6 Not. of Cas. 271.

Sea Regulations applied in Thames.]—See *The Cologne*, 9 Moore, P. C. (N.S.) 352; L. R. 4 P. C. 519; 27 L. T. 769; 21 W. R. 273; 1 Asp. M. C.

484—P. C.; *The Velocity*, 6 Moore, P. C. (N.S.) 263; 39 L. J., Adm. 20; L. R. 3 P. C. 44; 21 L. T. 686; 18 W. R. 264; *The Concordia*, L. R. 1 A. & E. 93; 12 Jur. (N.S.) 77; 14 L. T. 896.

—— **In the Suez Canal.**]—*The Hilda and The Australia*, 12 Ct. of Sess. Cas. (4th ser.) 76.

—— **In the Clyde.**]—*The Owl and The Ariadne, Little* v. *Burns*, 9 Ct. of Sess. Cas. (4th ser.) 118.

—— **Foreign Ship in the Solent—Application of Statutory Rules of 1854.**]—A foreign ship in the Solent within three miles of the coast is not subject to the rules of navigation contained in 17 & 18 Vict. c. 104, ss. 296, 297, 298. *The Saxonia*, Lush. 410; 15 Moore, P. C. 262; 31 L. J., Adm. 201; 8 Jur. (N.S.) 315; 6 L. T. 6; 10 W. R. 431.

Course of Other Ship in Doubt.]—A ship should not alter her helm decisively so long as the course of the other ship is in doubt. *The Bougainville and The James C. Stevenson*, L. R. 5 P. C. 316; 28 L. T. 822; 21 W. R. 653; 2 Asp. M. C. 1; *The James Watt*, 2 W. Rob. 270.

b. Cases on the Regulations.

(Arranged under the several Articles of the Regulations of 1897.)

PRELIMINARY.

Scope of the Rules; Definitions; corresponding with Article 1 *of the Regulations of* 1880 *and* 1884.

Tug lying to.]—A tug at sea waiting for employment with her engines idle and her fires banked is "under steam," and must keep out of the way of a sailing ship. *The Jennie S. Barker* and *The Spindrift*, 44 L. J., Adm. 20; L. R. 4 A. & E. 456; 33 L. T. 318; 3 Asp. M. C. 82. (N.B. The tug in this case, though stated in the report to be "lying to," had no canvas set.—ED.)

A tug lying with her fires banked under jib and foresail, with her helm lashed, was run into by a steamship:—Held, the steamship alone to blame. *The Helvetia*, 3 Asp. M. C. 43, n.

ARTICLE 1.

Ships' Lights; corresponding with Article 2 *of* 1880 *and* 1884.

Old Law as to Lights.]—A brig held in fault for a collision caused by her having no light (1854). *The Fairy*, 1 Spinks, 298. S. P. (1858), *The Calla*, Swabey, 465.

Before the statutory regulations were in force it was not necessarily negligence in a ship to have no light. *The Victoria*, 3 W. Rob. 49; *The Iron Duke*, 2 W. Rob. 377; 4 Not. of Cas. 94; on appeal, 4 Not. of Cas. 585; *The Londonderry*, 4 Not. of Cas. Suppl. xxxi. But see as to a ship at anchor *The Saxonia*, Lush. 410; 15 Moore, P. C. 262; 31 L. J., Adm. 201; 8 Jur. (N.S.) 315; 6 L. T. 6; 10 W. R. 431.

Duty to replace Lights Carried Away.]—See *The Saxonia*, supra; *The Aurora and The Robert Ingram*, Lush. 327.

Lights being Trimmed—Out by Accident.]—It is no excuse for not carrying lights that they were being trimmed, or that they went out by accident. *The C. M. Palmer and The Larnax*, 29 L. T. 120; 21 W. R. 702; 2 Asp. M. C. 94; *The Victoria*, 3 W. Rob. 49; *The Sylph*, 2 Spinks, 75.

Lights Obscured by Steamship's Smoke.]—A steamship unnecessarily obscuring her lights with her own smoke is in fault. *The Rona and The Ava*, 29 L. T. 781; 2 Asp. M. C. 182.

Clear Night—is no excuse for not carrying lights. *The City of London* (or *The London*), *Morgan* v. *Sim*, Swabey, 245, 300; 11 Moore, P. C. 307; 5 W. R. 678.

Vessel casting off from Moorings.]—When a vessel casting off from moorings in a navigable river places herself at night partly athwart the fairway, so that her regulation lights cannot be seen by vessels astern of her coming up the river, she is bound to make use of some conspicuous signal to warn them of her position. *The John Fenwick*, 41 L. J., Adm. 38; L. R. 3 A. & E. 510; 26 L. T. 322; 1 Asp. M. C. 249.

A steamship which, in getting under way in the Thames to go up the river between sunset and sunrise, is compelled to go astern and partly athwart the river in order to get clear ahead, and whose regulation lights are not visible to vessels coming up the river, is bound to take every possible precaution to warn approaching vessels of her position, and to use the best light she has on board for that purpose. *Ib.*

Placing a service lantern, ordinarily used to give light in discharging the cargo, over the stern, is not a sufficient precaution. *Ib.*

A vessel neglecting such precaution commits a breach of the regulations, and will be held to blame if a collision ensues. *Ib.*

Vessel coming to Anchor.]—A steamer manœuvring to come to an anchor in a place and manner such that her regulation lights cannot be seen by an approaching vessel is bound to give timely notice of her presence by shewing a light or some other sufficient means. *The Philotaxe*, 37 L. T. 540; 3 Asp. M. C. 513.

Vessel Aground or Stationary.]—When a vessel is aground in a place where her ordinary riding light cannot be distinguished by approaching vessels, and where vessels are not expected to lie, it is her duty to exhibit a light on a mast or some elevated position, and to have a look-out to give warning to approaching vessels of her position by the best means in her power. *The Thomas Lee*, 35 L. T. 406; 3 Asp. M. C. 260.

Dumb-barge in Thames.]—In a cause of damage by collision in the Thames a dumb-barge:—Held, not bound to have exhibited a light. *The Owen, Wallis*, 43 L. J., Adm. 36; L. R. 4 A. & E. 175; 30 L. T. 41; 22 W. R. 695; 2 Asp. M. C. 206.

When a collision occurs between a dumb-barge without lights and a steamer on a dark night in the Thames, there is no presumption of law that the steamer is to blame. *The Swallow*, 36 L. T. 231; 3 Asp. M. C. 371—C. A.

Flare.]—A sailing vessel having a steamship approaching on her starboard bow at night, burnt flare-up lights to attract her attention:—Held, that the burning of a flare is not forbidden by the regulations of 1884; held further, that whether a vessel is to blame or not for shewing a flare-up light must depend upon whether or not the exhibition of the flare is calculated to mislead. *The Merchant Prince*, 54 L. J., Adm. 79; 10 P. D. 139; 53 L. T. 914; 34 W. R. 231; 5 Asp. M. C. 520.

ARTICLE 2.

(*Steamships' Lights; corresponding with Article 3 of* 1880 *and* 1884.)

Under Way.]—A vessel driven from her anchors by a gale of wind, and setting sail to get out to sea, is, even if wholly unmanageable, under way, and is bound to exhibit coloured lights. *The George Arkle*, Lush. 382.

A vessel with her anchor down, but not actually holden by and under the control of it, is under way within the meaning of the Admiralty Regulation of 1858, and is bound to exhibit coloured lights. *The Esk and The Gitana*, 38 L. J., Adm. 33; L. R. 2 A. & E. 350; 20 L. T. 587; 17 W. R. 1064.

A sailing ship hove to is under way. *The London*, supra; *The James*, Swabey, 60; 10 Moore, P. C. 162; 4 W. R. 353—P. C.; *The Rosalie*, 50 L. J., Adm. 3; 5 P. D. 243; 44 L. T. 32; 4 Asp. M. C. 384.

And a tug driving at sea and waiting for employment. *The Jennie S. Barker and The Spindrift*, supra, col. 787; but see *The Helvetia*, 3 Asp. M. C. 43, n.

A sailing barge dropping up the river stern foremost, assisted by her anchor ahead, held not to be a "sailing vessel under way" within the Thames rules, and so not required to carry side lights. *The Indian Chief*, 58 L. J., Adm. 25; 14 P. D. 24; 60 L. T. 240; 6 Asp. M. C. 362.

Presumption of Fault.]—When a collision occurs at night, and the lights of one of the ships are not burning at the time when the vessels come in sight, and the court is not satisfied that the want of those lights is occasioned by circumstances over which the crew of the ship had no control, she must, even if the want of the lights did not contribute to the collision, be held to blame under the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), s. 17. *The Hibernia*, 31 L. T. 805; 24 W. R. 60; 2 Asp. M. C. 454.

Trinity Ballast Lighters.]—A lighter of sixty tons burthen was proceeding under sail in the Thames, above Gravesend, at night, without any light being exhibited on board her, and came into collision with a steam vessel. In a suit instituted on behalf of the owners of the lighter to recover in respect of the damage done to the lighter by reason of the collision, it was proved that the lighter was ordinarily employed in the river, and was not a sea-going vessel:—Held, that the sea regulations did not impose upon the lighter any obligation to carry any light, and that the lighter was not to blame for having no light. *The C. S. Butler*, L. R. 4 A. & E. 238; 31 L. T. 549; 23 W. R. 113; 2 Asp. M. C. 237.

Infringement of Regulations as to Lights.]—A trawler with a bright light at her masthead, contrary to the regulations, held not in fault for collision, the other ship not having in fact seen it. *The Chusan*, 53 L. T. 60; 5 Asp. M. C. 476.

—— **Previously to 36 & 37 Vict. c. 85, s. 17.**]—*The Emperor and The Lady of the Lake*, Holt's Rule of the Road. 37; *The Bougainville and The James C. Stevenson*, infra.

A vessel not shewing a light as required by law held under 14 & 15 Vict. c. 79, s. 28, not to be in fault for a collision where the absence of the light did not contribute to the collision. *The Panther*, 1 Spinks, 31.

Dumb-barge.]—A screw steamship had just come out of the Regent's Canal Dock, in the river Thames, before daylight on a December morning, when she came into collision with a dumb-barge which was drifting up the river with the flood tide, and without having any light exhibited:—Held, that the steamship might, under the circumstances, have kept out of the way of the barge, and that she ought to have done so, and that she was alone to blame for the collision. *The Owen Wallis*, 43 L. J., Adm. 36; L. R. 4 A. & E. 175; 30 L. T. 41; 22 W. R. 695; 2 Asp. M. C. 206.

Position and Exhibition.]—A barque's sidelights were so placed in the mizzen rigging that the centre of the lights did not project beyond the gunwale. They were two feet six inches within the broadest part of the vessel, and at a distance of more than 350 feet with the masts in line they could not be seen from a window forty feet above the deck of another vessel:—Held, not to be a sufficient compliance with the regulations as to lights. *The Germania*, 37 L. J., Adm. 59; 19 L. T. 20. Affirmed on appeal, 21 L. T. 44—P. C.

The law does not appoint any particular place at which the lights should be fixed, but they ought to be placed so as to be properly visible. *The Bougainville and The James C. Stevenson*, *Beal* v. *Marchais*, L. R. 5 P. C. 316; 28 L. T. 822; 21 W. R. 653; 2 Asp. M. C. 1.

Lamps duly screened and fixed on stands secured to the paul-bitts of the windlass are not placed in a proper position, as required by the regulations of 1863. *The Gustav*, 9 L. T. 547.

Lights Obscured—Effect of—Duty of Vessels.]—*The Bougainville and The James C. Stevenson*, *Beal* v. *Marchais*, supra.

Where the light of one vessel was invisible, the vessel was not previously to 36 & 37 Vict. c. 85, s. 17, on that account held to have contributed to the collision where the other vessel pursued a course which produced the collision. *Ib.*

When a steamship is approaching a sailing ship, and does not know what course the other ship is pursuing, it is her duty (whether the lights of the other vessel are visible or not) to take no decisive movement until she can ascertain it. *Ib.*

When a steamer sights a sailing vessel in the night-time at a distance of three miles, but, owing to the fact that the sailing vessel's lights are not visible, cannot ascertain the course of the sailing vessel, it is the duty of the steamer to slacken speed and wait to ascertain that course before adopting any decided manœuvre for the purpose of avoiding the sailing vessel. If the steamer immediately on sighting the sailing vessel adopts such a manœuvre, as by porting, and a collision ensues without fault on the part of the sailing vessel, the steamer is alone to blame. *Ib.*

When a steamship is approaching another, whose exact course cannot be at once ascertained by reason of her lights being obscured by her own smoke, it is the duty of the former to slacken speed and to wait till that course is ascertained before taking any decided step to avoid the other vessel; if, before having ascertained the exact course of the other, she, without slackening speed, executes a manœuvre which, although appearing to be right at the time, contributes to

the collision, she will be to blame. *The Rona, The Ava*, 29 L. T. 781 ; 2 Asp. M. C. 182—P. C.

It is negligence on the part of a steamer to go at full speed under steam and sail before the wind whilst her smoke is blown over her bows so as to obscure her lights, and to prevent her from seeing and from being seen by other ships approaching from an opposite direction. *Ib.*

A steamer seeing a ship's lights close ahead of her, and being unable to make out the lights or the course of the ship carrying them, should slacken speed until she is able to ascertain the meaning of the lights, and so be able to avoid the vessel carrying them. *The Fanny M. Carvill*, 44 L. J., Adm. 34 ; 13 App. Cas. 455, n. ; 32 L. T. 646 ; 24 W. R. 62 ; 2 Asp. M. C. 565.

See further, as to the effect of obscuration of lights, *The Duke of Buccleugh*, [1891] A. C. 310 ; 65 L. T. 422 ; 7 Asp. M. C. 68—H. L. (E.) ; *The Hermod*, 62 L. T. 670 ; 6 Asp. M. C. 509.

Lights Shifted — Tempestuous Weather — Partially Obscured.]—A brig of 239 tons, beating to windward, encountered such weather as to render it justifiable that her side-lights should be removed from the place where they were usually carried to the after-part of the ship near the taffrail. In this latter position the lights were so placed as to be obscured to the extent of a point, or a point and a half, on either bow. The brig came into collision with a barque on the opposite tack :—Held, that the circumstances of the case, while justifying the shifting of the lights, did not justify their being obscured as above mentioned, and that the brig be deemed to be in default under the 17th section of the Merchant Shipping Act, 1873. *The Tirzah*, 48 L. J., Adm. 15 ; 4 P. D. 33 ; 39 L. T. 547 ; 27 W. R. 584 ; 4 Asp. M. C. 55.

Effect of Non-exhibition of Lights.]—In a cause of collision between a steamship and a sailing vessel, occasioned by the fault of the steamship, it was proved that the sailing vessel had failed to comply with the regulations regarding lights, having either shewn no lights, as she was bound, or if she had any lights, that the lights could not be seen till the collision was too imminent for prevention :—Held, that the collision might have been avoided if the sailing vessel had obeyed the regulations, and that though the omission to exhibit proper lights might be immaterial where it is clearly shewn that the absence of such lights was not the cause of the collision, and did not conduce to it, yet where it is proved that a vessel has not shewn proper lights the onus lies on such vessel to shew that the non-compliance with the regulations was not the cause of the collision, which the sailing vessel failed to do. *The Fenham*, 6 Moore, P. C. (N.S.) 501 ; L. R. 3 P. C. 212 ; 23 L. T. 329.

Light Extinguished.]—A steamship (in 1849) held in fault for a collision caused by one of her side-lights being extinguished. *The Rob Roy*, 3 W. Rob. 190.

Seagoing Ship — Thames Sailing Ballast Lighter.] — A Trinity House sailing ballast lighter held not to be a seagoing ship required by the regulations to carry lights. *The C. S. Butler*, L. R. 4 A. & E. 238 ; 31 L. T. 549 ; 23 W. R. 113 ; 2 Asp. M. C. 408.

Ship dredging with Anchor—Side-lights.]—A vessel dredging with her anchor down is not required to carry side-lights. *The Smyrna*, cited Lush. 385.

Sailing Vessel towing Another.]—A brigantine with a cutter towing astern came into collision with another ship, in the Bristol Channel, after dark. The brigantine had the regulation side-lights exhibited, but the cutter had only a white light exhibited at her masthead. The brigantine was sailing close-hauled on the starboard tack, whilst the other ship was going free : —Held, that the regulations as to lights had been infringed by the cutter, and that the vessel towing her was to be deemed in fault for the collision by virtue of the provisions of the 17th section of the Merchant Shipping Act, 1873. *The Mary Hounsell*, 48 L. J., Adm. 54 ; 4 P. D. 204 ; 40 L. T. 368.

Wrong Lights—Presumption of Negligence.] —A ship carrying her side-lights with screens shorter than required by the regulations is not to be deemed in fault if the shortness of the screens could not by any possibility have contributed to the collision. *The Fanny M. Carvill*, 44 L. J., Adm. 34 ; 13 App. Cas. 455, n. ; 32 L. T. 646 ; 24 W. R. 62 ; 2 Asp. M. C. 569—P. C.

Where two ships incurred damage in a collision, and it was found that one of them was to blame for improper navigation, and that the other had infringed the regulations with respect to lights :—Held, that, in the absence of proof that such infringement could not possibly have contributed to the collision, the damage must be divided according to the ordinary rule of the court of admiralty. *The Fanny M. Carvill*, supra, approved. *The Hochung, The Lapwing, China Merchants' S. N. Co.* v. *Bignold*, 51 L. J., Adm. 92 ; 7 App. Cas. 512 ; 47 L. T. 485 ; 31 W. R. 303 ; 5 Asp. M. C. 39—P. C.

Absence of Lights—No Evidence that it contributed to Collision.]—An action for damages by collision in the Thames was brought by the owners of a barge against the owners of a steamer. The steamer had been obliged to alter her course in order to avoid another barge, and the barge with which the collision took place was last of three in tow of a tug, and did not carry a light as directed by the rules of the Thames conservancy ; but there was no evidence that the want of a light contributed to the collision :—Held, that the steamer was not to blame, and that she might have acted differently if the barge had carried a light. The action was dismissed without costs ; but semble that in successful admiralty appeals the appellants will have the costs of the appeal. *The Swansea* v. *The Condor*, 48 L. J., Adm. 33 ; 4 P. D. 115 ; 40 L. T. 442 ; 27 W. R. 748 ; 4 Asp. M. C. 115—C. A.

ARTICLE 3.

Towing Lights ; corresponding with Article 4 *of* 1880 *and* 1884.

Towing Lights.]—The object of the rule as to towing lights is to shew other ships that the towing ship is incumbered. *The America and The Syria*, 43 L. J., Adm. 30 ; L. R. 6 P. C. 127, 131 ; 31 L. T. 24 ; 22 W. R. 927 ; 2 Asp. M. C. 350.

ARTICLE 4.

Ships not under Command ; corresponding with Article 5 *of* 1880 *and* 1884.

Steamship making Five Knots.]—The steamship "P. Caland," owing to an accident to her

machinery, was making way at a speed of between four and five knots, instead of her normal speed of eleven knots; she could be steered, but could not reverse as easily as before the accident. She was carrying the three red lights in place of the white light:—Held, that under the above circumstances the "P. Caland" could not be said to have been "not under command" within the meaning of the Regulations. *The P. Caland, The P. Caland and Freight (Owners)* v. *Glamorgan Steamship Co.*, 62 L. J., Adm. 41; [1893] A. C. 207; 1 R. 138; 68 L. T. 469; 7 Asp. M. C. 317—H.L. (E.)

Ship parted from Anchor.]—A ship parted her cable in a gale, drove over a sand, and came into collision with another to leeward. She had no red light exhibited:—Held, that there was no statutory presumption of fault. *The Buckhurst*, 51 L. J., Adm. 10; 6 P. D. 132; 46 L. T. 108; 30 W. R. 232; 4 Asp. M. C. 484.

Steamship Riding by Chains — Anchors unshackled.]—Where a steamship has become unmanageable and is riding head to wind by her chains with anchors unshackled, it is her duty to exhibit the three red lights prescribed by Article 5 (a) of 1884, and to keep her steam up in order that she may immediately be brought under control should the necessity arise. *The Faedrelandet*, 64 L. J., Adm. 122; [1895] P. 205; 72 L. T. 650; 8 Asp. M. C. 1—C. A.

ARTICLE 5.

Sailing Ships and Ships in Tow; corresponding with Article 6 of 1880 *and* 1884.

Ship Hove-to—Under Way.]—A ship hove-to is under way within the meaning of the Regulations. *The Rosalie*, 50 L. J., Adm. 3; 5 P. D. 245; 44 L. T. 32; 4 Asp. M. C. 384. *The London* or *City of London*, 11 Moore, P. C. 307; Swabey, 245, 306; 5 W. R. 78. *The James*, 11 Moore, P. C. 162; Swabey, 55, 60; 4 W. R. 353. *The Pennsylvania*, 23 L. T. 55.

Trawler at work—Under way.]—A trawler with her gear down, fishing, is under way. *The Dunelm*, 53 L. J., Adm. 81; 9 P. D. 164; 51 L. T. 214; 32 W. R. 970; 5 Asp. M. C. 304, infra, col. 794. See also *The Edith*, Ir. R. 10 Eq. 345. *The Englishman*, 47 L. J., Adm. 9; 3 P. D. 18; 37 L. T. 412; 3 Asp. M. C. 506.

Ship bringing up — Under Way.]—A ship coming to an anchor and hauling down her jibs is under way. *The Adriatic*, 33 L. T. 102; 3 Asp. M. C. 16.

Ship Driving.]—Semble, a ship parted from her anchors and driving about in an unmanageable state should not carry her side-lights. *The Buckhurst*, supra, sed qu.

ARTICLES 6 AND 7.

Small Craft; corresponding with Article 7 of 1880 *and* 1884.

As to what craft may carry these lights. See *The Livingstone*, Swabey, 579; *The Calla*, Swabey, 465; *The Tirzah*, 48 L. J., Adm. 15; 4 P. D. 33; 39 L. T. 547; 4 Asp. M. C. 55.

ARTICLE 8.

Pilot Boats; corresponding with Article 9 of 1880 *and* 1884.

Pilot Boat—Unlicensed Pilots.]—Semble, a boat with a pilot on board or serving ships, is a pilot boat, whether the pilot is licensed or not. *The Mary Hounsell*, 48 L. J., Adm. 54; 4 P. D. 204; 40 L. T. 368; 4 Asp. M. C. 101.

ARTICLE 9.

Fishing Boats; corresponding with Article 10 of 1880 *and* 1884.

Trawler's Lights.]—A trawler carrying a white light at the masthead, as well as sidelights, infringes the regulations of 1884. *The Chusan*, 53 L. T. 60; 5 Asp. M. C. 476.

A French trawler and a schooner were in collision before sunrise. The trawler was about about to shoot her net, and had a white light at her masthead and no sidelights:—Held, that the trawler had not complied with the regulations of 1863. *The Englishman*, 47 L. J., Adm. 9; 3 P. D. 181; 37 L. T. 412; 3 Asp. M. C. 506.

A trawler going over the ground at the rate of a quarter of a knot in the hour with her trawl down held not in fault (under article 9 of the regulations of 1863) for exhibiting a bright white light only. *The Edith*, Ir. R. 10 Eq. 345.

Trawler at Work.]—A steam trawler, whilst engaged in trawling at the rate of two and a half knots an hour through the water and four and a half knots an hour over the ground, carrying a single white light, was run down by the "D.": it being admitted that the "D." was to blame, the question arose whether the trawler was not also to blame for not carrying sidelights:—Held, that the trawler was also to blame, since she was a vessel under way, and therefore subject to article 3 of 1880, and not to article 9 of 1863:—Held, on appeal, that the decision was right; but on the ground that though the trawler was one of a class of vessels within article 9 of 1863, she, in order to be "stationary" within the meaning of that article, was bound not to go faster than was necessary to keep herself under command whilst fishing, and that as her speed was greater than was necessary for so doing, she was, at the time of the collision, within article 3 of the regulations of 1880. *The Dunelm*, 53 L. J., Adm. 81; 9 P. D. 164; 51 L. T. 214; 32 W. R. 970; 5 Asp. M. C. 304—C. A. And see *The Edith*, supra.

A sailing vessel engaged in trawling is not bound to exhibit to an approaching vessel the red pyrotechnic lights required by the order in council of the 24th of June, 1885, unless there is risk of collision. *The Orion*, 60 L. J., Adm. 90; [1891] P. 307; 65 L. T. 500; 7 Asp. M. C. 88.

By article 10 (*d*) of 1884 "if a vessel when fishing becomes stationary, in consequence of her gear getting fast to a rock or other obstruction, she shall shew the light and make the fog signal for a vessel at anchor":—Held, that the rule is applicable although the weather, when the vessel becomes stationary, is clear. *The Warwick*, 15 P. D. 189; 63 L. T. 561; 6 Asp. M. C. 545.

The plaintiff's steam trawler, above twenty tons register, while fishing with the trawl down in the night and going at the rate of one and a half knots an hour, came in collision with the

defendants' sailing ship. The trawler was carrying a lantern in front of her foremast head, shewing a white, green, and red light, and about six or seven feet below it a white light, according to order in council of December 30th 1884. The trawler did not attempt to get out of the way of the sailing ship:—Held, that the trawler was not to blame for the collision; that article 17 of 1884 did not apply, inasmuch as there were "special circumstances," within the meaning of article 23 which authorised a departure from article 17, that by carrying the lights which she did, she apprised other vessels that she was not able to get out of the way, for such lights as she carried were the regular lights of steam vessels engaged in trawling which are not bound by the requirements of article 17. *The Tweedsdale*, 58 L. J., Adm. 41; 14 P. D. 164; 61 L. T. 371; 37 W. R. 783; 6 Asp. M. C. 430.

Row Boat at Anchor.]—"Open boat" in article 10 (*f*) (of the Regulations of 1884) held not to apply to a boat propelled entirely by oars. *Carse* v. *North British Steam Packet Co.*, 22 Ct. of Sess. Cas. (4th ser.) 475.

A fishing boat, in 1862, held, under 17 & 18 Vict. c. 104, not to be required to carry the statutory lights; but held to be in fault for not shewing a light. *The Olivia*, Lush. 497; 6 L. T. 398.

ARTICLE 10.

Overtaken Ship; Stern Light; corresponding with Article 11 *of* 1880 *and* 1884.

Stern Light — Law previous to 1880.] — Although a ship is, under some circumstances, bound to keep a look-out astern, and to shew a light or to give a signal to another ship overtaking her, and evidently unable to see her, nevertheless, where a steamer going at a high rate of speed in a fair way overtakes a sailing ship shewing no light or signal, and does not see her until too near to avoid a collision, although keeping a good look-out, the steamer will be held alone to blame, if a lower rate of speed would have given the steamer time to avoid the collision upon sighting the sailing ship. *The Earl Spencer*, 33 L. T. 235; 3 Asp. M. C. 4—P. C.

On a dark morning before daybreak in October, a small schooner with a crew of only four men was beating up into the outer harbour of Holyhead when she was run into from behind and sunk by a large paddle-wheel steamer which was entering the harbour at a speed of between ten and eleven knots. To recover for the damage sustained in the collision a cause of damage was brought by the owners of the schooner against the steamer:—Held, first, that the steamer was to blame for entering the harbour at too great a speed. *Ib.*

Held, also, that under the circumstances of the case the exhibition of a stern light was not obligatory on the schooner, and that the steamer was alone to blame for the collision. *Ib.*

It is primâ facie the duty of an overtaking ship to keep out of the way of a ship ahead of her; but if the latter ship sees another approaching her from a direction where her lights are not visible, and which vessel she had reason to suppose does not, in fact, whether keeping a good look-out or not, see her, and is likely to come into collision with her, it is her duty to give some warning to the overtaking ship, not necessarily by exhibiting a light, but by some signal, such as the firing of a gun, the shewing a light, or otherwise, which will indicate her whereabouts to the overtaking ship, and call the attention of that ship to the danger of a collision. *The Anglo-Indian*, 33 L. T. 233; 23 W. R. 882; 3 Asp. M. C. 1—P. C.

Where one vessel during the night time is overtaking another within the meaning of article 17 of 1863, although the leading vessel may be in such a position that the following vessel cannot see the regulation lights of the leading vessel, the latter is not bound, under ordinary circumstances, to give a signal or shew a light to the following vessel. *The Chanonry and The Leverington*, 42 L. J., Adm. 58; 28 L. T. 284; 1 Asp. M. C. 569.

A vessel, unless there is apparent danger, is not guilty of negligence in not shewing a light to a vessel following her. *The City of Brooklyn*, 1 P. D. 276; 34 L. T. 932; 24 W. R. 1056; 3 Asp. M. C. 230—C. A.

Apart from the regulations, it is a proper measure for a ship being overtaken at night to shew a light to the overtaking vessel. *The Hannah Park and The Lena*, 14 L. T. 675. And see *The John Fenwick*, 41 L. J., Adm. 38; L. R. 3 A. & E. 500; 26 L. T. 322; 1 Asp. M. C. 249.

Law Subsequent to 1880 — Character and Position of Stern Light.]—Article 11 of 1884—which directs that a ship being overtaken by another shall shew from her stern to such last-mentioned ship a white light, or a flare-up light—is infringed if such light is carried in any way other than is necessary to warn overtaking vessels. Where therefore such light is so placed or carried as to be visible over part of the area of a side-light it must be taken that there is a breach of article 11. *The Palinurus*, 57 L. J., Adm. 21; 37 W. R. 266—C. A. Affirming 13 P. D. 14; 58 L. T. 533; 36 W. R. 768; 6 Asp. M. C. 271; but see *Ib.*, as to 36 & 37 Vict. c. 65, s. 17—C. A.

In an action for collision it appeared that one of a pair of ordinary binnacle lamps in the plaintiff's vessel was temporarily removed from its place and used as a stern light:—Held, that in the absence of affirmative evidence of its efficiency on the particular occasion it could not be deemed to be such a light as is required by article 11 of 1884. *The Patroclus*, 13 P. D. 54; 58 L. T. 774; 36 W. R. 928; 6 Asp. M. C. 285.

A smack with her trawl down had a globular white light exhibited from her weather crosstree partially hidden from overtaking vessels by her sails, and did not exhibit any other white light or flare-up to an overtaking steamer:—Held, that this was an infringement of article 11 of 1884. *The Pacific*, 53 L. J., Adm. 67; 9 P. D. 124; 51 L. T. 127; 33 W. R. 124; 5 Asp. M. C. 263.

Binnacle Light not sufficient.] — The provisions of article 11 of 1880, that a ship being overtaken by another shall shew from her stern a light, are not complied with where the only light astern is the binnacle light in the binnacle. *The Breadalbane*, 7 P. D. 186; 46 L. T. 204; 4 Asp. M. C. 505.

Fixed Stern Light.]—The "D.," in tow of a steam-tug, was exhibiting from her stern a fixed bright light, when she was run into by the "S.," which was overtaking her. There were a great many vessels in the vicinity, some of which had overtaken and passed the "D.," and others were

overtaking her :—Held, that in these circumstances it was not an infringement of the regulations of 1884 to carry a fixed stern light. *The Stakesby*, 59 L. J., Adm. 72 ; 15 P. D. 166 ; 63 L. T. 115 ; 39 W. R. 80 ; 6 Asp. M. C. 532.

The stern light is (1880) not required to be fixed. See *The Breadalbane*, infra, col. 807.

It is a breach of article 11 (of 1884) to carry the stern light fixed. *The Imbro*, infra.

How long to be Exhibited.]—A smack being overtaken by a steamship shewed a stern light until risk of collision had apparently determined. The steamship then altered her helm and a collision followed :—Held, that the smack was not in fault. *The Reiher*, 45 L. T. 767 ; 4 Asp. M. C. 478 (overruled in *The Main*, infra).

The stern light must be shewn not once and for a short time only, but from time to time while the ship is "being overtaken" within the meaning of the article. *The Essequibo*, 57 L. J., Adm. 29 ; 13 P. D. 51 ; 58 L. T. 596 ; 6 Asp. M. C. 276.

One exhibition of a flare-up light by a vessel which is being overtaken by another is not a sufficient compliance with article 11 of 1884, but the light should be exhibited from time to time so long as there continues to be an overtaking vessel. *The Essequibo*, supra, approved. *The Basset Hound*, 6 R. 764 ; 71 L. T. 12 ; 7 Asp. M. C. 467—C. A.

Overtaking Ship, what is.]—An overtaking vessel within the meaning of article 11 is one which is approaching another from aft, and is more than two points abaft the beam of the foremost ship. *The Imbro*, 58 L. J., Adm. 49 ; 14 P. D. 73 ; 60 L. T. 936 ; 37 W. R. 559 ; 6 Asp. M. C. 392.

Where one of two ships is abaft the beam of the other in such a position that the hinder ship cannot see the sidelights of the leading ship, and the former is going at a greater speed than the latter, and getting nearer to her, the latter is a "ship which is being overtaken by another" within the meaning of article 11 of 1884, even though the hinder ship broadens on her quarter ; and she is in such circumstances bound to shew a stern light in sufficient time to enable the other, by the exercise of reasonable precautions, to avoid risk of collision. *The Main*, 55 L. J., Adm. 70 ; 11 P. D. 132 ; 55 L. T. 15 ; 34 W. R. 678 ; 6 Asp. M. C. 37 —C. A.

ARTICLE 11.

Riding Light ; corresponding with Article 8 *of* 1880 *and* 1884.

Ship ashore in Fairway.]—A ship ashore in a fairway must exhibit a light to warn other ships. *The Industrie*, 40 L. J., Adm. 26 ; L. R. 3 A. & E. 303 ; 24 L. T. 446 ; 19 W. R. 728 ; 1 Asp. M. C. 17 ; *Kidson* v. *McArthur*, 5 Ct. of Sess. Cas. (4th ser.) 936.

Ship Dredging with Anchor.]—A ship dropping up with the tide stern foremost is not at anchor within the Thames rules. *The Indian Chief*, 58 L. J. Adm., 25 ; 14 P. D. 24 ; 60 L. T. 240 ; 6 Asp. M. C. 362.

Riding Lights in Mersey Sea Channels.]—Vessels at anchor in the sea approaches to the River Mersey are required by 37 & 38 Vict. c. 52, s. 1, to exhibit a white light at the main or mizzen mast in addition to the white light prescribed by 25 & 26 Vict. c. 63, sched., Table C., article 7, and a vessel omitting to exhibit such additional light will, where the omission may have caused or contributed to a collision, be held to blame under 36 & 37 Vict. c. 85, s. 17. *The Lady Downshire*, 48 L. J. Adm. 41 ; 4 P. D. 26 ; 39 L. T. 236 ; 27 W. R. 648 ; 4 Asp. M. C. 28.

Ship at anchor with Side Lights up—Thames Rules.]—See *The Wega*, infra, col. 835.

Ship riding to her Chains—Anchor unshackled.]—See *The Faedrelandet*, supra, col. 793.

ARTICLE 12.

Flare ; new.

Old Law.]—For the old law as to flare, see *The Merchant Prince*, 54 L. J., Adm. 79 ; 10 P. D. 139 ; 53 L. T. 914 ; 34 W. R. 231 ; 5 Asp. M. C. 520 ; *The John Fenwick*, 41 L. J., Adm. 38 ; L. R. 3 A. & E. 500 ; 26 L. T. 322 ; 1 Asp. M. C. 249.

ARTICLE 13.

Men-of-War's Lights ; corresponding with Article 26 *of* 1880 *and* 1884.

The Regulations and Government Ships.]—Although the regulations are not, under the merchant shipping acts, binding on her majesty's ships, if the latter submit to the jurisdiction the question of negligence will be tried by the regulations. *H.M.S. Topaze*, 10 L. T. 659 ; 12 W. R. 923 ; *H.M.S. Supply*, 12 L. T. 799.

——**Foreign Ships of War.**]—*The Lord Byron*, cited, Maude & Pollock on Shipping (4th ed.), 607, n.

ARTICLE 14.

Steamship under Sail ; new.

ARTICLE 15.

Fog Signals ; corresponding with Article 12 *of* 1880 *and* 1884.

Sailing Vessel in Stays—Fog-horn.]—Where a sailing vessel is tacking in a fog, she is not relieved during the manœuvre from giving the signals prescribed by article 12 of 1884, and it is her duty until she gets the wind on to the side other than that on which she had had it to treat herself as still on the same tack on which she was when she began to go about and to make the prescribed signal, and only to change that signal when she gets the wind on the other side. *The Constantia*, 62 L. T. 236 ; 38 W. R. 272 ; 6 Asp. M. C. 478.

Mechanical Fog-horn.]—A barque provided only with a mouth fog-horn came into collision during a fog with a steamship. The fog-horn was duly sounded before the collision, and was heard by those on board the steamship, and those on board the steamship neglected for some time after they heard the fog-horn to stop or reverse the engines. The steamship was held to blame. The barque was held to be deemed in fault for not using a fog-horn to be sounded by mechanical means, as required by article 12 of 1880. The circumstance that the barque left the port a few days before the regulations came into force was

held not to afford any valid excuse for the neglect of those in charge of her to furnish her with a fog-horn to be sounded by mechanical means. *The Love Bird*, 6 P. D. 80; 44 L. T. 650; 4 Asp. M. C. 427. See also *The Pennsylvania and The Steamship Westphalia*, infra.

Accident to Mechanical Fog-horn.]—Where the mechanical fog-horn of a sailing ship breaks down, and a mouth-horn is made use of in its place, the departure from the regulations is necessary, and the vessel is not to blame. *The Chilian*, 45 L. T. 623; 4 Asp. M. C. 478.

Fog-bank—Ship concealed in.]—In the neighbourhood of a fog-bank in which other ships may be hidden, it is the duty of a vessel to sound her fog-horn, though not in the fog herself. *The Milanese*, 45 L. T. 151; 4 Asp. M. C. 218, 438—H. L. (E). *The N. Strong*, [1892] P. 105; 67 L. T. 299; 7 Asp. M. C. 194, infra, col. 801.

Vessel at Anchor—Bell.]—A vessel at anchor in the Mersey held in fault for a collision with a ferry steamship in a fog, caused by her not ringing her bell. *The North American and The Wild Rose*, 14 L. T. 68.

Thames Barge in Fault for not ringing Bell.]—See *The Blue Bell*, infra, col. 835.

Old Law.]—Apart from the regulations, it is the duty of a ship in a fog to sound her fog-horn. *The Carron*, 1 Spinks, 91.

ARTICLE 16.

Speed in Fogs; corresponding with Article 13 *of* 1880 *and* 1884.

Whistle heard ahead—Duty of Steamer—Speed.]—A steamship, the "D.," in a dense fog off Ushant, proceeding at slow speed, heard a whistle about three points on her starboard bow; the whistle was repeated several times and answered by the "D." In about a quarter of an hour from the first sound of the whistle the steamship "E." appeared about a length from the "D." crossing from starboard to port. The engines of the "D." were reversed full speed, but a collision occurred. The court having held both ships to blame, the owners of the "D." appealed:—Held, by the court of appeal, that the "D." was also to blame, for she should have been brought to as complete a standstill as possible, without getting out of command, at an early period after the first sound of the whistle, and should have also stopped and reversed sooner. *The Dordogne*, 54 L. J., Adm. 29; 10 P. D. 6; 51 L. T. 650; 33 W. R. 360; 5 Asp. M. C. 328—C. A.

Where two steamships, invisible to each other by reason of a thick fog, find themselves gradually approaching each other until they are within a few ships' length of each other, each of them ought at once to stop and reverse her engines in compliance with article 18 (of 1884), unless the whistle of the other clearly indicates that she is upon such a course that she will pass clear without involving risk of collision, or unless there are circumstances which make it impossible or dangerous to stop and reverse the engines. *The Ceto*, 14 App. Cas. 670; 62 L. T. 1; 6 Asp. M. C. 479—H. L. (E.)

And see further as to the duty of steamships in fog, article 23, post, cols. 816, seq.

A collision happened between the steamship "I." and the barque "Z." in a fog. It was proved that the "I." had reduced her speed so far as was possible without stopping her way altogether:—Held, that she had not infringed article 13 of 1880. *The Zadok*, 53 L. J., Adm. 72; 9 P. D. 114; 50 L. T. 695; 32 W. R. 1003; 5 Asp. M. C. 252.

It is the duty of those who have charge of a steamship in motion during a dense fog on first hearing the whistle of a steamship in such close proximity to them that risk of collision between the two vessels is involved, to bring their vessel immediately to a standstill on the water, and not execute any manœuvre with their helm until they have definitely ascertained the position and course of the other ship. *The Kirby Hall*, 52 L. J., Adm. 31; 8 P. D. 71; 48 L. T. 797; 31 W. R. 658; 5 Asp. M. C. 90.

If an officer in charge of a vessel in a fog hears a whistle ahead, he must act sooner than if it is heard from any other quarter, and on the probability that the vessel which is sounding the whistle is coming towards him—Per Lord Esher, M.R. *The Ebor*, 11 P. D. 25; 54 L. T. 200; 34 W. R. 448; 5 Asp. M. C. 560.

A steamship, navigating in a fog at a moderate speed, hearing a whistle sounded many times, indicating that a steamer was approaching her, and had come very near to her, so near that if the vessels had then been stopped they would have been within hailing distance, is bound, under the 16th article, not only to stop the motion of her engines, but to reverse them, so as to stop the motion of the vessel, and ought not to wait until the vessels sight each other, when such a manœuvre may be too late. *The Frankland and The Kestrel*, *Morton* v. *Hutchinson*, 9 Moore, P. C. (N.S.) 365; L. R. 4 P. C. 529; 27 L. T. 633; 1 Asp. M. C. 489.

In a dense fog it is the duty of a steam vessel to anchor as soon as circumstances will permit. *The Otter*, L. R. 4 A. & E. 203; 30 L. T. 43; 22 W. R. 557. *The Girolamo*, 3 Hag. Adm. 169.

A steam vessel proceeding, though at a moderate speed, under steam, in a dense fog, after she had reached a proper anchorage-ground:—Held, to blame for so doing. *Ib.*

Where an officer in charge of a steamship in a dense fog hears a whistle apparently two or three points on the bow, but cannot be sure of the bearing within a point or two, and does not know the heading of the vessel whistling, it is his duty to diminish the speed of his vessel to the utmost to give him time to ascertain the manœuvres of the other vessel, and for that purpose he must either reduce the speed until the engines are only just moving, or he must stop them, but he need not necessarily continue to keep them stopped, but only sufficiently to diminish his way, and when he is beginning to lose steerage way, then, and only then, may put them on again, but as slowly as is possible. The fact of a steam-whistle alleged to have been blown in a fog not being heard by those on approaching ship is not necessarily proof that there was a bad look-out on the approaching ship, as the direction in which and the distance from which the sound would be heard is uncertain. *The Rosetta*, 59 L. T. 342; 6 Asp. M. C. 310.

A sailing vessel in tow of a tug and a steamship were approaching one another in a fog. The captain of the steamship heard a whistle five points on his starboard bow, and two minutes later, he heard a second whistle which he considered to be broader on his starboard bow and still a considerable distance off. He kept on, and after that heard another whistle more ahead,

whereupon he stopped and reversed his engines, and gave three blasts. He then saw the other vessels about a hundred yards off, and a collision took place, and the sailing vessel sank. Jeune, P., decided that the sailing vessel alone was to blame:—Held, applying the rule laid down by the house of lords in *The Ceto* (14 App. Cas. 670), that the captain of the steamship ought to have stopped on hearing the second whistle, inasmuch as he had failed to prove (the burden of proof being on him) that there were indications of such a kind as would lead a seaman of reasonable care and skill to the conclusion that the vessels would pass well clear of one another without danger of collision, and that, under the circumstances, both vessels were to blame. *The Knarwater*, 63 L. J., Adm. 65; 6 R. 784—C. A.

Duty of Steamer before entering Fog.]—A collision occurred between a steamer and a sailing vessel, about five to six miles S.W. of the Longships in the English Channel. Immediately before the collision the steamer was proceeding S.W. b. S. at the rate of eight or nine knots, and approaching a bank of fog, in which the sailing ship was, but did not sound her whistle, or reduce her speed. The sailing vessel (a barque) was heading N.N.W. with a moderate south-easterly breeze of between three and four, and, under all plain sail, except her mainsail, spanker and light sails, was making about four knots an hour. In an action of damage by collision:—Held, that the steamer was to blame for excessive speed, and that, though it was not an infraction of the terms of articles 12 (*a*), 13, of 1884, she ought, as a matter of precaution, to have whistled on approaching the fog, and also to have reduced her speed:—Held, also, that the sailing vessel had not infringed article 13, as, considering the locality, she was not proceeding at a rate of speed beyond what was necessary to keep her well under command. *The N. Strong*, [1892] P. 105; 67 L. T. 299; 7 Asp. M. C. 194.

Alteration of Helm.]—Where those in charge of a steamship in a dense fog hear the whistle of another steamship on either bow, but not so broad that they may reasonably infer that she will clear their vessel, they ought not to manœuvre with the helm before seeing the other vessel. *Ib.*

The plaintiffs' vessel, while proceeding in a dense fog, heard the whistle of the defendants' vessel about three and a half points on her starboard bow, and thereupon starboarded her helm. A collision, however, occurred, as the defendants' vessel struck her on her starboard quarter:—Held, that, under the circumstances, the plaintiffs' vessel was not to blame for starboarding her helm. There is no general rule that a vessel when proceeding in a fog is not entitled to act with her helm, but that each case must depend upon the special circumstances. *The Vindomora*, 14 P. D. 172; 38 W. R. 69—C. A. And see *The Kirby Hall*, supra.

"Moderate Speed"—Steamship.]—The officer in charge of a steamer on hearing a whistle almost right ahead should reduce her speed to as low a rate as possible, only keeping her under command; by omitting to do so he had not gone at a "moderate" speed within the meaning of article 13 of 1880. *The Dordogne*, supra, col. 799, commented on—per Lord Esher, M.R. *The Ebor*, supra, col. 800.

"Moderate speed" in a river of narrow channel means that a vessel shall be brought nearly to a standstill, whether the whistle or foghorn of another vessel is heard or not; but in the open sea the article need not be so strictly construed, unless a whistle or foghorn is heard—per Brett, M.R. *The Dordogne*, supra.

A collision happened between the steamship "I." and the barge "Z." in a fog. It was proved that the "Z." was proceeding at more than four knots an hour:—Held, an infringement of article 13 of 1880, for the term "moderate speed" means that a vessel is to reduce her speed so far as she can consistently with keeping steerage way. *The Zadok*, 53 L. J., Adm. 72; 9 P. D. 114; 50 L. T. 695; 32 W. R. 1003; 5 Asp. M. C. 252.

A steamship going twelve and a half knots during fog in mid-ocean held in fault. *The Europa*, 14 Jur. 627.

If a steamer in a fog cannot reduce her speed sufficiently to comply with article 13 of 1884 without occasionally stopping her engines, it is the duty of those in charge of her to stop them. *The Resolution*, 60 L. T. 430; 6 Asp. M. C. 363. Cf. *The Rosetta*, 59 L. T. 342; 6 Asp. M. C. 310.

A steamer going at the rate of seven knots an hour ran into a barque. The collision occurred in the Atlantic Ocean, in the direct line to New York, about 200 miles to the east of Sandy Hook. There was at the time a thick fog, and the barque was not seen till within a ship's length of the steamer. The barque, though hove-to, was making headway at the rate of about a mile an hour. A bell was frequently sounded on board the barque, but no foghorn was used:—Held, that the steamer was alone to blame for the collision, because she was going at an improper rate of speed, and because wrong and contradictory orders were given after the barque was sighted. *The Pennsylvania*, 23 L. T. 55—P. C.

The rate of speed proper for a steamer must depend on circumstances, but in a thick fog and at a part of the ocean where frequently a great number of vessels are congregated, seven knots an hour is too great. *Ib.*

The barque was wrong in not using a foghorn as required by the admiralty regulations; but though a foghorn would have been heard further than a bell, yet the neglect to use a foghorn was not the cause of the vessels coming into the position which caused the collision. *Ib.*

When a steamship bound to the westward in the English Channel, when off the Caskets, and ten miles therefrom, was running at a speed of eight or nine knots an hour in a dense fog:—Held, that the rate of speed was unlawful. *The Westphalia* (*Steamship*), 24 L. T. 75; 1 Asp. M. C. 12.

A steamer in a dense fog is bound to go as slow as it is possible for her to go and maintain steerage way. *Ib.*

In the locality mentioned the omission of a sailing vessel in a dense fog to sound her foghorn until she heard the whistle of a steamer quite near, was great neglect on her part. The horn should be continually sounded from the moment fog sets in. *Ib.*

Four to five knots an hour is not a moderate speed for a steamer in a thick fog in the Baltic twenty-five miles east of Gothland. *The Magna Charta*, 25 L. T. 512; 1 Asp. M. C. 193—P. C.

What is moderate speed depends upon the circumstances of each case. *The Zadok*, supra. S. P., *The Europa*, 14 Jur. 627. *The Dordogne*,

supra. *The Elysia*, infra. *The Ebor*, supra. *The City of Brooklyn*, 1 P. D. 276; 34 L. T. 932; 24 W. R. 1056; 3 Asp. M. C. 230—C. A. *The Owl and The Ariadne*, 9 Ct. of Sess. Cas. (4th ser.) 118.

Apart from the regulations, excessive speed in fog is negligence. *The Juliet Erskine*, 6 Not. of Cas. 633. *The Lord Saumarez*, 6 Not. of Cas. 600

—— **Sailing Ship.**]—What is a "moderate speed" for a sailing ship in a fog depends on the place where the ship happens to be and her handiness, and is not necessarily proportioned to or less than the maximum speed she can make under the circumstances. A speed of about five knots in the case of a sailing ship out in the Atlantic Ocean is a "moderate speed," and, in compliance with this rule, the sailing ship being at the time under all plain sail, and going as fast as she can with the wind on her quarter. *The Elysia*, 46 L. T. 840; 4 Asp. M. C. 540—C. A.

When a ship in tow of a steam-tug and in charge of a duly licensed pilot who has the control of both vessels, is navigating a river in a fog so dense that the banks of the river cannot be seen, and those on board the tug and ship in tow do not know in what direction they are going, it is negligence on the part of both vessels to proceed. *Smith* v. *St. Lawrence Tow-boat Co.*, L. R. 5 P. C. 308; 28 L. T. 885; 21 W. R. 569; 2 Asp. M. C. 41.

A barque with nearly all sail set, going five knots in a frequented part of the English Channel in a fog, held in fault under article 13 of 1884. See, per Hannen, P., as to the duty of a sailing ship in fogs. *The Zadok*, 53 L. J., Adm. 72; 9 P. D. 114; 50 L. T. 695; 32 W. R. 1003; 5 Asp. M. C. 252.

A sailing ship carrying a press of sail on a foggy night:—Held, not in fault for the collision, which was said to be inevitable accident. *The Ebenezer*, 2 W. Rob. 206.

A sailing ship in a fog must go at a speed at which it will be possible to avoid another ship when seen. Sailing ships under a press of sail in a fog held not in fault. *The Itinerant*, 2 W. Rob. 236.

A schooner under all plain sail in the Bristol Channel held in fault for not going at a moderate speed in fog. *The Beta*, 9 P. D. 134; 51 L. T. 154; 33 W. R. 190; 5 Asp. M. C. 276. S. P., *The Virgil*, 2 W. Rob. 201.

Excessive Speed—Inevitable Accident.]—A vessel going too fast in fog cannot sustain the defence of inevitable accident. *The Europa*, 14 Jur. 627. S. P., *The Juliet Erskine*, 6 Not. of Cas. 633. And see *The Smyrna*, 2 Moore, P. C. (N.S.) 447; 10 Jur. (N.S.) 977; 11 L. T. 74. *The Marpesia*, 8 Moore, P. C. (N.S.) 468; L. R. 4 P. C. 212; 26 L. T. 333; 1 Asp. M. C. 261.

Ferry-boat running in Fog.]—A ferry steamship has no right to get under way in thick weather when she can do so only with risk to other ships. *The North American and The Wild Rose*, 14 L. T. 68, 547. S. P., *The Perth*, 3 Hag. Adm. 414. *The Victoria*, 3 W. Rob. 49.

—— **Knowledge of Vessels in Track.**]—A steam ferry-boat started in a dense fog to cross a navigable river, those in charge of her having been informed that vessels were anchored in or near her track. The ferry-boat, although navigated with all ordinary care, ran into and damaged a ship at anchor:—Held, that the ferry-boat was to blame. *The Lancashire*, L. R. 4 A. & E. 198; 29 L. T. 927; 2 Asp. M. C. 202.

Speed when passing through Fishing Grounds.]—A sailing ship going six and a half knots over fishing ground on a very dark night held in fault for collision with a trawler. *The Pepperell*, Swabey, 12.

Running through Roadstead.]—A vessel is not justified in running through a crowded roadstead in thick fog. See *The Victoria*, 3 W. Rob. 49; *The George*, 4 Not. of Cas. 161; *The Lochlibo*, 7 Moore, P. C. 427.

In Thames—Dredging with Anchor in Fog.]—See *The Aguadillana*, 60 L. T. 897; 6 Asp. M. C. 390.

Speed of Mail Ships.]—It is no excuse for excessive speed that the ship was carrying mails. *The Vivid*, *Churchward* v. *Palmer*, 10 Moore, P. C. 472; 4 W. R. 755; in court below, Swabey, 88.

As to Speed generally.]—*See* 2. NEGLIGENCE, ii. SPEED, supra, col. 690.

ARTICLE 17.

Steering and Sailing Rules; Sailing Ships; corresponding with Article 14 *of* 1880 *and* 1884.

Old Rule as to close-hauled and free Ship—Port and Starboard Tack.]—By the law maritime, a vessel sailing free, or a steamship, is bound to give way to a vessel close-hauled; the vessel close-hauled is not bound to alter her course, but at night is bound to exhibit a sufficient light in time to enable the other to avoid collision. *The Saxonia*, Lush. 410; 15 Moore, P. C. 262; 31 L. J., Adm. 201; 8 Jur. (N.S.) 315; 6 L. T. 6; 10 W. R. 431.

If a vessel at sea is going close-hauled to the wind, and another meeting her is going free, the rule of the sea is for the latter vessel to go to leeward; and although such vessel may either go to leeward or windward as she best can, yet she ought, as a general rule, to suppose that the vessel going to windward will keep her position. *Handayside* v. *Wilson*, 3 Car. & P. 528.

The rule of the river is, that if a light vessel is going free, and a loaded vessel is running close-hauled to the wind, it is the duty of the loaded vessel to keep her course, and of the vessel going free to bear away. *Sills* v. *Brown*, 9 Car. & P. 601.

The general rule of navigation where two vessels are close-hauled and nearing one another, is that the one on the port tack should give way, and the one on the starboard tack keep her luff; but this rule will not excuse the vessel on the starboard tack not taking other measures to prevent a collision if circumstances render them necessary. *The Lady Anne*, 15 Jur. 18.

A barque held solely to blame for causing a collision off the Lizard for not giving way upon a dark night to a small schooner, close-hauled to the wind on the starboard tack under close-reefed sails. *The Fortune*, *Mackay* v. *Roberts*, 9 Moore, P. C. 357. S. P., *The Gazelle*, 5 Not. of Cas. 101.

When two vessels are approaching each other, nearly on the same course, and both have the wind free, each vessel is bound to port her helm and run to starboard of the other; but when one vessel is close-hauled the ship that has the wind free is bound to make way for the close-hauled

ship. *The Chancellor*, *Williams* v. *Gutch*, 14 Moore, P. C. 202 ; 4 L. T. 627.

A ship with the wind on the port beam held in fault for a collision with another on the starboard tack close-hauled (1836). *The Chester*, 3 Hag. Adm. 316.

Semble, under the old rule of seamen a vessel on the port tack, whether close-hauled or not, bore up for another on the starboard tack. *The Stranger*, 6 Not. of Cas. 36.

The old rule was for the ship on the larboard tack to bear up, and for the other to keep her reach. *The John Brotherick*, 8 Jur. 276. S. P., *The Mary Stewart*, 2 W. Rob. 244. *The Jupiter*, 3 Hag. Adm. 370.

The free ship gives way to one close-hauled. *Jamieson* v. *Drinkald*, 5 L. J. (O.S.) C. P. 30.

Under the old law a ship with the wind on the quarter was bound to go astern of a ship close-hauled. *The Dumfries*, Swabey, 125.

Ships on opposite tacks ; both held in fault, one for want of look-out and not porting, the other for starboarding. *The Washington*, 5 Jur. 1067.

The old port-helm rule applied to two sailing ships with the wind free meeting on opposite courses. *The London Packet*, 2 Not. of Cas. 501. *The Seringapatam*, 2 W. Rob. 506 ; 5 Not. of Cas. 61.

A ship with the wind free held in fault for delaying too long to keep out of the way of another close-hauled. *The Colonia*, 3 Not. of Cas. 13, n.

A full-rigged ship with the wind free crossing a brig and a schooner close-hauled upon the same tack was held in fault for approaching the latter so close that, upon the schooner going about, a collision with the brig was inevitable. *The Mobile*, Swabey, 69, 127 ; 10 Moore, P. C. 467.

"Giving way" in the Trinity house rule of 1840, meant going under a vessel's stern. *The Rose*, 2 W. Rob. 1.

Collier on starboard tack held in fault for bearing up to a galliot on the port tack (1834). *The Jupiter*, 3 Hag. Adm. 320.

Whether under the old law a ship close-hauled on the starboard tack meeting another end on, or nearly so, was required to port her helm was doubtful. See *The Betsey*, 1 Spinks, 34, n.: *The Clarence*, 1 Spinks, 206 : *The Halcyon*, Lush. 100 : *Chadwick* v. *City of Dublin Steam Packet Co.*, 6 El. & Bl. 771 ; 3 Jur. (N.S.) 207 : *The Dumfries*, Swabey, 125.

Under the old law (semble) the port-tack ship was required to bear up where the course of the other ship was doubtful. *The Traveller*, 2 W. Rob. 197 ; *The Ann and Mary*, 2 W. Rob. 189 ; *The George*, 5 Not. of Cas. 368.

Under 14 & 15 Vict. c. 79, s. 27, a vessel close-hauled on the port tack and another with the wind free on the starboard tack were required both to port. *The Wansfell*, 1 Spinks, 269.

Duty of Ship required to Keep out of the Way.]—A ship required to keep out of the way of another might, under former regulations, do so in any way she thinks fit. *The Bougainville and The James C. Stevenson*, L. R. 5 P. C. 316 ; 28 L. T. 822 ; 21 W. R. 653 ; 2 Asp. M. C. 1. S. P., *The Nor*, 30 L. T. 576 ; 22 W. R. 30 ; 2 Asp. M. C. 264 : *The Great Eastern*, 3 Moore, P. C. (N.S.) 31 ; 11 L. T. 5.

Sailing Vessel Hove-to on Port Tack.]—A sailing vessel hove-to on the port tack is bound to keep out of the way of a crossing vessel under sail close-hauled on the starboard tack. *The Rosalie*, 50 L. J., Adm. 3 ; 5 P. D. 245 ; 44 L. T. 32 ; 4 Asp. M. C. 384.

Two vessels hove-to on opposite tacks with their helms lashed a-lee held to be within 17 & 18 Vict. c. 104, s. 296, requiring them to port their helms. *The James*, Swabey, 60 ; 4 W. R. 353—P. C. And see *The Eleanor and The Alma*, 2 Mar. Law Cas. (O.S.) 240 ; *The London*, 6 Not. of Cas. 29.

Ship reefing Topsails.]—A vessel engaged in reefing topsails held in fault for not porting. *The Blenheim*, 1 Spinks, 285.

A brig on the port tack reefing topsails was struck at night by a schooner on the starboard tack :—Held, that owing to the darkness the collision happened without fault in either ship ; action dismissed without costs. *The John Buddle*, 5 Not. of Cas. 387.

A barque on the port tack, engaged in furling topsails, held in fault for not giving way. *The City of Carlisle*, Br. & Lush. 363 ; 11 L. T. 33.

Close-hauled Ship and Free Ship.]—A ship close-hauled on the port tack held in fault for pertinaciously standing on, the other ship with the wind free being also in fault. *The Commerce*, 3 W. Rob. 287.

Port and Starboard Tack.]—A vessel on the starboard tack that obstinately kept her course and struck the other ship before she had gathered way on the port tack held in fault. *The Ida and The Wasa*, 15 L. T. 103.

Duty of Ship required to keep her Course.]—*See* ARTICLE 21, infra, col. 814.

Duty of Ship on Port Tack.]—A vessel whose duty it is to keep out of the way should do so at once ; if a collision occurs in consequence of her close shaving, she is in fault. *The John Brotherick*, 8 Jur. 276.

Port-tack Ship hailed to keep her Luff.]—A vessel on the port tack hailed by the other on the starboard tack to keep her luff held not in fault for doing so. *The Carolus*, 3 Hag. Adm. 343, n.

"Close-hauled"—Meaning of.]—The wind being somewhere from S. to S.S.E. the sloop "Constantine" heading N.N.E. fell in with the cutter "Spring," heading W. by S. to leeward :—Held, that it was the duty of the "Constantine" to keep out of the way, and of the "Spring" to keep her course. *The Spring*, L. R. 1 A. & E. 99 ; 12 Jur. (N.S.) 788 ; 14 W. R. 975. And see *The Singapore and The Hebe*, 4 Moore, P. C. (N.S.) 271 ; L. R. 1 P. C. 378.

A collision took place in January, 1881, between two sailing vessels, the "P." and the "S.," which were crossing. The court having come to the conclusion, upon conflicting evidence, that the "S.," though not strictly "close-hauled," was not "running," and that she was "free" at most two points, the wind being at farthest on her beam, while the wind was at most on the quarter of the "P.," almost certainly not more than three points from her course, and in all probability more nearly "aft" :—Held, that the "S." was "close-hauled," and that the "P." had the wind "aft," both within the meaning of the article, and that the "P." was therefore bound to have kept out

of the way of the "S.," and was solely to blame for the collision. If the wind be at any less angle than forty-five degrees with the line of a vessel's keel, it is a wind "aft" within the article. *The Privateer*, 9 L. R., Ir. 105—C. A.

The custom of sailors to treat sailing ships when in the trades as close-hauled ships when they are sailing a point or two from being as close-hauled as they can lie, does not affect the legal construction of the regulations, and the court will not exonerate vessels so sailing from duties applicable to sailing ships in other latitudes. Semble, a sailing ship is close-hauled within the meaning of the regulations if she is sailing half a point free of the nearest she can lie to the wind, but not if she is two points off. *The Earl Wemyss*, 61 L. T. 289; 6 Asp. M. C. 407—C. A.

The sailing ship "E. W." while sailing free in the trades saw the red light of the sailing vessel "A." on her starboard bow. The "A." was sailing close-hauled (as it is called in the trades), but was in fact not as close to the wind as she could lie. As the vessels approached the "E. W." ported to keep out of the way of the "A." At about the same time the "A." not only luffed up as close as she could to the wind, but also went a little farther under a starboard helm, thus counteracting the porting of the "E. W.," and a collision occurred:—Held, that the "A." altered her course in breach of article 22 of the regulations for preventing collisions, and was to blame for the collision. *Ib.*

Port-tack Ship bearing up to Free Ship.]—A ship on the port tack bore up to a free ship and so caused the collision:—Held, that she was not in fault, because she could not under the circumstances with reasonable care have known that the other ship was free. *The Theodore H. Rand*, 56 L. J., Adm. 65; 12 App. Cas. 247; 56 L. T. 343; 35 W. R. 781; 6 Asp. M. C. 122—H. L.

Approaching Close-hauled Ship too close.]—A ship with the wind free held in fault for approaching two others so close that upon one of them going about a collision with the other was inevitable. *The Mobile*, 10 Moore, P. C. 467: Swabey, 127; 4 W. R. 708—P. C.

Tacking or Wearing.]—When a vessel is sailing upon a wind, and passes from one tack to another, as a general rule she should tack and not wear, unless for some good reason and with sufficient sea room for the purpose. *The Falkland and The Navigator*, 1 Moore, P. C. (N.S.) 379; Br. & Lush. 204; 9 Jur. (N.S.) 1113.

Vessels Crossing or Overtaking.]—Semble, that where two ships are on converging courses, with the difference of a point and a half, the one having the other on her quarter four or five points abaft the beam, they are crossing ships, and not within the overtaking rules. *The Breadalbane*, 7 P. D. 186; 46 L. T. 204; 4 Asp. M. C. 505.

Under former regulations there was no fixed rule as to when a ship is to be considered as crossing or overtaking, but the question must be decided from the circumstances of each particular case. *The Peckforton Castle*, 47 L. J., Adm. 69; 3 P. D. 11; 37 L. T. 816; 26 W. R. 346; 3 Asp. M. C. 533—C. A.

A collision occurred in the daytime between two port-tacked vessels. One of such vessels had the wind free and the other was close-hauled. The vessel which had the wind free was being overtaken by the close-hauled vessel, and there was a difference of four points between the direction of their heads. The collision occurred by the close-hauled vessel from leeward striking the starboard beam of the vessel which had the wind free. At the hearing of an action of damage brought for the recovery of the damage sustained in the collision:—Held, first, that the 12th article of the regulations for preventing collisions at sea was applicable to the case. *Ib.*

Held, secondly, that the vessel with the wind free ought to have ported her helm in time or to have taken whatever steps were necessary to avoid the collision. *Ib.*

Vessels Crossing or Meeting.]—Collision by two sailing vessels crossing and having the wind on opposite sides:—Held, that by the 12th article, the vessel on the port side was bound to get out of the way of the vessel on the starboard side, unless she had the wind free. *The Constitution*, 2 Moore, P. C. (N.S.) 453; 10 Jur. (N.S.) 831; 10 L. T. 894.

When two vessels are approaching, one heading N.N.E. ½ E. and the other S.W. ½ W., they are crossing and not meeting. *The Henry and The St. Cyran*, 12 W. R. 1014.

A ship and a barque were both on the port tack. The barque was the windward vessel, and had the wind three points free. The ship was close-hauled, and when first sighted by the barque was approaching her on her lee beam:—Held, that the ships were crossing each other, and that it was the duty of the barque, being the windward vessel, to get out of the way of the other, *The Peckforton Castle*, 47 L. J., Adm. 69; 3 P. D. 11; 38 L. T. 816; 26 W. R. 346; 3 Asp. M. C. 533—C. A.

Luffing.]—A close-hauled vessel is justified in luffing so as to bring her, after she has sighted another vessel as close to the wind as she can get so as to remain under command, and such luffing is not a deviation from her course that will relieve the other vessel, having the wind free, from the duty of getting out of her way. *The Marmion*, 27 L. T. 255; 1 Asp. M. C. 412—P. C.

When a ship close-hauled is bound to keep her course, luffing as close to the wind as she can without losing headway is not a deviation within the regulations, such as will render her liable for a collision with another vessel, whose duty it is to keep out of her way. *The Aimo and The Amelia*, 29 L. T. 118; 21 W. R. 707; 2 Asp. M. C. 96—P. C. Cf. *The Earl Wemyss*, supra.

When it is the duty of a ship to keep out of the way of another, but she is unable to do so by reason of being disabled in a former collision, and the other ship being unaware of her disabled condition, continues her course, a collision ensuing is the result of inevitable accident. *Ib.*

Beating to Windward on the same Tack.]—Two vessels, which had been sailing in company, were beating to windward. They were both close-hauled on the same tack, the one ahead and a little to the windward of the other. The leading vessel stood in as near as she could to a shoal, and was then obliged to go about. The other vessel kept her reach. The two vessels came into collision:—Held, that it was the duty of the following vessel to have gone about at

the time she saw the leading vessel go about; and that, as the collision was occasioned by the following vessel neglecting to go about at the proper time, she was to blame for the collision. *The Priscilla*, L. R. 3 A. & E. 125; 23 L. T. 566.

Ship in Stays.]—When a port-tacked vessel has thrown herself into stays and becomes helpless, she ought nevertheless to execute any practicable manœuvre in order to get out of the way of a starboard-tacked vessel. *The Lake St. Clair* v. *The Underwriter*, *Wilson* v. *Canada Shipping Co.*, 2 App. Cas. 389; 36 L. T. 155; 3 Asp. M. C. 361—P. C.

A starboard-tacked vessel, when apprised of the helpless condition of a vessel which by the ordinary rule of navigation ought to get out of her way, is bound to execute any practicable manœuvre which would tend to avoid a collision. *Ib.*

Both vessels were held to blame for the collision. *Ib.*

Burden of Proof.]—A vessel proceeding in a cause of collision and alleging herself to have been in stays at the time of the collision, and therefore helpless, is bound to prove in the first instance that such was the fact. The burden of proof then shifts, and the other side must shew that the collision was occasioned by the vessel proceeding being improperly put in stays or was an inevitable accident. *The Sea Nymph*, Lush. 23; 15 L. T. 103.

ARTICLE 18.

Steamships Meeting; corresponding with Article 15 of 1880 *and* 1884.

Port-helm Rule of former Acts.]—The port-helm Trinity house rule of 1840 did not apply where the ships' heads were in different but not opposite directions. *The London Packet*, 2 Not. of Cas. 501.

A galliot starboarded to the green light of a steamship on her starboard bow, and, on the steamship's red light appearing, ported. The steamship struck her on the port side. The steamship either starboarded or ported too late or not at all. Steamship held in fault. *The Sylph*, Swabey, 233.

The "port-helm" rule of 1840 did not require a vessel to port her helm where by doing so she would put herself ashore or not avoid risk of collision. *The Friends, General Steam Navigation Co.* v. *Tonkin*, 4 Moore, P. C. 314.

A schooner held in fault under 9 & 10 Vict. c. 100, for starboarding her helm to an approaching steamship, which ported. *The Leith*, 7 Not. of Cas. 137.

Port-helm Rule of 1854.]—A steamship, "B. O.," saw the green and white lights of another steamship, the "B. D.," distant about a mile and a half, and a point on the starboard bow. The "B. O." ported. The "B. D." kept her course, and at the last moment starboarded:—Held, that the "B. O." ought either to have kept her course or to have slowed until the course of the other vessel had been ascertained; that the "B. O." improperly ported, and was therefore to blame. *The Black Diamond*, 9 L. T. 396; 12 W. R. 219.

The statutory rule of port-helm, given by 17 & 18 Vict. c. 104, s. 296, applied only when vessels were meeting in opposite directions end on, or nearly so, when the observance of the rule would have made the vessels pass port side to port side. *The Independence*, Lush. 270; 14 Moore, P. C. 103; 4 L. T. 563; 9 W. R. 582.

Regulations of 1863—Meeting or Approaching "End on."]—Article 13 only applies when there is a continuous approaching of two ships. *The Jesmond and The Earl of Elgin*, 8 Moore, P. C. (N.S.) 179; L. R. 4 P. C. 1; 25 L. T. 514; 1 Asp. M. C. 150.

When two vessels are meeting end on, or nearly end on, and one of them, at a proper distance, ports her helm sufficiently to put her on a course which will carry her clear of the other, she thereby determined the risk, and is not "approaching another ship so as to involve risk of collision" and is not bound to slacken speed or stop. *Ib.*

Both Ships must port.—Both ships must port their helms, although collision would be avoided by one porting. *The Araxes and The Black Prince*, 15 Moore, P. C. 122. See also *The Owl and The Ariadne*, *Little* v. *Burns*, 9 Ct. of Sess. Cas. (4th ser.) 118; *The Cleopatra*, Swabey, 135.

End-on or nearly End-on — Meaning of Phrase.] — Ships on W.N.W. and S. E. by E. courses respectively held to be "crossing" and "not meeting." *The Constitution*, 2 Moore, P. C. 453; 10 Jur. (N.S.) 831; 10 L. T. 894 (decision before order in council of 30th July, 1868).

Two ships heading respectively N.N.E. ½ E. and S.W. ½ W. held to be crossing and not meeting ships. *The Henry and The St. Cyran*, 12 W. R. 1014.

Ships within two points of meeting end on held to be nearly end on within article 15 of the regulations of 1863. *The Fruiter and The Fingal*, 13 L. T. 610.

Ships upon S.S.W. and N.E. ½ N. courses respectively held not to be meeting end on or nearly end on. *The Rona and The Ava*, 29 L. T. 781; 2 Asp. M. C. 182.

Aliter where the courses were N.N.W. and S.E. (semble). *The Jesmond and The Earl of Elgin*, supra.

And where the ships were proceeding up and down the Clyde, each having the other half a point on the bow. *The Owl and The Ariadne*, *Little* v. *Burns*, 9 Ct. of Sess. Cas. (4th ser.) 118.

"Meeting" and "Crossing" Ships—Distinction between.]—See *The Franconia*, 2 P. D. 8; 35 L. T. 721; 25 W. R. 197; 3 Asp. M. C. 295—C. A. *The Peckforton Castle*, 47 L. J., Adm. 69; 3 P. D. 11; 38 L. T. 816; 26 W. R. 396; 3 Asp. M. C. 533—C. A. *The Breadalbane*, 7 P. D. 186; 46 L. T. 204; 4 Asp. M. C. 505. *The Seaton*, infra.

ARTICLE 19.

Steamships Crossing; corresponding with Article 16 of 1880 *and* 1884.

The "S." and the "P." were on parallel (S.W. by W.) courses, the "P." being abaft the beam of the "S." and overtaking her. When the ships were three or four miles apart, the "P." altered her course to S. ½ W., and a collision followed, the ships remaining on the same courses:—Held, that the overtaking rule prevailed over the crossing rule (articles 16 and 20 of 1880), and that the "P." was alone in fault. *The Seaton*, 53 L. J.,

Adm. 15 ; 9 P. D. 1 ; 49 L. T. 747; 32 W. R. 600 ; 5 Asp. M. C. 191.

"Crossing" Rule—Its Application in a winding River.]—Two steamships in reaches of the Thames that make an angle with each other were approaching each other :—Held (under the regulations of 1863), that the "crossing" rule did not apply. *The Velocity, General Steam Navigation Co.* v. *Hedley*, 6 Moore, P. C. (N.S.) 263 ; 39 L. J., Adm. 20 ; L. R. 3 P. C. 44 ; 21 L. T. 686 ; 18 W. R. 264. See also *The Ranger and The Cologne, Malcolmson* v. *General Steam Navigation Co.*, 9 Moore, P. C. (N.S.) 352 ; L. R. 4 P. C. 519 ; 27 L. T. 769 ; 21 W. R. 273 ; 1 Asp. M. C. 484 ; *The Esk and The Niord*, 7 Moore, P. C. (N.S.) 276 ; L. R. 3 P. C. 436 ; 24 L. T. 167 ; 1 Asp. M. C. 1 ; *The Oceano and The Virgo*, 3 P. D. 60 ; infra, col. 830.

—— **In Cardiff Drain.**]—A steamship bound for Penarth dock and making the usual docking signal, held bound to keep out of the way of another steamship on her starboard bow coming down Cardiff drain. *The St. Andrews*, 54 L. T. 278 ; 5 Asp. M. C. 552. See also *The Leverington*, infra.

"Crossing" Rule and "Narrow channel" Rules may apply together.]—*The Leverington*, 55 L. J., Adm. 78 ; 11 P. D. 117 ; 55 L. T. 386 ; 6 Asp. M. C. 7, infra, col. 823.

Two Ships making for same Spot.]—Two vessels making for a pilot station to take pilots on board are to be treated as crossing vessels, if their courses, if continued, would intersect ; and the fact of their seeking pilots at the same place is not such a special circumstance as will take them out of the operation of the rule requiring that the ship which has the other on her own starboard hand shall keep out of the way of the other. *The Ada, The Sappho*, 28 L. T. 825 ; 2 Asp. M. C. 4—P. C.

Crossing Vessels in Rivers.]—The considerations which arise in regard to vessels in the open sea are not the same as those which apply to the reaches of a winding river. Whether or not vessels are "crossing vessels" in a river depends on their presumable courses, and the question, therefore, always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends upon the nature of the locality where she is at that moment. *The Leverington* (supra) distinguished. *The Pekin, The Normandie (Owners)* v. *The Pekin (Owners)*, 66 L. J., P. C. 97 ; [1897] A. C. 532 ; 77 L. T. 443—P. C.

ARTICLE 20.

Steamship and Sailing Ship ; corresponding with Article 17 *of* 1880 *and* 1884.

Reason of the Rule.]—Is that the steamship is more perfectly under command than the sailing ship. *The Independence*, Lush. 270 ; 11 Moore, P. C. 103 ; 4 L. T. 553 ; 9 W. R. 587.

Sailing Ship overtaking Steamship.]—Under the regulations of 1863 there was doubt as to the duty of a sailing ship overtaking a steamship. *The Philotake*, 37 L. T. 540 ; 3 Asp. M. C. 512.

Duty of Steamship.]—It is the duty of a steamer, where there is risk of collision, whatever may be the conduct of the sailing vessel, to do everything in her power that can be done, consistently with her own safety, in order to avoid collision—per Westbury, C. *The City of Antwerp and The Friedrich*, 37 L. J., Adm. 25 ; L. R. 2 P. C. 25.

Where a steamer is charged with omitting to do something which she ought to have done, there must be clear proof, first, that the thing omitted to be done was clearly within the power of the steamer ; secondly, that, if done, it would in all probability have prevented the collision ; and, thirdly, that it was an act which would have occurred to any officer of competent skill and experience in command of the steamer. *Ib.*

Trawler at Work.]—A steam trawler at work held excused by article 23 of 1884 from keeping out of the way of a sailing ship. *The Tweedsdale*, 58 L. J., Adm. 41 ; 14 P. D. 164 ; 61 L. T. 371 ; 37 W. R. 783 ; 6 Asp. M. C. 430.

Duty of Sailing Ship—Keep her Course.]—The fact that a steamship is neglecting to keep out of the way of a sailing ship does not make it the duty of the sailing ship to take measures to avoid a collision, except possibly in very exceptional circumstances, because it is possible for a steamship to act for a sailing ship up to almost the last moment, and any action on the part of the sailing ship might be liable to increase risk of collision. The s.s. "H." was approaching the sailing ship "S." for several minutes, with her masthead and red lights open, on the starboard bow of the "S." The "S." kept her course till a collision was imminent, and then hard-a-ported, but the "H." with her port side struck the stem and port bow of the "S." The "H." admitted that she was to blame, but contended that the "S." was also to blame for breach of article 23 of 1884 in not manœuvring for the "H." after she saw the "H." persisting in doing nothing to keep out of her way :—Held, that the "S." was not to blame, as the circumstances were not such as to require the "S." to alter her course and manœuvre for the "H." *The Highgate*, 62 L. T. 841 ; 6 Asp. M. C. 512.

A sailing ship meeting a steamship end on must not port, but must keep her course. *The Bougainville and The James C. Stevenson*, L. R. 5 P. C. 316 ; 28 L. T. 822 ; 21 W. R. 653 ; 2 Asp. M. C. 1.

In the Thames—Steamship's Signal—Unable to keep clear.]—In the Thames, where it was not possible for the steamship to keep out of the way, and she gave the required signal to a sailing barge :—Held, that the barge was alone in fault for the collision which followed. *The Long Newton*, 59 L. T. 260 ; 6 Asp. M. C. 302.

Sailing Ship going about.]—A sailing ship in the Thames turning to windward went about when she got to the edge of the tide without giving any notice of her intention to a steamship astern : — Held, that the steamship was alone in fault. *The Palatine*, 27 L. T. 631 ; 1 Asp. M. C. 468.

Sailing Ship rounding to.]—A barque rounding to before coming to an anchor was struck by a steamship :—Held, that the steamship was alone in fault, although she alleged that she was baffled by the rapid change in the barque's lights. *The Neptune*, 13 L. T. 510.

Sailing Ship not keeping her Course.]—Collision in the Atlantic Ocean at midnight between a steamship of unusual size and tonnage and a sailing vessel; the steamer going at a rate of between twelve and thirteen knots an hour; the vessel sailing close-hauled on the port tack, and being two or three miles distant when she first sighted the steamer, instead of keeping her course, ported her helm:—Held, first, that under the 18th article of 1863, it was the duty of the sailing vessel to have kept her course without alteration, unless the danger of collision was so imminent when the steamer was sighted as to render a departure from the 18th article necessary to avoid danger, and that she was, therefore, partly to blame for the collision, having contributed to it by porting. *The Great Eastern*, 3 Moore, P. C. (N.S.) 31; 11 L. T. 5.

Held, secondly, that the steamer was to blame, as, even if the sailing vessel had kept her course, from the rate of speed the steamer was advancing a collision was inevitable, it being, under article 15, the duty of a steamer meeting a sailing vessel to reverse her engines, slacken her speed in sufficient time, so as, having regard to the state of the weather, as far as possible to avoid a collision. *Ib.*

A collision took place between a sailing ship and a steamship on a dark night, the wind S.S.E.; the sailing ship steering N.E. by E., the steamship S.S.W., so that the lights of the sailing ship were seen about four points on the starboard bow. The sailing ship, instead of keeping her course, ported her helm; thereupon the helm of the steamship was put hard a-port, and her engines were reversed:—Held, that the steamship was solely to blame for the collision. *The Lady Jocelyn*, 12 Jur. (N.S.) 965. S. P., *The Una* v. *The Thomas Lea*, 14 L. T. 834. *The Fruiter* v. *The Fingal*, 13 L. T. 611.

A slight alteration of the course by the sailing ship when two miles off the steamship held not a breach of the regulations. *The Norma*, 35 L. T. 418; 3 Asp. M. C. 272.

A steamer was sighted by a sailing vessel at a sufficient distance to have avoided a collision. The steamer took no steps until the vessels were very near to each other, when she starboarded her helm, and the sailing vessel ported her helm:—Held, that the steamer was alone to blame, as it was the duty of a steamer to keep out of the way of the sailing vessel, provided she could do it, either by starboarding or porting her helm, and that, on the other hand, it was the duty of the sailing vessel to keep her course, and that she could only be excused from deviating from it by shewing that it was necessary to do so in order to avoid immediate danger. *The Velasquez*, 4 Moore, P. C. (N.S.) 426; 36 L. J., Adm. 19; L. R. 1 P. C. 494; 16 L. T. 777; 6 W. R. 89.

Tug with Ship in Tow must keep out of way of Sailing Ship.]—A schooner, close-hauled on the starboard tack at night, saw the starboard light and the two towing lights of a steam tug, three points on her port bow about a mile off. The schooner kept her luff. The steam tug had a fully-laden ship in tow, and was steaming against a head wind in the open sea. The steam tug kept her course until it was too late to get out of the way of the schooner, and the steam tug and the schooner came into collision:—Held, that the schooner was right in holding her course, and that the steam tug was alone to blame. *The Warrior*, L. R. 3 A. & E. 553; 27 L. T. 101; 21 W. R. 82; 1 Asp. M. C. 400.

The steamship "Aracan" found at a foreign port the "Syria," a screw steamship, totally disabled in her machinery; both vessels belonged to the same owner. The captain of the "Aracan," to protect his employers' interest and earn salvage from the owners of the cargo of the "Syria," took her in tow, and towed her into the English Channel, and whilst so doing came into collision with a sailing ship close-hauled on the starboard tack. The damage done by the "Aracan" caused the sailing ship to sink, but before she sank the "Syria" ranged up alongside of her and came into contact with her. The "Aracan" first saw the green light of the ship at a distance of three-quarters of a mile, and then, instead of slackening speed or starboarding her helm, attempted to cross the bows of the ship. The ship saw at two miles distance the "Aracan" and "Syria," with a great length of hawser between them, and the red lights of both, and kept her course:—Held, that the "Aracan" was to blame for the collision. *The American and The Syria, Union Steamship Co.* v. *The Aracan*, 43 L. J., Adm. 30; L. R. 6 P. C. 127; 31 L. T. 42; 22 W. R. 927; 2 Asp. M. C. 350.

A vessel close-hauled on the port tack in the open sea, and in daytime, and a steamer towing a large ship, were standing so as to cross each other's bows, the steamer being on the lee-beam of the sailing vessel:—Held, that the sailing vessel was to blame for holding her reach, and that the steamer was likewise to blame for taking no measure in time to avoid collision. *The Independence*, Lush. 270; 14 Moore, P. C. 103; 4 L. T. 563; 9 W. R. 582—P. C.

Article 21.

Keep her Course and Speed: Corresponding with Article 22 of 1880 *and* 1884.

Alteration of Helm to give more Room.]—A ship being overtaken does not infringe the rule requiring her to keep her course by altering half a point in order to give the other more room. *The Franconia*, 2 P. D. 8; 35 L. T. 721; 25 W. R. 197; 3 Asp. M. C. 295—C. A.

"Course."]—The word "course" refers to the direction of the vessel's head and not to her speed. *The Beryl*, 53 L. J., Adm. 75; 9 P. D. 137; 51 L. T. 554; 33 W. R. 191; 5 Asp. M. C. 321—C. A. But see *The Leverington*, infra, col. 823.

Overtaken Vessel altering Course.]—Semble, that a vessel, which is being overtaken by another, is not to blame within article 22 of the regulations if she alters her course at such a distance ahead of the overtaking vessel that the latter can, by the exercise of reasonable care, keep out of the way of the former. *The Banshee*, 57 L. T. 841; 6 Asp. M. C. 221—C. A.

Sailing Ship doing nothing to avoid Collision.]—Until just before the collision a sailing ship took no steps to avoid collision with a steamship which she saw was doing nothing to keep out of the way:—Held, that the sailing ship was not in fault. *The Highgate*, 62 L. T. 841; 6 Asp. M. C. 512.

Stringency of the Rule as to keeping her Course.]—See per Dr. Lushington, *The Vivid*,

7 Not. of Cas. 127. S. P., *The Immaganda Sara Clasina*, 7 Not. of Cas. 582. *The Test*, 5 Not. of Cas. 276. *The Byfoged Christensen and The William Frederick*, 4 App. Cas. 669; 41 L. T. 535; 28 W. R. 233; 4 Asp. M. C. 201—H. L. (E.)

"If a ship bound to keep her course undertakes to justify her departure from the rule, she takes upon herself the obligation of shewing both that her departure was, at the time it took place, necessary in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid that danger"—per Sir J. Colvile. *The Agra and The Elizabeth Jenkins*, 4 Moore, P. C. (N.S.) 435; 36 L. J., Adm. 16; L. R. 1 P. C. 501; 16 L. T. 755; 16 W. R. 735.

But she must not obstinately stand on when a collision may plainly be avoided by an alteration of course. *The Lake St. Clair and The Underwriter*, 2 App. Cas. 389; 36 L. T. 155; 3 Asp. M. C. 361. *The Rosalie*, 50 L. J., Adm. 3; 5 P. D. 245; 44 L. T. 32; 4 Asp. M. C. 384.

A steamship overtaking a sailing ship held in fault for a collision which occurred whilst the sailing ship was rounding-to before anchoring. *The Neptune*, 13 L. T. 510. And see *The Falkland and The Navigator*, Br. & Lush. 204; 1 Moore, P. C. (N.S.) 379; 9 Jur. (N.S.) 1113.

A sailing ship meeting a steamship nearly end on held in fault for porting. *The Bougainville and The James C. Stevenson*, L. R. 5 P. C. 316; 28 L. T. 822; 21 W. R. 653; 2 Asp. M. C. 1.

A slight alteration of the helm when the ships were two miles apart held not to be an infringement of the rule requiring the ship to keep her course. *The Norma*, 35 L. T. 418; 3 Asp. M. C. 272. And see *The Banshee*, supra, col. 814.

Or where the alteration was to give the overtaking ship more room. *The Franconia*, supra, col. 814.

A three-masted schooner close hauled on the starboard tack held in fault for collision with a smack hove-to on the port tack with her helm lashed, she having done nothing until the collision was inevitable. *The Rosalie*, supra, col. 806.

"Keep her Course"—Meaning of, in Winding River.]—Semble, in a winding river the meaning of "keep her course" is that the vessel is to keep her course in the river, having regard to the windings of its channel, not that she shall keep the compass course upon which she is for the moment heading. *The Velocity*, 39 L. J., Adm. 20; 6 Moore, P. C. (N.S.) 263; L. R. 3 P. C. 44; 21 L. T. 686; 18 W. R. 264. And see *The Pekin, Normandie (Owners)* v. *The Pekin (Owners)*, *and cases cited*, supra, col. 811.

But see *The Banshee*, supra, col. 814.

Ship Hove to.]—As to how a ship hove to is to "keep her course," see *The General Lee*, 19 L. T. 750.

Ship Close Hauled—Luffing.]—A close-hauled ship does not break the rule requiring her to keep her course by luffing a little, so long as she is sailing full and by. *The Marmion*, 27 L. T. 255; 1 Asp. M. C. 412. *The Aimo and The Amelia*, 29 L. T. 118; 21 W. R. 707; 2 Asp. M. C. 96; *The Great Eastern*, 3 Moore, P. C. (N.S.) 31; 11 L. T. 5. *The Singapore*, 4 Moore, P. C. (N.S.) 271; L. R. 1 P. C. 378.

A ship that luffed to the extent of two and a half points, held in fault for not keeping her course. *The Earl Wemyss*, 61 L. T. 289; 6 Asp. M. C. 407—C. A.

If a close-hauled ship departs from the rule requiring her to keep her course, she should generally luff rather than bear up. *The Agra and The Elizabeth Jenkins*, supra. *The Great Eastern*, supra, col. 813.

ARTICLE 22.

"Keep out of the Way"; new.

ARTICLE 23.

"Stop and Reverse": Corresponding with Article 18 of 1880 and 1884.

Article 13 and Article 18 of 1884.]—Article 13 of 1884 cannot be broken without at the same time breaking article 18 of 1884—per Lord Esher, M.R. *The Ebor*, 11 P. D. 25; 54 L. T. 200; 34 W. R. 448; 5 Asp. M. C. 560, infra.

In Fog—Whistle of approaching Steamship.]—When two steamships, invisible to each other by reason of a thick fog, find themselves gradually drawing nearer, until they are within a few ships' length, they are within the second direction of article 18 of 1894, and each of them ought at once to stop and reverse, unless the fog signals of the other vessel have unequivocally indicated that she is steered so as to pass clear without risk of collision; or unless other circumstances exist which make it dangerous to stop and reverse. *The Ceto*, 14 App. Cas. 670; 62 L. T. 1; 6 Asp. M. C. 479—H. L. (E.)

A sailing ship in tow of a steam-tug in a fog, while proceeding at as slow a rate of speed as possible, came into collision with a steamer whose whistle had been heard several times approaching. The engines of the tug were not stopped or reversed before the collision:—Held, that there had been a sufficient compliance with the provisions of article 18 of 1884 on the part of the tug and tow. *The Lord Bangor*, 65 L. J., Adm. 6; [1896] P. 28; 11 R. 822; 73 L. T. 414; 8 Asp. M. C. 217.

A steamer heard a whistle on her port bow in a dense fog, and it was repeated, shewing that the vessel from which it was sounded was approaching and was in her vicinity:—Held, that under such circumstances it is a general rule of conduct that there is a necessity to stop and reverse, and that she had disobeyed the rule by not so doing. *The John McIntyre*, 53 L. J., Adm. 115; 9 P. D. 135; 51 L. T. 185; 33 W. R. 190; 5 Asp. M. C. 278—C. A.

The plaintiff steamer, in a fog off Cromer, heard a whistle almost right ahead; she was then going slowly, about three knots an hour, and she continued at this speed for about a minute, until a second whistle was heard, when the order was given to stop and reverse; but the defendants' steamer coming into sight, a collision occurred. The defendants admitted at the trial that they were to blame:—Held, that the plaintiffs were also to blame, for they had infringed article 18 by going on at the same speed after they heard the first whistle as before. *The Ebor*, 11 P. D. 25; 54 L. T. 200; 34 W. R. 448; 5 Asp. M. C. 560—C. A.

A steamship in a very thick fog, going three and a half knots, heard the whistle of a steamship almost right ahead several times. Her helm

was ported, but her speed not changed:—Held, that she was in fault for not stopping and reversing. *The Rossgull and The Spaniel, Leitrim (Countess)* v. *Burns*, 24 Ct. of Sess. Cas. (4th ser.) 993.

During a fog the steamships "A." and "L." were sailing upon opposite courses, bound eastward and westward respectively. The "A.'s" whistle was first heard by the master of the "L." a point or a point and a half on his starboard bow, and the sound gradually broadened until it was two and a half to three points on that bow. The next whistle did not seem to broaden, and the master of the "L." immediately stopped his engines. The next whistle satisfied him that the "A." was porting and closing on his starboard bow, and he thereupon reversed his engines. The vessels came into collision, which they would not have done if the "A." had not ported:—Held, that the "L." was to blame for the collision as well as the "A.," because the master of the "L." ought to have reversed, and not merely to have stopped his engines under the circumstances. *The Ceto* (supra) discussed. *The Lancashire*, 63 L. J., Adm. 80; [1894] App. Cas. 1; 6 R. 46; 69 L. T. 663; 7 Asp. M. C. 376—H. L. (E.)

And see further, as to duty of steamships in fog, ARTICLE 16, ante, cols. 799, seq.

A steamship held in fault for not having reversed until the lights of an approaching steamship appeared in a thick fog, she having previously stopped her engines on hearing the other vessel's whistle close at hand. *The Frankland and The Kestrel*, 9 Moore, P. C. (N.S.) 365; L. R. 4 P. C. 529; 27 L. T. 633. S. P., *The Love Bird*, 6 P. D. 80; 44 L. T. 650; 4 Asp. M. C. 427.

A steamship held in fault for not having stopped until the other ship's whistle was heard a second time and nearer, when her lights were first seen. *The Kirby Hall*, 52 L. J., Adm. 31; 8 P. D. 71; 48 L. T. 797; 31 W. R. 658; 5 Asp. M. C. 90.

A steamship held in fault for not having reversed as well as stopped on seeing a barge ahead, at anchor in the Thames, a ship's length off. *The Harton*, 53 L. J., Adm. 25; 9 P. D. 44.

Duty to reduce speed to the lowest possible point when a whistle is heard on the bows in fog. *The Rosetta*, 59 L. T. 342; 6 Asp. M. C. 310.

A steamship, hearing the whistle of another three times in a thick fog, did not stop and reverse until the other ship came into view a ship's length off:—Held, that she had broken article 18. *The Dordogne*, 54 L. J., Adm. 29; 10 P. D. 6; 51 L. T. 650; 33 W. R. 360; 5 Asp. M. C. 550.

Crossing Ships—Risk of Collision.]—The steamship "M." sighted the masthead and green lights of the steamship "S.," distant about three miles, and bearing about two and a-half points on the port bow. When the "S." got within three ship-lengths of the "M.," still shewing her masthead and green lights at a bearing of four points on the port bow, she suddenly starboarded, and although the "M." immediately stopped her engines, a collision occurred. The court, having held that the "S." was to blame, further found that the respective courses of the vessels was such that had the "S." kept her course and not starboarded, she would have passed one and a-half ship-lengths astern of the "M.," and that the best and most seamanlike manœuvre for the "M." was to continue her speed as she did, but that there was in fact risk of collision before the "S." starboarded, and that the "M." was to blame for not stopping sooner. *The Memnon*, 62 L. T. 84; 6 Asp. M. C. 317—H. L. (E.)

Effect of Infringement of Article 18.]—The "K." and "V.," two large steam vessels, coming in opposite directions, sighted each other at a considerable distance; they ultimately came into collision. The "K." alleged that when the two vessels were fast approaching each other the "V." improperly changed its course; that the master of the "K." could not rely on the "V." taking a particular course; that to meet possible contingencies he ordered his engineers to stand to their engines, and almost instantly afterwards gave the order to starboard the helm, which he deemed would prevent or greatly mitigate the collision, and then stopped and reversed the engines. This was not exactly the order required by the regulations, which directed that in such a case the engines should be stopped and reversed. The court of admiralty had deemed both vessels to be in fault, and had adjudged accordingly; the court of appeal had held the master of the "K." to be excused under the circumstances of the case, and had given judgment against the "V." On appeal to the house of lords:—Held, that the statutes and the regulations had not left the master of the "K." a discretion in the matter; that he was bound to stop and reverse the engines, and that as he had not done so at the first moment of danger he had disregarded the regulations, and consequently that the "K." must be held in part responsible. *The Khedive, Stoomvaart Maatschappy Nederland* v. *P. and O. Steam Navigation Co.*, 52 L. J., Adm. 1; 5 App. Cas. 876; 43 L. T. 610; 29 W. R. 173; 4 Asp. M. C. 567—H. L. (E.)

Reasonable Time to be allowed before the Rule is applicable.]—Those in charge of a vessel must have a reasonable time to appreciate a situation of danger before the stop and reverse rule can be held to have been infringed. Where the red light of a steamship came into view, the green having previously been seen, on the starboard bow of another more than half a minute before the collision, and no order to stop and reverse was given:—Held, that the rule had been infringed. *The Emmy Haase, Maclaren* v. *Compagnie Française de Navigation à Vapeur*, 53 L. J., Adm. 43; 9 App. Cas. 690; 50 L. T. 372; 32 W. R. 880; 5 Asp. M. C. 216—H. L. (Sc.) And see *The Beryl*, infra; *The Ceto*, supra, col. 816.

Instantaneous compliance with article 18 of 1884, by which "every steamship when approaching another ship so as to involve risk of collision shall slacken her speed or stop and reverse if necessary," is not necessary; a man for the exercise of his judgment must be allowed a short, but a very short, time. *The Emmy Haase* (supra) approved. *The Ngupoota*, 66 L. J., P. C. 88; [1897] A. C. 391—P. C.

The "A." and "B." were crossing within the meaning of article 16, and it was the duty of the "A." to keep out of the way, but she did not do so. The "B.," when from a quarter to half a mile distant, slackened her speed, and continued with slackened speed to within 300 yards of the "A.," and then stopped and reversed, but not in time to prevent a collision:—Held, that the "B." must be held, for not stopping and reversing sooner, to blame as well as the "A." Articles 16 and 18 (of 1880) are intended to be applicable according to the circumstances as they would

present themselves to the mind of a prudent sailor, and come into force before the risk of collision is fixed and determined. *The Beryl*, 53 L. J., Adm. 75; 9 P. D. 137; 51 L. T. 554; 33 W. R. 191; 5 Asp. M. C. 321—C. A.

Steamship justified in not Stopping.]—A steamer, the "G.," saw a green light at some distance and starboarded her helm; soon after the port side of the "B.," without a red light, came into view, so close that the only chance of avoiding a collision was for the "G." to continue at full speed ahead and starboard her helm, which she did. The "B." struck the "G." on her starboard side:—Held, that the "B." was alone to blame for the collision, and that the stop and reverse rule did not apply under the circumstances to the "G.," and that article 23 was applicable. *The Benares*, 53 L. J., Adm. 2; 9 P. D. 16; 49 L. T. 702; 32 W. R. 268; 5 Asp. M. C. 171—C. A.

Duty of Sailing Ship as to Taking Way Off.]—Though article 18 (of 1880) does not apply to sailing ships, nevertheless a sailing ship under the circumstances mentioned in the article must be under such sail that the way can readily be taken off her. See per Brett, L.J. *The Dordogne*, supra, col. 817.

Article 16 and article 22 (crossing and keeping course rules) of the regulations of 1880, are wholly independent of the stop and reverse rule. Per Brett, M.R. *The Beryl*, supra; *The Dordogne*, supra.

Whether the Stop and Reverse Rule applies at Same Time with other Rules.]—Semble, when two ships are approaching each other upon meeting or crossing courses with risk of collision, and one or both alter their helms so as to determine risk of collision, the stop and reverse rule does not apply. *The Jesmond and The Earl of Elgin*, 8 Moore, P. C. (N.S.) 179; L. R. 4 P. C. 1; 25 L. T. 514; 1 Asp. M. C. 150. *The Rhondda*, 8 App. Cas. 549; 49 L. T. 210; 5 Asp. M. C. 114.

Steamship in Fault for not Stopping.]—A steamship held in fault for not having stopped and reversed when risk of collision must have been apparent. *The Thames and The Lutetia*, 9 App. Cas. 640; 12 Ct. of Sess. Cas. (4th ser.) 1—H. L. (Sc.)

Lights coming into Line.]—The "S." and "C." were approaching each other at night on opposite courses, so as to pass starboard to starboard. The master of the "C." saw the green and white lights of the "S." somewhat more than a quarter of a mile distant, coming into line. This indicated a probability that the "S." was porting, which would cause a risk of collision; soon after the red light of the "S." was seen. The engines of the "C." had been previously stopped, but the master did not reverse her engines till the red light of the "S." was seen; the vessels soon after came into collision:—Held, that the "C." was to blame for infringing the stop and reverse rule, because as there was a probability of risk of collision when the master of the "C." saw the green and white lights of the "S." coming into line, he should, being aware of such probability, have then reversed the engines of the "C." *The Stanmore*, 54 L. J., Adm. 89; 10 P. D. 134; 53 L. T. 10; 5 Asp. M. C. 441—C. A. And see *The Albis*, supra, col. 786; *The Abis and The Oporto*, supra, col. 785.

Perverse Action of other Ship.]—A steamship, "A.," ported to another steamship, "B.," that was approaching her with all her lights shewing, until "B.'s" green was shut in. "B." by starboarding opened her green again to "A.," who again ported and again shut in the green. "B." continuing her starboard helm again opened her green, and a collision followed:—Held, that "A." was in fault under 36 & 37 Vict. c. 85, s. 17, for not having stopped and reversed. *The Arratoon Apcar*, 59 L. J., P. C. 49; 15 App. Cas. 37; 62 L. T. 331; 38 W. R. 481; 6 Asp. M. C. 491—P. C.

Object of the Rule as to Stopping and Reversing.]—The object of the stop and reverse rule is to minimise the results of collisions as well as to prevent them. See *The Emmy Haase*, supra; *The Thames and The Lutetia*, supra; and per Lord Watson, *The Khedive*, supra, col. 818.

Steam Trawler.]—Semble, article 18 (of 1884) applies to a steam trawler at work. *The Tweedsdale*, 58 L. J., Adm. 41; 14 P. D. 164; 61 L. T. 371; 37 W. R. 783; 6 Asp. M. C. 430.

Thames Rule as to Stopping and Reversing.]—A steamship rounding a point in the Thames held not in fault under rule 14 of the Thames rules (1877) as to stopping and reversing; although if she had not been under a port helm at the time there would have been risk of collision. *The Libra*, 6 P. D. 139; 45 L. T. 161; 4 Asp. M. C. 429.

The Stop and Reverse Rule does not apply to Overtaken Ship.]—*The Franconia*, 2 P. D. 8; 35 L. T. 721; 25 W. R. 197; 3 Asp. M. C. 295—C. A.

Meeting Steamships—Porting without Stopping and Reversing.]—Two steamships were approaching each other in daylight nearly end on. One, "T.," ported and gave the port helm signal. The other, "O.," still came on, and "T." ported again and gave a second port helm signal. "O." then starboarded, and a collision followed:—Held, that "T." was not in fault for not having stopped and reversed before the second porting. *The Otto and The Thorsa*, *Wilson* v. *Currie*, [1894] App. Cas. 116; 6 R. 162; 20 Ct. of Sess. Cas. (4th ser.) 876—H. L. (Sc.)

Other Ship on Wrong Side of River.]—The "Dromedary," proceeding up the Clyde on her right side in a thick fog, heard the whistle of the tug of the "Nerano." She did not stop or reverse until she saw the tug, which with the "Nerano" was on the wrong side of the river:—Held, that the "Dromedary" was not in fault for a collision which followed. *The Nerano and the Dromedary*, 22 Ct. of Sess. Cas. (4th ser.) 237.

Old Law as to Stopping and Reversing.]—Steamship held in fault for not stopping and reversing, in consequence of bad look-out. *The Julia David*, 46 L. J., Adm. 54.

Steamship held in fault for a collision in the Thames caused by her not stopping and reversing. *The Trident*, 1 Spinks, 217.

ARTICLE 24.

Overtaking Ship; corresponding with Article 20 *of* 1880 *and* 1884.

Crossing or Overtaking.]—When a vessel is at the same time overtaking and crossing the course

of another vessel, she is to be deemed an overtaking, and not a crossing ship under article 16, and is bound therefore to obey the directions of article 20 of 1880, and keep out of the way of the other vessel. *The Seaton*, 53 L. J., Adm. 15; 9 P. D. 1; 49 L. T. 747; 32 W. R. 600; 5 Asp. M. C. 191. But see *The Breadalbane*, 7 P. D. 186; 46 L. T. 204; 4 Asp. M. C. 505.

As a general rule wherever two steamships are on converging courses, the one abaft the beam of the other in such a position that the hinder ship cannot see the side lights of the leading ship, the former, if going at a greater speed than the latter, is to be considered as a vessel overtaking another vessel, within the meaning of the regulations, and bound to keep out of the way; and they are not to be treated as crossing vessels. *The Franconia*, 2 P. D. 8; 35 L. T. 721; 25 W. R. 197; 3 Asp. M. C. 295—C. A.

A ship is not overtaking the other unless she is going faster than the latter. *Ib.*

An "overtaking" vessel within the area lighted by the stern light of the "overtaken" vessel does not cease to have the obligation imposed by article 20 of 1884, of keeping out of her way upon catching sight of one of her side lights:—Semble, where there is no risk of collision and the vessel comes within sight of the side lights of the other, the vessels being at a considerable distance apart, article 16, the crossing rule, applies *The Molière*, 62 L. J., Adm. 102; [1893] P. 217; 1 R. 639; 69 L. T. 263; 7 Asp. M. C. 364.

A ship coming up with another ahead upon a course differing from that of the ship ahead by half a point:—Held, to be overtaking her. *The Chanonry*, *The Leverington*, 42 L. J., Adm. 58; 28 L. T. 284; 1 Asp. M. C. 569.

And where the difference of courses was one and a-half points. *The Breadalbane*, supra.

As to the "overtaking" rule in the Tyne by-laws, see *The Henry Morton*, 31 L. T. 859; 2 Asp. M. C. 466.

And see further, as to the distinction between crossing and overtaking ships, ARTICLES 10, 20, ante, cols. 797, 811.

Overtaken Vessel — Manœuvres for Third Vessel.]—Where a vessel which is being overtaken by another deviates from her course, it is still the duty of the overtaking ship to do all she reasonably can to keep out of the way of the former. An overtaken vessel which finds it necessary to manœuvre for a third vessel is to blame if she deviates from her course more than is necessary to avoid immediate danger. *The Saragossa*, 68 L. T. 400; 7 Asp. M. C. 289—C. A. Affirmed in H. L.

Collision in Suez Canal.]—A steamship was overtaking another in a salt water lake forming part of the Suez Canal, and before she passed the other a collision occurred:—Held, under the regulations, the overtaking ship was in fault. *The Hilda and The Australia*, 12 Ct. of Sess. Cas. (4th ser.) 76.

Ships working to Windward.]—A steamship in the Thames was coming up with a sailing ship turning to windward. The latter went about as the steamship attempted to pass her, and a collision occurred:—Held, that the steamship was alone in fault. *The Palatine*, 27 L. T. 631; 1 Asp. M. C. 468.

Two sailing ships turning to windward on the same tack. When the leading ship goes about, the other, if she cannot stand in without risk of collision, must also go about. *The Priscilla*, L. R. 3 A. & E. 125; 23 L. T. 566; 1 Asp. M. C. 468.

Two ships working to windward. The leading ship wears:—Semble, the other is not an "overtaking" ship whilst the wearing ship is approaching her during wearing. *The Falkland and The Navigation*, Br. & Lush. 204; 1 Moore, P. C. (N.S.) 379; 9 Jur. (N.S.) 1113.

ARTICLE 25.

Narrow Channel; Starboard Side Rule; corresponding with Article 21 *of* 1880 *and* 1884.

Starboard-side Rule under former Acts.]—A vessel held in fault for navigating on the port or Cheshire side of the Mersey, contrary to 9 & 10 Vict. c. 100, s. 9. *The Nimrod*, 15 Jur. 1201.

A steam vessel was proceeding down the river Thames, close to the Surrey shore, under the management of a licensed pilot, when she came into collision with a barge, which was sailing up the river. In an action for the damage thereby caused against the pilot:—Held, that, according to 14 & 15 Vict. c. 79, s. 27, and 17 & 18 Vict. c. 104, ss. 296, 297, it was the duty of the pilot to have kept the steam vessel to the starboard side of, but within, the fairway or midchannel, and when he saw the risk of collision, to port her helm so as to pass on the port side of the barge, and therefore it was properly left to the jury to say, whether, at the time of the collision, the steam vessel was on the starboard side, and within the fairway or midchannel, and, whatever was the position of the steam vessel, whether the collision was caused by the negligence of the pilot or not. *Smith* v. *Voss*, 2 H. & N. 97; 26 L. J., Ex. 233; 5 W. R. 534.

Under 14 & 15 Vict. c. 79, a vessel was required to keep on the starboard side of the Thames, notwithstanding a usage for vessels to work the tide in navigating the river. *The Sylph*, 2 Spinks, 75.

A custom of the river as to vessels keeping to particular sides and waters as they are going up or down:—Held, not to override the Trinity house regulations of 1840. *The Friends*, 4 Moore, P. C. 314.

A practice for vessels in a river to keep in or out of the strength of the tide cannot supersede a rule of navigation made for preventing collisions. *The Duke of Sussex*, 1 W. Rob. 274.

A custom that vessels in a river should keep upon the one side of it when the statute law requires them to keep on the other, cannot be maintained. 17 & 18 Vict. c. 104, ss. 297, 298. *The Unity*, Swabey, 101.

See also, for decisions as to the starboard side, rule under former act. *The Panther*, 6 Spinks, 31. *The Malvina*, 1 Moore, P. C. (N.S.) 357; Lush. 493; Br. & Lush. 57; 9 Jur. (N.S.) 527; 8 L. T. 403; 11 W. R. 576. *The Meeander and The Florence Nightingale*, 1 Moore, P. C. (N.S.) 63; Br. & Lush. 29; 6 L. T. 400. *The Seine*, Swabey, 411. *The Hand of Providence*, Swabey, 107. *The Nimrod*, 15 Jur. 1201.

Application to Ship in Tow.]—The starboard-side rule (17 & 18 Vict. c. 104, s. 297) held applicable to a ship in tow. *The La Plata*, Swabey, 220, 298.

In the Tees.]—*The Mary Lohden*, 58 L. T. 641; 6 Asp. M. C. 262.

In the Danube.]—*The Yourri and The Spearman*, 10 App. Cas. 276; 53 L. T. 29; 5 Asp. M. C. 458.

What are—Straits of Messina.]—The Strait of Messina is a narrow channel within the meaning of article 21:—Held, that the "A. L.," by infringing the said article, occasioned the collision which afterwards happened, and failed to establish that the "R.," by anything which she did, contributed to it or could in any way have avoided it. *The Rhondda, Scicluna* v. *Stevenson*, 8 App. Cas. 549; 49 L. T. 210; 5 Asp. M. C. 114—P. C.

Held, that the "R.'s" helm having been put hard-a-port in a way which, if successful, would have put her on such a course as would have determined the risk of collision, the duty of reversing her engines did not arise till it was discovered that the vessel, owing to the action of a current, was not obeying her helm. *Ib.*

—— **Falmouth Harbour.**]—Applies to a steamship entering and passing up Falmouth Harbour, and if a steamer going into that harbour keeps to the side of the channel which lies on her port hand, she violates the regulations. *The Clydach*, 51 L. T. 668; 5 Asp. M. C. 336.

—— **Cardiff Docks.**]—A collision occurred at the junction of the main channel leading to Cardiff Docks and the channel to the Roath Basin, between a steamer going up the former and another coming down the latter:—Held, that the place of collision was a "narrow channel" within article 21, and that articles 16 and 22 were also applicable, there being no special or local rules to supersede the general rules of navigation. *The Leverington*, 55 L. J., Adm. 78; 11 P. D. 117; 55 L. T. 386; 6 Asp. M. C. 7—C. A.

—— **Mersey Sea Channel.**]—The channel near the bell buoy outside the Queen's Channel of the Mersey is not a narrow channel within 17 & 18 Vict. c. 104, s. 297. *The Mæander and The Florence Nightingale*, 1 Moore, P. C. (N.S.) 63; Br. & Lush. 29; 6 L. T. 400.

—— **The Swin.**]—The Swin, between the Middle Lightship and the Middle Sands, is a narrow channel within article 21 of 1884, and, therefore, two steamships passing one another through it, should each keep to that side of the fairway of the channel which lies on their starboard side. *The Minnie*, [1894] P. 336; 11 R. 705; 71 L. T. 715; 7 Asp. M. C. 521—C. A.

Since the lighting of the N.E. Maplin buoy, in 1894, it has been safe and practicable, by day and night, for inward-bound vessels navigating the Swin Channel, at the entrance to the river Thames, to pass to the northward and westward of the Swin Middle Lightship; and in order to comply with the regulations, they must now, in navigating that part of the channel, leave the lightship on the port hand. *The Minnie*, supra, and *The Corennie* ([1894] P. 338) discussed. *The Oporto*, 66 L. J., Adm. 12; 75 L. T. 599; 8 Asp. M. C. 213. See *S. C.* in C. A., supra, col. 785.

—— **Whether question of Fact or Law.**]—As to whether it is for the judge or the jury to decide what is a narrow channel. See *The Birkgate and The Barrabool*, 58 L. J., P. C. 101; 14 App. Cas. 318—P. C.

Dockyard Ports—Admiralty Regulation as to Navigation—Plymouth.]—The powers, if any, of the lords of the admiralty under 54 Geo. 3, c. 159, s. 2, to make regulations as to navigation and mooring of ships in dockyard ports, must be exercised in strict conformity with the act. A notice signed by the admiralty superintendent at Plymouth, as to merchant ships leaving the deep-water channel of Hamoaze free for H.M.'s ships when docking, not issued in accordance with the act, held invalid. *H.M.S. Topaze*, 10 L. T. 659; 12 W. R. 923.

ARTICLE 26.

Sailing Ships and Fishing Craft; new.

ARTICLE 27.

Special Circumstances; corresponding with Article 23 of 1880 and 1884.

Where there is one chance of escaping collision, article 23 of 1880 justifies a seaman in departing from the regulations in order to avail himself of it. *The Benares*, 53 L. J., Adm. 2; 9 P. D. 16; 49 L. T. 702; 32 W. R. 268; 5 Asp. M. C. 171.

Departure from the regulations, even though no negligence is involved, if not necessary, may cause the ship to be held in fault. See *The Khedive, Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.*, 52 L. J., Adm. 1; 5 App. Cas. 876; 43 L. T. 610; 29 W. R. 173; 4 Asp. M. C. 567—H. L. (E.) Cf. *The Memnon*, supra, col. 818.

The principle of law that you are not to adhere to strict rules of navigation, but avoid an accident if possible, is a doctrine very carefully to be watched. Per Dr. Lushington. *The Test*, 5 Not. of Cas. 276. Cf. *The William Frederick and The Byfoged Christensen*, 4 App. Cas. 669; 41 L. T. 535; 28 W. R. 233; 4 Asp. M. C. 201.

A vessel ought not to obstinately persist in adhering to the rules of navigation if by departing from them (semble, and so only) a collision may be avoided. *The London*, 6 Not. of Cas. 29.

Although rules of navigation may, and must sometimes be departed from, "it is at the same time of the greatest possible importance to adhere as closely as possible to established rules, and not to allow a deviation from them, unless the circumstances which are alleged to have rendered such deviation necessary are most distinctly proved and established." Per Dr. Lushington. *The John Buddle*, 5 Not. of Cas. 387.

A vessel with the wind free held in fault for obstinately holding on her course, the other ship being close-hauled and also in fault. *The Commerce*, 3 W. Rob. 287.

The Trinity house sailing and steering rule of 1840 not to be departed from upon mere ground of convenience in practice. *The Friends*, 4 Moore, P. C. 314. *The Gazelle*, 1 W. R. 471.

A vessel put her helm to starboard, contrary to the rules, in the expectation that the other vessel would, under the special circumstances, also act contrary to the rules:—Held, that the former was in fault for a collision that followed. *The Superior*, 6 Not. of Cas. 607.

Duty of sailing ship to depart from the regulations where steamship does nothing. See *The Highgate*, ante, cols. 812, 814.

The 19th article of 1862, which directs that in

"obeying and construing all the other and previous regulations, due regard is to be had to all dangers of navigation, and to any special circumstances existing in any particular case, rendering a departure from such rules necessary, in order to avoid immediate danger," does not prescribe any specific course to be adopted or pursued. *The Allan and The Flora*, 14 L. T. 860.

If a ship, bound to keep her course under article 18, justifies her departure from that rule, she takes upon herself the obligation of shewing both that her departure was, at the time it took place, necessary in order to avoid immediate danger, and also that the course adopted by her was reasonably calculated to avoid that danger. *The Agra and Elizabeth Jenkins*, 4 Moore, P. C. (N.S.) 435 ; 36 L. J., Adm. 16 ; L. R. 1 P. C. 501 ; 16 L. T. 755 ; 16 W. R. 735.

It is dangerous to the public to leave to masters of vessels a discretion as to obeying or departing from the sailing rules ; and accordingly such a discretion need not be exercised except in cases of very clear necessity. Where a collision has occurred owing to one colliding vessel having failed to observe (as its duty was) the rule of the road, by keeping out of the way :—Held, that, in the absence of proof as to the particular time at which an intention to violate that rule was clearly manifest, the other colliding vessel, being primâ facie bound to observe the 18th rule by keeping on its course, would not have been justified in departing therefrom. *The Byfoged Christensen, The William Frederick*, 4 App. Cas. 669 ; 41 L. T. 535 ; 28 W. R. 233—P. C.

Departure from the rule provided by 17 & 18 Vict. c. 104, s. 296, for ships meeting each other to port their helms, allowed ; the circumstances being such as to render such departure necessary to avoid immediate danger. *The Moderation*, 1 Moore, P. C. (N.S.) 528 ; 9 L. T. 586.

A collision took place between two sailing vessels crossing, the wind being about S.S.E., and the vessel "C." steering about N.N.E., the vessel "S." about W. by S. ; the vessel "C." did not keep out of the way, but kept her course, and the vessel "S.," instead of keeping her course, ported her helm, alleging immediate danger as a reason for so doing :—Held, that both vessels were to blame ; the vessel "C." for not having kept out of the way, in accordance with the provisions of the last clause of the 12th article, and the vessel "S." for not having kept her course, but having improperly ported her helm, there being no evidence of immediate danger to justify a departure from the 18th article. *The Spring*, L. R. 1 A. & E. 99 ; 12 Jur. (N.S.) 788 ; 14 W. R. 975. S. P., *The Dapper and The Lady Normanby*, 14 L. T. 895.

Two sailing ships at night were approaching each other so as to pass port-side to port-side. The one whose duty it was to keep out of the way under article 14 (*a.*) altered her course and began to come across the course of the other. The master of the ship whose duty it was, under article 22 of 1884, to keep her course, at a distance of a quarter of a mile saw the red light of the other ship shut in, and her green light come into view. He continued to keep his course till the other ship herself could be seen, when it was too late to avoid the collision, which immediately occurred :—Held, by the court of appeal, that the officer in charge of the ship which was primâ facie bound to keep her course should not have kept his course after he saw that the other vessel was going to cross his bows ; and that article 23 of 1884 had then come into operation, and that therefore both ships were to blame for the collision. But held, in the house of lords, that very great allowances should be made for an officer in charge of a ship suddenly placed in difficult circumstances by the wrongful act of another ship. The judgment of the court below was reversed upon the facts and evidence. *The Tasmania*, 15 App. Cas. 223 ; 63 L. T. 1 ; 6 Asp. M. C. 517—H. L. (E.) Reversing 37 W. R. 552—C. A.

In a cause of collision between two steam vessels meeting nearly end on in the river Thames, it was alleged by the defendants that the helm of their vessel was put a-starboard to avoid a barge :—Held, that the onus of proving that a departure from the rule was necessary in order to avoid immediate danger lay upon the defendants ; and that, in the absence of sufficient evidence to shew what became of the barge, the defendants had failed in their proof, and were, therefore, to blame for the collision, the result of not porting their helm. *The Concordia*, L. R. 1 A. & E. 93 ; 12 Jur. (N.S.) 771 ; 14 L. T. 896.

Article 23 (article 27 of 1897) is a rule of common sense, to the effect that the regulations are to be read and applied so as not to cause collision. *See*, per Dr. Lushington, *The Allan and The Flora*, 14 L. T. 860.

"When one person neglects his duty, and so puts another into danger, the second is not justified in doing nothing to avert that danger, though it is caused entirely by the fault of the first." Per Brett, M.R. *The Jane Bacon*, 27 W. R. 35. And see *The Ida and The Wasa*, 15 L. T. 103.

The "Lady Anne," close-hauled on the starboard tack, held in fault for not putting down her helm and easing off her head sheets at the last moment, so as to avoid another ship close-hauled on the port tack. *The Lady Anne*, 15 Jur. 18.

A sailing ship held in fault for collision with a steamship in a fog because, after hearing the whistle of the steamship, her people were not ready at the braces to assist the helm when the ships came into sight of each other at close quarters. *The Zadok*, 53 L. J., Adm. 72 ; 9 P. D. 114 ; 50 L. T. 695 ; 32 W. R. 1003 ; 5 Asp. M. C. 252.

Article 23 (article 27 of 1897) does not apply to a case where non-compliance with the regulations could not have caused the collision, nor where the regulations could not safely be complied with. See *The City of Antwerp and The Friedrich*, supra. *The Concordia*, supra.

The "dangers of navigation" refer primarily to dangers other than collision. As to whether danger of collision is included, see *The Benares*, supra.

Convenience is no excuse for departing from the regulations. *The Araxes and The Black Prince*, 15 Moore, P. C. 122. *And see cases* supra, col. 822.

The fact that a tug or a steamship has a heavy ship in tow does not justify her in not keeping out of the way of a sailing ship. *The Warrior*, L. R. 3 A. & E. 553 ; 27 L. T. 101 ; 21 W. R. 82 ; 1 Asp. M. C. 400. *The American and The Syria*, 43 L. J., Adm. 30 ; L. R. 6 P. C. 127 ; 31 L. T. 42 ; 22 W. R. 927 ; 2 Asp. M. C. 350 And see *The Independence*, Lush. 270 ; 14 Moore, P. C. 103 ; 4 L. T. 563 ; 9 W. R. 582.

Nor the fact that the two ships are both making for the same pilot cutter. *The Ada and*

The Sappho, 27 L. T. 718; 1 Asp. M. C. 575. Affirmed, 28 L. T. 825; 2 Asp. M. C. 4.

Semble, article 27 does not justify a departure from the regulations on the ground of a reasonable expectation that the damage would be thereby diminished. *The Khedive*, supra, col. 818.

And see further, as to departure from the regulations, 2. PRESUMPTION OF FAULT, ante, cols. 707, seq.

ARTICLE 28.

Sound Signals; corresponding with Article 19 *of* 1880 *and* 1884.

ARTICLE 29.

Proper Precautions; corresponding with Article 24 *of* 1880 *and* 1884.

As to what are Proper Precautions.]—*See* 1. NEGLIGENCE, supra, cols. 684, seq.

ARTICLE 30.

Local Rules; corresponding with Article 25 *of* 1880 *and* 1884.

Infringement of Local Rules.]—Will be held to be negligence. See *The Margaret*, 54 L. J., Adm. 18; 9 App. Cas. 873; 52 L. T. 361; 33 W. R. 281; 5 Asp. M. C. 371—H. L. (E.) *The Yourri* and *The Spearman*, 10 App. Cas. 276; 53 L. T. 29; 5 Asp. M. C. 458, infra, col. 828.

A vessel on the wrong side of the Tyne, in breach of the local rule, held in fault for collision. *The Raithwaite Hall*, 30 L. T. 233; 2 Asp. M. C. 210.

As to the obligation to obey local rules, and proof of them, see *The Henry Morton*, 31 L. T. 859; 2 Asp. M. C. 466. *The Peerless*, Lush. 30; appeal, 13 Moore, P. C. 484; 30 L. J., Adm. 89. *The Smyrna*, 2 Moore, P. C. (N.S.) 435; 10 Jur. (N.S.) 977; 11 L. T. 74, infra, col. 828.

Ignorance of a local rule is no excuse for not complying with it—per Lord Esher. *The River Derwent*, 64 L. T. 509; 6 Asp. M. C. 467.

A Trinity sailing ballast lighter held not to be required by the sea regulations to carry lights in the Thames. *The C. S. Butler*, L. R. 4 A. & E. 238; 31 L. T. 549; 23 W. R. 113; 2 Asp. M. C. 408.

A local rule, though not made by competent authority, may give rise to a custom which will be binding on all ships. *The Fyenoord*, Swabey, 374. See also *The Smyrna*, infra, col. 828; *H.M.S. Topaze*, supra, col. 824.

ARTICLE 31.

Distress Signals; corresponding to Article 27 *of* 1884.

12. LOCAL RULES.

a. Danube.

Authority of Rules of Navigation.]—The treaty of peace, signed at Paris, in 1856, after putting the Danube, with respect to the rights of persons using it for the purposes of navigation, in the same category as other great European rivers separating different states were placed by the Congress of Vienna, provided that a commission, in which Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey should each be represented by one delegate, should have power to establish certain fixed duties to be levied, to cover the expenses of certain works which were in progress, which commission was to be temporary. It also provided for a river commission, which was to be permanent; its duties being to prepare regulations of navigation and a river police. The commission to consist of delegates from the states traversed by the river along its whole line. The European commission issued provisional regulations for the police of the Lower Danube, and one of those regulations contained rules for navigating the Danube:—Held, that the rules were not binding on vessels navigating the Danube, the European commission having no authority to make such regulations. *The Smyrna*, 2 Moore, P. C. (N.S.) 435; 10 Jur. (N.S.) 977; 11 L. T. 74.

Ascending and Descending Ships—Articles 32, 36.]—Article 32 of the regulations applicable to the navigation of the Lower Danube provides that "when a vessel ascending the river finds itself exposed to meeting a vessel descending at a point which does not afford sufficient breadth, she must stop below the passage till the other vessel has cleared it; and if the ascending vessel should be actually in the passage as the other approaches it, the descending vessel must stop above until the passage is clear." The first part of this rule is imperative whenever an ascending ship, approaching a point which does not afford sufficient breadth for two vessels to pass, has notice that, if she proceeds, she will be exposed to the risk of meeting a descending ship at or near the point. The second part of the rule only comes into operation in cases in which the ascending ship has already reached the point of danger, and has actually begun to navigate the contracted passage, before notice of the approach of the descending ship is conveyed to her. Where, however, it is clearly the intention of one of the vessels to violate the rule, it is the duty of the other to give way and not to press her claim to precedence. *SS. Diana* v. *SS. Clieveden*, 64 L. J., P. C. 22; [1894] A. C. 625; 6 R. 515; 71 L. T. 101; 7 Asp. M. C. 489—P. C.

Keeping to Right Bank.]—Under r. 34, c. 2, of the Danube commission rules, vessels going down the Danube should keep to the right bank. Where a vessel going down the Danube, when there was a fog and approaching night, went to the left bank:—Held, that, according to the true construction of the rule, that was neglect of duty; and that such negligence was the cause of a collision which occurred with a vessel coming up, although the absence of lights on the latter vessel might have partly contributed to the accident. *The Yourri, The Spearman*, 10 App. Cas. 276; 53 L. T. 29; 5 Asp. M. C. 458—P. C.

b. Humber.

Stern Light — Compulsory Pilotage.]—The "R.," in charge of a tug, was dropping astern foremost up the Humber with the tide, and was eventually brought athwart the tide to go into dock. The "R." was exhibiting, in addition to the masthead and side lights, a white light from the main peak shewing astern, which had been placed there by the order of the pilot, who was by compulsion of law in charge of the "R." The rules for the navigation of the river Humber, made by order in council in pursuance of 25 & 26 Vict. c. 63, s. 32, incorporate the regulations

for preventing collisions at sea. The "E.," coming down the Humber, and the "R." came into collision. At the hearing it was admitted that the "E." was to blame:—Held, that the "R." was also to blame, for that as the Humber rules were within the purview of 36 & 37 Vict. c. 85, s. 17, there had been, by the exhibition of a stern light, a breach of statutory regulation, namely of article 2, which it was impossible to say might not have contributed to the collision, and there was no circumstance to make a departure from the regulation necessary. *The Ripon*, 54 L. J., Adm. 56 ; 10 P. D. 65 ; 52 L. T. 438 ; 33 W. R. 659 ; 5 Asp. M. C. 365. See *The Monte Rosa*, ante, col. 773.

Vessel at Anchor—Height of Riding Light.]—The "M.," a two-masted vessel, while at anchor in the river Humber was exhibiting an anchor light on the forestay at a height of about ten feet above the deck, and another on the mizzen mast at a height of about twenty-five feet above the deck :—Held, that there was a sufficient compliance with the rule for the navigation of the Humber, which provides that the after light shall be double the height of the forward light. *The Magneta*, 59 L. J., Adm. 55 ; 15 P. D. 101 ; 63 L. T. 114 ; 6 Asp. M. C. 531.

c. Mersey.

Lights.] — Vessels at anchor in the sea approaches to the river Mersey are bound by 37 & 38 Vict. c. 52, s. 1, to exhibit a white light at the main or mizzen mast, in addition to the white light prescribed by 25 & 26 Vict. c. 63, sched., table C., art. 7, and a vessel omitting to exhibit such additional light will, where the omission may have caused or contributed to collision, be held to blame under s. 17 of the 36 & 37 Vict. c. 85. *The Lady Downshire*, 48 L. J., Adm. 41 ; 4 P. D. 26 ; 39 L. T. 236 ; 27 W. R. 648 ; 4 Asp. M. C. 25.

Customs' Light.]—A steamship under way is not entitled to carry a white light at the mizzen truck as a signal for a customs officer, or otherwise than as a quarantine light ; and if she carries such a light for the former purpose, she is guilty of a breach of the Mersey navigation rules, and will be held to blame for a collision if the other vessel might have been misled thereby. *The Talbot*, [1891] P. 184 ; 64 L. T. 542 ; 7 Asp. M. C. 36.

Stern Light.]—At the trial of an action for damage by collision it appeared that the stern light of the plaintiffs' vessel was placed on deck abaft a house on the after part of the deck :—Held, that this was an infringement of rule 5 of the Mersey rules, but the court, having regard to the position of the plaintiffs' and the defendant's vessels, held, that the infringement could not have contributed to the collision. *The Fire Queen*, 56 L. J., Adm. 90 ; 12 P. D. 147 ; 57 L. T. 312 ; 36 W. R. 15 ; 6 Asp. M. C. 146.

Vessel at Anchor—Lights.]—The steamship "H." at night ran into the barque "E." at anchor in the river Mersey. By order in council of the 5th Jan., 1881, every vessel when at anchor in the river Mersey shall carry two white lights, the after light being carried double the height of the foremost light. The "E." exhibited two anchor lights, both of which were about twenty feet above the deck. It was admitted by the defendants that they only saw the after light :—Held, that the "H." was to blame for a bad look-out, and the "E." to blame for a breach of the regulation, it not being shewn that in the circumstances of the case the breach could not have contributed to the collision. *The Hermod*, 62 L. T. 670 ; 6 Asp. M. C. 509.

Launch.]—As to precautions to be taken at launches in the Mersey, see *The George Roper*, and *Cases*, supra, cols. 696, 697.

cc. Newport.

Entering Port of Newport—By-laws.]—The proper mode for a vessel to enter the port of Newport, having regard to rules 12 and 13 of the by-laws (1894) of the port, which require every vessel proceeding seaward to be kept to the right-hand or west, and every vessel proceeding inward from the sea to be kept to the right-hand or east of mid-channel—that is to say, the deep-water navigable channel, the entrance to which is marked by the Bell and Red buoys—is to keep outside the buoys until she can turn so as to pass between them, passing nearer to the Red buoy than to the Bell buoy, although when the tide is high there is sufficient water to allow a vessel to enter the channel by passing over the flats inside the buoys. A vessel, however, entering the port from the eastward would not be wrong, as regards a vessel coming out, in entering the channel by passing inside the Red buoy. *The Winstanley*, 65 L. J., Adm. 121 ; [1896] P. 297 ; 75 L. T. 133 ; 8 Asp. M. C. 170—C. A.

d. Thames.

Regulation of 1863—Crossing Rule.]—Ships in the Thames approaching each other upon opposite sides of a point round which the river bends, upon such headings that if at sea they would be crossing ships, are not crossing ships within the regulations of 1863. *The Ranger and The Cologne, Malcolm* v. *General Steam Navigation Co.*, 9 Moore, P. C. (N.S.) 352 ; L. R. 4 P. C. 519 ; 27 L. T. 769 ; 21 W. R. 273 ; 1 Asp. M. C. 484—P. C. *The Velocity, General Steam Navigation Co.* v. *Hedley*, 6 Moore, P. C. (N.S.) 263 ; 39 L. J., Adm. 20 ; L. R. 3 P. C. 44 ; 21 L. T. 686 ; 18 W. R. 264—P.C. See also *The Esk and The Niord*, 7 Moore, P. C. (N.S.) 276 ; L. R. 3 P. C. 436 ; 24 L. T. 167 ; 1 Asp. M. C. 1. *The Oceano and The Virgo*, infra.

Getting under Way—Shewing a Light.]—A steamship getting under way in the Thames, and athwart the river in such a position that her side lights are not visible to vessels bound up and down, must shew a light sufficient to warn approaching vessels of her presence. If she fails to do so, she breaks the Thames rules, 1872, r. 20. *The John Fenwick*, L. R. 3 A. & E. 500 ; 41 L. J., Adm. 38 ; 26 L. T. 322 ; 1 Asp. M. C. 249.

Crossing Rule of 1872.]—A steamship, "A.," going up the river Thames, met another, "B.," coming down in the reach above her, which made an angle in the reach in which she was. At this time "A." had "B." on her starboard bow :—Held, that they were crossing ships within rule 29 of the Thames rules, 1872, and that it was the duty of "A." to keep out of the way. *The Oceano and The Virgo*, 3 P. D. 60.

Thames Rules, 1880—Steamships—Rounding Points of River.]—Rule 23 of the Thames

rules, 1880, is not confined to the seaward side of "a line drawn from Blackwall Point to Bow Creek." A steamship, the "C. S.," left the South-West India Docks nearly opposite the curve of Blackwall Point, and proceeded down stream at easy speed against a flood tide. In a few minutes, as she was about to round Blackwall Point, she perceived the steamship "M." in Bugsby's Reach, and preparing to round the point; the "C. S." stopped and reversed her engines, but a collision between the "C. S." and the "M." took place:—Held, that rule 23 of the Thames rules, 1880, did not apply, under the circumstances, to the "C. S."; that ordinary care on the part of the "M." would have enabled her to avoid the collision, and that she alone was to blame. *The Margaret, Cayzer* v. *Carron Co.*, 54 L. J., Adm. 18; 9 App. Cas. 873; 52 L. T. 361; 33 W. R. 281; 5 Asp. M. C. 371—H. L. (E.)

Thames Rules, 1880, rr. 22, 23.]—A steamship navigating the Thames against the tide is bound to obey rule 23 of the Thames rules, 1880, and on approaching one of the points there named, to wait until vessels then approaching it with the tide have passed her, or, quære, passed the point. Whether vessels are also to observe rule 22, and pass port-side to port-side, depends on whether the vessel navigating against the tide is close to the shore when waiting for the one coming down with the tide to pass her, or so far out as to allow the latter to pass port-side to port-side. Semble, where the point to be passed is on the north side of the river with a flood tide, or on the south side with an ebb tide, if the vessel navigating with the tide has her green light open when ahead of the vessel waiting, the 23rd rule alone applies, and the vessels will pass clear starboard to starboard; otherwise both rules apply. Steamships rounding a point are not bound to stop or reverse engines because at one moment they are approaching each other with risk of collision if they keep straight on, but without risk of collision if both vessels keep the curvilinear course they are then on. *The Libra*, 6 P. D. 139; 45 L. T. 161; 4 Asp. M. C. 429.

Barge Dredging—Lights.]—The sailing barge "M.," with her mast lowered and her anchor on the ground, was dredging down the river Thames, when she was run into by the steam tug "I. C.," with a string of barges in tow. The "M." was exhibiting a white light in a globular lantern, which was placed on the top of her mast-case, about four feet above the deck:—Held, that "M." was not a sailing vessel "under way," within the meaning of the Thames rules, 1880. *The Indian Chief*, 58 L. J., Adm. 25; 14 P. D. 24; 60 L. T. 240; 6 Asp. M. C. 362.

Thames Rules, 1880—Application of Rule 22.]—This rule is not to be interpreted in the same way as the "end on" rule of the sea regulations. Vessels may be approaching each other with risk of collision in the Thames without being end on, or nearly end on, and where the green or red light of one is seen on the starboard or port bow of the other. *The Odessa*, 46 L. T. 77; 4 Asp. M. C. 493—C. A. Followed in *The Lady Wodehouse*, 2 Times L. R. 252. *The Mary Lohden*, 58 L. T. 641; 6 Asp. M. C. 262.

Barges in Tow.]—No. 4 of the by-laws of the Thames conservators, July, 1877, is as follows: "Above and to the westward of Albert Bridge at Chelsea, six vessels and no more may be towed together in a single line at one time, and the distance between any two of the vessels shall not exceed fifty feet":—Held, that the towing of eight barges by a steam tug, the first four being in a single line, and the last four two abreast, but lashed closely together, was an infringement of the by-law. *Gadney* v. *Rough*, 40 L. T. 258; 4 Asp. M. C. 73.

Ballast Lighter—Lights.]—The regulations for preventing collisions at sea issued under the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), ss. 31, 32, and order in council of the 9th of January, 1863, do not apply to a ballast lighter which, though at times navigated under sail, never goes to sea, but is wholly employed within the limits of the jurisdiction of the Thames conservancy. *The C. S. Butler*, L. R. 4 A. & E. 238; 31 L. T. 549; 23 W. R. 113.

When such a vessel has been injured in a collision, her owners will not, in the absence of any by-law of the conservators of the Thames prescribing lights to be carried by her, be held disentitled to recover damages in a cause of collision on the ground that she contributed to the collision by being under way before sunrise without having any lights exhibited. *Ib.*

Dumb-barges.]—Dumb-barges in motion driving with the tide up or down the river Thames at night are not bound to carry lights. *The Owen Wallis*, 43 L. J., Adm. 36; L. R. 4 A. & E. 175; 33 L. T. 41; 22 W. R. 695.

A dumb-barge coming up the river Thames in a flood tide may keep on either side of the river, and there is no obligation on her by custom or otherwise to keep in mid-channel. *Ib.*

There is no duty on a dumb-barge driving with the tide in the Thames to keep out of the way of a steamship; but it is the duty of the steamship to keep out of the way of the barge. *Ib.*

When a collision occurs between a dumb-barge without lights and a steamer on a dark night in the Thames, there is no presumption of law that the steamer is to blame. *The Swallow*, 36 L. T. 231; 3 Asp. M. C. 371—C. A.

Dumb-barges in the Thames do not carry anchors, and have no means of bringing up except by going ashore or fastening on to anything they may come in contact with, and hence a dumb-barge getting under way in clear weather and getting into a fog, is not guilty of negligence if she comes into contact with a vessel moored in the river, and if that vessel, in breach of the rules and by-laws for the navigation of the river Thames, has her anchor not stock-a-wash, and the barge is thereby injured, the vessel so moored is solely responsible for such damage. *The Rose of England*, 59 L. T. 262; 6 Asp. M. C. 304.

Stopping and Reversing.]—A steamer having stopped but not having reversed immediately before a collision, though the court found as a fact that her not having done so did not affect the collision, and having thus infringed rule 14 of the Thames rules, 1880:—Held, that she was nevertheless not to blame, for the Thames rules do not fall within the operation of s. 17 of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85). *The Harton*, 53 L. J., Adm. 25; 9 P. D. 44; 50 L. T. 370; 32 W. R. 597; 5 Asp. M. C. 213.

Fog—Anchorage Ground.]—Although a vessel may be justified in anchoring in the fairway of the Thames through being overtaken by a dense fog, such a place is not a proper anchorage ground under articles 10 and 12 of the Thames rules, 1872, and the duty lies on those in charge of her to move her as soon as they reasonably can, and if a collision occurs whilst she is so anchored, the question will be, whether between the time of her anchoring and the collision the weather was such that she could reasonably have been removed. A steamship bound up the Thames on a flood tide ought not to leave a wharf and get under way in a dense fog, and, semble, if a vessel is overtaken by a dense fog in such circumstances, the proper mode for her to go up is dredging up stern first with her anchor down, so that she can be brought up at any moment. *The Aguadillana*, 60 L. T. 897; 6 Asp. M. C. 390.

—— **In Gravesend Reach.**]—Where a vessel, intending either to moor at one of the buoys or anchor in the anchorage ground in Gravesend Reach, moves from buoy to buoy to select one, and, finding them all occupied, anchors a short distance above the last of the buoys, she does not navigate within the anchorage ground in contravention of the Thames rules, 1872, r. 15. *The City of Delhi*, 58 L. T. 531; 6 Asp. M. C. 269.

Vessel Dropping up River stern foremost—Look-out Astern—Duty to Warn approaching Vessel.]—It is the duty of a vessel dropping up the Thames in the neighbourhood of the Docks at night to have a look-out astern, and to warn an approaching vessel bound down of her presence. Semble, a steamship may under such circumstances sound the blast of five seconds' duration mentioned in the Thames rules, 1880, r. 19. *The Juno*, 11 R. 679; 71 L. T. 341; 7 Asp. M. C. 506.

Anchor Stock awash.]—By r. 20 of the rules and by-laws for the regulation of the navigation of the river Thames, allowed by order in council, February 5, 1872, "No vessel shall be navigated or lie in the river with its anchor or anchors hanging by the cable perpendicularly from the hawse unless the stock shall be awash . . . ." In an action of damage for a collision which occurred in the river Thames, it appeared that the anchor of the plaintiffs' vessel was one of the parts which first came in contact with the defendants' vessel. It was hanging from the hawse, shackle, or ring, awash, and the defendants by their counter-claim charged the plaintiffs with neglecting to comply with the rule:—Held, that the rule had not been infringed, as the anchor must be as low as stock awash, but may be as much lower as is thought proper. *The J. R. Hinde*, 61 L. J., Adm. 91; [1892] P. 231; 67 L. T. 832; 7 Asp. M. C. 257.

Where a vessel, intending either to moor at one of the buoys or anchor in the anchorage ground in Gravesend Reach, finds all the buoys occupied, and, on passing the last buoy, gets her anchor a-cockbill for the purpose of bringing herself to anchor on finding a suitable place, and, after she has got a short distance above the buoys, a collision occurs and damage is done by the anchor, such anchor is only a-cockbill during such time as is "absolutely necessary" for bringing her to anchor within the meaning of the Thames rules, 1880, r. 19. *The City of Delhi*, supra. And see *The Rose of England*, supra, col. 832.

Whether the anchor of a steamer in the Thames should be carried at the hawse-pipe with the stock above water is a matter within the province of the pilot, notwithstanding that the carrying of an anchor in such a position may be an infringement of r. 20 of the Thames conservancy by-laws; and therefore owners are not liable for damage caused thereby. *The Ripon* (supra, col. 829) explained. *The Monte Rosa*, 62 L. J., Adm. 20; [1893] P. 23; 1 R. 557; 68 L. T. 299; 41 W. R. 304; 7 Asp. M. C. 326.

A dumb-barge, by the negligent navigation of those in charge of her, was suffered to come into contact with a schooner moored to a mooring-buoy in the river Thames. The schooner had her anchor hanging over the bow with the stock above water, contrary to the Thames by-laws. The anchor made a hole in the barge and caused damage to her cargo. But for the improper position of the anchor neither the barge nor her cargo would have received any damage. In an action of damage by the owners of the barge against the schooner:—Held, that both vessels were to blame, and that therefore the owners of the barge were entitled to half the damage sustained. *The Margaret*, 50 L. J., Adm. 67; 6 P. D. 76; 44 L. T. 291; 29 W. R. 533—C. A.

Vessel crossing River.]—By article 24 of the rules and by-laws for the navigation of the river Thames, "Steam-vessels crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river," and by article 25 such other vessels shall keep their course:—Held, that a ship which has not completely accomplished the manœuvre of crossing is still under the obligation of the rule, although her stem may have got as near to the opposite shore as she can safely get, if she is still athwart the stream. *The River Derwent*, 64 L. T. 509; 7 Asp. M. C. 37—H. L. (E.)

Where a vessel lying at anchor in the river Thames, head to tide, gets under way for the purpose of proceeding up or down the river with the tide, and in turning round she has to work across the river, she is a steam-vessel "crossing from one side of the river towards the other side" within the meaning of the Thames rules, 1880, r. 24, and it is her duty to keep out of the way of vessels navigating up and down the river, and of the latter to keep their course, under article 25. *The Schwan*, 61 L. T. 308; 6 Asp. M. C. 409.

—— **Steamship—Four blast signal.**]—Where a steamship navigating the river Thames is in such a position, through no fault of those in charge of her, that it is unsafe or impracticable for her to keep out of the way of a sailing vessel, it is the duty of the sailing vessel, under the Thames rules, 1880, r. 21, on hearing the steamer's whistle sounded as therein provided, to keep out of the way of the steamer. *The Longnewton*, 59 L. T. 260; 6 Asp. M. C. 302.

Steamship Swinging—Stern Light.]—A steamship having let go her anchor in the Thames was swinging to the tide athwart the river. Her sidelights and masthead light were not taken in for three or four minutes after the anchor held, when her riding light was put up and her masthead light shown at the stern by way of a stern light:—Held, that she was in fault for a collision with another steamship under way, which occurred

very shortly after she took in her sidelights and put up her riding light. Held, also, that her masthead light, which she exhibited at her stern, was not such a light as is required by the Thames rules, 1892, r. 7 (*c*). Held, also, that she was in fault for not sounding four or more blasts of her steam whistle in compliance with the Thames rules, 1880, r. 18. *The Vega*, 64 L. J., Adm. 68; [1895] P. 156; 11 R. 726; 72 L. T. 332; 7 Asp. M. C. 597.

Steamship Turning—Four Blast Signal.]—A steamship about to turn in the river is bound to give the signal required by the Thames rules, 1880, r. 18, before executing the manœuvre of turning. *The New Pelton*, 60 L. J., Adm. 78; [1891] P. 258; 65 L. T. 494; 7 Asp. M. C. 81.

Fog—Fairway—Duty to ring Bell.]—The word "fairway" in r. 13 of the Thames rules (1877) means a clear passage-way by water. A barge lay at anchor above and inside the West Blyth buoy in Sea Reach, in not less than eighteen feet of water at half ebb:—Held, in fault for a collision caused by her not ringing a bell in a fog at intervals of not more than two minutes. *The Blue Bell*, 64 L. J.. Adm. 71; [1895] P. 242; 11 R. 790; 72 L. T. 540; 7 Asp. M. C. 601.

Watermen's Act—22 & 23 Vict. c. cxxxiii.—27 & 28 Vict. c. cxiii.—Barges in Tow.]—A tug hauling into dock thirty-one barges from the dock gates does not break r. 59 made under the above act. *Rolles* v. *Newell*, 59 L. J., Q. B. 423; 25 Q. B. D. 335; 63 L. T. 384; 39 W. R. 96; 55 J. P. 70; 6 Asp. M. C. 563.

—— **Licensed Watermen in charge of Barges.**]—As to the construction of r. 60 made under the above act, see *Elmore* v. *Hunter*, 47 L. J., M. C. 8; 3 C. P. D. 116; 38 L. T. 179; 3 Asp. M. C. 555.

—— **Barge over 50 Tons—Two Hands.**]—Under the Thames Conservancy and Watermen's Acts, and by-laws thereunder, if a barge under way exceeds 50 tons, there must be two qualified licensed watermen on board, and one is not sufficient though assisted by another unqualified man. *Perkins* v. *Gingell*, 50 J. P. 277.

And see as to the Waterman's Act, supra, cols. 139, seq.

e. Tees.

"Maximum of Speed Six Miles per Hour."]—The 22nd clause of the by-laws of the river Tees, which provides that no steamship shall be navigated on any part of the river Tees at a higher rate of speed than six miles per hour, is to be construed as prohibiting a steamship proceeding against the tide being navigated at a greater speed than six miles per hour over the ground. *The R. L. Alston*, 8 P. D. 5; 48 L. T. 469; 5 Asp. M. C. 43—C. A.

Starboard side of River—Steamship.]—Articles 17 and 18 of the river Tees conservancy by-laws, providing that ships shall keep "the starboard side of the river, so that the port helm may always be applied," and that a "steamship, when approaching another ship on an opposite course or from an opposite direction, shall before approaching within 30 yards, slacken her speed, and keep as near as possible to the starboard side of the river," are to be observed even when vessels are approaching one another so as to shew each other their green lights, and nothing will excuse the non-observance of these rules but extreme necessity. *The Mary Lohden*, 58 L. T. 461; 6 Asp. M. C. 262—C. A.

f. Tyne.

Crossing River—Duty of Vessels going up or down.]—The duty imposed by article 22 of the rules for the navigation of the river Tyne upon vessels crossing the river not to cause obstruction, injury, or damage to other vessels, does not require them in any event to get out of the way of vessels going up or down, and they are at liberty when crossing at a proper time and in a proper manner to do so at such times as may be convenient to themselves, and vessels proceeding up and down must take the ordinary precautions to avoid collision with crossing ships. *The Thetford*, 57 L. T. 455; 6 Asp. M. C. 179.

Crossing near Pier-heads.]—By-law 20 of the regulations of the river Tyne, 1884, must be taken to mean that a vessel is not to cross from north to south, or from south to north, close up to the pier-heads, but is to get on a proper course when at some considerable distance outside the pier-heads. *The Harvest*, 11 P. D. 90; 55 L. T. 202; 6 Asp. M. C. 5—C. A.

Side of River—Crossing River.]—By the by-laws regulating the navigation of the river Tyne (clause 17), all vessels proceeding to sea must keep to the south side of mid-channel, and (clause 20) "vessels crossing the river and vessels turning take upon themselves the responsibility of doing so safely with reference to the passing traffic." Under these by-laws a vessel outward bound coming at full speed out of the Tyne dock on the south side of the river Tyne, and crossing the river to the north side, whether intentionally, in violation of clause 17, or unintentionally by reason of the force of the tide, is bound to use the utmost caution to avoid the passing traffic, and to contemplate before attempting to come out any contingencies, such as tide, stoppage of the traffic, &c., which may arise, and she should only cross if it can be done without risk to that traffic; if a collision occurs by want of such caution, the ship will be responsible. *The Henry Morton*, 31 L. T. 859; 2 Asp. M. C. 466—P. C.

Semble, that the 21st clause of the by-laws, providing that "when steam vessels are proceeding in the same direction, but with unequal speed, the vessel which steams slowest shall, when overtaken," take certain measures to allow the overtaking steamship to pass her, applies only to a vessel overtaking and passing another actually upon the same course with itself *Ib.*

A brig, in ballast, coming up the Tyne, along the south shore, came into collision with a smack being tugged down along the same shore. She pleaded, in defence, a custom of that river that vessels in ballast should come along the south shore:—Held, that no such custom could be maintained against the express conditions of the 17 & 18 Vict. c. 104. *The Hand of Providence*, Swabey, 107.

Launch.]—See *The United States*, ante, col. 697.

By-law 20.]—The construction put upon by-law 20 of the by-laws for the regulation of the river

Tyne, 1884, in *The Harvest* (55 L. J., Adm. 35; 11 P. D. 90), that an incoming vessel shall not begin to make for the river and to shape her course up it too near the piers, does not mean to lay down a hard and fast rule as to distance, but only that the incoming vessel shall leave reasonable room for an outgoing vessel to pass out. *The John O'Scott*, 66 L. J., Adm. 47; [1897] P. 64; 76 L. T. 222; 8 Asp. M. C. 235—C. A.

13. Jurisdiction and Practice.

a. Jurisdiction.

The jurisdiction of the Admiralty formerly extended to all water, where the tide ebbs and flows, and where great ships go. See per Lord Blackburn, *Reg.* v. *Anderson*, 38 L. J., M. C. 12; L. R. 1 C. C. 161; 19 L. T. 400; 17 W. R. 208; 11 Cox, C. C. 198; *Reg.* v. *Carr*, 10 Q. B. D. 76; 47 L. T. 450; 4 Asp. M. C. 604.

Collision within a County.]—Appearance under protest in a cause of collision on the ground that it was infra corpus, &c., overruled. The collision was in the Thames in the neighbourhood of Hole Haven. *The Eliza Jane*, 3 Hag. Adm. 335.

Prohibition awarded in the same case. *Carfrae* v. *Salmon*, 3 Hag. Adm. 338.

A collision in the Humber, twenty miles from the main sea, near the Yorkshire coast, and three miles from that of Lincolnshire:—Held (1832), not to be within the jurisdiction of the admiralty. *The Public Opinion*, 2 Hag. Adm. 398.

Prohibition to the admiralty in a suit for collision (semble in the river Thames), but upon terms that the names of the owners be given. *Martin* v. *Green*, 1 Keb. 730; and see *The Volant*, 1 Not. of Cas. 503.

Prohibition to the admiralty in a suit for a collision on the Thames at Redriff. *Dorrington's Case*, Moo. 916; and see *Violet* v. *Blaque*, Cro. Jac. 514; *Velthasen* v. *Ormsley*, 3 Term Rep. 315.

—— **Collision in Dock in London — County Court.**—The county court has jurisdiction under the Admiralty Court Act, 1861, s. 7, to hear such a case. *Reg.* v. *City of London Court Judge*, 51 L. J., Q. B. 305; 8 Q. B. D. 609; 30 W. R. 566. *And see cases* post, cols. 922, 941.

Foreign Ships in Foreign Waters.] — The court has jurisdiction over an action brought by a British subject against a foreign ship for a collision in foreign waters. *The Griefswald*, Swabey, 430.

Before 24 & 25 Vict. c. 10, s. 7, a master of a Danish schooner lying alongside the quay at the port of Ibraila, in the Danube, got on board an English barque lying outside him; and with a view to get the schooner out, wilfully cut the barque adrift from her moorings, whereby she swung to the stream and capsized a barge, which contained part of her cargo belonging to Turkish owners:—Held, that the Turkish owners of the cargo destroyed could not sue the Danish schooner in the Court of Admiralty. *The Ida*, Lush. 6; 1 L. T. 417.

The court had jurisdiction in case of a collision between an English and an Irish vessel in the Great North Holland Canal. *The Diana*, 32 L. J., Adm. 57; 9 Jur. (N.S.) 26; 7 L. T. 397; 11 W. R. 189; *and see* post, col. 922.

Damage to Ship otherwise than by Collision.] Semble. The Admiralty Court had always jurisdiction in case of damage to a ship by contact with another object not being a ship. *The Zeta, Mersey Docks and Harbour Board* v. *Turner*, 63 L. J., Adm. 17; [1893] A. C. 468; 1 R. 307; 69 L. T. 630; 7 Asp. M. C. 369; 57 J. P. 660—H. L. (E.)

Action in personam against Pilot.]—The High Court of Admiralty had no jurisdiction to entertain an action in personam against a pilot in respect of a collision caused by his negligence in the high seas. *Reg.* v. *City of London Court Judge*, 61 L. J., Q. B. 337; [1892] 1 Q. B. 273; 66 L. T. 135; 40 W. R. 215; 7 Asp. M. C. 140—C. A.

Consequently a county court has no such jurisdiction in such case. *Ib.*

Loss of Life.]—The Admiralty Court has jurisdiction under 24 Vict. c. 10, s. 7, to entertain an action under Lord Campbell's Act to recover damages for the death of a person killed in a collision. *The Guldfaxe*, 38 L. J., Adm. 12; L. R. 2 A. & E. 325; 19 L. T. 740; 17 W. R. 578. S. P., *The Borodino*, 5 L. T. 291. But see *Smith* v. *Brown*, 40 L. J., Q. B. 214; L. R. 6 Q. B. 729; 24 L. T. 808; 19 W. R. 1165; 1 Asp. M. C. 53, contra; and *The Vera Cruz*, infra.

The Admiralty Court Act, 1861 (24 Vict. c. 10), which by s. 7 gave the Court of Admiralty "jurisdiction over any claim for damage done by any ship," did not give jurisdiction over claims for damages for loss of life under Lord Campbell's Act (9 & 10 Vict. c. 93); and the Admiralty Division cannot entertain an action in rem for damages for loss of life under Lord Campbell's Act. *The Franconia* (infra) overruled. *The Vera Cruz, Seward* v. *The Vera Cruz*, 54 L. J., Adm. 9; 10 App. Cas. 59; 52 L. T. 474; 33 W. R. 477; 5 Asp. M. C. 386; 49 J. P. 324—H. L. (E.)

—— **Liability of Foreign Ships.**]—An action was instituted against a foreign ship to recover damages for the death of the husband of the plaintiff alleged to have been caused by a collision brought about by the improper navigation of the ship proceeded against:—Held, that the Admiralty Court had jurisdiction to entertain the action. *The Franconia* or *Jeffrey* v. *Franconia* (*Owners*), 46 L. J., Adm. 33; 2 P. D. 163; 36 L. T. 640; 25 W. R. 796—C. A.

An action in rem against a foreign ship under Lord Campbell's Act (9 & 10 Vict. c. 93, s. 2), is not within the Admiralty Court Act, 1861 (24 Vict. c. 10, s. 7), and therefore the Admiralty Division has not jurisdiction over such an action. The Chancery and Admiralty Divisions may entertain such a claim in an action for limitation of liability, under their general statutory jurisdiction as to limitation of liability. Per Brett, M.R. *The Vera Cruz*, 53 L. J., Adm. 33; 9 P. D., 96; 51 L. T. 104; 32 W. R. 783; 5 Asp. M. C. 270—C. A. See *S. C.*, in H. L., supra.

Foreigners and their Representatives.]—Foreigners injured, or the representatives of foreigners killed, may sue in the Court of Admiralty in respect of injuries done by a British vessel on the high seas. *The Explorer*, 40 L. J., Adm. 41; L. R. 3 A. & E. 289; 23 L. T. 604; 19 W. R. 166.

17 & 18 Vict. c. 104, s. 512—Loss of Life—Notice to Board of Trade.]—In a collision a Norwegian brig foundered with all hands. In

answer to an inquiry from the Norwegian vice-consul the board of trade answered that they did not intend to hold an inquiry—meaning, as the court held, an inquiry under Part VIII. of the act. Afterwards the widow of one of the seamen drowned brought an action for damages against the owners of the other ship, and notice of her desire to proceed was sent to the board, who stated that they did not intend to institute an inquiry under Part IX. of the act :—Held, that this notice not having been given to the board before action brought the action did not lie. *Haglund* v. *Russells*, 9 Ct. of Sess. Cas. (4th ser.) 958.

Nets Fouled by a Trawler.]—Justices held to have jurisdiction in a case of drift nets being fouled by a trawler. *Hallett* v. *Dowdall*, 18 Q. B. 882.

Torts on the High Sea.]—The Admiralty Court has original jurisdiction over torts on the high seas ; therefore where the damage was done by a keel without mast, and usually propelled by a pole. *The Sarah*, Lush. 549.

Ship Damaging Pile Driver.]—A collision between a ship and a pile driving machine ashore held to be within s. 29 of the Court of Admiralty (Ireland) Act, 1867, 30 & 31 Vict. c. 114. *The Maid of the Mist*, 21 W. R. 310.

Action against Pilot in charge of Vessel.]—The Court of Admiralty has no jurisdiction to entertain a suit against a pilot for damage occasioned to a ship by his negligence whilst in charge of another ship. *The Alexandria*, 41 L. J., Adm. 94 ; L. R. 3 A. & E. 574 ; 27 L. T. 565 ; 1 Asp. M. C. 464. But see *The Zeta*, infra, col. 941 ; *Reg.* v. *City of London Court (Judge)*, infra, col. 942.

The Court of Passage and the county courts, having no larger admiralty jurisdiction than the Court of Admiralty, cannot, therefore, entertain such a suit. *Ib.*

—— **Joinder of Pilot as Defendant.**]—Where an action in rem has been brought against a ship and her owners for damage by collision, and compulsory pilotage has been pleaded, an order ought not afterwards to be made for the joinder of the pilot as a defendant (assuming there was jurisdiction to make the order) if the effect of so doing would be to embarrass the trial of the action. *The Germanic*, 65 L. J., Adm. 53 ; [1896] P. 84 ; 73 L. T. 730 ; 44 W. R. 394 ; 8 Asp. M. C. 116—C. A.

Plaintiff's Ship at Anchor—Burden of Proof—Who to Begin.]—The plaintiff's ship being at anchor, held that the burden of proof was on the defendants, and that they must begin. *The George Arkle*, 5 L. T. 290.

Damage to Barge in a Body of County.]—By the 24 & 25 Vict. c. 10, s. 7 the Admiralty Court has jurisdiction in a cause of damage done by a sea-going vessel to a barge propelled by oars within the body of a county. *The Malvina*, Lush. 493 ; Br. & Lush. 57 ; 1 Moore, P. C. (N.S.) 357 ; 9 Jur. (N.S.) 527 ; 8 L. T. 403 ; 11 W. R. 576, and see *The Sarah*, supra. *Everard* v. *Kendall*, 39 L. J., C. P. 234 ; L. R. 5 C. P. 428 ; 22 L. T. 508 ; 18 W. R. 892.

Damage to Tow by Tug—Jurisdiction.]—The Admiralty Court has jurisdiction to entertain a suit against a steam-tug by the vessel in tow for damage done to such vessel by collision caused by the conduct of the tug. *The Night Watch*, 32 L. J., Adm. 47 ; 8 Jur. (N.S.) 1161 ; 7 L. T. 396 ; 11 W. R. 189. But see *The Robert Row*, ante, col. 756.

Discontinuance, Effect of.]—See *The Ardandhu*, *Kronprinz* (*Owners of Cargo*) v. *Kronprinz* (*Owners*), infra, col. 751.

Form of Action—Trespass or Case.]—If a collision occurs through the pilot's negligence, the owner being on board, the remedy against the owner is by action on the case and not trespass. *Huggett* v. *Montgomery*, 2 Bos. & P. (N.R.) 447.

b. Parties.

Child en ventre sa mère.]—In a suit for limitation of liability, instituted on behalf of the owners of a brig against the owners of a barque, an appearance was entered on behalf of a child of one of the drowned men killed by the collision, en ventre sa mère. The court reserved leave to the child en ventre, if born within due time, to prefer its claim for damages sustained by the death of its father. *The George and Richard*, L. R. 3 A. & E. 466 ; 24 L. T. 717 ; 20 W. R. 246 ; 1 Asp. M. C. 50. The child was afterwards born, and its claim was assessed.

Right of Underwriters.]—The right of the underwriters of a lost ship for damages against a wrongdoer is merely to make the same claim that the insured might have made. *Simpson* v. *Thomson*, 3 App. Cas. 279 ; 38 L. T. 1 ; 3 Asp. M. C. 567—H. L.

In the case of a collision between two ships belonging to the same owner, by which one was totally lost through the exclusive fault of the other :—Held, that the underwriters could make no claim against the sum paid into court, under the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 54, the insured being himself the person who had caused the damage. *Ib.*

Bailees of a Barge Competent to Sue in rem.]—The bailees of a barge are competent to sue in rem in the Admiralty Court in cases of collision. *The Minna*, L. R. 2 A. & E. 97.

Action by one Part Owner.]—If one of the part owners of a ship sue alone for damage by collision and the defendant do not plead in abatement, the other part owner may afterwards sue alone for the damage suffered by him in respect of his share, and the defendant cannot plead in abatement. *Sedgworth* v. *Overend*, 7 Term Rep. 279 ; *Addison* v. *Overend*, 6 Term Rep. 118.

To an action on the case against some of the co-owners of a ship for negligence of the master in damaging the plaintiff's goods on board another ship by collision it cannot be pleaded in abatement that there are other co-owners. *Mitchell* v. *Tarbutt*, 5 Term Rep. 649 ; 2 R. R. 684.

Third Party Order.]—Where a ship, whilst in the hands of engineers for repairs, came into collision with another vessel whose owners sued her in rem for damages, the owner of the ship sued cannot bring in the engineers as third parties, as his right (if any) against them is not one of contribution or indemnity within the meaning of R. S. C., Ord. XVI. r. 48. *The Jacob Christensen*, 64 L. J., Adm. 92 ; [1895] P. 281 ; 11 R. 795 ; 72 L. T. 902 ; 8 Asp. M. C. 21. See also *The Cartsburn*, col. 758, *The Bianca*, ante, col. 668.

c. Default of Appearance.

Default of Appearance by Defendant.]—See *The Spero Expecto*, infra, col. 988.

d. Cross Actions—Bail—Security.

Security—Plaintiff out of Jurisdiction.]—The provision of 24 Vict. c. 10, s. 34 as to giving security to answer a cross cause, applies where the plaintiff is a British subject resident in the jurisdiction. The "Cameo" and the "Restless" were in collision, and the "Restless" sank. Her owners arrested and sued the "Cameo"; the "Cameo" owners entered a cross-action against the "Restless" owners in personam:—Held, that the latter, though British subjects resident within the jurisdiction, must give security to answer the cross action. *The Cameo*, Lush. 408; 5 L. T. 773.

—— **Staying Proceedings—"Principal Cause" —"Cross Cause."**]—A collision having taken place between the "J." and the "R.," by which the "R." was sunk, the owners of the "J." commenced an action of damage in personam. Subsequently the owners of the "R." commenced an action of damage in rem against the "J.," whose owners gave bail to avoid her arrest. The actions were consolidated, the owners of the "R." being made defendants to the first action, in which they delivered a counter-claim:—Held, that the court had no power, under s. 34 of the Admiralty Court Act, 1861, to order the counter-claim to be stayed until the defendants gave security to answer the plaintiff's claim. *The Rougemont*, 62 L. J., Adm. 121; [1893] P. 275; 1 R. 658; 70 L. T. 420; 7 Asp. M. C. 437.

Bail to Answer Counter-claim.]—The power of the Admiralty Division under s. 34 of the Admiralty Court Act, 1861, to order an action to be stayed until bail has been given to answer a cross-action or counter-claim, does not extend to making an absolute order to give bail; and in a damage action in which the plaintiffs had discontinued after the defendants had counterclaimed, the court refused to enforce an order, made by the registrar, to give bail to answer such counterclaim. *The Alexander*, 48 L. T. 797; 5 Asp. M. C. 89.

The court has jurisdiction by 24 Vict. c. 10, s. 34, to order a plaintiff in an action for damage by collision to give security for damages to a defendant who brings a counter-claim. The court can exercise this power when such plaintiff is a foreign sovereign whose ship cannot be arrested. *The Newbattle*, 54 L. J., Adm. 16; 10 P. D. 33; 52 L. T. 15; 33 W. R. 318; 5 Asp. M. C. 356—C. A.

Cross-actions—Bail.]—Two foreign vessels, a barque and a ship came into collision, and the barque sank. The ship was arrested in a damage cause by the owners of the barque. The owners of the ship thereupon commenced a cross-action against the owners of the barque, to which the latter made no appearance. Motion to dismiss the original action unless an appearance and bail were given by the owners of the barque rejected. *The Carlyle*, 6 W. R. 197.

Where there is a cross-action, and both come on to be heard together by consent of proctors, the court decides in the cross-action according to the facts pleaded and proved in the original action. *The Vortigern*, Swabey, 518; 1 L. T. 307.

The owners of a ship, "A.," brought an action in a cause of damage against the owners of "B." The court found both to blame; no cross-action had been entered pending those proceedings. Subsequently the owners of "B." entered an action in a cause of damage against the owners of "A.," who gave an appearance under protest:—Held, that the owners of "A." must give an absolute appearance, though a cross action, in the first instance, would have been the proper course. *The Calypso*, Swabey, 28; 4 W. R. 303.

Where cross actions were brought, and one vessel was found solely to blame, but her owners were freed from responsibility because the collision was caused by the act of a pilot who was employed compulsorily, in the action brought by the innocent vessel, the court dismissed the plaintiff without costs, but in the cross action condemned the guilty vessels in costs. *The Annapolis and The Johanna Stoll*, Lush. 295; 30 L. J., Adm. 201; 4 L. T. 417.

Collision between two foreign vessels, "A." and "B."; total loss of "A."; "B." was arrested in an action by the owner of "A."; cross action by the owners of "B.," but no appearance. The court refused to stay proceedings in the action against "B." until an appearance was given in the cross-action. Subsequently an appearance was entered, but no bail given; judgment in the original action pronouncing both ships in fault; the court refused to order that no damages be paid to the owners of "A." until decree given in the cross-action. *The North American and The Tecla Carmen*, Lush. 79.

When cross causes are instituted in respect of a collision, security cannot be required, under 24 & 25 Vict. c. 10, s. 34, for a greater amount than the value of a vessel of the defendant from whom security is demanded, though that may have sunk and the action against the owner is a personal one. *The Calcutta*, 17 W. R. 744.

Both Ships in fault—Payment out to Foreign Owner.]—Collision suit between the owners of a foreign ship residing out of the jurisdiction and cross suit by the owners of the other a British ship. In the cross suit the foreign defendants entered no appearance, whereupon it was discontinued. In the principal suit both ships were found to blame. The court withheld payment of the damages claimed by the foreign owner until he consented to a deduction of half the damage sustained by the British ship. *The Seringapatam*, 3 W. Rob. 28.

Reference—Plaintiff out of Jurisdiction.]—Where a decree has been made of both vessels to blame, the court will not refer the damage of both vessels to the registrar, but will leave the defendant to his cross-action, notwithstanding that the ship of the plaintiff perished in the collision, and the plaintiff resides out of the jurisdiction. *The North American*, Swabey, 466.

e. Preliminary Act.

Amendment.]—The preliminary act on behalf of the defendants was ordered to be amended, as it did not contain a proper statement of the distance and bearing of the other vessel in

accordance with Ord. XIX. r. 28 (i.). *The Godiva*, 55 L. J., Adm. 13; 11 P. D. 20; 54 L. T. 55; 34 W. R. 551; 5 Asp. M. C. 524.

When required.] In an action for damage to cargo sustained in a collision between two ships where the action is brought against the ship carrying the cargo, the parties are not bound to file the preliminary acts under Ord XIX. r. 30. *The John Boyne*, 36 L. T. 29; 25 W. R. 756; 3 Asp. M. C. 341.

Action by Tow against Tug.]—The plaintiffs, owners of the barge "H." and of her cargo, employed the defendants' tug "W." to tow the "H." in the Thames. The "H." whilst in tow was in collision with a third ship, and was lost with her cargo. In an action by the plaintiffs against the defendants for negligence:—Held, that no order for the filing of a preliminary act would be made. *Armstrong* v. *Gaselee*, 58 L. J., Q. B. 149; 22 Q. B. D. 250; 59 L. T. 891; 37 W. R. 462; 6 Asp. M. C. 353.

Action Under Lord Campbell's Act.]—In an action under Lord Campbell's Act for loss of life in a collision, preliminary acts under Ord. XIX. r. 28 (1884) were ordered to be filed. *Webster* v. *Manchester, Sheffield and Lincolnshire Ry.*, 5 Asp. M. C. 256, n.

May not be departed from.]—*The Miranda*, 51 L. J., Adm. 56; 7 P. D. 185; 47 L. T. 447; 30 W. R. 615; 4 Asp. M. C. 595. *The Frankland*, 41 L. J., Adm. 3; L. R. 3 A. & E. 511; 25 L. T. 889; 20 W. R. 592; 1 Asp. M. C. 207, 489. *The Vortigern*, Swabey, 578.

When to be Exchanged.]—Where the case is to be heard on vivâ voce evidence only, the preliminary acts are to be exchanged before the evidence is taken. *The Ruby Queen*, Lush. 266.

f. Pleadings.

Rules of Pleadings—Proof secundum allegata.]—The plaintiff in a collision suit must plead and prove the facts from which negligence is to be inferred; the defendant is not concluded by alleging that the collision was caused by a fact which he fails to prove. *The East Lothian*, Lush. 241; 14 Moore, P. C. 1; 4 L. T. 489.

The court will proceed secundum allegata et probata, even though entertaining some doubt whether, in so doing, it will arrive at the whole truth and justice of the case. *The North American and The Tecla Carmen*, 12 Moore, P. C. 331; Swabey, 358.

In a cause of collision, therefore, a party suing cannot recover in full if he fails to prove the case set up in his pleading and evidence, although no fault is proved against his vessel, and fault is established against the other vessel. *Ib.*

A plaintiff is only entitled to recover secundum allegata et probata. *The Ann*, Lush. 55; 13 Moore, P. C. 198; 3 L. T. 128; 8 W. R. 567.

Where a plaintiff charges two separate collisions, whereby his vessel, being at anchor, was driven on the rocks, and sustained great damage, and the first collision was such, that the plaintiff's vessel might, and probably would have driven on the rocks if no second collision had happened, he will be entitled to recover, on proving the first collision only, as the rule that the plaintiff must recover secundum allegata et probata is thereby satisfied. *The Despatch*, Lush. 98; 14 Moore, P. C. 83; 2 L. T. 219.

Where the plaintiffs pleaded that the collision was caused by the defendant's vessel having suddenly put her helm a-starboard, and the evidence given in support of the petition was that the collision was caused by the defendant's vessel having ported instead of continuing her course under a starboard helm:—Held, that the evidence could not be applied to the statement in the petition, and that the plaintiffs, therefore, were not entitled to recover. *The Haswell*, Br. & Lush. 247—P. C. And see *The Hoshung and The Lapwing*, 7 App. Cas. 512; 51 L. J., P. C. 92; 47 L. T. 485; 31 W. R. 303; 5 Asp. M. C. 39—P. C.

The rule, that a party seeking redress for an injury can only recover secundum allegata et probata, applies only to cases where the averments alleged are material to the issue raised. *The Alice* and *The Rosita*, 5 Moore P. C. (N.S.) 300; 38 L. J., Adm. 20; L. R. 2 P. C. 214; 19 L. T. 753.

Where, therefore, in a case of collision caused by a vessel drifting and driving down upon another at anchor in the same anchorage, though the relative bearing of the two vessels previously to the collision was incorrectly pleaded and alleged by the vessel proved to be entitled to redress:—Held, that the vessels not being in motion, their previous relative bearing when at anchor was not a material fact to the issue, namely, which vessel caused the collision, so as to render the actual proof of the damage of no avail, and so entitle the offending party to the benefit of the rule. *Ib.*

To a petition alleging that the "M." had been for some time close-hauled on the starboard tack, and that the "W. N." on the port tack came into collision with her, the answer admitted that the "W. N." was close-hauled on the port tack, and alleged that the "M." was seen on the port tack distant about a mile:—Held, that the defendants were bound also to allege what was subsequently done on board the "W. N." and before the collision, and the mode of the collision. *The Why Not*, 38 L. J., Adm. 26; L. R. 2 A. & E. 265; 18 L. T. 861.

If a plaintiff in a collision suit intends to rely upon a particular act of negligence by the defendant, he is bound specifically to allege that act in his pleadings, and it is not sufficient that the act may be included generally in an allegation in the pleadings, which do not clearly state such particular act, as it is likely to mislead the defendant, and prevent his being prepared to meet that particular case. *The Marpesia*, 8 Moore P. C. (N.S.) 468; L. R. 4 P. C. 212; 26 L. T. 333; 1 Asp. M. C. 261.

Semble, that the established rule, which requires a plaintiff in a cause of damage to state with reasonable certainty the instances of neglect on which he intends to rely, and if he relies on a breach of a statutory rule of navigation, that he should specifically plead that the act done or not done was in violation of that particular rule, does not apply to a case where one vessel is under way and the other incapable of moving. *The Secret*, 26 L. T. 670; 1 Asp. M. C. 318 (Irish).

When the petition states such facts on the part of the plaintiff, as if proved or admitted, would lead to the conclusion that the vessel charged with the collision was to blame, it is then rather for the defendant to shew what has been done than for the plaintiff to shew what might have been avoided. *Ib.*

The pleadings should be confined to the merits of the collision. *The George Arkle*, Lush. 222. See *S. C.*, 5 L. T. 290.

Special damages, as rewards paid to salvors for services rendered necessary by the collision, are not to be pleaded. *Ib.*

An allegation in a petition that the vessel proceeded against in a collision cause was "considerably farther out to the north side of the river than" the other vessel, and improperly ported and so brought about a collision, is sufficiently proved, to entitle the owners of the vessel making the allegation to recover, by shewing that the vessel proceeded against was farther over to the south side of the river than the other, and improperly ported. *Malcolmson* v. *General Steam Navigation Co.*, *The Ranger and The Cologne*, 9 Moore, P. C. (N.S.) 352 ; L. R. 4 P. C. 519 ; 27 L. T. 769 ; 21 W. R. 273 ; 1 Asp. M. C. 484.

Ship in hands of Agent for sale—Defence not pleaded.]—In a cause of damage, alleged to have been done by and imputable to the acts of the owners, and their servants, of the vessel proceeded against, a general denial was pleaded in answer, and a special defence that the damage complained of was the same as had been already adjudicated upon in a court of law, and judgment obtained and satisfied ; at the hearing it was proved by a witness, who was the principal defendant in the action, that the damage proceeded for was occasioned by acts done by him on his own responsibility, and in the assertion of a right claimed by him as consignee for sale of the vessel, and not as the agent on behalf of the owners ; whereupon the judge held, that the suit could not be maintained : but, inasmuch as the defence thus disclosed had not been specifically pleaded, declined to give the defendants their costs, or to go into the special defence, though his judgment thereon was asked for by the defendants' counsel : —Held, that the appeal was not for costs alone within the meaning of the rule of the appellate court against the allowance of appeals involving costs only ; that the general traverse and denial of the averments in the petition was sufficient to justify the evidence produced ; and that the defendants were further entitled to have the judgment of the court, as asked on the special defence pleaded, that if prejudiced by such judgment they might appeal. *The Orient, Yeo* v. *Tatem*, 8 Moore, P. C. (N.S.) 74 ; 40 L. J., Adm. 29 ; L. R. 3 P. C. 696 ; 24 L. T. 918 ; 20 W. R. 6 ; 1 Asp. M. C. 108.

—— **Admissions.**]—An allegation averred that by an act of the legislative council of India, and the rules and regulations passed pursuant to such act, the defendants were exempted from responsibility for the damages sued for by reason of the ship being in charge of a pilot, whom they were obliged by the provisions of that act to take on board. The responsive allegation did not traverse such averment as to the fact of the act and rule and regulations, and the requirement to take a pilot on board, but simply alleged that the defendants were not exempted by the act, and the rules and regulations :—Held, that the act and the rules and regulations being pleaded, and not denied, there was no necessity to prove them, the responsive allegation admitting, as far as was necessary between the parties to the cause, the act, rules and regulations as a fact, though not the effect of their operation in law. *The Peerless*, 13 Moore, P. C. 484 ; Lush. 103 ; 30 L. J., Adm. 89 ; 3 L. T. 125.

—— **In Limitation Suit.**]—See *The Karo*, ante, col. 752.

Replying.]—A plaintiff may plead new matter in reply, if it is really matter of reply, and not properly a part of the case set up in his behalf. *The Bothnia*, Lush. 52 ; 29 L. J., Adm. 65.

Adding Pleas.]—The court will not, at the hearing of a cause of collision, allow a plea to be added alleging that the vessel proceeded against was in charge of a licensed pilot, and that the accident was caused by his default. *The Alhambra*, Br. & Lush. 286.

Defence of Compulsory Pilot.]—The defence of compulsory pilotage must be specially pleaded. *The Canadian*, 1 W. Rob. 343. *The Northampton*, 1 Spinks, 155, n. *The Alhambra*, supra. *The Philomela*, 1 Spinks, 155, n.

Inevitable Accident.]—By the old practice of the admiralty, if the defence of inevitable accident is relied on, it must be pleaded in terms. *The E. Z.*, 33 L. J., Adm. 200 ; 10 L. T. 290.

Infringement of the Regulations.]—Where violation of a statutory rule is intended to be charged, it must be so pleaded. *The Ebenezer*, 2 W. Rob. 210 ; *The Ironmaster*, 6 Jur. (N.S.) 782 ; Swabey, 441 ; *The Exeter*, 2 W. Rob. 261 ; *The Bothnia*, Lush. 52. See also *The Lady Anne*, 7 Not. of Cas. 370.

Salvage rendered necessary by Collision.]—Should not be pleaded. *The George Arkle*, Lush. 222.

g. Interrogatories.

As to interrogatories in a collision action. See *The Biola*, 34 L. T. 185 ; 24 W. R. 524 ; 5 Asp. M. C. 125. *The Radnorshire*, 49 L. J., Adm. 48 ; 5 P. D. 172 ; 43 L. T. 319 ; 29 W. R. 476 ; 4 Asp. M. C. 338.

Whole Crew Drowned.]—In an action for damage, where all the plaintiff's crew who could give evidence as to the collision were drowned, the court ordered the defendants to answer certain interrogatories which were directed to those matters upon which information would be afforded by the preliminary act. *The Isle of Cyprus*, 59 L. J., Adm. 90 ; 15 P. D. 134 ; 63 L. T. 352 ; 38 W. R. 719 ; 6 Asp. M. C. 534.

h. Inspection.

Reports of Surveys—Inspection of.]—The defendant in an action of damage to cargo is not entitled to obtain from the plaintiff an inspection of reports of surveys in possession of the plaintiff, written and prepared solely for the purpose of the action. *The Theodor Korner*, 47 L. J., Adm. 85 ; 3 P. D. 162 ; 38 L. T. 818 ; 27 W. R. 307 ; 4 Asp. M. C. 17.

Reports by Officer of her Majesty's Ships—Inspection of.]—After a collision between one of her majesty's ships and another ship, it is the duty of the commanding officer of her majesty's ship to forward a report of the collision to the lords commissioners of the admiralty. But in a cause of damage against one of her majesty's

ships a motion to inspect such a report was refused on affidavit by the secretary to the admiralty that it would be prejudicial to the public interests to allow such reports to be inspected. *H.M.S. Bellerophon*, 44 L. J., Adm. 5; 31 L. T., 756; 23 W. R. 248; 2 Asp. M. C. 449.

Order to inspect Ship—24 Vict. c. 10, s. 18.]—Made, *The Magnet*, 44 L. J., Adm. 1; L. R. 4 A. & E. 417, 428; 32 L. T. 129; 2 Asp. M. C. 478; *The Germania*, 37 L. J., Adm. 59; 19 L. T. 20. *S. C.* on app. 21 L. T. 44. Refused, *The Victor Covacevitch*, 54 L. J., Adm. 48; 10 P. D. 40; 52 L. T. 632; 5 Asp. M. C. 417.

i. Evidence.

Naval Officer—Result of Inquiry.]—The result of an inquiry into the conduct of a naval officer for getting his ship into collision, cannot be given in evidence in the Admiralty Court. *H.M.S. Swallow*, Swabey, 30.

Decision of Pilotage Authority.]—Decision of a pilotage authority at an investigation into the conduct of the pilot of a ship that had been in collision is not admissible as evidence in an action for collision. *The Lord Seaton*, 2 W. R. 391.

Proceedings at Wreck Inquiry.]—Evidence of proceedings at shipping casualty inquiries is not admissible in a collision action. *The Mangerton*, Swabey, 120; 2 Jur. (N.S.) 620. S. P., *The London* or *The City of London*, 11 Moore, P. C. 307; Swabey, 245; 5 W. R. 678.

Depositions of Witnesses—Cross-examination upon—Originals must be Produced.]—Certified copies of statements made to the receiver of wreck as to the cause of collision cannot be used to discredit the witness upon cross-examination. The originals must be produced. *The Emperor and The Zephyr*, 12 W. R. 890. S. P., *The Risca*, *The Benayo*, cited Marsden on Collisions (4th ed.) 355. But see *The Oscar*, 10 L. T. 789; 12 W. R. 872.

—— **Not Admissible as Evidence.**]—Depositions taken before a receiver of wreck are not admissible in evidence to prove the facts to which they relate. *The Little Lizzie*, L. R. 3 A. & E. 56; 23 L. T. 84; 18 W. R. 960; *The Emperor and The Zephyr*, supra.

The examination of the captain of the plaintiff's ship, taken by the receiver of wrecks under 17 & 18 Vict. c. 104, s. 448, is not admissible for the defendant for the purpose of proving the fact that the damage to the ship from the collision was on her starboard bow; such fact being offered for the purpose of shewing that the plaintiff's ship was in fault, the question which ship caused the damage to the other not being a matter which the receiver had power to examine into. *Nothard* v. *Pepper*, 17 C. B. (N.S.) 39; 10 Jur (N.S.) 1077; 10 L. T. 782.

—— **After Death.**]—Depositions made by persons on board a ship relative to a collision cannot, even after the decease of the deponents, be used as evidence on behalf of that ship at the trial. *The Henry Coxon*, 47 L. J., Adm. 83; 3 P. D. 156; 38 L. T. 819; 27 W. R. 263; 4 Asp. M. C. 18.

Statements of Master or Crew.]—The statements of the master with regard to a collision are, but the statements of the mate or seamen are not, admissible evidence against the owners. *The Actæon*, 1 Spinks, 176.

Admissions by the crew as to the circumstances of a collision, are not evidence in an action brought by the shipowners and crews. *The Foyle*, Lush. 10.

A statement made by the pilot that the collision was caused by his fault is not admissible as evidence of the fact; nor evidence of a seaman confirming the pilot's statement; nor the decision of a pilotage authority as to the pilots being in fault or otherwise. *The Lord Seaton*, 2 W. Rob. 39; 4 Not. of Cas. 164. But see *The Schwalbe*, infra.

A statement of the master as to the cause of a collision is admissible in evidence against the shipowner. *The Manchester*, 1 W. Rob. 62.

Statements by the master as to the cause of collision are admissible in evidence; those by the crew are not. *The Midlothian*, 15 Jur. 806; *The Emperor and The Zephyr*, supra; *The Europa*, 13 Jur. 856; *The Solway*, 54 L. J., Adm. 83; 10 P. D. 137; 53 L. T. 680; 34 W. Rob. 232; 5 Asp. M. C. 482.

Statements made by the mate and seamen as to their ship making water or not immediately after the collision held admissible as part of the res gestæ. *The Mellona*, 10 Jur. 992.

Evidence contradicting a denial by the pilot of the other ship that he made use of an expression indicating that his helm had been wrongly put to starboard:—Held, to be admissible. *The Schwalbe*, Swabey, 521.

Allegations and Proof.]—On appeal, in a cause of collision between two vessels originally at anchor, the statement in the defendants' answer in the Admiralty Court as to the bearing of their vessel in respect to the other when at anchor, varied from the proof:—Held, that the statement as to the bearing of one vessel in respect of the other when at anchor was immaterial, and was therefore not necessary under the Admiralty Rules, 1859, No. 67, and that the variance was therefore immaterial. *The Rosita*, 38 L. J., Adm. 20; L. R. 2 P. C. 214; 19 L. T. 753; 17 W. R. 209.

Lights.]—Evidence of an order, as to the lights, given twelve hours before the collision, is admissible, but not of conversations with respect to them. *The Aleppo*, 35 L. J., Adm. 9; 14 L. T. 228.

Proof of Loss.]—On a reference to the registrar in a cause of damage, the plaintiffs, who were underwriters of the cargo, and had paid as for a total loss, produced in support of their title as owners of the cargo lost, the policies of insurance of the cargo, the bills of lading, and the invoice and copy manifest:—Held, that they must give further evidence of the value of the goods, and of a discharge from the owners of the cargo. *The John Bellamy*, 39 L. J., Adm. 28; L. R. 3 A. & E. 129; 22 L. T. 244.

Protest—Original.]—The original protest, and not a notarial copy must be produced. *The Ljubica*, 23 L. T. 474; following *The Emma*, 2 W. Rob. 315; 3 Not. of Cas. 114.

Whole Crew Drowned.]—A schooner and a steamship were in collision, and all the crew of the schooner were drowned. The steamship

held in fault upon admissions in her answer. *The Aleppo*, 35 L. J., Adm. 9 ; 14 L. T. 228.

Evidence of Agency.]—In an action for damage done to the plaintiff's lug-boat, by the negligence of the defendant's servant, it was proved that the barge was the defendant's, but the witness could not identify the bargeman :—Held, that this was primâ facie evidence that the barge was steered by the defendant's servant ; and that, if the barge was in the use of any other person, it lay on the defendant to prove it. *Joyce* v. *Capell*, 8 Car. & P. 370.

No Cross-examination.]—Where witnesses are, by mistake, examined de bene esse on behalf of one party to a collision action, without cross-examination, the cause will not be heard until the witnesses are submitted for cross-examination. *The Chance*, Swabey, 294 ; 6 W. R. 221.

Reference—Evidence.]—On a reference in a collision action the registrar and merchants are not bound by uncontradicted evidence as to the amount of damage done, but are entitled to use their own judgment and experience, and find in accordance therewith. *The Bernina*, 55 L. T. 781 ; 6 Asp. M. C. 65.

Opinion of Experts.]—In an action for negligently steering a ship, whereby the plaintiff lost his passage in her, no evidence can be given of a specific act of negligence, which is not the foundation of the action ; but evidence may be given that the captain had often expressed his conviction that the officer in charge of the ship was incompetent ; and experienced nautical men may be called as witnesses, and asked whether, in their judgment, particular facts which have been proved amount to gross negligence. *Malton* v. *Nesbit*, 1 Car. & P. 70.

But a nautical witness cannot be asked whether he thinks, having heard the evidence, that the conduct of the captain was correct or not. *Sills* v. *Brown*, 9 Car. & P. 601.

In an action for running down the plaintiff's ship, a nautical witness may be asked, whether, having heard the evidence, and admitting the facts proved by the plaintiff to be true, he is of opinion that the collision could have been avoided by proper care on the part of the defendant's servants. *Fenwick* v. *Bell*, 1 Car. & K. 312.

Where Court assisted by Trinity Masters.]—In a cause of damage, where the court is assisted by trinity masters, evidence will not be received on a mixed question of law and nautical skill. *The Earl Spencer*, L. R. 4 A. & E. 431 ; 32 L. T. 370 ; 23 W. R. 661 ; 4 Asp. M. C. 523. Affirmed 33 L. T. 235 ; 3 Asp. M. C. 4—C. A.

As to evidence of usual course of navigating a channel see *The Corennie*, [1894] P. 338, n. *See also cases*, post, col. 999.

When Actions consolidated.]—The court cannot except by consent order that evidence in one suit that has been heard shall be admitted as evidence in a subsequent suit. *The Demetrius*, 41 L. J., Adm. 69 ; L. R. 3 A. & E. 523 ; 26 L. T. 324 ; 20 W. R. 761 ; 1 Asp. M. C. 251.

In consequence of a collision between vessels "A." and "B.," both the vessels and also the cargo laden on board the "A." sustained damage. A suit in rem was instituted by the owners of the "A." against the "B." to recover the damage done to their vessel. A cross suit was instituted by the owners of the "B." against the "A." These suits were heard and determined. Afterwards a suit in rem was instituted on behalf of the owners of the cargo on board the "A." against the "B." to recover the damage done to the cargo :—Held, that the court had no power to order the evidence taken in the suit by the owners of the "A." against the "B." to be admitted in the suit instituted on behalf of the owners of cargo. *Ib.* See also *The William Hutt*, Lush. 25.

Entries in Log.]—Entries made in the ship's log by the mate of a vessel relative to a collision and signed by him and the captain nearly two days after the collision, cannot be used as evidence on behalf of the ship in which they were made, after the decease of the persons making and signing them. *The Henry Coxon*, 47 L. J., Adm. 83 ; 3 P. D. 156 ; 38 L. T. 819 ; 27 W. R. 263 ; 4 Asp. M. C. 18.

The log-book of one of the ships produced contained an erasure as to the wind at the time of the collision, but the alteration was rather adverse to the case on behalf of the ship :—Held, that the erasure was immaterial, it being adverse to the case on behalf of the ship. *The Constitution*, 2 Moore, P. C. (N.S.) 453 ; 10 Jur. (N.S.) 831 ; 10 L. T. 894—P. C.

The official log is not evidence for the ship. *The Europa*, 13 Jur. 856. *The Malta*, 3 Hag. Adm. 158, n. *The Earl of Dumfries* (engineer's log), 54 L. J., Adm. 7 ; 10 P. D. 31 ; 51 L. T. 906 ; 33 W. R. 568 ; 5 Asp. M. C. 342.

Lightship Log.]—The court will admit a lightship log, on production by the officer of the trinity house in whose custody such logs are kept, without requiring the evidence of the person who made the entries. *The Maria Das Dorias*, Br. & Lush. 27 ; 32 L. J., Adm. 163 ; 7 L. T. 838 ; 11 W. R. 500.

Coastguard Log.]—The books containing the entries made by the coastguard, and sent to the coastguard office, are admissible to prove the state of wind and weather at the time of the collision, without calling the person who made the entries. *The Catherina Maria*, L. R. 1 A. & E. 53 ; 12 Jur. (N.S.) 380.

Protest.]—A protest is not evidence for the ship. *Christian* v. *Coombe*, 2 Esp. 489 ; *The Ljubica*, 23 L. T. 474 ; *The Emma*, 2 W. Rob. 315 ; 3 Not. of Cas. 114 ; *The Hedwig*, 1 Spinks, 19.

Verdict in Action for same Collision.]—A verdict in a common-law action for the same collision cannot be received in evidence in the admiralty. *The Friends, General Steam Navigation Co.* v. *Tonkin*, 4 Moore, P. C. 314 ; in court below, 1 W. Rob. 484.

j. Res or Bail Insufficient.

Res insufficient.]—An action in rem having been brought, and the proceeds of the res being insufficient to satisfy the plaintiff's claim, a citation in personam issued. *The Pet*, 20 L. T. 961 ; 17 W. R. 899.

Bail insufficient.]—Where bail is given in a collision action, in a sum which is insufficient to cover the damage and costs, the party giving bail will not be ordered to pay any further sum beyond that for which bail is given, except

under special circumstances; as where he puts the plaintiff to unnecessary costs. *The Temiscouata*, 2 Spinks, 208. See *The Kalamazoo*, 15 Jur. 155.

Re-arrest—Bail insufficient—Admiralty Court Act, 1861, ss. 15, 22.]—Where the bail given proves insufficient to cover damages recovered and costs, the ship may be re-arrested to satisfy the costs. *The Freedom*, L. R. 3 A. & E. 495; 25 L. T. 392; 1 Asp. M. C. 136.

—— **Action entered for too little.**] — Where, in a collision suit, the action was by mistake entered for 1,000*l.*, the real claim being for 2,600*l.*, the vessel decreed to be re-arrested for the balance. *The Hero*, Br. & Lush. 447; 13 W. R. 927.

Common-Law Action to recover Damages not recovered in Admiralty.]—It is no bar to an action for a collision at sea that a judgment in rem has been recovered in the Admiralty Court, and execution levied by the sale of the defendant's vessel, where the damage done was more than the amount realised by such sale. *Nelson* v. *Couch*, 15 C. B. (N.S.) 99; 33 L. J., C. P. 46; 10 Jur. (N.S.) 366; 8 L. T. 577; 11 W. R. 964.

Personal Remedy—Res insufficient.]—If the value of the defendant's vessel and freight is not equal to the damage done, the plaintiff may, after judgment, obtain a monition against the defendant personally to satisfy the deficiency. *The Zephyr*, 11 L. T. 351.

Action in rem after Action in Personam.]—A party, having two remedies, an action in personam and an action in rem, resorted, in the first instance, to his personal action, and obtained judgment, but could not recover the amount sued for:—Held, that he was entitled afterwards to proceed in rem. *The Bengal*, *The John and Mary*, Swabey, 471; 5 Jur. (N.S.) 1085.

Undertaking to put in Bail — In Salvage Action—Award in Excess of Bail — Personal Liability of Owner of res for the Difference.]—A salvage action was instituted in a sum of 5,000*l.* The solicitors for the defendants gave an undertaking to put in bail for 5,000*l.* The sum of 7,500*l.* was awarded for salvage:—Held, that the plaintiff was entitled to sue out a writ of fieri facias against the defendants for the difference between 5,000*l.* and the amount of the award. *The Dictator*, 61 L. J., Adm. 73; [1892] P. 304; 67 L. T. 563; 7 Asp. M. C. 251.

k. Generally.

Res—Increase of Value by Repairs.] — A vessel damaged by collision was arrested and subsequently repaired, whereby her value was considerably increased:—Held, that she was only liable to arrest for her value at the time when she was arrested. *The St. Olaf*, 38 L. J., Adm. 41; L. R. 2 A. & E. 360; 20 L. T. 758; 17 W. R. 743.

Amount of Freight payable into Court.] — The freight payable by the owner of cargo on board the ship sued for collision is the amount payable by him to the shipowner; allowing for deductions allowed by charterparty, costs of paying into court, and deductions agreed to for delivering short of the destination by reason of the collision. *The Leo*, Lush. 444; 31 L. J., Adm. 78; 6 L. T. 58.

Arrest of wrong Ship.]—A plaintiff in a collision suit, who failed to prove the identity of the ship arrested with the ship that had done the damage:—Held, not liable in damages for arresting her, he having acted in good faith and without gross negligence. *The Evangelismos*, 11 Moore, P. C. 352; Swabey, 378. And see *The Active*, 5 L. T. 773, infra, col. 856.

Compromise—Doubt as to Law—Consideration.]—The defendants in a collision suit, in consideration of the plaintiffs releasing the ship from arrest in admiralty, agreed to pay 180*l.* for the damage done; the defendants' ship was in charge of a compulsory pilot at the time, and the law as to the liability of the shipowners in such case was unsettled:—Held, that there was a good consideration for the promise to pay 180*l.* *Longridge* v. *Dorville*, 5 B. & Ald. 117.

Discontinuance.]—See *The Ardandhu* or *The Kronprinz*, ante, col. 651.

Limitation of Liability—Stay of Actions after.]—See *The Sisters*, and cases ante, col. 749.

Right of Beginning.]—Where a defendant admits in the pleadings that his ship, when under way, ran into a vessel at anchor, but denies that the vessel at anchor was the vessel of the plaintiff, the plaintiff must begin and prove his case. *The Earl of Leicester*, Br. & Lush. 188.

The defendants, by their pleadings, made no charge against the plaintiffs, but only denied generally the averments in the petition, and pleaded inevitable accident:—Held, that defendants ought to begin. *The Thomas Lea*, 38 L. J., Adm. 37; 20 L. T. 1017.

Right of Reply.]—In a cause of collision, in which the evidence has been taken before an examiner of the court, the plaintiff's counsel is entitled to reply. *The Rjukan*, 14 W. R. 973.

Sale of Ship arrested and in perishable Condition.]—A ship arrested in a damage suit, being in a perishable condition, first decree made for her sale. *The Sylvan*, 2 Hag. Adm. 155.

Function of Nautical Assessors in Admiralty.]—*See* cols. 849, 999.

—— **Action at Common Law — Nautical Assessors.**]—New trial ordered (1826) in a collision action at common law, at which "the judge may have the assistance of two of the brethren of the trinity house to explain the duties of the masters of both ships." *Jameson* v. *Drinkald*, 5 L. J., C. P. 30.

—— **Assessors Disagreeing.**] — Semble, that where the two assessors disagree, the court can call in a third, and, after submitting the evidence already given to him, have the case re-argued before the three assessors. *The Philotaxe*, 37 L. T. 540; 3 Asp. M. C. 512.

The judgment is that of the judge, and he may decide in accordance with advice of one or more of the assessors or not as he thinks fit. *Ib.*

Reference—Total Loss Caused by Plaintiff's Negligence—Special Report.]—If upon reference the plaintiffs present a case of immediate partial damage resulting in the total loss of their ship,

and no evidence is given on either side of the pecuniary extent of such partial damage, and the registrar is of opinion that the plaintiffs are not entitled to recover the total loss, upon the ground that by ordinary skill and diligence after the collision they might have avoided it, but are entitled to recover the partial damages, he should not assess the amount of the partial damages conjecturally and report such amount to be due, but should make a special report to the court; and the court will then order a further reference to ascertain the amount of the partial damages by evidence. *H.M.S. Flying Fish*, Br. & Lush. 436; 2 Moore, P. C. (N.S) 77; 34 L. J., Adm. 113; 12 L. T. 619.

Reference—Practice as to.]—Practice of the Admiralty Court, as to referring questions of damages to the registrar and merchants, explained. *The Sir George Seymour*, 1 Spinks, 67.

Foreign Suit pending.]—In a cause of damage in respect of collision between two foreign vessels in the Bosphorus; semble, that if a suit as to the same subject-matter is pending elsewhere whereby the plaintiff can obtain full indemnity, the Court of Admiralty will suspend the proceedings in its court or put the plaintiff to his election; and the court will so act whether the proceedings elsewhere are in rem or in personam. *The Mali Ivo*, 38 L. J., Adm. 34; L. R. 2 A. & E. 356; 20 L. T. 681.

—— **Judgment obtained.**] — Where cross actions between an English and a foreign ship were heard and judgment given in a foreign court in favour of the English ship in both actions, and suits in the Court of Admiralty were afterwards heard and the English vessel found alone to blame:—Held, that she must be condemned in damages and costs, notwithstanding the foreign judgments. *The Delta, The Erminia Foscolo*, 45 L. J., Adm. 111; 1 P. D. 393; 35 L. T. 376; 25 W. R. 46; 3 Asp. M. C. 256.

Plea of Judgment in Admiralty.]—A plea in a common-law action of a decree in the Admiralty Court, in the defendant's favour, in respect of the same collision, is bad, if it does not state that the admiralty had jurisdiction. *Harris* v. *Willis*, 15 C. B. 710; 24 L. J., C. P. 93; 3 C. L. R. 609; 3 W. R. 238.

Verdict and Judgment at Law.]—A verdict and judgment at law are no bar to subsequent proceedings in admiralty. *The Clarence*, 1 Spinks, 206. But see, per Knight Bruce, L.J., 1 Spinks, 209, n.; *The Sylph*, 37 L. J., Adm. 14; L. R. 2 A. & E. 24; 17 L. T. 519; *The Antelope*, 42 L. J., Adm. 42; L. R. 4 A. & E. 33; 28 L. T. 74; 21 W. R. 464; 1 Asp. M. C. 511.

Res Judicata—Consular Court.]—Plea of res judicata in case where judgment was given in a collision action by a court summoned by the Prussian legation, at Constantinople, overruled. *The Griefswald*, Swabey, 430.

Consolidation of Actions.]—Where several actions are brought against a ship in respect of one collision by different plaintiffs, and several bail bonds given, and the actions are consolidated by order of the court, and the damage pronounced for in the usual course, the court has the power to open the order of consolidation and dissever the actions, but will not do so unless due cause is shewn. *The William Hutt*, Lush. 25; 1 Swabey, 696; 2 L. T. 448.

Judgment by Consent — Setting aside by Consent.]—In an action by the owners of the "Britannia" against the owners of the "Bellcairn" for collision, a judgment dismissing claim and counter-claim was taken by consent. Subsequently, the owners of cargo on board the "Britannia" brought an action against the owners of the "Bellcairn," and obtained a judgment that both ships were to blame. The owners of the "Bellcairn" then limited their liability and paid the money into court, and the owners of the "Britannia" having, with the consent of the owners of the "Bellcairn," obtained an order in the registry setting aside the judgment in the first action, brought in a claim against the fund in court:—Held, that the order setting aside the judgment of the court was void, and that the owners of the "Britannia" could not claim against the fund in court. *The Bellcairn*, 55 L. J., Adm. 3; 10 P. D. 161; 53 L. T. 686; 34 W. R. 55; 5 Asp. M. C. 503—C. A.

Sale of Ship and Cargo—Freight.]—Where in an action in rem for collision against ship and freight, in which the defendants' ship was held solely to blame, the ship being still under arrest with the cargo on board, was ordered to be sold; the court on motion directed the marshal to discharge the cargo, to retain the same in his custody as security for the payment of the landing and other charges and freight, if any, due from the owners or consignees of the cargo in respect of the same, and that in default of any application for the delivery of the cargo within fourteen days, the marshal should be authorised to sell such part of the cargo as might be necessary to pay the said charges and freight, if any, due. *The Gettysburg*, 52 L. T. 60; 5 Asp. M. C. 347.

Payment out of rem found due for Damages.]—A shipwright who had effected repairs on a ship after a collision, for which the other ship was held in fault, applied to have the amount found due by the registrar paid out to him upon the ground that the owners were bankrupt and had paid him nothing:—Application refused. *The Endeavour*, 62 L. T. 840; 6 Asp. M. C. 511.

Doubt as to Plaintiff being Owner.]—If a question is raised, after judgment in a collision suit, whether the plaintiff was the owner of the injured ship, the amount found due upon the reference will be ordered to be paid into the registry. *The Ilos*, Swabey, 100. And see *The Minna*, supra, col. 725.

Priorities of Claimants.]—Of two plaintiffs in two damage causes he who first obtains a decree is entitled to priority. Where the proceeds of the defendant's ship are in the registry, and the second plaintiff thinks that they are insufficient to satisfy both claims, he must apply to the court before decree pronounced. *The Clara*, Swabey, 1.

—— **Second Suit Begun — Payment out of Damages.**]—Where the owners of the damaged ship and the owners of part of her cargo had obtained a decree in their favour:—Held, that they were entitled to have the proceeds of the wrongdoing ship paid out of court to them,

although the owners of the rest of the cargo have, after decree in the first suit, instituted a second suit against the wrongdoing ship. *The Saracen*, 4 Not. of Cas. 498; 2 W. Rob. 451; 6 Moore, P. C. 56.

Appeal upon Facts alone—Reluctance of Privy Council to differ from Judge below.]—The judicial committee refused to reverse a decision of the court below upon facts alone, the judge having had the advantage of seeing the witnesses and judging of their credibility. *The Alice and The Princess Alice*, 38 L. J., Adm. 5; L. R. 2 P. C. 245; 19 L. T. 678; 17 W. R. 209.

Remission of Action from Court of Appeal.]—If the cause is remitted from the Court of Appeal, with injunction "to proceed according to the tenor of former acts had and done," the court has no authority to relax an order made previously to the appeal. *The William Hutt*, Lush. 25; 1 Swabey, 696; 2 L. T. 448.

Contributory Negligence—Appeal—Point not taken below.]—The privy council will not entertain on appeal in a case of collision a question of contributory negligence which was not raised in the court below. *The Pleiades* v. *The Jane*, 60 L. J., P. C. 59; [1891] A. C. 259; 65 L. T. 169; 7 Asp. M. C. 41—P. C.

I. Costs.

i. *Generally.*

Against the Crown.] — Costs may be given against the Crown where the lords of the admiralty appear to contest a collision suit. *The Swallow*, Swabey, 30.

In a cause of damage instituted on behalf of her majesty in her office of admiralty, and of the commander and crew of one of her majesty's ships against a private shipowner, the court on a finding for the defendant, decline to condemn the Crown in costs, but condemned the commander and crew to pay the whole of the costs. *The Leda*, Br. & Lush. 19; 32 L. J., Adm. 58; 9 Jur. (N.S.) 208; 7 L. T. 864; 11 W. R. 302.

Co-plaintiffs are severally liable to the whole of the costs. *Ib.*

Misconduct after Collision punished by.]—Owner of ship that rendered no assistance to another with which she had been in collision, though not in fault for the collision, condemned in costs. *The Celt*, 3 Hag. Adm. 343.

A Dutch and a Spanish ship were in collision in the Channel. The Spanish seamen came on board the Dutch ship with knives and were violent. The Dutch ship was held in fault for the collision, but no costs were given to the Spanish ship. *The Catalina*, 2 Spinks, 23.

Compromise — Collusion.] — In an admiralty wages action, the plaintiffs and defendants compromised the action by payment by the defendants to the plaintiffs of a sum in discharge of claim and costs. The plaintiffs left the country without paying their solicitors' costs. There was no evidence that the settlement was made with a view of depriving the plaintiffs' solicitors of their lien for costs:—Held, that no order could be made that the defendants pay the plaintiffs their taxed costs. *The Hope*, 52 L. J., Adm. 63; 8 P. D. 144; 49 L. T. 148; 32 W. R. 269; 5 Asp. M. C. 126—C. A.

Co-defendants—Costs of successful Defendant.]—The dumb barge "E.," while in tow of the steamtug "S.," was damaged by a collision with the steamship "R. L." The owners of the "E." commenced an action joining the owners of both vessels as defendants. At the trial "R. L." was found alone to blame:—Held, that the owners of the "R. L.," having endeavoured to throw the blame on the "S.," must pay her costs as well as those of theplaintiffs. *The River Lagan*, 57 L. J., Adm. 28; 58 L. T. 773; 6 Asp. M. C. 281.

Wrong Ship sued.]—If the plaintiff negligently arrests the wrong ship he will have to pay costs. *The Evangelismos*, Swabey, 378; 12 Moore, P. C. 352. S. P., *The Active*, 5 L. T. 773; *The Strathnaver*, 1 App. Cas. 58; 34 L. T. 148; 3 Asp. M. C. 113. And see *The Peri*, 32 L. J., Adm. 46; 8 Jur. (N.S.) 1230; 11 W. R. 44.

Collision caused by Fault of third Ship—Costs.]—The owners of a pier in the Thames sued the owners of the "Valencia" and the owners of the "Alfred" for damage done to their pier by the "Valencia." The "Valencia" owners admitted collision with the pier, but said that their ship was driven against the pier by the negligent navigation of the "Alfred"; and the jury so found:—Held, that the "Alfred" owners must pay the costs of the "Valencia" owners as well as those of the plaintiffs. *Green* v. *Goodyer*, 6 Asp. M. C. 281, n.

Costs in Limitation Action.]—*See The Warkworth* and cases, supra, col. 753.

Expense of detaining Witnesses.]—The expense of detaining witnesses until the trial is allowed as costs. *The Karla*, Br. & Lush. 367; 13 W. R. 295.

Cost of Bail.]—Money paid to sureties on a bail bond in consideration of their suretyship is not allowed as costs. *The Numida*, *The Collingrove*, 54 L. J., Adm. 78; 10 P. D. 158; 53 L. T. 681; 34 W. R. 156; 5 Asp. M. C. 483.

Costs of paying Freight into Court.] — The owner of cargo arrested for freight may deduct the costs of paying it into court. *The Leo*, Lush. 414; 31 L. J., Adm. 78; 6 L. T. 58.

Monition to pay in Freight—Doubt as to Law.]—Where freight was not brought in by the person against whom a monition had issued, upon a reasonable doubt as to whether the act 3 & 4 Will. 4, c. 57, s. 47, allowed it, costs not given, the appearer having abandoned his petition. *The Lord Aukland*, 2 W. Rob. 301.

Monition to pay—Res insufficient.]—The proceeds of a vessel sold in a collision suit being insufficient, a monition issued against the owner to pay costs. *The John Dunn*, 1 W. Rob. 159.

Costs of Commission for taking Evidence abroad.] — Circumstances under which costs allowed against unsuccessful party. *The Hilda and The Australia*, 12 Ct. of Sess. Cas. (4th ser.) 574.

ii. *Compulsory Pilot.*

Practice as to Costs.]—Defendants in a cause of damage, who rely at the hearing upon the defence of compulsory pilotage only, and succeed in this point, but whose pleadings raise other issues which are not proved, are not entitled to their costs. *The Livia*, 25 L.T. 887; 1 Asp. M.C. 204.

Defendants in a collision suit, by their answer, denied that their vessel was to blame, and also set up the defence of compulsory pilotage. The court decided that their vessel was to blame, but dismissed the suit upon the ground that the defence of compulsory pilotage was established:—Held, that the plaintiff was not entitled to any portion of the costs of the suit. *The Schwan, The Robert Morrison*, 43 L. J., Adm. 18; L. R. 4 A. & E. 187; 30 L. T. 537; 22 W. R. 743. S. P., *The Winston*, 53 L. J., Adm. 69; 9 P. D. 85; 51 L. T. 183; 5 Asp. M. C. 274—C. A.

In an action of damage, if the only defence is that the collision was caused by the negligence of a pilot taken by compulsion of law, the defendants, if successful in establishing this defence, are entitled to costs. *The Juno*, 45 L. J., Adm. 105; 1 P. D. 135; 34 L. T. 741; 24 W. R. 902; 3 Asp. M. C. 217.

The rule of the Court of Admiralty, that, where the defendants succeed on a plea of compulsory pilotage, no costs are to be given, also holds good in the Court of Appeal. *The Daioz*, 47 L. J., Adm. 1; 37 L. T. 137; 3 Asp. M. C. 477—C. A.

The admiralty division will adhere to the practice of the High Court of Admiralty as to costs in cases of compulsory pilotage. *The Princeton*, 47 L. J., Adm. 33; 3 P. D. 90; 38 L. T. 260; 3 Asp. M. C. 562.

Where the defendants in a collision suit raise a defence on the merits, and also set up a plea of compulsory pilotage, and the court dismisses the suit on the ground that the plea of compulsory pilotage is established, each party to the suit will, in accordance with the practice prevailing in the Court of Admiralty before the Judicature Acts, be left to bear his own costs. *The Matthew Cay*, 49 L. J., Adm. 47; 5 P. D. 49; 41 L. T. 759; 28 W. R. 262; 4 Asp. M. C. 224. S. P., *The Agricola*, 2 W. Rob. 10.

The only defence was, that the collision was caused by the fault of a pilot whom the defendants were compelled to take. They having proved their case:—Held, that plaintiffs must be condemned in costs. *The Royal Charter*, 38 L. J., Adm. 36; L. R. 2 A. & E. 362; 20 L. T. 1019; 18 W. R. 49. See also *The Oakfield*, 55 L. J., Adm. 11; 11 P. D. 34; 54 L. T. 578; 34 W. R. 687; 5 Asp. M. C. 575; *The Beta*, Br. & Lush. 328; 3 Moo. P. C. (N.S.) 23; 34 L. J., Adm. 76; 12 L. T. 1; *The Innisfail and The Secret*, 35 L. T. 819; 3 Asp. M. C. 337.

Collision caused either by fault of compulsory pilot or by accident:—Suit dismissed with costs. *The Castor*, 6 L. T. 106.

Collision caused by fault of compulsory pilot of plaintiff's ship:—Plaintiff's action dismissed with costs; defendant's cross action dismissed without costs. *The Annapolis and The Johanna Stoll*, Lush. 295.

Where a suit is dismissed because the collision was caused by the fault of a compulsory pilot, costs were formerly never given. *The Admiral Boxer*, Swabey, 193. *The Marathon*, 48 L. J., Adm. 17.

Admiralty Rule not applied in other Divisions.]—In an action in the exchequer division, tried by a jury, for damages caused by collision of the defendants' ship with the plaintiffs' ship, the defendants raised several grounds of defence, but succeeded only on the ground that the collision was caused by the negligence of the pilot, whom they were compelled by law to employ. The plaintiffs afterwards, under Ord. LV., applied to the exchequer division for an order depriving the defendants of costs, on the ground that in the admiralty division a defendant under similar circumstances is entitled to no costs:—Held, that, whether the exchequer division had or had not power to make such an order, it ought not to be made, for the rule which prevails in the admiralty division does not extend to the other divisions. *The Daioz, General Steam Navigation Co.* v. *London and Edinburgh Shipping Co.*, 47 L. J., Ex. 77; 2 Ex. D. 467; 36 L. T. 743; 25 W. R. 694; 3 Asp. M. C. 454; 47 L. J., Adm. 1; 37 L. T. 137; 3 Asp. M. C. 377—C. A.

Counter-claim—Defendant alone to blame.]—In an action of damage arising out of a collision the plaintiff's claim was dismissed without costs, the court having found that the defendants' vessel was alone to blame for the collision, but that they were exempt from liability on the ground of compulsory pilotage. The defendants had counter-claimed:—Held, that, under the circumstances, the plaintiffs were entitled to have the counter-claim dismissed with costs. *The Ruby*, 15 P. D. 139; 63 L. T. 735; 6 Asp. M. C. 577. See *S. C.* in C. A., ante, col. 778.

Discontinuance—Compulsory Pilotage.]—In an action of damage by collision, the defendants pleaded, inter alia, that their vessel at the time of the collision was compulsorily in charge of a licensed pilot, and that the negligence, if any, which caused the collision, was solely that of the pilot:—Held, that on the plaintiffs discontinuing their action, they must pay the defendants' costs. *The J. H. Henkes*, 56 L. J., Adm. 69; 12 P. D. 106; 56 L. T. 581; 35 W. R. 412; 6 Asp. M. C. 121.

Uncertainty of Law.]—Uncertainty of the law as to compulsory pilotage assigned as a reason for not giving successful party his costs. *The Hankow*, 48 L. J., Adm. 29; 4 P. D. 197; 40 L. T. 335; 4 Asp. M. C. 97.

iii. *Inevitable Accident.*

Costs—Inevitable Accident—Admission in Pleadings.]—The plaintiffs in an action for damage by collision admitted on the pleadings that the collision was the result of an inevitable accident:—Held, that the defendants were entitled to judgment with costs. Unless there are special circumstances to induce the court to depart from this rule, costs will be given against the plaintiffs in an action of damage, whenever the defendants prove that the collision is the result of an inevitable accident. *The Naples*, 55 L. J., Adm. 64; 11 P. D. 124; 55 L. T. 584; 35 W. R. 59; 6 Asp. M. C. 30.

A sailing ship in a gale drove from her anchors across a sand, and her rudder was so damaged as to render the ship unmanageable; in this condition she came into collision after sunset with a brig at anchor. At the time of the collision the ship had her anchor-light exhibited and no other light. In an action of damage by the owners of the brig against the ship it was held that the collision was occasioned by inevitable accident, and that the ship, in the circumstances of the case, was not to be deemed in fault for not carrying side-lights, or the three red lights prescribed by the regulations, and that the suit ought to be dismissed without costs. *The Buckhurst*, 51 L. J., Adm. 10; 6 P. D. 152; 46 L. T. 108; 30 W. R. 232; 4 Asp. M. C. 84.

When the defence of inevitable accident is sustained, the plaintiff will not be ordered to pay

the costs, unless he might have known that there was, apart from the merits, a good legal defence. *The Virgo*, 35 L. T. 519; 25 W. R. 397; 3 Asp. M. C. 285.

It is a rule in the Admiralty Court, where a collision is found to be the result of an inevitable accident, to make no order as to costs, unless it can be shewn that the suit was brought unreasonably and without sufficient grounds. *The Marpesia*, 8 Moore, P. C. (N.S.) 468; L. R. 4 P. C. 212; 26 L. T. 333; 1 Asp. M. C. 261.

It is the practice of the Admiralty Court in case of inevitable accident that each party should pay its own costs. But if, from the circumstances of the collision, it must have been obvious that the collision was an inevitable accident, the court will use its discretion as to dismissing the suit with costs. *The Innisfail, The Secret*, 35 L. T. 819; 3 Asp. M. C. 337.

Where the court finds inevitable accident, the general rule is, that each party pays his own costs; but the court still holds, and will on occasion exercise, a discretionary power to condemn the plaintiff in costs. *The London*, Br. & Lush. 82; 9 Jur. (N.S.) 1330; 9 L. T. 348. *The Itinerant*, 2 W. Rob. 236.

Costs given against the claimant in a case of collision which was an inevitable accident. *The Thornley*, 7 Jur. 659.

Inevitable accident found by Court of Appeal; decision below reversed. The modern rule is that costs follow the event in case of collision by inevitable accident, unless there are special circumstances. *The Monkseaton*, 58 L. J., Adm. 52; 14 P. D. 51; 60 L. T. 662; 37 W. R. 523; 6 Asp. M. C. 383. S. P., *The Batavier*, 59 L. J., Adm. 546; 15 P. D. 37; 62 L. T. 406; 38 W. R. 522; 6 Asp. M. C. 500—C. A.

For earlier decisions aliter, see *The Corinna*, 35 L. T. 781; 3 Asp. M. C. 307; *The Agra and The Elizabeth Jenkins*, 4 Moore, P. C. (N.S.) 435; 36 L. J., Adm. 16; L. R. 1 P. C. 501; 16 L. T. 755; 16 W. R. 735; *and cases* supra.

Both ships found in fault in court below; one appeals; appeal dismissed, with costs. *The Milanese*, 45 L. T. 151; 4 Asp. M. C. 438—H.L. (E.)

A. held alone in fault in court below; B. alone in fault in Court of Appeal; A. gets costs of appeal and below. *The Glannibanta and The Transit*, 1 P. D. 283; 34 L. T. 934; 24 W. R. 1033; 3 Asp. M. C. 339—C. A.

iv. *Both Vessels in Fault.*

Both Vessels to blame—Action by Owners of Cargo.]—The owners of a cargo laden on board a vessel which had been sunk in a collision with another vessel brought an action of damage against the owners of such other vessel. The judge of the admiralty division pronounced that both vessels were to blame for the collision, gave the plaintiffs half their damages from the defendants, and condemned the defendants in the costs of the action. The decision that both vessels were to blame was upheld by the Court of Appeal:—Held, that as the plaintiffs had failed on the issue that the vessel carrying the cargo was not to blame, no costs ought to have been given. *The City of Manchester*, 49 L. J., Adm. 81; 5 P. D. 221; 42 L. T. 521; 4 Asp. M. C. 261. S. P., *The Vera Cruz*, 53 L. J., Adm. 33; 9 P. D. 88; 51 L. T. 104; 32 W. R. 783; 5 Asp. M. C. 270. Cf. *The Washington*, 5 Jur. 1067; *The Telegraph*, 1 Spinks, 427; *The Lake St. Clair and The Underwriter*, 2 App. Cas. 389; 63 L. T. 155; 3 Asp. M. C. 361. *The Love Bird*, 6 P. D. 80; 44 L. T. 650; 4 Asp. M. C. 427. *The Rigborgs Minde*, 52 L. J., Adm. 74; 8 P. D. 117; 49 L. T. 23; 5 Asp. M. C. 460—C. A.

When both ships are to blame for a collision, the damages are equally divided, and each party bears his own costs. *The Agra and Elizabeth Jenkins*, 4 Moore, P. C. (N.S.) 438; 36 L. J., Adm. 16; L. R. 1 P. C. 501; 16 L. T. 755; 16 W. R. 735.

In a collision case where both ships are to blame, the plaintiff is entitled to his costs if in his statement of claim he admits that he is to blame. *The General Gordon*, 63 L. T. 117; 6 Asp. M. C. 533.

Both ships in fault. Appeal dismissed with costs except so far as increased by respondent adhering to appeal. *The Mœander and The Florence Nightingale*, 1 Moore, P. C. (N.S.) 63; Br. & Lush. 29.

The case of *The Milan* (Lush. 388) does not lay down any general rule that whenever owners of cargo succeed in an action brought by them to recover damages for the loss of or injury to the cargo, they are entitled to the whole costs of the litigation. "The circumstances of each particular case must introduce a variation in the way the costs are given"—per Baggallay, L. J. *The City of Manchester*, supra. Semble, *The Hibernia*, 5 P. D. 3; 31 L. T. 805; 24 W. R. 60; 2 Asp. M. C. 454, not now followed.

The rule of no costs where both ships in fault, applies where the fault of one ship is the fault of her compulsory pilot. *The Hector*, 52 L. J., Adm. 51; 8 P. D. 218; 37 W. R. 491; 5 Asp. M. C. 1013. *The Rigborgs Minde*, supra. *The Oakfield*, supra, col. 773.

In Court of Appeal—Where both Ships in Fault.]—See *The North American*, infra.

v. *Appeal.*

When the Court of Appeal varies the decision of the judge of the admiralty division, by which he found one vessel wholly to blame for a collision, by finding that the collision was an inevitable accident, the practice of the privy council that each party should, except under very exceptional circumstances, pay their own costs, will be followed. *The City of Cambridge*, 35 L. T. 781; 3 Asp. M. C. 307—C. A.

When the Court of Appeal varies a decision of the judge of the admiralty division, by which he found one vessel wholly to blame for a collision, by finding that both vessels are to blame, each party will pay its own costs, both in the court below and in the Court of Appeal. *The Corinna*, 35 L. T. 781; 3 Asp. M. C. 307—C. A.

Semble, in successful admiralty appeals the appellants will have their costs of the appeal. *The Swansea and The Condor*, or *Perkins* v. *The Condor*, 48 L. J., Adm. 33; 4 P. D. 115; 40 L. T. 442; 27 W. R. 748; 4 Asp. M. C. 115—C. A. And cp. *The City of Berlin*, 47 L. J., Adm. 2; 2 P. D. 187; 37 L. T. 307; 25 W. R. 793; 3 Asp. M. C. 491—C. A.

When the Court of Appeal varies the decision of the court below by finding both vessels to blame for a collision, there will be no order as to costs, but each party must bear the costs of the whole litigation. *The Milanese*, 45 L. T. 151; 4 Asp. M. C. 438—H. L. (E.)

Action and cross action; judgment, both ships to blame and damages to be divided; appeal by one party in both actions, and adherence to the

appeal by the other party; the judgment being affirmed, each party was sentenced to pay his own costs. *The Saxonia and The Eclipse*, Lush. 410; 15 Moore, P. C. 262; 31 L. J., Adm. 201; 8 Jur. (N.S.) 315; 6 L. T. 6; 10 W. R. 431—P. C.

Judgment of the Court of Admiralty in a cause of collision, which imputed mutual blame, and condemned each party in a moiety of the damages and costs, reversed by the judicial committee upon a review of the evidence and the opinion of the nautical assessors. *The Singapore and The Hebe*, 4 Moore, P. C. (N.S.) 271; L. R. 1 P. C. 378.

Where both ships are found in fault in the court below and the decree is affirmed no costs of appeal are given. *The North American and The Tecla Carmen*, Swabey, 358; 12 Moore, P. C. 331; Lush. 79. *But see next case.*

Where an appeal from a judgment in a collision action that both ships are to blame is dismissed, the appellant will be ordered to pay the costs of the appeal except so far as they have been increased by notice given by the respondent under Ord. LVIII. r. 6 (1879), of his intention to ask for a variation of the judgment. *The Lauretta*, 48 L. J., Adm. 55; 4 P. D. 25; 40 L. T. 444; 27 W. R. 902; 4 Asp. M. C. 118.

Where the Court of Appeal reverses or varies the decision of the court below and finds both ships in fault, no costs of the appeal or of the court below are given. *The Hector*, supra, col. 860; *The Rigborgs Minde*, supra; *The Arratoon Apcar*, 59 L. J., P. C. 49; 15 App. Cas. 37; 62 L. T. 331; 38 W. R. 481; 6 Asp. M. C. 491—P. C.

Appeal dismissed without costs because the appellant pleaded the other ship ported, whereas, in fact, she caused the collision by starboarding. *The Ann*, Lush. 55; 13 Moore, P. C. 198; 3 L. T. 128; 8 W. R. 567.

vi. *High Court or County Court.*

Less than £300 recovered.]—The court will not give a successful plaintiff his costs in actions which might have been commenced in the county court, unless there are special circumstances to justify the plaintiff in bringing the action in the High Court. *The Asia*, 60 L. J., Adm. 38; [1891] P. 121; 64 L. T. 327; 7 Asp. M. C. 25.

In an action of damage by collision, the hearing lasted five hours, and the decision mainly turned on the inability of the defendants to exonerate their steamship from the charge of not keeping out of the way of the plaintiffs' steamer, a large vessel in tow of tugs, and which the defendants' steamer was overtaking in the river Thames. In the result the defendants' vessel was held alone to blame, and the damages were referred in the usual way to the registrar and merchants.—The plaintiffs filed their particulars of claim amounting to 339*l.* 15*s.* 7*d.*, but the reference was not proceeded with, as the parties agreed the damages at 226*l.* 5*s.*—On motion on behalf of the plaintiffs, to condemn the defendants and their bail in that amount, with interest, and in the costs of the action, the defendants contended that the plaintiffs were not entitled to their costs, as the amount recovered was under the statutory county court limit of 300*l.*, and therefore, the action ought to have been brought in a county court:—Held, that the plaintiffs were entitled to their costs, for the discretion of the court in allowing, or refusing, costs now depends upon whether, considering the facts and the circumstances of the particular case, the plaintiffs have acted properly and reasonably in bringing their action in the High Court, and—considering the size of the vessels, the nature of the collision, the length of time the hearing lasted, and the judgment pronounced—this case was a proper one to be tried in the High Court. *The Saltburn*, [1892] P. 333; 1 R. 543; 69 L. T. 88; 7 Asp. M. C. 325.

Where successful plaintiffs in a collision action in the High Court recovered less than 300*l.* they were allowed no costs, although they claimed more than the county court limit. *The Herald*, 63 L. T. 324; 6 Asp. M. C. 542.

By s. 9 of the County Courts Admiralty Jurisdiction Act, 1868: "If any person shall take in the High Court of Admiralty, or in any superior court, proceedings which he might, without agreement, have taken in a county court, . . . and shall not recover a sum exceeding the amount to which the jurisdiction of the county court in the admiralty cause is limited by this act, . . . he shall not be entitled to costs, and shall be liable to be condemned in costs," unless the judge before whom the cause is tried shall certify that it was a proper admiralty cause, to be tried in the Admiralty Court or in a superior court:—Held, that this enactment was inconsistent with the discretionary power as to costs given to the court by Ord. LXV. r. 1, and must, therefore, be taken to be repealed. *Tenant* v. *Ellis* (6 Q. B. D. 46) approved. *Rockett* v. *Clippingdale* or *Chippingdale*, 60 L. J., Q. B. 782; [1891] 2 Q. B. 293; 64 L. T. 641—C. A.

vii. *Reference.*

An action of damage was brought by the owners of the ship "V." against the ship "S.," and the owners of the "S." claimed damages by way of counter-claim against the "V." At the hearing of the action the court found both ships to blame for the collision, condemned the owners of each ship in a moiety of the damage sustained by the other, referred the question of damages to the registrar and merchants and made no order as to costs. Afterwards the owners of the "S." brought their counter-claim into the registry. No tender was made by the owners of the "V.," and the registrar struck off less than one-ninth of the amount claimed, but made no recommendation as to the costs of the reference. The court, on the application of the owners of the "S.," condemned the owners of the "V." in the costs of and incident to the reference. *The Consett* (infra) followed. *The Savernake*, 49 L. J., Adm. 71; 5 P. D. 166; 29 W. R. 123; 5 Asp. M. C. 34, n.

In an action of damage brought by the owners of the ship "J." and the owners of the cargo on board her against another vessel, the court pronounced that the two vessels were both to blame for the collision, and condemned the defendants in a moiety of the damage proceeded for:—Held, that the owners of the cargo on board the "J." were entitled to the costs of the affidavits brought in by them in support of their claim at the reference. *The Consett*, 5 P. D. 77; 42 L. T. 33; 28 W. R. 622; 4 Asp. M. C. 230—C. A.

Where, in an action of damage, the defendant sets up a counter-claim relating to the collision in respect of which the action is brought, and both ships are held to blame, and a reference is ordered to ascertain the amount of damage sustained by each ship, each party is, as a general

rule, entitled to the costs of establishing his claim before the registrar, provided that not more than one-fourth of his claim has been disallowed. *The Mary*, 7 P. D. 201 ; 48 L. T. 28 ; 31 W. R. 248 ; 5 Asp. M. C. 33.

Where a plaintiff claimed unliquidated damages in respect of loss of the remainder of a season's fishing occasioned by a collision, and on a reference to the registrar and merchants, the defendant objected to the claim altogether, but the plaintiff recovered, being awarded less than two-thirds of the amount claimed by him as damages, the court gave him costs in respect of the reference on the ground of the peculiarity of the plaintiff's claim, and without prejudice to the general rule as to costs of references. *The Gleaner*, 38 L. T. 650 ; 3 Asp. M. C. 582.

Where the amount of damage is referred to the registrar and merchants, and a tender is made by the defendant but not accepted by the plaintiff, if the amount pronounced to be due is less than two-thirds of the claim, but exceeds the tender of the defendant, the plaintiff is liable for the general costs of the reference, but the defendant for the costs occasioned by his making an insufficient tender. *The Seine*, Swabey, 513 ; 2 L. T. 340.

The ordinary rule, that a plaintiff shall pay the costs of the reference to the registrar and merchants, if their report disallows more than one-third of his claim, is not to be relaxed, even if he fails in substantiating his entire claim upon a question of law only. *The Empress Eugénie*, Lush. 138.

In a damage action, at the reference, more than one-third of the plaintiff's claim was disallowed ; the greater part of the items disallowed being sums claimed in respect of salvage service rendered after the collision :—Held, that the usual rule should not prevail, and that under the special circumstances the plaintiffs were entitled to their costs. *The Berbice*, 6 L. T. 106.

Notwithstanding a general rule that where more than one-fourth of the plaintiff's claim was struck off no costs of reference were given, it was always within the registrar's discretion to allow the plaintiff his costs. *The Amelia*, 23 L. T. 544 ; 19 W. R. 216. And see *The Williamina*, 3 P. D. 97. See *The Elina*, 5 P. D. 237, n. ; *The Parana*, 2 P. D. 118 ; 36 L. T. 388 ; 25 W. R. 596 ; 3 Asp. M. C. 399—C. A.

Claimant ordered to pay costs of reference ; less than two-thirds of original claim proved. *The Eilean Dubh*, 49 L. T. 444 ; 5 Asp. M. C. 154.

There is no hard-and-fast rule as to allowing or disallowing costs of the reference. *The Friedeberg*, 54 L. J., Adm. 75 ; 10 P. D. 112 ; 52 L. T. 837 ; 33 W. R. 687 ; 5 Asp. M. C. 426.

Costs of appeal from the registrar's report usually follow the result of the appeal. *The Black Prince*, Lush. 568 ; *The Parana*, supra.

Where more than one-third of the plaintiff's claim was disallowed by the registrar, the plaintiffs were condemned in the costs of the reference. *The Naomi*, 32 L. T. 836 ; 23 W. R. 887 ; 2 Asp. M. C. 588. S. P., *The Englishman*, 38 L. T. 756 (where the rule as to one-third was considered to be binding on the court) ; *The Gleaner*, supra.

Upon a reference in a collision cause more than one-fourth and less than one-third of the claim was disallowed :—Held, each party must pay his own costs of the reference. *The Peerless*, Lush. 30 ; 6 L. T. 107.

viii. *Security for Costs.*

Where a plaintiff has recently executed a deed of assignment of all his property to an assignee, he will be required to give security for the costs of suit, unless he satisfies the court that he is solvent. The fact that he is carrying on business is not sufficient proof of his solvency. *The Lake Megantic*, 36 L. T. 183 ; 3 Asp. M. C. 382.

A defendant in a collision cause making a counter-claim for the damage sustained by his own vessel, must, if he is resident out of the jurisdiction, give security for the costs, not merely of his counter-claim, but of the whole action. *The Julia Fisher*, 2 P. D. 115 ; 36 L. T. 257 ; 25 W. R. 756 ; 3 Asp. M. C. 380—C. A.

If he makes default in giving security for costs pursuant to order, he will have his counter-claim dismissed. *Ib.*

Where the plaintiff in a collision suit was resident out of the jurisdiction, the Admiralty Court required him to give security for costs. *The Sophie*, 1 W. Rob. 326 ; *The Volant*, 1 W. Rob. 383 ; *The Johanna Frederich*, 1 W. Rob. 39 ; *The Lord Cochrane*, 1 W. Rob. 312 ; *The Constantine*, 4 P. D. 156 ; 27 W. R. 747—C. A. *The Newbattle*, 54 L. J., Adm. 16 ; 10 P. D. 33 ; 52 L. T. 15 ; 33 W. R. 318 ; 5 Asp. M. C. 356.

XXI. PASSENGER SHIPS.

1. *Qualification*, 864.
2. *Contracts of Conveyance*, 866.
3. *Emigrant Ships*, 873.
4. *Passage Broker*, 873.

1. QUALIFICATION.

Number of Passengers — Tonnage.]—Under 18 & 19 Vict. c. 119, ss. 3 and 71, a sailing ship is not a passenger ship because she carries more than thirty passengers, or more than one statute adult passenger to every fifty tons, if that number or proportion is not made up without reckoning cabin passengers ; and where persons are cabin passengers in all respects except that of having received contract tickets in the form in schedule K. which in its terms applies to passenger ships only, such persons, for the purpose of estimating the number or proportion, are to be reckoned as cabin passengers ; and unless, without including them, the number or proportion is not made up, the ship is not a passenger ship. *Ellis* v. *Pearce*, El. Bl. & El. 431 ; 27 L. J., M. C. 257 ; 4 Jur. (N.S.) 1275 ; 6 W. R. 683.

Certificate from Board of Trade—Defence to Action on Policy.]—In an action on a marine policy, a plea that the ship was sent by the owners with passengers on board on the voyage on which she was lost, without the owners having done what was necessary to enable them to receive, and without having received, a passengers' certificate from the Board of Trade, all which the owner well knew, is good. *Dudgeon* v. *Pembroke*, 43 L. J., Q. B. 220 ; L. R. 9 Q. B. 581 ; 31 L. T. 31 ; 22 W. R. 914. And see *S. C.* in H. L., col. 1088.

—— **"Vessel used in Navigation"—"Passenger Steamer."**]—An electric launch, in which passengers are taken for hire on pleasure trips on an artificial lake three feet deep, half a mile long, and 160 yards wide, is not a "vessel used in navigation" within s. 2 of the Merchant

Shipping Act, 1854, nor a "passenger steamer" within s. 318, so as to require a duplicate of a certificate of the board of trade to be put up in a conspicuous part of the vessel. *Reg.* v. *Southport Corporation*, or *Southport Corporation* v. *Morriss*, 62 L. J., M. C. 47; [1893] 1 Q. B. 359; 5 R. 201; 68 L. T. 221; 41 W. R. 382; 7 Asp. M. C. 279; 57 J. P. 231.

—— **Steamship not having Certificate carrying Persons other than Crew.**]—The respondents were charged that they being the owners of the British steamship "Era," did ply on the river O. with certain passengers on board without having one of the duplicates of a certificate issued by the board of trade put up in some conspicuous part of the ship so as to be visible to all persons on board the same. More than twelve persons were taken on board the steamer for an excursion from I. down the river O. to F. and back. No charge was made by the respondents for the use of the steamer, but a gratuity was given to the master and crew. The justices dismissed the case:—Held, that the justices were right, as the steamship was not a passenger steamship within the meaning of ss. 303 and 313 of the Merchant Shipping Act, 1854. *Hedges* v. *Hooker*, 60 L. T. 822; 37 W. R. 491; 6 Asp. M. C. 386; 53 J. P. 613.

Persons carried gratuitously.]—The Merchant Shipping Act, 1854, s. 303, defines "passenger" as including any person carried in a steamship other than the master and crew, and the owner, his family and servants; and "passenger steamer" as including every British steamship carrying passengers between places in the United Kingdom; and in s. 318 provides that no passenger steamer shall proceed to sea, or upon any voyage and excursion with passengers on board, without a certificate as therein prescribed, and a penalty is imposed for offending against the section. The Merchant Shipping Act of 1876, exempts from these provisions steamships carrying passengers not exceeding twelve in number. The owner of a tug steamer called the "Flying Hawk," was summoned to answer a complaint that a certain passenger steamship, called the "Flying Hawk," of which he was owner, went to sea on the 21st July, 1882, from Dublin, with more than twelve passengers on board, without any Board of Trade certificate, and without having a duplicate of such certificate put up in some conspicuous part of the ship, contrary to the provisions of the 17 & 18 Vict. c. 104, s. 318, and the 39 & 40 Vict. c. 80, s. 16. The persons on board the steamer on the occasion in question, other than the master and crew, considerably exceeded twelve in number, and had been invited for a pleasure trip in respect of which none of them paid anything. The magistrate having dismissed the summons; on a case stated:—Held, that the magistrate, if he believed the evidence, should have convicted the defendant. *Kiddle* v. *Kidston*, 14 L. R., Ir. 1; 15 Cox, C. C. 379.

—— **Refusal to give Certificate—Remedy.**]—A board of trade surveyor refused to give a certificate for a passenger steamship under the Merchant Shipping Act, 1854, ss. 307, 312, 318; the Merchant Shipping Amendment Act, 1872, s. 13:—Held, that the Merchant Shipping Amendment Act, 1876, ss. 14, 15, provided the shipowner with a remedy by appeal to the court of survey, and that the jurisdiction of the court of session was excluded. *Denny Brothers* v. *Board of Trade*, 7 Ct. of Sess. Cas. (4th ser.) 1019.

2. Contract of Conveyance.

Time of Sailing.]—Where a vessel, bound for the East Indies, is advertised to sail by a certain day, and does not, the shipowner will be entitled to recover half the passage-money of a person who refused to go, after having engaged a passage, unless either the time was of the essence of the contract, or the delay in sailing was unreasonable. *Yates* v. *Duff*, 5 Car. & P. 369.

C., who resided in Ireland, having applied to certain emigration agents in London, respecting a passage for himself and family on board their ships to Australia, received in answer a letter in which they agreed to convey him and his family for a sum of money. This letter was written on the fly-sheet of a printed circular, headed "Emigration to Australia," and which stated that ships "will be despatched on the appointed days (wind and weather permitting), for which written guarantees will be given." Then followed a list of ships, amongst which the "Asiatic" was named as to sail from London on the 15th of August, and from Plymouth on the 25th. In another part of the circular it was stated, "Passengers from Ireland can readily join at Plymouth. A deposit of one-half the passage-money to be paid at the time the berths are engaged, the balance to be paid prior to granting the embarkation order." C. engaged a berth on board the "Asiatic," and paid the agents a deposit, but no written guarantee was given. The "Asiatic" did not arrive at Plymouth until the 3rd of September, although not prevented by wind or weather. The berth was kept vacant from London to Plymouth:—Held, that the statement in the circular was not a mere representation, but a warranty that the "Asiatic" would sail on the days appointed, and that as she did not, C. was justified in taking a passage on board another vessel, and was entitled to recover from the emigration agents the amount of the deposit, and the expenses he had been put to by the delay at Plymouth. *Cranston* v. *Marshall*, 5 Ex. 395; 19 L. J., Ex. 340.

Custom as to Right to Carry—Charterparty.]—A charterparty, not amounting to a demise of the ship, provided for the carriage of a full and complete cargo of lawful produce and merchandise for payment of a lump freight, but was silent as to the use to which the passengers' cabins might be put:—Held, that the charterers were not entitled to carry passengers in the cabins. *Shaw* v. *Aitken*, 1 Cab. & E. 195.

No custom exists entitling the charterer under the above circumstances to carry passengers, or entitling the shipowner to have passengers carried for his benefit. *Ib.*

Loss of Life—Claim by Person not responsible for Negligence—Admiralty Rule as to Damages.]—A passenger on board the "Bushire" and one of the crew lost their lives by drowning in consequence of a collision with the "Bernina." Both vessels were to blame, but neither of the deceased had anything to do with the negligent navigation of the "Bushire":—Held, that their representatives could maintain actions under Lord Campbell's Act against the owners of the "Bernina," and could recover the whole of the damages; s. 25, sub-s. 9, of the Judicature Act, 1873, not being applicable to such actions. *Thorogood* v. *Bryan* (8 C. B. 115) and *Armstrong* v. *Lancashire and Yorkshire Ry.* (44 L. J., Ex. 89) overruled. *The Bernina*, *Mills* v. *Armstrong*, 57 L. J., Adm.

65 : 13 App. Cas. 1 ; 58 L. T. 423 ; 36 W. R. 870 ; 6 Asp. M. C. 257 ; 52 J. P. 212—H. L. (E.)

—— **Liability—Meaning of Words "Loss or Damage"—Passenger's Ticket.**]—The personal representatives of a deceased man cannot maintain an action under Lord Campbell's Act (9 & 10 Vict. c. 93), where the deceased, if he had survived, would not have been entitled to recover. The defendants, a steamship company, issued a passenger's ticket, which contained amongst others, the following condition :—"The company will not be responsible for any loss, damage, or detention of luggage under any circumstances. . . . The company will not be responsible for the maintenance of passengers, or for their loss of time or any consequence arising therefrom . . . nor for any delay arising out of accidents ; nor from any loss or damage arising from the perils of the sea, or from machinery, boilers, or steam, or from any act, neglect or default whatsoever of the pilot, master or mariner" :—Held, that the words "loss or damage arising from the perils of the sea," as contained in the above conditions, exempted the defendants from liability for injury or loss of life to a passenger occasioned on the voyage by the negligence of the defendants' servants. *Haigh* v. *Royal Mail Steam Packet Co.*, 52 L. J., Q. B. 640 ; 49 L. T. 802 ; 5 Asp. M. C. 189 ; 48 J. P. 230—C. A.

—— **Injury to Passenger — Contributory Negligence.**]—The owner of a Clyde steamboat held liable to a passenger who rushed on to the gangway after the bow rope of the steamboat had been cast off, and was thereby thrown into the water and injured. *Monaghan* v. *Buchanan*, 13 Ct. of Sess. Cas. (4th ser.) 860. And see *Dalyell* v. *Tyrer*, El. Bl. & El. 899, supra, col. 714.

County Court—Admiralty Jurisdiction—Carriage of Passengers' Luggage.]—Passengers' luggage carried on board a ship is not "goods" within the meaning of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and consequently the act does not confer jurisdiction to try a claim arising out of the loss of such luggage, as a court having admiralty jurisdiction. *Reg.* v. *City of London Court Judge*, 53 L. J., Q. B. 28 ; 12 Q. B. D. 115 ; 51 L. T. 197 ; 32 W. R. 291 ; 5 Asp. M. C. 283.

Rights of Passengers as to Berths.]—In an action, in which one of the questions between the parties was, whether the defendant was justified in expelling the plaintiff from a berth in a steamer, it was proved that the plaintiff placed his coat upon the berth while it was vacant, afterwards applied at the office of the company to which the steamer belonged for the purpose of engaging the berth, and caused the company's clerk or agent, then in attendance at the office, to enter the plaintiff's name on the way-bill opposite the number of the berth, but that the defendant, having also applied for the same berth, another agent or clerk of the company altered the way-bill by inserting the defendant's name opposite the berth, and allotting another one to the plaintiff, and that the plaintiff, upon returning to the berth in dispute, after the steamer had started, found the defendant's servant at the door, who refused to allow him to enter. The plaintiff afterwards entered the berth and was removed by the defendant. Evidence was also given that, according to the usage on board the steamer, the rights of the passengers inter se to berths during the voyage were to be determined by the way-bill as finally settled and sent on board, and that disputes during the voyage with respect to passengers' accommodation should be decided by the captain or steward :—Held, first, that the plaintiff was not entitled to a direction that he was in possession of the berth in dispute. *Dysart* v. *Montgomery*, Ir. R. 8 C. L. 245.

Held, secondly, that the way-bill, as finally settled and delivered to the officers on board, determined the right to the berth as between the plaintiff and the defendant. *Ib.*

Held, thirdly, that the jury having found that the way-bill, as finally settled for the purpose of the voyage, allotted the berth to the defendant, and that he was in possession at the time of the alleged assault, he was justified in removing the plaintiff, without using unnecessary violence, upon his refusal to leave the berth. *Ib.*

Putting into Port during Voyage.]—The captain of a ship covenanted to promote the comfort of passengers engaged by the plaintiff ; the plaintiff covenanted not to interfere with the navigation of the ship, and to defray the expense of putting into port if it should be necessary for the convenience and at the request of the plaintiff :—Held, that the captain was bound to put into port for the convenience and at the request and expense of the plaintiff, unless he could shew that putting in would be dangerous. *Corbin* v. *Leader*, 10 Bing. 275 ; 3 M. & Scott, 751 ; 6 Car. & P. 32.

Accommodation and Provisions.]—There was in an agreement under seal for the use of cabins and accommodations for passengers in a ship, a covenant on the part of the captain, to permit and suffer the hirer to stow away the baggage of the passengers in a part of the hold :—Held, that this, in connection with a covenant to promote the comfort and convenience of the hirer and his passengers, fairly imported that there should be some demand or request made by the hirer for the clearing the space agreed on. *Ib.*

A covenant to keep up a supply of the necessary and usual quantity of water, for the use of the passengers, is not broken by a deficiency for a short time, occasioned by the unusual length of the voyage. *Ib.*

In an action against a captain for not furnishing good and fresh provisions to a passenger on a voyage, the jury must be satisfied that there was a real grievance sustained by the plaintiff, and there is no right of action unless he has really been a sufferer ; for it is not because a man does not get such a good dinner as he might have had that he is therefore to have a right of action against the captain who does not provide all that he ought. *Young* v. *Fewson*, 8 Car. & P. 55.

Authority of Captain over.]—A declaration on an agreement to carry the plaintiff in a ship to a particular place alleged as a breach, that the defendants by their agent, caused him to be disembarked at an intermediate point, and by their agent caused the disembarkation to be conducted in a scandalous, disgraceful, and improper manner, whereby, and also by contemptuous usage and insulting language addressed to the plaintiff by the agent in effecting the disembarkation, the plaintiff sustained damage :—

Held, a good declaration: *Coppin* v. *Braithwaite*, 8 Jur. 875. *And see Cases* ante, col. 81.

Held, secondly, that the judge rightly received evidence of the language of the captain in putting the plaintiff on shore, in which he described him as being a pickpocket, and belonging to the swell mob. *Ib.*

Held, thirdly, that the judge rightly directed the jury, that the defendants were responsible for any injury naturally resulting from the acts of the captain, when acting as their servant; and that the plaintiff was entitled to fair compensation for the injury done to him in being put on shore at the intermediate place, so far as injury arose from the act of the captain in putting him on shore. *Ib.*

Conduct unbecoming a gentleman, in the strict sense of the word, will, it seems, justify a captain of a ship in excluding a passenger from the cuddy table, whom he has engaged by contract to provide for there; but it is difficult to say in what degree want of polish would in point of law warrant such exclusion; but it is clear, that, if a passenger use threats of personal violence towards the captain, the captain may exclude him from the table, and require him to take his meals in his own private apartment. *Prendergast* v. *Compton*, 8 Car. & P. 454.

The captain has absolute control over the passengers in all that is necessary to the safe and proper conduct of the vessel, but the exercise of such power in each instance is defined and limited by the necessity of the case. *King* v. *Franklin*, 1 F. & F. 360. See also *Noden* v. *Johnson*, 16 Q. B. 218; 20 L. J., Q. B. 95; 15 Jur. 424.

The captain has authority to exercise so much force as is necessary for the safety of the ship. *Aldworth* v. *Stewart*, 4 F. & F. 957; 14 L. T. 862.

To imprison a passenger in his cabin for seven days for alleged insolence to the captain personally is an excess of such power, and an action for the false imprisonment will lie. *Ib.*

Passage-money—Commencement of Voyage.]—Where an agreement was made to carry a passenger on board a ship from London to the West Indies, the passage-money to be paid in London before the commencement of the voyage; and the passenger put his baggage on board in the Thames, meaning himself to embark at Portsmouth; and the ship was lost going round to that place; the passage-money could not be recovered back. *Gillan* v. *Simpkin*, 4 Camp. 241; 16 R. R. 784.

Aliter, if the agreement had been to carry the passenger from Portsmouth to the West Indies. *Ib.*

—— **Ship's Officers—When entitled to.**]—If a captain of an East Indiaman dies at the outward port, after having contracted to bring home certain passengers and laid in a certain quantity of stores for the homeward voyage; and the chief mate, succeeding to the command, brings home these and other passengers, and provides further stores for their subsistence during the voyage; the captain's representatives are entitled to the passage-money of the passengers with whom he had contracted, and the mate to that of the others; the representatives being liable to him for the portion of the stores laid in by him consumed by the former class of passengers, and he being liable to the representatives for the portion of the captain's stores consumed by the latter class of passengers. *Siordet* v. *Brodie*, 3 Camp. 263.

—— **Lien for.**]—The master has a lien on the luggage of a passenger for his passage-money. *Wolf* v. *Summers*, 2 Camp. 631; 12 R. R. 764.

But he has certainly no lien on the passenger himself, or the clothes which he is actually wearing, when he is about to leave the vessel. *Ib.*

—— **Capture—Condemnation as Prize.**]—The plaintiff contracted to carry the defendant, his family, and luggage, from Demerara to Flushing; and in the course of the voyage, within four days' sail of Flushing, the ship was captured by an English ship of war, and brought into England, and the ship and cargo libelled for prize in the court of admiralty, and the cargo condemned, and proceedings still pending against the ship; but the defendant and his family were liberated, and their luggage in fact restored to their possession:—Held, that however the question might be as to the plaintiff's right to recover passage-money upon an implied assumpsit pro ratâ itineris, if the ship was restored, yet pending the proceedings against the ship, as prize in the admiralty court, no such action could be maintained for non constat, but that the ship might be condemned and the freight decreed to the captors. *Muloy* v. *Backer*, 5 East, 316; 1 Smith, 447; 7 R. R. 704.

—— **Mortgage of Ship.**]—In an action to recover passage-money brought by mortgagee of a ship against mortgagor, which passage-money had been received, by the mortgagor, as part of the earnings of the ship before the mortgagee took possession of the ship:—Held, that the mortgagee could not recover. *Willis* v. *Palmer*, 7 C. B. (N.S.) 340; 29 L. J., C. P. 194; 6 Jur. (N.S.) 732; 2 L. T. 626; 8 W. R. 295.

—— **Insurance of.**]—A policy of insurance was effected upon the passage-money of emigrants upon a voyage from Liverpool to Boston against the perils of the sea. At the end of the policy was a memorandum, "On passage-money of emigrants, subject to pay a loss pro rata, and subject to the clauses and conditions under ss. 47—51 of the 15 & 16 Vict. c. 44, and against these risks only":—Held, that the policy extended to any expense occasioned by the perils insured against, which were thrown upon the shipowners by any of the enumerated sections; but not to the expense of maintaining the passengers during the detention of the ship at a foreign port for the purpose of repairs, the ship afterwards completing the voyage with the passengers on board, such expense being cast upon the owners by s. 32. *Willis* v. *Cooke*, 5 El. & Bl. 641; 25 L. J., Q. B. 16; 1 Jur. (N.S.) 1164; 4 W. R. 54.

Expenses of forwarding Passengers to Destination.]—By 15 & 16 Vict. c. 44, s. 49, if any passengers of any passenger ship shall, without any neglect or default of their own, find themselves within any foreign or colonial port other than that at which they have contracted to land, and the master of the ship shall decline, or omit within six weeks thereafter, to forward or carry them on to their original destination, it shall be lawful for the governor of the colony to forward such passengers to their intended destination. By s. 50 the expenses incurred under this section

shall become a debt due to the crown from the owner, charterer and master:—Held, that a policy of assurance by the owners against all liabilities, to which they might become by perils of the sea liable under these sections, covered a liability for expenses incurred by the captain in forwarding, without the intervention of the governor, and before the lapse of six weeks, passengers who were in a colony to which they were not ultimately destined, in consequence of the loss of the ship in which they sailed. *Gibson* v. *Bradford*, 4 El. & Bl. 586; 24 L. J., Q. B. 159; 1 Jur. (N.S.) 520; 3 W. R. 183.

Loss of Luggage—Liability of Owners.]—A passenger by steamer from America paid for and received a passenger ticket from the agents of the owners, containing a condition exempting the owners from liability in case of loss or detention of the ship by accidents of navigation or perils of the sea, and from responsibility for luggage, goods, or other description of property, unless bills of lading had been signed therefor:—Held, that the latter condition not having been observed by the passenger, he could not recover for the loss of his luggage, though the loss was caused by the ship having been wrecked owing to the negligence of the captain. *Wilton* v. *Royal Atlantic Mail Steam Navigation Co.*, 10 C. B. (N.S.) 453; 30 L. J., C. P. 369; 8 Jur. (N.S.) 232; 4 L. T. 706; 9 W. R. 748.

—— **Special Contract—Notice.**]—A passenger on paying his fare received a ticket from the clerk of the steamship company, on the back of which was a notice exonerating the company from liability for loss, injury, or delay to the passenger or his luggage, however caused. There was no evidence that the passenger had been made aware of this condition before or at the time when he took the ticket. During the voyage the steamer was lost by the negligence of the servants of the company, and the passenger lost his luggage and suffered other damage and inconvenience:—Held, that, in the absence of proof that the passenger had assented to be bound by the condition indorsed on the ticket, it was no defence to an action by him to recover the loss he had sustained. *Henderson* v. *Stevenson*, L. R. 2 H. L. (Sc.) 470; 32 L. T. 709. See also *Burke* v. *S. E. Ry.*, 49 L. J., C. P. 107.

—— **Exemption from Liability.**] — A contract entered into between a shipowner and a passenger, contained a provision that the shipowner would not be answerable for loss of baggage "under any circumstances whatsoever":—Held, that such a stipulation covered the case of wilful default and misfeasance by the shipowner's servants. *Taubman* v. *Pacific Steam Navigation Co.*, 26 L. T. 704; 1 Asp. M. C. 336.

—— **Robbery—Conditions on Ticket Limiting Liability.**]—Sect. 502 of the Merchant Shipping Act, 1894, provides that the owner of a British seagoing ship shall not be liable for the loss by robbery without his actual fault of any gold, silver, jewellery, &c., taken on board his ship, the true nature and value of which have not been declared. This section applies whether the robbery be committed by a passenger for whose act the shipowner would not be otherwise responsible, or by one of the servants. A passenger from Durban to London by the defendants ship received a ticket, which purported to be a receipt for the passage-money. On the margin of the ticket were the words "Issued subject to the further conditions printed on the back hereof," and on the face of the ticket there was written and printed matter which the passenger saw, but did not read. There was also this clause, "The owners do not hold themselves responsible for any loss, damage, or detention of luggage under any circumstances," and on the back there was an indorsement, "Conditions and Regulations," one of which was that "it is hereby agreed by the person holding this ticket that the owners will not be liable in any way for the luggage of passengers unless the passenger choose to pay 1*s.* per cubic foot for luggage put under the owners' charge." A box, part of the passengers' luggage, containing money, jewellery, and papers, was during the voyage stolen, it was supposed by one of the crew:—Held, that the terms and conditions on the ticket constituted the terms of the contract between the passenger and the shipowners; that the passenger ought to have known that there were conditions, and that he had, under the circumstances, reasonable notice of the conditions, and was bound by them, although he had not read the same, and that he could not recover from the shipowners:—Held also, that, apart from the special contract, the passenger was disentitled from recovering that part of the goods which consisted of gold and silver by reason of section 502, the value of the same not having been declared, and there being no actual fault on the part of the shipowners. *Acton* v. *Castle Mail Packets Co.*, 73 L. T. 158; 8 Asp. M. C. 73.

Limitation of Liability.]—A railway company carrying passengers and goods partly by railway and partly by its own ships is entitled to the limitation on the liability of shipowners imposed by the merchant shipping acts. *L. & S. W. Ry.* v. *James*, 42 L. J., Ch. 337; L. R. 8 Ch. 241; 28 L. T. 48; 21 W. R. 151. *And see* ante, cols. 738 seq. as to LIMITATION OF LIABILITY.

Means of Access to Ship.]—A. agreed to carry B. from Milford Haven to Liverpool: the mode of transit provided was that B. should come on to a hulk lying in the harbour at Milford Haven, and wait till a steamer came and took him to Liverpool. On the hulk, close to a ladder down which B. had to pass to reach the steamer, was a large hatchway, which was negligently left unguarded and improperly lighted, and B. fell through it and was injured. The hulk belonged to a third party, and A. had only acquired a right to use it for the purpose of embarking passengers on his steamer. In an action by B. against A. for the injury he sustained:—Held, that he was answerable for all injury occurring through the means of transit being improper, whether it arose from negligence of his own servants or of other parties who helped to provide the means of transit. *John* v. *Bacon*, 39 L. J., C. P. 365; L. R. 5 C. P. 437; 22 L. T. 477; 18 W. R. 894.

Held, also, that A. having invited B. on to the hulk, was bound to protect him from concealed dangers, and was liable for injury he sustained through the condition of the hatchway, even though it was under the care of others and not his own servants. *Ib.*

3. Emigrant Ships.

Contracts to Equip.]—The defendant being under contract with the owner to supply and fit an emigrant ship with everything comprised in the commissioners of emigrants' schedule, to the entire satisfaction of the surveyor to such commissioners, the plaintiff contracted with the defendant to do part of such work, viz. he undertook "to fit up the between-decks of the ship for government emigrants, to provide all materials and labour viz. all plumbers' and joiners' work, for 15*s.* per statute adult; the whole to be done to the satisfaction of the emigration commissioners." The plaintiff erected many more berths in the vessel than she was measured to carry according to 18 & 19 Vict. c. 119, and several of the berths had to be taken down, and some of them to be rebuilt and altered, by the plaintiff, by the order of the emigration commissioners. By the like order other work, in the nature of ship's fittings, was done by the plaintiff, such as making a ventilator, deck lights, and a schoolmaster's cabin:—Held, that the defendant was only liable to pay the plaintiff at the rate of 15*s.* per statute adult for the number of berths by which the ship was allowed by the commissioners to go to sea, and that he was not responsible for any further sum in respect of the other work done by the plaintiff under the order of the commissioners. *Dobson* v. *Hudson*, 1 C. B. (N.S.) 652; 26 L. J., C. P. 153; 3 Jur. (N.S.) 216; 5 W. R. 308.

Duties of Emigration Officer.]—An emigration officer, appointed under 15 & 16 Vict. c. 44, was justified in refusing to certify that the requirements of the statute had been complied with, if he, acting bonâ fide, deemed that the quantity of cargo on board a passenger ship was such as to endanger the safety of the ship, although none of the articles expressly prohibited by s. 26 were on board, and although his objection was not to any specific articles on board, but solely because the ship was too deep in the water; and if an action was brought against him for refusing his certificate under such circumstances, he was, by s. 81, entitled to have the verdict entered for him. *Steel* v. *Schomberg*, 3 C. L. R. 302; 4 El. & Bl. 620; 24 L. J., Q. B. 87; 1 Jur. (N.S.) 679.

The 16th section did not apply to such a case. *Ib.*

4. Passage Broker.

Passenger's Contract—"Passage Broker"—Person who "receives Money for or in Respect of a Passage in any Ship."]—A "passage broker" within the meaning of s. 341, sub-s. 1, of the Merchant Shipping Act, 1894, is one who sells or lets a passage in a named ship to commence at a definite time for a specified voyage. A person who by way of business, agrees to place farm pupils in the colonies in consideration of a lump sum which includes ship's passage fare, but without specifying any particular ship, and who out of that sum subsequently pays for and obtains from a duly qualified passage broker a contract ticket for a second-class passage in a particular ship, is not a "passage-broker" within the meaning of s. 341, sub-s. 1, of the act of 1894; nor is he a person who "receives money for and in respect of a passage in any ship" within the meaning of s. 320, sub-s. 1, of the same act. *Morris* v. *Howden*, 66 L. J., Q. B. 264; [1897] 1 Q. B. 378; 76 L. T. 156; 45 W. R. 221; 61 J. P. 246.

XXII. BOARD OF TRADE PROCEEDINGS.

1. *Wreck Inquiries*, 874.
2. *Marine Board Inquiries*, 876.
3. *Unseaworthy Ships, Detention*, 877.

1. Wreck Inquiries.

Decision of Judge given in open Court—Reasons.]—The decision given by the judge after an investigation into a casualty dealing with the certificate of an officer must be given in open court, but need not be accompanied by reasons, and if he gives reasons the officer is not entitled to a copy of the shorthand-writer's notes of those reasons, for the purpose of an appeal. *The Kestrel*, 6 P. D. 182; 45 L. T. 111; 30 W. R. 182; 4 Asp. M. C. 433.

Jurisdiction to suspend Master's Certificate.]—The jurisdiction to suspend the certificate of the master of a ship has not been extended by the Merchant Shipping Act, 1876 (39 & 40 Vict. c. 80), ss. 29, 32, to cases not within ss. 242 and 432 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104); and therefore where an inquiry into the stranding of a ship where no damage has been done is held by a wreck commissioner under s. 32 of the later act, he has no jurisdiction upon such inquiry to suspend the certificate of the master of the stranded ship. *Story, Ex parte*, 47 L. J., Q. B. 266; 3 Q. B. D. 166; 38 L. T. 29; 26 W. R. 329; 3 Asp. M. C. 549.

A shipping casualty must be actually caused or contributed to by the master to enable the court of inquiry to suspend his certificate. *The Arizona*, 49 L. J., Adm. 54; 5 P. D. 123; 42 L. T. 505; 28 W. R. 704; 4 Asp. M. C. 269—C. A.

An error of judgment on the part of the master of a vessel at a moment of great difficulty and danger does not amount to a wrongful act or default, within the meaning of the 242nd section of the Merchant Shipping Act, 1854, so as to justify the suspension or cancellation of the master's certificate. *The Fumenoth*, 7 P. D. 207; 48 L. T. 28; 5 Asp. M. C. 35, infra.

—— **Appeal.**]—Where a court of inquiry into a shipping casualty, held under the 8th part of the Merchant Shipping Act, 1854, orders the suspension of a master's certificate, in pursuance of the powers given by the 242nd section of the same act, and the 23rd section of the Merchant Shipping Act, 1862, the court of appeal, having jurisdiction under the Shipping Casualties Investigations Act, 1879, will on appeal consider the evidence on which the judgment of the court of inquiry proceeded, and will reverse the judgment if the evidence is insufficient to justify the suspension of the certificate. Where a court of inquiry ordered a master's certificate to be suspended, and the only ground on which the decision could be supported was that serious damage to a ship had been caused by the wrongful act or default of the master, within the meaning of s. 242 of the Merchant Shipping Act, 1854, sub-s. 2, and on appeal it appeared to the court of appeal that there was no evidence that the damage had been caused by the wrongful act or default of the master, the court of appeal reversed the decision, and restored to the master his certificate. *The Arizona*, supra.

—— **Who may Appeal.**]—A shipowner, who has appeared as a party at the hearing of an investigation under the merchant shipping acts

into the circumstances attending the loss of a ship owned by him, has no right of appeal, notwithstanding that the tribunal investigating the case has given a decision suspending the certificate of the master of the ship and condemning the shipowner in costs. *The Golden Sea*, 51 L. J., Adm. 64 ; 7 P. D. 194 ; 47 L. T. 579 ; 30 W. R. 842 ; 5 Asp. M. C. 23.

The wreck commissioner having been requested to hold an investigation into the loss and abandonment of a British ship, found that the loss of the ship was due to certain improper ballast taken on board her at an English port having been converted into mud by mixture with the water made by her during the voyage, and so choking the pumps that they could not be used, whereby the ship foundered, and for these wrongful acts and defaults suspended the certificate of the master of the ship for three months. The master appealed. The probate, divorce, and admiralty division being of opinion that the evidence before the wreck commissioner established that the master had authority from his owner to provide ballast for the vessel without restriction as to price, and had been aware of the character of the ballast which she had taken on board, and that the carrying of such ballast contributed to her loss, dismissed the appeal with costs. *Ib.*

—— **Fresh Evidence on Appeal.**]—On a shipping casualty appeal where it is desired to adduce fresh evidence at the hearing of the appeal, application for leave to do so should be made to the court of appeal by motion prior to the hearing of the appeal. *The Famenoth*, 7 P. D. 207 ; 48 L. T. 28 ; 5 Asp. M. C. 35, supra.

—— **Procedure on Appeal.**]—The court when hearing an appeal will look to the report and the annex thereto. Observations on the admission of fresh evidence on appeal and on the admissibility of evidence of experts where the court is assisted by assessors. *The Kestrel*, supra, col. 874.

—— **Costs.**]—Where, on an appeal under the Shipping Casualties Investigations Act, 1879, the decision of the wreck commissioner, suspending the certificate of a master, was affirmed, but the Court of Appeal recommended that the Board of Trade should shorten the time for which the certificate had been suspended, the parties to the appeal were left to bear their own costs of the appeal. *The Kestrel*, supra.

The court below having suspended the certificate on the invitation of the board of trade, the court of appeal ordered the board of trade to pay the costs of the appeal. *The Arizona*, supra, col. 874.

On a successful appeal the board of trade, having appeared in support of the decision appealed from, were directed to pay the costs of the appeal. *The Famenoth*, supra.

Wrongful Act or Default—Costs.]—Failure of the master to take reasonable steps for the safety of passengers during an unreasonable panic :—Held, to be a wrongful act in default for which his certificate might be suspended. *Brown* v. *Board of Trade*, 18 Ct. of Sess. Cas. (4th ser.) 291.

Costs of evidence of a part of case abandoned by board of trade disallowed. *Ibid.*

Appeal—Proper Evidence not before the Court Below.]—Appeal from decision of board of trade inquiry as to the stranding of a ship, and suspension of the master's certificate allowed, on the ground that proper and necessary evidence had not been placed before the court below. *Turner* v. *Board of Trade*, 22 Ct. of Sess. Cas. (4th ser.) 18.

Master leaving Bridge—Instructions to Mate—Procedure—Questioning Master.]—See *Watson* v. *Board of Trade*, 19 Ct. of Sess. Cas. (4th ser.) 1078.

—— **Suspension of Certificate.**] — A master left the bridge whilst his ship was proceeding through a narrow channel to call the second mate. The first mate was left on the bridge :—Held, that the master's certificate was properly suspended. *Ewer* v. *Board of Trade*, 7 Ct. of Sess. Cas. (4th ser.) 835.

Naval Inquiry into Conduct of Captain.]—When an inquiry is instituted under the Merchant Shipping Acts into the conduct of a captain, the court may proceed with the inquiry, although the board of trade has no charge to make against the captain. *Minto, Ex parte*, 35 L. T. 808 ; 25 W. R. 251 ; 3 Asp. M. C. 323.

Refusal to order Re-hearing — Appeal.]—A refusal by the board of trade to grant a re-hearing of an investigation into the conduct of a certificated officer is not a decision within 42 & 43 Vict. c. 72, s. 2, sub-s. 2, and therefore no appeal lies from it to the admiralty division of the high court. *The Ida*, 55 L. J., Adm. 15 ; 11 P. D. 37 ; 54 L. T. 497 ; 34 W. R. 628 ; 6 Asp. M. C. 57.

Refusal to Institute Inquiry—Foreign Ship.]—A refusal by the board of trade to institute an inquiry under 17 & 18 Vict. c. 104, s. 512, is not a condition precedent to an action in rem against a foreign ship—Per Butt, J. *The Vera Cruz*, 9 P. D. 88 ; 51 L. T. 24 ; 5 Asp. M. C. 254. See *S. C.* in H. L., ante, col. 838.

2. Marine Board Inquiries.

Marine Boards—Jurisdiction.]—A local marine board appointed to inquire into a charge of alleged misconduct against the master or mate of a vessel has a discretionary power as to granting summonses for witnesses for the defence. *Reg.* v. *Collingridge*, 34 L. J., Q. B. 9 ; 12 W. R. 1109.

—— **Witnesses.**]—It is a proper course for such court before granting the summonses to inquire who the witnesses are and what they are expected to prove, and to refuse the summons in respect of any witness who can only speak to matters clearly irrelevant. The witnesses summoned for the defence are witnesses of the court, and their expense is to be borne not by the defendant but by the public. *Ib.*

Perjury before.] — Wilful and corrupt false swearing before a local marine board lawfully constituted, upon a matter material to an inquiry then being lawfully investigated by them in pursuance of 17 & 18 Vict. c. 104, is perjury, and indictable as such. *Reg.* v. *Tomlinson*, 36 L. J., M. C. 41 ; L. R. 1 C. C. 49 ; 12 Jur. (N.S.) 945 ; 15 L. T. 188 ; 15 W. R. 46 ; 10 Cox, C. C. 323.

Cancellation of Certificate—Power of Board of Trade—Local Marine Board.]—The board of trade remitted a case under s. 471 of the Merchant Shipping Act, 1894, for inquiry to a local marine board, who reported that the charge was proved, and advised that the certificate should be suspended, but stated that they had no power to do so:—Held, that the local marine board was a "court" within s. 470 (b) and had the power; also that the board of trade had not the power. *Board of Trade* v. *Leith Local Marine Board*, 24 Ct. of Sess. Cas. (4th ser.) 177.

3. Unseaworthy Ships, Detention.

Detention and Survey by Board of Trade.]—In order to justify the board of trade in taking proceedings under the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), s. 12, it was unnecessary that either the complaint as to a vessel or the report from surveyors should state in express terms that she was unable to proceed to sea "without serious danger to human life"; it was sufficient if it appeared from the facts therein respectively mentioned that she was in that condition. *Lewis* v. *Gray*, 45 L. J., C. P. 720; 1 C. P. D. 452; 34 L. T. 421; 3 Asp. M. C. 136.

The plaintiff was the owner of a British ship named the "L.," which was at the British port of S., and was intended to be employed in the foreign cattle trade. Certain surveyors of the board of trade reported in doubtful terms that owing to her unusual proportions the "L." was an unsafe ship. The board of trade thereupon ordered the "L." to be provisionally detained. A court of survey was held as to the condition of the "L.," and the members thereof reported that the "L.," was not unsafe, and that she ought not to have been detained. The "L." was accordingly released. The plaintiff then brought an action against the secretary of the board of trade to recover compensation for the loss to him by reason of the provisional detention. At the trial it was admitted that the "L." was a safe ship. The judge in substance directed the jury to consider whether it was reasonable in the board of trade to detain the "L." for survey without a direct affirmation by their surveyors that in their opinion she was unsafe:—Held, a misdirection; for the proper question to be left to the jury was whether the facts with regard to the "L.," as she lay at S., which would have been apparent to a person of ordinary skill on examining her and inquiring about her, would have given him reasonable and probable cause to suspect her safety and to detain her for survey and inquiry. *Thompson* v. *Farrer*, 51 L. J., Q. B. 534; 9 Q. B. D. 372; 47 L. T. 117; 4 Asp. M. C. 562—C. A.

Indictment for sending Unseaworthy Ships to Sea.]—A man was tried and convicted under 34 & 35 Vict. c. 110, s. 11, for sending a ship to sea in an unseaworthy state, upon an indictment which did not aver either that he knew of her being unseaworthy, or that he had not used reasonable means to make her seaworthy:—Held, first, that the indictment need not aver that the accused knew the ship to be in an unseaworthy state. *Reg.* v. *Freeman*, Ir. R. 9 C. L. 527.

Held, secondly, that the indictment need not contain averments negativing the use of reasonable means to make and keep the ship seaworthy. *Ib.*

Foreign Ship—Overloading.]—An order in council under s. 37 of the Merchant Shipping Act, 1876, is not needed to enforce the provisions of ss. 13 and 34 of the act relative to the detention of a foreign ship which has been overloaded in a port of the United Kingdom, and is unsafe to put out to sea. *Chalmers* v. *Scopenich*, 61 L. J., M. C. 117; [1892] 1 Q. B. 735; 66 L. T. 348; 40 W. R. 477; 7 Asp. M. C. 171; 56 J. P. 521.

Damages—Want of Reasonable and Probable Cause—Injury to Reputation as Shipowner.]—The Merchant Shipping Act, 1876, by s. 6, sub-s. 1, enacts that the board of trade may, if they have reason to believe, on complaint or otherwise, that a British ship lying in any port in the United Kingdom is unsafe—that is to say, is, by reason of (amongst other things) overloading, unfit to proceed to sea without serious danger to human life—provisionally order the detention of the ship for the purpose of being surveyed; and by s. 10 provides that if it appears that there was not reasonable and probable cause for such detention, the board of trade shall be liable to pay to the owner of the ship "his costs of and incidental to the detention and survey of the ship, and also compensation for any loss or damage sustained by him by reason of the detention or survey":—Held, that a shipowner, whose ship has been detained under s. 6, sub-s. 1, cannot under s. 10 recover damages for injury to his reputation as a shipowner by reason of the action of the board of trade in detaining the ship. *Dixon* v. *Calcraft*, 61 L. J., Q. B. 529; [1892] 1 Q. B. 458; 66 L. T. 554; 40 W. R. 598; 7 Asp. M. C. 161; 56 J. P. 388—C. A.

Right to Trial at Bar—Change of Venue.]—By the Crown Suits Act, 1865, s. 46, where in any cause in which the attorney-general is entitled on behalf of the crown to demand as of right a trial at bar he states to the court that he waives that right, "the court on the application of the attorney-general shall change the venue to any court he may select":—Held, that an action under 39 & 40 Vict. c. 80, s. 10, against the secretary of the board of trade, to recover damages for the detention of a ship for survey without reasonable and probable cause, is within the above section, that the attorney-general is entitled to demand as of right a trial at bar in such an action, and that the court is bound on his waiving that right to change the venue to any county wherein he elects to have the action tried. *Dixon* v. *Farrer*, 56 L. J., Q. B. 53; 18 Q. B. D. 43; 55 L. T. 578; 35 W. R. 95; 6 Asp. M. C. 52—C. A.

Detention by Board of Trade—Ship sold to Foreigner—36 & 37 Vict. c. 85, s. 12.]—Until the British register is closed, a British ship, though sold to a foreigner, is liable to detention for unseaworthiness. *Granfelt* v. *Lord Advocate*, 1 Ct. of Sess. Cas. (4th ser.) 782.

XXIII. WHARFINGER.

1. *Landing and Shipping Goods*, 878.
2. *Obstruction to or by Wharf*, 879.

1. Landing and Shipping Goods.

Bonded Goods—Duty to Receive.]—The London Dock Company, having a certificate from the treasury under 43 Geo. 3, c. 132, allowing

importers to deposit wines upon their premises without paying duty, are bound to receive such goods for a reasonable charge. *Allnutt* v. *Inglis*, 12 East, 527; 11 R. R. 482.

Sufferance Wharfs.]—The acts relating to landing goods at a sufferance wharf are for the protection of the shipowner. *Barber* v. *Meyerstein*, 39 L. J., C. P. 187; L. R. 4 H. L. 317; 22 L. T. 808; 18 W. R. 1041.

Delivery by Wharfinger to Mate of Ship.]—Where goods are to be carried coastwise, and the usage of the wharf is to deliver them on the wharf to the mate of the ship; if they are delivered to the mate the wharfinger's responsibility is at an end, and he is not liable though the goods are lost from the wharf before they are shipped. *Cobban* v. *Downe*, 5 Esp. 41; 8 R. R. 825.

Trover—Acknowledgment by Wharfinger as to Property in the Goods.]—The defendant, a wharfinger, having acknowledged certain timber on his wharf to be the property of the plaintiff: —Held, that he could not dispute the plaintiff's title in an action of trover. *Gosling* v. *Birnie*, 7 Bing. 339; 5 M. P. 160; 9 L. J. (O.S.) C. P. 105.

Detinue—Fraudulent Indorsement of Bill of Lading.]—The plaintiff, a foreign merchant, upon the order of L., shipped wine to him in London, and sent him bills of lading. L. handed the bills of lading to the defendant, a wharfinger, directing him to warehouse the goods for him, L. The defendant did so, receiving the wine subject to a stop-order for freight, pursuant to 25 & 26 Vict. c. 63, s. 28. L. refused to accept the wine, as not being equal to sample, and the plaintiff agreed to take it back. L. sent no delivery order to the plaintiff, but collusively indorsed the bills of lading to M., who caused the wine to be transferred in the wharfinger's books from L.'s name to his own. The plaintiff demanded the wine from the wharfinger, offering to pay all expenses, and to indemnify him against other claims. In an action of detinue:—Held, that the wharfinger had no better title than L., his bailor, and that the plaintiff was entitled to recover. *Batuit* v. *Hartley*, L. R. 9 Q. B. 594; 29 L. T. 968; 20 W. R. 899; 1 Asp. M. C. 337.

2. Obstruction to or by Wharf.

See also XXIV. Ports, Piers, Harbours, Lighthouses, and Docks. *c.* Obstruction to Harbours, infra, cols. 890, seq.

Obstruction in River Bed—Negligence of Wharfinger—Vessel grounding.]—By charter-party it was agreed that the plaintiffs' ship should load a cargo of iron ore, sail for Newport, Mon., and deliver the cargo as directed by the consignees or their agent. By the bill of lading, which incorporated the conditions of the charter-party, the cargo was to be delivered to named consignees or their assigns. The bill of lading was indorsed to the defendants, who were proprietors of a wharf at Newport, and lessees of part of the river bed alongside the wharf. The vessel on her arrival at Newport was ordered by the defendants to discharge her cargo at the wharf. There were two berths or "docks" alongside the wharf, one outside the other; and between them a ridge of mud had accumulated. The vessel in approaching the wharf grounded on the ridge and was damaged:—Held, that the defendants were liable. *The Calliope*, 60 L. J., Adm. 28; [1891] A. C. 11; 63 L. T. 781; 39 W. R. 641; 6 Asp. M. C. 585; 55 J. P. 357—H. L. (E.)

Vessel Grounding and Receiving Damage Alongside Jetty—Liability.]—The defendants, wharfingers in the Thames, in consideration of charges for landing and storing cargo, allowed the plaintiff to discharge his vessel at their jetty, alongside which the vessel grounded at low water. The bed of the river was vested in the Thames conservators, and the defendants were not aware whether it was even and fit for ships to ground on. The vessel grounded and received damage owing to the river bed being uneven:—Held, that the defendants were liable, as they must be taken to have represented that they had taken reasonable care to ascertain that the river bed alongside their jetty was fit for a ship to ground on. *The Moorcock*, 58 L. J., Adm. 73; 14 P. D. 64; 60 L. T. 654; 37 W. R. 439; 6 Asp. M. C. 373—C. A.

Damage to Craft by Piles.]—The defendants were possessed of a wharf in the Thames, alongside of which in the river bed was a campshed of piles to keep the soil up. It had been improperly erected by the defendants' predecessors, and was out of repair, and dangerous to vessels. The plaintiffs' barge came to the wharf to receive goods from a schooner unloading at the wharf, to be discharged into the barge by the wharf crane, grounded on the campshed and was injured:—Held, that the defendants were liable. *White* v. *Phillips*, 15 C. B. (N.S.) 245; 33 L. J., C. P. 33. And see *Brownlow* v. *Metropolitan Board of Works*, 16 C. B. (N.S.) 546; 33 L. J., C. P. 233; 12 W. R. 871—Ex. Ch.

The plaintiff was possessed of a wharf on the Thames, in front of which was a pile driven into the river bed by a former occupier of the wharf, and essential for the use of the wharf. The pile had been there without objection by the crown or river conservators for over twenty years:—Held, that the ownership not being disputed, the plaintiff could maintain an action against the defendant for negligently damaging the pile. *Lancaster* v. *Eve*, 5 C. B. (N.S.) 717; 28 L. J., C. P. 235; 5 Jur. (N.S.) 683.

Navigable River—Access to Wharf.]—A navigable river is a public highway, navigable in a reasonable way by everyone. Accordingly, a riparian owner has a right to moor a ship of ordinary size alongside his wharf, to unload or load, although she may overlap his neighbours' premises; provided she does not prevent reasonable access to the same. *Original Hartlepool Collieries Co.* v. *Gibb*, 46 L. J., Ch. 311; 5 Ch. D. 713; 36 L. T. 433; 3 Asp. M. C. 411. See also *Bell* v. *Quebec Corporation*, 49 L. J., P. C. 1; 5 App. Cas. 84—P. C.

The owner of land abutting upon a navigable river has a right, distinct from that of the public to navigate, of access to his land from the river. *Lyon* v. *Fishmongers' Co.*, 46 L. J., Ch. 68; 1 App. Cas. 662; 35 L. T. 569; 25 W. R. 165—H. L. (E.)

Nuisance—Wharf projecting into River.]—The defendant's ship, navigating the Thames, struck and injured the plaintiff's wharf, which he alleged projected into the river so as to be a nuisance:—Held, that the defendant was not justified in injuring the wharf, even if it were a

nuisance, if he could have conveniently navigated the river without injury to the wharf. *Davies* v. *Petley*, 15 Q. B. 276.

Wharves and Quays — Exercise of Private Rights over—Obstruction of Public Traffic.]—By a special act of 1840 trustees were appointed for the management of a certain harbour. Sect. 53 of the act authorised the lord of the manor, or the owner of land situate within or adjoining to the harbour, amongst other things, to lay down railways over the quays, roads and works, but so as all such railways should be constructed of such height and in such form as should not in any manner impede or interrupt the general public traffic of the port, or the free passage to and from the same; and railways so to be erected or made were (subject to the aforesaid restriction) to be wholly excluded from the jurisdiction of the trustees, and be the private property and for the sole and exclusive use of the person or persons upon whose land the same should stand or be placed, and his or their assigns. The lord of the manor was the owner of lands adjoining the south side quay of the harbour. Tenants of the lord of the manor having proceeded to lay down two lines of railway from their works along the south side quay, an action was brought by the trustees of the harbour to restrain them from constructing such railway, on the ground that they would impede the general public traffic of the port:—Held, that the main object of the act was to benefit the persons frequenting the harbour, and that any railway laid on the south side of the quay must be constructed in such a way as not by its construction or its natural and necessary user, in any manner to impede the fair public traffic of the port:—Held, also, that, as the defendants' railway did so impede the traffic, the plaintiffs were entitled to an injunction, and to an order for removal of such railway. *Lowther* v. *Curwen*, 58 L. T. 168.

Navigable River — Obstruction—Injunction.]—The owner of a wharf on a navigable river drove piles into the bed of the river diminishing by three feet the navigable breadth of the river:—Held, that an injunction should issue. *Att.-Gen.* v. *Terry*, L. R. 9 Ch. 423; 29 L. T. 716; 2 Asp. M. C. 219—C. A.

Right to Navigate—Private Fishery.]—A shipowner is entitled to use a navigable river for the purposes of navigation, although in so doing he may interfere with a private right of fishery, providing he does not act wantonly or maliciously. *Anon.*, 1 Camp. 517, n.

Damage to or by Craft alongside Wharf.]—See *Dalton* v. *Denton*, ante, col. 696.

Rights of Wharfinger over the adjacent Bed of the River.]—See *Macey* v. *Metropolitan Board of Works*, 3 N. R. 669; 33 L. J., Ch. 377; 10 Jur. (N.S.) 333; 10 L. T. 66; 12 W. R. 619.

Damage to Ship through inefficiency of Tug—Stranding.]—See *The Ratata*, infra, col. 896.

XXIV. PORTS, PIERS, HARBOURS, LIGHTHOUSES AND DOCKS.

1. *Ports.*
   a. Generally, 882.
   b. Tolls and Dues, 883.
2. *Piers, Harbours and Lighthouses.*
   a. Piers, 886.
   b. Injury to Piers, 889.
   c. Obstruction to Harbours, 890.
   d. Tolls, Dues and Metages, 896.
3. *Docks.*
   a. Reparation and Regulation, 903.
   b. Tolls and Dues, 906.
   c. Liability of Dock Companies, 908.
   d. Duties of Dockmasters and others, 913.

1. PORTS.

a. Generally.

Creation.]—A port may be created in modern times, with a right to receive a port duty from all who come within its limits. *Jenkins* v. *Harvey*, 1 Gale, 23; 5 Tyr. 326; 1 C. M. & R. 877; 5 L. J., Ex. 17.

The crown is entitled, except where vested rights would be interfered with, to create a port for the landing of goods, and to assign its limits, though the soil is in a subject; and such creation is a good consideration for the receipt of petty customs and port dues throughout the port so assigned. And such petty customs and port dues might in ancient times be granted away by the crown. *Exeter Corporation* v. *Warren*, 5 Q. B. 773; D. & M. 524; 8 Jur. 441.

The owners in fee of the manor of Whitstable, in an action for anchorage dues, claimed in respect of a vessel casting anchor on a certain anchorage-ground situate within the sea below low-water mark, adduced evidence that the tolls had been taken from time immemorial; that they kept buoys, beacons and lights to mark the bounds between the oyster beds and the anchorage ground; that Whitstable, before and since the time of legal memory, had been mentioned in official documents as a port; and that in ancient times there was a place within the manor for the unlading of merchandise:—Held, that the anchorage dues had a legal origin, the existence of a port being established. However commodious a place may be for vessels, it will not therefore become a port, the establishment of which must be by authority of the crown; but evidence of traffic in respect of tolls of merchandise being taken, of a place being mentioned as a port in early documents, and of natural configuration favourable to the formation of a port, justify an inference of fact that a port did exist. *Foreman* v. *Whitstable (Free Fishers)*, L. R. 4 H. L. 266; 21 L. T. 804; 18 W. R. 1046.

Limits of Ports.]—The powers of the board of trade under 16 & 17 Vict. c. 107 (Customs Consolidation Act, 1853), and 25 & 26 Vict. c. 69, s. 17 (The Harbours Transfer Act, 1862), to appoint ports and declare the limits, are not limited to revenue purposes only; nor are such powers confined to ports in their merely geographical sense. *Nicholson* v. *Williams*, 40 L. J., M. C. 159; L. R. 6 Q. B. 632; 24 L. T. 875; 19 W. R. 973; 1 Asp. M. C. 67.

Where, therefore, by an order of the board of trade, the limits of the port of Hull were extended and defined, and the sea between Flamborough Head and Spurn Point was placed within them, and persons were prohibited from taking ballast or shingle from certain parts of the shore so extended as the port of Hull:—Held, that a person so taking ballast or shingle from such

parts was guilty of an offence within 54 Geo. 3, c. 159, s. 14. *Ib.*

By-laws—Speed of Ships—Thames.]—Under 7 & 8 Geo. 4, c. lxxv. s. 57, the lord mayor and aldermen had power to regulate the speed of steamships in the Thames. *Tisdell* v. *Combe*, 3 N. & P. 29 ; 7 A. & E. 788 ; 1 W. W. & H. 5 ; 7 L. J., M. C. 48 ; 2 Jur. 32.

By-law—Dealing in Marine Stores.]—A by-law under a local harbour act, which incorporated the 10 Vict. c. 27, declared that no person should deal in marine stores in or about the docks without first obtaining permission of the dock company. An engineer of a steamer in dock sold to C. some old iron bars and worn-out fittings within the dock without such permission :—Held, that the by-law was ultra vires and unreasonable, being in restraint of trade. *Chamberlain* v. *Conway*, 53 J. P. 214.

Water Bailiff—Thames.]—As to the right of the conservators of the Thames to appoint, see *Turnidge* v. *Shaw*, 3 El. & El. 588 ; 30 L. J., M. C. 113 ; 7 Jur. (N.S.) 755 ; 3 L. T. 147 ; 9 W. R. 381.

By-laws of Dock Companies.] — *See* infra, 3. DOCKS.

Thames Watermen's Acts.]—*See* ante, cols. 139, 835.

b. Tolls and Dues.

Nature of.]—A port duty ex vi termini implies a consideration for it. *Jenkins* v. *Harvey*, 1 Gale, 23 ; 5 Tyr. 326 ; 1 C. M. & R. 877 ; 5 L. J., Ex. 17.

Tyne—"Coals exported from the Port"—What are.]—By the Tyne Coal Dues Act, 1872 (35 Vict. c. xiii.), the old coal dues are abolished, and the commissioners are empowered to levy dues, one penny per ton on "coals exported from the port" :—Held, that, in the absence of anything in the act to the contrary, "exported from the port" must be taken to be used in its ordinary meaning of "carried out of the port" ; and therefore included coals taken out of the port in a steamer to be consumed on board during a distant voyage. *Muller* v. *Baldwin*, 43 L. J., Q. B. 164 ; L. R. 9 Q. B. 457 ; 30 L. T. 864 ; 22 W. R. 909 ; 2 Asp. M. C. 204. See *Stockton and Darlington Ry.* v. *Barrett*, 11 Cl. & F. 590—H. L. (E.) *S. C.*, 8 Scott. (N.R.) 641 ; 7 Man. & G. 870—Ex. Ch.

Liverpool—Vessels Trading Inwards, or in Ballast and Trading Outwards.]—An act provided that a vessel trading inwards to the port of Liverpool should pay dock rates, according to a fixed scale, proportioned to the distance of the port from which she was trading, and that a vessel arriving in ballast, but trading outwards, should pay in proportion to the distance of the port to which she was trading. A vessel that had discharged her cargo at a port in England and taken on board ballast, being about to sail to Liverpool for the purpose of loading a cargo for the West Indies, took on board a bale of cotton and a few other articles admittedly in order that she might pay dock rates as a vessel trading inwards from the port where she took on board such articles, and not as a vessel arriving in ballast :—Held, that she was a vessel arriving in ballast within the meaning of the act. *De Garteig* v. *Mersey Docks and Harbour Board*, 37 L. T. 411.

Hull—Return or Double Voyage.]—Under a clause in an act exempting ships "from the payment of the same port or toll duties more than once for the same voyage out and home, notwithstanding such ship or vessel might go out and return with a loading of goods or merchandise" :—Held, that a vessel having cleared out of port at Hull, with a cargo of goods for Mogadore, on the coast of Africa, which she discharged, and then took in another cargo for London, discharged the same at London, and took in a cargo for Hull, with which she arrived there, constituted two distinct voyages, and did not fall within the exemption. *Kingston-upon-Hull Dock Co.* v. *Huntington*, 2 Chit. 597.

London—Grain for Sale—Import Duties.]—Grain brought into the port of London for the purpose of being dealt with, and which is actually dealt with, in such a manner as to change its character and name in a commercial sense, and which after being so changed is then sold, is not "grain brought into the port of London for sale" within the meaning of s. 4 of the Metage on Grain (Port of London) Act, 1872, and is not liable to the duty thereby imposed. *Cotton* v. *Vogan*, 65 L. J., Q. B. 486 ; [1896] A. C. 457 ; 74 L. T. 591 ; 61 J. P. 36—H. L. (E.) Affirming 14 R. 763 ; 44 W. R. 55—C. A.

Docks—Charge for watching Goods.]—A local dock act enacted that the master of a vessel or owner of cargo may cause the cargo to be deposited in a transit shed and that the goods should be removable from such shed by the same process in all respects as if the cargo was still on board :—Held, that the porter watching the shed could sue the owners of goods for watching the goods while there. *Bowmphrey* v. *Houghton*, 55 J. P. 729.

Ramsgate Harbour Dues—22 Geo. 2, c. 40.]—Ships passing Ramsgate at such a distance as not to be likely to receive aid from Ramsgate do not pay dues under 22 Geo. 2, c. 40. *Pole* v. *Jonson*, W. Bl. 764. See also *Matson* (or *Batson*) v. *Scobel*, 4 Burr. 2258.

Sunderland—Primage.]—A charter of James 2 granted and confirmed to the corporation of the master, pilots and seamen of Newcastle-upon-Tyne, that all persons, as well subjects as strangers born, being owners of any goods, brought in any ship from beyond the seas into the river Tyne, or any member or creek belonging to the port of Newcastle-upon-Tyne, shall from time to time, as often as such goods shall be brought in, pay an ancient duty lawfully, usually and accustomably paid to the corporation, called primage ; that is to say, 2*d.* for every tun of wine and all other goods, rated by the tun (fish killed and brought in by Englishmen only excepted), and 3*d.* for every last of flax, and all other goods rated by the last, in manner following ; that is to say, aliens and strangers-born, and all other such person or persons who with ships or vessels shall arrive within the port, or in any of the creeks or members, and not belonging to the same, before they depart with their ships or vessels from the port, or from the creeks, shall pay the duties for and in the name of primage ; and every free merchant, and every other inhabitant of Newcastle, arriving with their ships or

vessels within the river of Tyne, shall pay the duties, within ten days after the landing of the goods, upon lawful demand. The defendants were natives and merchants of Sunderland, which was a creek or member of the port of Newcastle-upon-Tyne. They brought their own goods from sea in their own ships, into Sunderland, and refused to pay the primage on such goods claimed by the corporation, who thereupon brought an action to recover it. On the trial the corporation put in the charter, and gave evidence of ancient and modern usage, that all persons, including those resident in Sunderland, and who being owners of goods brought them into Sunderland in ships from beyond sea, had paid primage:—Held, that the corporation was not precluded by the charter from claiming primage in respect of goods imported into Sunderland by Sunderland merchants; that the charter was not incompatible with such claim, and that evidence of usage was admissible in support of it. *Bradley* v. *Newcastle-upon-Tyne (Master, Pilots and Seamen)*, 2 El. & Bl. 427; 23 L. J., Q. B. 35; 18 Jur. 240; 1 W. R. 394—Ex. Ch.

Newcastle—Primage—"Owner."]—Under the same charter:—Held, also, that a person who gratuitously landed, entered and warehoused goods for the owners, who resided in London, was an owner within the meaning of the charter, and liable to the dues. *Newcastle-upon-Tyne (Master, Pilots and Seamen)* v. *Hammond*, 4 Ex. 285; 18 L. J., Ex. 417.

Hull—Meaning of "Port"—Goole.]—The 14 Geo. 3, c. 56, s. 42, which gives the Hull Dock Company a tonnage on ships coming into or going out of the harbour of Kingston-upon-Hull and the company's basin or docks within the port of Kingston-upon-Hull, or unloading or lading any of their cargo within the port, must be construed as using the term port in the popular sense, and not as extending the burden of dock duties to places which, in point of local description, are without the port of Hull, as Goole, on the river Ouse. *Kingston-upon-Hull Dock Co.* v. *Browne*, 2 B. & Ad. 43.

Evidence of Title.]—Where a party suing for port duties, as owner of a port, gave no other evidence of title than the continual enjoyment of a duty which the jury found to be unreasonable in amount:—Held, that he could not have a verdict for a less amount found by the jury to be reasonable. *Brune* v. *Thompson*, 4 Q. B. 543: 2 G. & D. 110; 12 L. J., Q. B. 251.

Keeping up a capstan and rope in a cove to assist boats in landing, and without which they could not safely land in bad weather, is a good consideration for a reasonable toll on all boats frequenting the cove, whether they used the capstan or not; and the custom to exact the toll is good, although the party claiming it is neither owner of the cove nor lord of the manor, nor were his predecessors shewn to have been such; but he and they had always been owners of the spot on which the capstan stood, and of an estate in the neighbourhood. *Falmouth (Earl)* v. *George*, 5 Bing. 286; 2 M. & P. 457; 7 L. J. (o.s.) C. P. 40; 30 R. R. 597.

Whitstable—Anchorage Dues.]—A right to anchorage dues cannot exist merely in respect of the use of the soil; it must be founded on proof that the soil of the claimant was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered by the owner of the soil who claimed the anchorage due. *Gann* v. *Whitstable (Free Fishers)* 11 H. L. Cas. 192; 20 C. B. (N.S.) 1; 35 L. J., C. P. 29; 12 L. T. 150; 13 W. R. 589. See also *Foreman* v. *Whitstable Free Fishers* supra.

Evidence of mere immemorial usage will not sustain such a claim. *Ib.*

A liability to make compensation for actual injury done to the oyster beds by anchoring, is not to be confounded with a liability to toll for casting anchor in the soil itself. *Ib.*

Goods Distrainable for Port Dues.]—Anchor and sails of a ship carrying coals from Newcastle and all the master's goods are distrainable for port dues; not only the coals in respect of which the dues arise. *Vinkestone* v. *Ebden*, 1 Salk. 248.

2. Piers, Harbours and Lighthouses.

a. Piers.

Calling in.]—Steam vessels plying between the river Itchen, at Southampton, and the Isle of Wight, are bound, under the Southampton Local Pier Act, to call at the royal pier at Southampton when requested by five passengers to do so. *Farrand* v. *Cooper*, 12 C. B. (N.S.) 283.

Right to use.]—The plaintiff was the owner of the soil forming the bed of a navigable lake and also of a pier which had been thereon erected wrongfully by a third person. The defendants, in common with the public, had the right of navigating the lake, and were the lessees, from the person who erected the pier, of the land adjoining that part of the lake where the pier was erected, and therefore had a right to embark and disembark, at the land leased by them, passengers using the defendants' boats on the lake. The pier was maintained by the plaintiff, and from its position prevented the defendants from getting with their boats to the land leased by them when landing and taking on board passengers:—Held, that the defendants were justified in causing passengers to pass and repass over the pier between their boats and the land leased by them. *Marshall* v. *Ulleswater Steam Navigation Co.*, 41 L. J., Q. B. 41; L. R. 7 Q. B. 166; 25 L. T. 793; 20 W. R. 144.

The city of London by licence granted a company permission to form a floating pier on the Thames, such pier to remain during pleasure, and to take tolls on all passengers landed at the pier. Under the powers conferred upon them by the Thames Embankment Act, 1862, the board of works took the floating pier from the company, and agreed to pay them a certain sum, and to construct a new landing-stage in lieu of the old pier, and to appropriate it in perpetuity to the benefit of the company. The Thames Embankment Act, 1868, purported to give validity to this agreement. On a bill by the conservators of the Thames (in whom all the estate of the city of London in the bed, soil and shores of the river had become vested by the Thames Conservancy Act, 1857) to restrain the company from continuing in possession of the landing-stage constructed in lieu of the old pier:—Held, that the company was entitled to the use of the pier only on sufferance, and at the pleasure of the conservators of the Thames;

that the board of works had no power to convert the licence at pleasure into an irrevocable licence; and that the act which purported to give a validity to the agreement between the company and the board of works did not affect the rights of the conservators of the Thames. *Thames Conservancy* v. *S. E. Ry.*, 24 L. T. 246; 1 Asp. M. C. 3.

Remedy in respect of.]—Held, also, that their proper remedy was by bill in equity, and not by ejectment. *Ib.*

Right to erect.]—By an act passed in 31 Hen. 8, the corporation of the city of Exeter was empowered to pluck down, dig, break and cast up all and all manner of weirs, rocks, sands, gravel, and other lets and nuisances in the river Exe between the city of Exeter and the high sea, and further to do and make all other things requisite and necessary whereby ships, &c., might have their sure course and recourse in the said river to and from the city of Exeter, compensating the owners of the soil where such works should be made for injury done to the soil:—Held, that this act did not give the corporation any right to institute a suit to restrain the erection of a pier in the river, but only a right to abate nuisances on giving compensation. *Exeter Corporation* v. *Devon (Earl)*, L. R. 10 Eq. 232; 23 L. T. 382; 18 W. R. 879.

Held, also, that the pier did not interfere with or affect any property or privilege belonging to the corporation within the General Pier and Harbour Act, 1861, s. 14, and consequently that the consent of the corporation was not required for the erection of the pier. *Ib.*

The right or privilege referred to in the General Pier and Harbour Act, 1861, s. 14, means a profitable right or privilege, one that confers a tangible benefit on the person or corporation possessing it, and not a mere right to abate a nuisance on giving compensation, like that which the corporation of Exeter possessed under 31 Hen. 8. *Ib.*

Operation of Provisional Orders.]—In persuance of a provisional order made by the board of trade under the General Piers and Harbours Act, 1861 (24 & 25 Vict. c. 45), duly confirmed by an act passed in 1874 (37 & 38 Vict. c. clxxxv.), the plaintiffs constructed a pier, commencing at the end of a narrow street, and by so doing prevented the public from getting to the sea shore from the end of the street without passing over a portion of the pier, for which they were obliged to pay a toll. Neither the provisional order nor the special act contained a reference to any right of way. The defendants contended that the public had a prescriptive right of way from the street to the shore, which must be taken away by express words, and that, at any rate, it was saved under ss. 11 and 14 of 24 & 25 Vict. c. 45. They therefore threatened to pull down certain gates put up at the end of the pier by the plaintiffs, who then brought this action for an injunction to restrain them from doing so:—Held, that, as the pier was built in accordance with statutory provisions, and as its existence was physically inconsistent with the alleged right of way, the right of way was abolished by necessary implication, and that the reservations contained in the 11th and 14th sections of 24 & 25 Vict. c. 45 did not apply, as they were inconsistent with the powers contained in the subsequent special act. *Yarmouth Corporation* v. *Simmons*, 47 L. J., Ch. 792; 10 Ch. D. 518; 38 L. T. 881; 26 W. R. 802.

User by Railway Company—Special Contract—Statutory Tolls.]—The proprietor of a pier erected under the powers of an act of parliament, which were to be exercised during a certain limited period, was authorised by the act to demand certain specified tolls, for the use of the pier when completed. By an agreement between him and a railway company, he agreed to complete his pier at a considerably earlier time than he was bound to do by the act, and the company agreed to complete a branch railway to the pier by the same time; but the agreement contained no stipulations as to opening the pier or railway, or as to the terms on which the pier was to be used. The owner of the pier completed it accordingly, but refused to permit the railway company to use it, except upon terms to which the company declined to accede. The court refused to grant on motion an injunction restraining the owner of the pier from obstructing the use of it by the company at the statutory tolls. *Furness Ry.* v. *Smith*, 1 De G. & Sm. 299.

Londonderry — Validity of Regulations for Boats.] — Harbour commissioners were empowered by statute to make by-laws for regulating and fixing the conduct and hire or fare of all boats or ferry-boats plying in the harbour, and for regulating the conduct of boatmen, ferrymen, and others plying in the harbour:—Held, that a by-law, requiring the owners of boats carrying passengers within the port to take out an annual licence from the commissioners under a penalty was ultra vires. *Londonderry Harbour Commissioners* v. *Londonderry Bridge Commissioners*, [1894] 2 Ir. R. 384.

Pier built on Waste of Manor—Railway to Pier—User.]—An ancient pier and quay built by the lord of a manor is made the subject of a deed of trust, to which the lord for the time being is a party, and subsequently is from time to time regulated by statutes, local, but so far public, by which certain dues are imposed. In the deed, and in the statutes, there are recitals that the pier and quay are built on waste ground of the manor. An act is obtained to make a railway on the pier coming from a distant range of hills containing iron ore, which is intended to be shipped from the pier, and the tenant for life and devisees in trust of the last lord assent to such act. The railway company, having failed to obtain a lease of the pier, purchase land of the devisees down to the foot of the pier, and then, without notice to them or any other proceedings taken as to compensation or otherwise, enter on the pier, and are proceeding to make a railway thereon. A bill is filed, and an injunction moved for to restrain such works:—Held, first, that the pier was built upon waste ground of the manor; secondly, that nothing had been done to divest the rights of the lord, and that his devisees were owners of the soil; thirdly, that it was not a highway, and that, as between the lord and the company, they would be liable to an action for trespass if they interfered with the use of the pier, which their works, if prosecuted, it clearly appeared would do. Injunction granted to restrain the company from entering without taking the necessary legal steps by notices, and making compensation, but refused

to restrain the laying down rails in a particular manner, there being nothing to shew that they intended to proceed irregularly. *Thompson* v. *West Somerset Mineral Ry.*, 5 W. R. 296.

Liability for Negligence causing Injury to Boat.]—The defendant, under a local act, constructed a pier and a landing-stage. The pier was a solid structure, which did not extend to low-water mark, but the landing-stage floated on the river, and was moored below low-water mark by anchors fixed in the bed of the river, a bridge being made to connect the landing-stage with the pier. Part of this landing-stage was beyond the limits marked on the deposited plans, but it, with its mooring anchors, received the approval of the admiralty. One of the mooring anchors to which the floating stage was attached was insufficiently buoyed to indicate its position under the water, and thereby injured a boat, which, whilst lawfully navigating the river, and without any negligence of the owner of the boat, struck against such anchor:—Held, in an action for the injury to the boat, that the landing-stage and works were authorised by the act; but that there was a cause of action against the defendant for negligence in insufficiently buoying the anchor, which caused the injury to the boat. *Jolliffe* v. *Wallasey Local Board*, 43 L. J., C. P. 41; L. R. 9 C. P. 62; 29 L. T. 582; 2 Asp. M. C. 146.

b. Injury to Piers.

By Stress of Weather.]—By the Harbours, Docks and Piers Act, 1847 (10 Vict. c. 27), the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock or pier, or the quays or works connected therewith; and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same. There is a proviso that nothing therein contained shall extend to impose any liability upon the owner, where the vessel is, at the time when the damage is caused, in charge of a compulsory pilot:—Held, that, in a case where the damage to the pier had been occasioned by a vessel, through the violence of the winds and waves, at a time when the master and crew had been compelled to escape from the vessel, and had, consequently, no control whatever over it, the owners were not liable. *Wear River Commissioners* v. *Adamson*, 47 L. J., Q. B. 193; 2 App. Cas. 743; 37 L. T. 543; 26 W. R. 217; 3 Asp. M. C. 521—H. L.

A liability imposed by statute is subject, no less than a liability at common law, to the exception that, in the absence of express words, no duty is imposed upon a person to make good a loss or damage occasioned, without his default, by causes which human agency is powerless to control. *Ib.*

Under the Harbours, Docks and Piers Clauses Act, 1847 (10 Vict. c. 27), s. 74, the owner of a vessel doing damage to the piers or works of a harbour is liable to make good the damage, although the accident is the result of inevitable accident from stress of weather, without any default of those in charge. *Dennis* v. *Tovell*, 42 L. J., M. C. 33; L. R. 8 Q. B. 10; 27 L. T. 482; 21 W. R. 170; 2 Asp. M. C. 402.

The owners of a pier, who are undertakers within the meaning of the Harbours, Docks and Piers Clauses Act, 1847, acquire, under s. 74, a maritime lien in respect of any damage done to their pier by a ship, and may proceed in rem to recover that damage in the court of admiralty, and the shipowners are debarred, by s. 74, from setting up the defence of inevitable accident. *The Merle*, 31 L. T. 447; 2 Asp. M. C. 402.

See *Romney Marsh* (*Lords, Bailiffs and Jurats*) v. *Trinity House Corporation*, 41 L. J., Ex. 106; L. R. 7 Ex. 247—Ex. Ch.

Who may Recover for Damage caused to Pier.]—When a limited company, duly constituted by a provisional order made under the General Piers and Harbours Act, 1861 and 1862, as the undertakers of a pier within the meaning of the Harbours, Docks and Piers Clauses Act, 1847, is voluntarily wound up, and its property sold by the liquidator, a purchaser of the pier has transferred to him both the property and the rights of the original undertaker, becomes the undertaker, within the meaning of the last-mentioned act, and can recover against a ship for damage done to his pier by that ship. *The Merle*, supra. *But see Cases* supra.

Damage to Pier in Foreign Country.]—The question of the liability of a shipowner, proceeded against in the English admiralty court, for an injury done by his ship to a pier, projecting into the sea, but attached to the soil of a foreign country, is governed by the lex loci, and not by English law. *The M. Moxham*, 46 L. J., Adm. 17; 1 P. D. 107; 34 L. T. 559; 24 W. R. 650; 3 Asp. M. C. 191—C. A.

When an English ship, by the negligence of her master and crew, ran into and damaged a pier on the coast of Spain, and the owners of the pier proceeded against the ship for the damage in the admiralty court, and the shipowner pleaded that by the law of Spain a shipowner was not responsible for the damage occasioned by the negligence of his master and crew:—Held, that the plea was a good defence to the action. *Ib.*

c. Obstruction to Harbours.

See also XXIII. WHARFINGERS, supra, col. 879.

Who liable — Underwriters — Owner.]—The harbour-master of a harbour constructed under a private act incorporating the Harbours Act, 1847 (10 & 11 Vict. c. 27), having incurred expense in removing an obstruction caused by part of a wreck, sought to recover it from the owner of the ship under s. 56. The underwriters, who had paid as for a total loss, were joined with the original shipowner as defendants:—Held, that the underwriters did not by such payment become the owners of the wreck for the purpose of liability to the harbour-master under this section, and that the original shipowner must bear the expense, the liability having attached to him as owner at the time of the happening of the casualty. *Eglinton* (*Earl*) v. *Norman*, 46 L. J., Ex. 557; 36 L. T. 888; 25 W. R. 656; 3 Asp. M. C. 471—C. A.

Liability of Owner of Wreck.]—The "D.," in consequence of the sole default of her master and crew, had sunk in the Thames and had become a wreck, obstructing the navigation of the river.

Her mate sent a message to the harbour-master at G. to inform him of the accident, who said that he would cause the wreck to be lighted. A few hours afterwards, the wreck not having been lighted, a vessel, without any default on the part of those on board her, came into collision with the wreck and sustained damage. An action of damage having been instituted on behalf of the owner of the damaged vessel against the owners of the "D.," the judge at the trial refused to admit the evidence shewing that the mate of the "D." had sent a message to the harbour-master, and that the latter had promised to light the wreck:—Held, that the evidence was wrongly rejected, that the collision had not been caused by the negligence of the owners of the wreck, and that they were not liable for the damage done. *The Douglas*, 51 L. J., Adm. 89; 7 P. D. 151; 47 L. T. 502; 5 Asp. M. C. 15—C. A.

Sect. 96 of the Dublin Port and Docks Act (32 & 33 Vict. c. c.) enacts, that "the harbour-master or dockmaster may remove any wreck or other obstruction to the harbour, quays, docks, or other approaches to the same; and also any floating timber which impedes the navigation thereof; and the expense of removing any such wreck, obstruction or floating timber, shall be repaid by the owner of the same, and the harbour-master or dockmaster may detain such wreck, obstruction or floating timber for securing the expenses, and, on nonpayment of such expenses on demand, may sell such wreck, obstruction or floating timber, and out of the proceeds of such sale pay such expenses, rendering the surplus, if any, to the owner on demand":—Held, that a personal liability is not thereby imposed on the owner in respect of the removal of a vessel which has been sunk in the harbour or in the approaches to the harbour, either by the act of God, or through the negligence of a person not the owner, or for whose act the owner is not responsible. *The Edith*, 11 L. R., Ir. 270—C. A.

Duties of Commissioners.]—Under 6 & 7 Will. 4, c. 117, the dues, and other moneys which the commissioners of Kingstown harbour were by statute empowered to receive from vessels frequenting the harbour, were directed to be applied, in the first place, in payment of the expenses of maintaining and regulating the harbour; and it was provided that if there should be any overplus, beyond what should be requisite for the purposes of that act, and earlier acts relating to the harbour, and recited in the preamble, such overplus should be applied in repayment of certain advances which the lord-lieutenant was authorised to make. One of these earlier acts directed that means should be used for the cleansing and deepening, and also for the improving of the harbour, and another directed the commissioners to proceed in the making, improving and completing the harbour; but none of the acts relating to the harbour imposed in terms upon the commissioners the duty of removing accumulations or obstructions which had existed previously to their appointment. In an action against the commissioners for negligence, in allowing an accumulation of rubbish in the harbour, whereby a vessel was injured, they pleaded that the obstructions which caused the injury complained of were in the harbour before their appointment, and that the moneys statutably receivable by them were applicable to certain specific works, and that they never had any moneys applicable under those acts to the removal of the obstructions complained of:—Held, a good answer to the action. *Campbell* v. *Hornsby* Ir. R. 6 C. L. 37. See *S. C.*, Ir. R. 7 C. L. 540 Ex. Ch.

Liability of Harbour Commissioners for not moving Obstructions.]—Harbour commissioners cannot be sued for not cleansing, deepening or removing obstructions from the harbour, if they have not funds to enable them to do so. *Grant* v. *Sligo Harbour Commissioners*, Ir. R. 11 C. L. 190.

By act of parliament, 26 & 27 Vict. c. lxxxix., the harbour of B. was vested in the defendants, the limits were defined, and the defendants had jurisdiction over the harbour of P. and the channel of P. beyond those limits, for the purpose of, inter alia, buoying "the said harbour and channel," but they were not to levy dues or rates beyond the harbour of B. By 42 & 43 Vict. c. cxlvi., a moiety of the residue of light duties to which ships entering or leaving the harbour of P. contributed were to be paid to the defendants and to be applied by them in, inter alia, buoying and lighting the harbour and channel of P. A vessel was wrecked in the channel of P., which, under the Wrecks Removal Act, 1877 (40 & 41 Vict. c. 16), s. 4, the defendants had power to, and did partially remove. The wreck not removed was not buoyed, and the plaintiff's vessel was in consequence wrecked:—Held, that the statutes imposed upon the defendants an obligation to remove the wreck from the channel, or to mark its position by buoys, and that, not having done so, they were liable in damages to the plaintiff. *Dormont* v. *Furness Ry.*, 52 L. J., Q. B. 331; 11 Q. B. D. 496; 49 L. T. 134; 5 Asp. M. C. 127; 47 J. P. 711. See also *Reg.* v. *Williams*, 53 L. J., P. C. 64; 9 App. Ca. 918, infra.

Obstruction on Land to Passage to.]—A local act enacted, that "if any person shall place on any quay, within ten feet of the quay head, or on any ground immediately adjoining to the haven, and within the space of ten feet from high-water mark, any goods, so as to obstruct the free and commodious passage through or over the same, every person so offending shall forfeit any sum not exceeding 5*l.*" A boat builder placed three boats in a yard in his occupation, on the part immediately adjoining the river, and within the space of ten feet from high-water mark, so as to obstruct the passage, and was convicted in the penalty. There was no public right of passage through and over the yard:—Held, by Cockburn, C.J., Crompton and Blackburn, JJ. (dissentiente Wightman, J.), that the section applied only to cases where the public had a right of passage, and that the conviction could not be sustained. By Wightman, J., that the obstruction was prohibited in express terms, and that he was properly convicted. *Harrod* v. *Worship*, 1 B. & S. 381; 30 L. J., M. C. 165; 8 Jur. (N.S.) 153; 9 W. R. 865.

Harbour Authority—Liability for Damage to Ship taking the ground.]—A vessel that had taken the ground in a tidal harbour was damaged in her bottom. A stone was found in the berth where she lay, that might have caused the damage:—Held, that in the absence of proof that the harbour authority had been negligent they were not liable. *Thompson* v. *Greenock, Harbour Trustees*, 3 Ct. of Sess. Cas. (4th ser.) 1226.

—— **Damage by Snag.**]—The government of a colony had the control of a tidal harbour and authority to remove obstructions; and the wharves belonged to them, the public having a right to navigate the harbour and to use the wharves on payment:—Held, that the government was liable for damage to a vessel by a snag, which they had not taken reasonable care to remove. *Reg.* v. *Williams*, 53 L. J., P. C. 64; 9 App. Cas. 418.

—— **Damage by submerged Pile — Liability of Trustees of Navigation.**] — Unpaid trustees appointed for public purposes in aid of the common-law right of navigating an ancient highway, with a discretionary but not compulsory power of removing obstructions:—Held, not liable in an action for damage to the plaintiff's barge by striking upon a submerged pile. *Forbes* v. *Lee Conservancy Board*, 48 L. J., Ex. 402; 4 Ex. D. 116; 28 W. R. 688.

—— **Damage by sunken Wreck.**] — A canal company taking tolls for the use of it and having power to raise sunken boats at the owner's expense, held liable for damage to a fly boat that struck on a sunken boat; and that their liability was by the common law and not under their statute. *Parnaby* v. *Lancaster Canal Co.*, 11 A. & E. 223; 3 P. & D. 162; 9 L. J., Ex. 338—Ex. Ch. See also *The Moorcock*, and cases ante, col. 880; *The Utopia*, ante, col. 721; *Metcalf* v. *Hetherington*, and cases post, col. 910.

Damage by Stump of Beacon — Liability of Trinity House.]—A beacon erected by and vested in the trinity house, having been nearly destroyed, a stranger applied to the trinity house, and obtained leave to remove the remains of it. He removed part of the remains, but left an iron stump standing up above a rock under the water. A vessel struck against the iron stump and was lost:—Held, that the trinity house was liable. *Gilbert* v. *Trinity House Corporation*, 56 L. J., Q. B. 85; 17 Q. B. D. 795; 35 W. R. 30.

Statutory Duty to buoy River—Damage by Neglect to do so.]—Semble, the harbour authority is liable. *Buchanan* v. *Clyde Lighthouses Trustees*, 10 Ct. of Sess. Cas. (4th ser.) 531.

Wreck—Expenses of Removal.]—The owner of a wreck within the meaning of s. 56 of the Harbours, Docks and Piers Clauses Act, 1847, is the owner at the time that the wreck is removed and disposed of, not the person who was owner at the time the obstruction occurred. *Eglinton* (*Earl*) v. *Norman*, supra, col. 890, overruled on this point. *The Crystal, Arrow Steamship Co.* v. *Tyne Commissioners*, 63 L. J., Adm. 146; [1894] A. C. 508; 6 R. 258; 71 L. T. 346; 7 Asp. M. C. 513—H. L. (E.)

Per Lord Herschell, L.C., and Lord Watson (Lords Ashbourne and Morris dissenting): Semble, that s. 56 of that act creates a personal debt in respect of which an action may be maintained against the owner of a wreck which is removed by the harbour-master as causing an obstruction to any harbour or dock. *Ib.*

Per Lord Macnaghten: Semble, that the owner only incurs liability under that section when the wreck is substantially in the same condition at the conclusion of the operation of removal as it was at the commencement, and the owner derives some benefit from the removal: the statute did not contemplate the disposal of the wreck by explosives. Whether at common law a man can by abandonment wholly deprive himself of property in goods. Quære. *Ib.*

Per Lord Herschell, L.C.: River commissioners who sell a wreck which is obstructing the entrance to their river are not bound to apply the moneys derived from the sale pro rata to the expenses incurred under the acts of 1847 and 1877. *Ib.*

Wear River Commissioners v. *Adamson*, supra, col. 70, discussed, and *The Edith*, supra, col. 891, disapproved. *Ib.*

—— **Thames Conservancy.**]—In ascertaining the charges and expenses of weighing or raising a vessel under the Thames Conservancy Act, 1857, s. 86, the cost of a special apparatus provided by the conservators for removing wrecks, and used on the particular occasion, may be taken into account; such cost comprising interest upon capital invested in the apparatus, repairs, a depreciation fund and the insurance of the apparatus against risk. The charge for insurance of the apparatus cannot be estimated by reference to the tonnage of the wreck raised by it. Where it appears that the work in question could have been done more cheaply by a less expensive apparatus, the charges must be based on the lower rate. *The Harrington*, 57 L. J., Adm. 45; 13 P. D. 48; 59 L. T. 72; 6 Asp. M. C. 282.

—— **Mersey Docks and Harbour Board—Wreck-raising Plant.**]—A lightship and a dredger, the property of the Mersey docks and harbour board, were sunk by the negligence of the defendant's ships. The board, having power by 37 & 38 Vict. c. xxx. to raise and sell wrecks and retain the expenses, raised the wrecks and sued the defendants for the expenses:—Held, that the board were entitled to recover in respect of the plant used for raising the wrecks at the rate of 12*l.* per tide during the period the plant was at work; that rate being calculated with reference to the capital invested in the plant, repairs, depreciation fund and insurance. *The Harrington* (supra), approved. *The Emerald, The Greta Holme*, 65 L. J., Adm. 69; [1896] P. 192; 74 L. T. 645; 8 Asp. M. C. 134—C. A. As to damages recoverable for the loss of use of the dredger, see *The Greta Holme* (*S. C.* on appeal to H. L.), supra, col. 735.

——**Aire and Calder Navigation—Abandonment by Owners—Tidal Water.**]—Sect. 47 of the Aire and Calder Navigation Act, 1889, provides that if any vessel shall be sunk in the river Ouse within the limits of the jurisdiction of the undertakers, and the owners shall not forthwith remove the same, it shall be lawful for the undertakers to remove such vessel and to detain the same until payment be made of all the expenses relating thereto, or to sell such vessel and thereout to pay such expenses and the expenses of the sale, returning to the owner of such vessel the overplus:—Held, that, upon the true construction of the section, the time when the expenses were incurred, and not the time when the vessel sank, is the period at which the ownership is to be ascertained, and that the owners of a vessel which sank in tidal

water in the river Ouse within the statutory limits, who abandoned her sine animo recuperandi, were not liable to pay to the undertakers of the navigation the expenses, incurred by the undertakers after the abandonment, of unsuccessfully attempting to raise the vessel and of destroying her by explosives. *Barraclough* v. *Brown*, 66 L. J., Q. B. 672 ; 76 L. T. 797 ; 8 Asp. M. C. 290—H.L. (E.)

—— **Humber—Failure to Raise—Blowing up.**]—A Humber conservancy act enabled commissioners, when any vessel was sunk in the Humber (on neglect of the owners), to appoint a person to raise or blow up the same, with powers to recover summarily the expenses from such owners. A vessel was sunk in the Humber, and, on the neglect of the two owners to raise her, the commissioners appointed a person to raise or blow her up. Whilst the works were in progress, one of the part owners died, leaving two executors. The attempts to raise having failed, the vessel was blown up, and proceedings were taken against the surviving part owner and the two executors of the deceased part owner, to recover the expenses incurred in endeavouring to raise the vessel, and in blowing her up :—Held, first, that it was for the justices to decide whether or not these expenses were properly incurred ; and, secondly, that the justices had no power to include the executors in such order. *Wilson* v. *Carter*, 7 L. T. 676 ; 11 W. R. 337.

—— **Victoria—Marine Act, 1890, s. 13.**]—The above act imposes upon the registered owner of a ship sunk in a harbour the duty of clearing the wreck away, or of reimbursing the statutory officer the expenses incurred by him in doing so. He cannot escape this liability by abandoning the wreck to underwriters, or otherwise. *The Crystal* (supra, col. 893), distinguished. *Howard Smith and Sons* v. *Wilson*, 65 L. J., P. C. 66 ; [1896] A. C. 579 ; 75 L. T. 81 ; 8 Asp. M. C. 197—P. C.

—— **Mersey—Removing Wrecks.**]—The Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), empowers the defendants to raise, destroy, &c., any "wrecks of vessels and any vessels that shall be sunk in any dock within the port of Liverpool," which may be an obstruction to the navigation, and, in case the master or owner of such vessel or other obstruction shall neglect to pay the charge of removing the same for the space of three days after demand, to sell the same, and out of the proceeds retain the expense incurred in raising, destroying, &c., "such wrecks or other obstructions," rendering the overplus to the person entitled to the same. A ship came into collision with another vessel and was sunk in the Mersey, within the port of Liverpool, having on board copper ore and other goods belonging to the plaintiffs. The defendants took possession of the wreck, which obstructed the navigation, and claimed the exclusive right of dealing with ship and cargo. A portion of the cargo (worth about 1,200*l.*) was raised by them from the wreck, at a cost of 294*l.* 14*s.*, and they ultimately blew up and destroyed the hull of the vessel and the rest of the cargo. The expense incurred by them in removing the obstruction caused by ship and cargo was about 4,500*l.* :—Held, that the defendants were not entitled to detain the plaintiffs' goods to indemnify themselves for the costs incurred in the destruction of the ship, of which the plaintiffs were not the owners. *Vivian* v. *Mersey Docks and Harbour Board*, 39 L. J., C. P. 3 ; L. R. 5 C. P. 19 ; 21 L. T. 362.

Damage to Ship—Stranding—Duty of Harbour Authority to provide efficient Tugs—Liability.]—Under the Ribble Navigation Act, 1883, the defendants were constituted the harbour authority for the port of Preston, and all vessels entering or within the port or harbour were under the control of the defendants' harbour master, whose orders they were bound to obey. The plaintiffs' vessel on arrival at the mouth of the river was lightened under the orders of the defendants, and the harbour-master subsequently informed the plaintiffs' master that there would be sufficient water on a certain morning to enable the plaintiffs' vessel to dock at Preston, and a tug was supplied by the defendants for the purpose of towing her to the dock. The plaintiffs' vessel was preceded up river by two smaller vessels which were towed by two tugs also supplied by the defendants. Owing to bad stoking, or some other cause which was not explained by the defendants, the leading tug occupied an hour in doing what she should have accomplished in thirty-five minutes. It was impossible for the plaintiffs' vessel, owing to the narrowness of the channel, either to pass the leading vessel and her tug or to turn back. The two leading vessels entered the Preston dock, but the plaintiffs vessel was stranded about a quarter of a mile from the dock owing to the river having fallen about fourteen inches, and was damaged :—Held, that the defendants, as between themselves and the plaintiffs, had the duty imposed upon them to supply an efficient tug for the leading vessel, and that as a primâ facie case had been made out by the plaintiffs that the tug was not efficient, and that primâ facie case had not been explained away by the defendants, they were liable for the damage caused to the plaintiffs' vessel. *The Ratata*, 66 L. J., Adm. 39 ; [1897] P. 118 ; 76 L. T. 224 ; 8 Asp. M. C. 236—C. A. Affirmed in H. L. See also *Reney* v. *Kirkcudbright Magistrates*, post, col. 914.

Ballast—Casting into Rivers.]—19 Geo. 2, c. 22, s. 1, which imposed a penalty for casting ballast into rivers is impliedly repealed by 54 Geo. 3, c. 159, s. 11. *Michell* v. *Brown*, 1 El. & El. 267 ; 28 L. J., M. C. 53 ; 5 Jur. (N.S.) 707.

Expense of Cutting Weeds.]—Persons incorporated by act of parliament to improve the navigation of a river, having power to take tolls :—Held not liable for sewerage in the river, or for not cutting weeds which were no injury to the navigation. *Parrett Navigation Co.* v. *Robins*, 10 M. & W. 593 ; 12 L. J., Ex. 81.

Expense of Pumping Ship in Dock.]—See *Blackett* v. *Smith*, 12 East, 518, ante, col. 69.

d. Tolls, Dues and Metages.

Lighthouse Duties.]—British ships, in passing by the Eddystone and other lighthouses in the Channel, not touching at any place in Great Britain or Ireland, are not liable to pay the lighthouse duties to the trinity house. *Trinity House Corporation* v. *Sorsbie*, 3 Term Rep. 768.

Exemptions — Mail Packet.]— A post-office packet, hired by the postmaster-general, under a contract to carry mails and government dispatches to and from Dover to Calais, entering the harbour of Dover on her return voyage, bringing no mail, but having on board dispatches for the secretary at war, and also private passengers and their luggage, a carriage, and bullion for passage and freight, the vessel, being the private property of the commander, was a vessel employed in his majesty's service, and therefore exempt from the payment of the Dover harbour dues payable under 47 Geo. 3, c. 69, s. 6, which contained an exemption in favour of vessels belonging to his majesty, or that might be employed in his service. *Hamilton* v. *Stow*, 1 D. & R. 274; 5 B. & Ald. 649.

—— **Transport Chartered to Crown.**]—Where a person chartered his ship to the commissioners of the transport service on behalf of the crown, to be employed as a transport, and the ship in the course of such employment made several voyages from Deptford to foreign parts and back:—Held, that by the terms of the charterparty, coupled with the nature of the service, a temporary ownership passed to the crown, so that the charterer, during the time of such service, was not to be considered as owner within the charters granted to the Trinity house, which impose lighthouse duties, and for buoyage and beaconage on the masters and owners of ships. *Trinity House Corporation* v. *Clark*, 4 M. & S. 288. See *Smithett* v. *Blythe*, 1 B. & Ad. 509; 9 L. J. (O.S.) K. B. 39.

—— **Material for Government Works.**]—By a local act in 1826, wharfage duties were authorised to be taken in respect of certain goods, including stone, which should be imported into a harbour, and the same were to be vested in the corporation of the borough for the purpose of repairing, improving and maintaining the harbour, wharfs, &c., within the borough and town. There were no words in the act binding the crown to pay such duties, but there were provisions exempting the crown from liability in respect of coals imported into the port for the use of his majesty's steam-packets, and actually used on board the same, and also from the tolls to be taken for passing over a bridge connected with the harbour. Stones were brought by a barge into the harbour, for the purpose of being used upon government works which were being carried on there, and which, if they had been brought by any private individual, would have been liable to the duties given by the act:—Held, that the crown was not liable to be called upon to pay such duties. *Weymouth Corporation* v. *Nugent*, 6 B. & S. 22; 34 L. J., M. C. 81; 11 Jur. (N.S.) 465; 11 L. T. 672; 13 W. R. 338.

Who Liable to Pay Shipper—Owner.] — A local act, incorporating a company, by s. 71 imposed certain river dues in respect of goods carried on the river Ribble, for every time of passing certain lines, without saying by whom they were to be paid. The 10 & 11 Vict. c. 27, which was incorporated with the special act, provides, by s. 42, that rates in respect of goods shipped or unshipped within the limits of the harbour, dock or pier, shall be paid, in case the goods are to be shipped, before shipment, or in case they were to be unshipped, before removal from the premises of the undertakers:—Held, in the case of coals which A. had sold to B., and contracted to deliver on board a ship to be provided by B., that even if s. 42 of the general act be applicable to dues under s. 71 of the special act, A. was not liable to the company for such dues, and that A. was not the shipper of coals so as to be owner within the interpretation clause of the 10 & 11 Vict. c. 27. *Ribble Navigation Co.* v. *Hargreaves*, 17 C. B. 385; 25 L. J., C. P. 97.

What Goods Liable—Gravel from Thames and Lea.]—The Trinity house has a right to the duty of ballastage of screened garden gravel, though not taken from the Thames; but it is doubtful whether gravel taken from the river Lea is within the jurisdiction of the Trinity house. *Trinity House Corporation* v. *Staples*, 2 Chit. 689.

"**Metals.**"]—An act for keeping in repair a harbour imposed duties, enumerated in a schedule annexed, on goods exported and imported. In the schedule, under the head "metals," certain duties were imposed on copper, brass, pewter and tin; and on all other metals not enumerated, for every 10*l.* value, 10*d.*:—Held, that the latter words did not include gold and silver, and, therefore, that the commissioners were not entitled to demand for specie or bullion, 10*d.* for every 10*l.* value. *Casher* v. *Holmes*, 2 B. & Ad. 592; 9 L. J. (O.S.) K. B. 280.

By Package or Weight.]—An act authorised harbour commissioners to charge a sum not "exceeding 1*d.* for every ton or less quantity than a ton, and for every package and parcel of goods, wares, merchandise, &c., exported or imported over the bars of certain rivers." Tin plates were exported, packed in wooden boxes for shipment, and such boxes formed and composed one entire quantity or shipment in one vessel (under one bill of lading), and to the same consignee, and at a uniform rate of freight on all the tin plates so shipped, such freight being paid on the quantity of tons weight:—Held, that the commissioners were entitled to charge 1*d.* per package, and were not bound to charge 1*d.* per ton weight. *Jones* v. *Phillips*, 7 Ex. 85; 21 L. J., Ex. 6.

"**Exportation.**"] — The words "shipped for exportation" are not necessarily restricted to an exportation to foreign countries, but may mean exportation in its widest sense, that is, carrying out of port. *Stockton and Darlington Ry.* v. *Barrett*, 11 Cl. & F. 590—H. L. (E.); 8 Scott (N.R.) 641; 7 Man. & G. 870—Ex. Ch.

"**Importation.**"]—A local act imposed a duty on goods imported into or exported from the harbour of Berwick-upon-Tweed. The harbour extends from the bridge over the Tweed down the river to the sea. A person brought goods by sea into the harbour in a sea-going vessel, chartered for the voyage, and having first used the rings or posts erected by the harbour commissioners in order to moor the vessel while her masts were being lowered, passed under the bridge, and unloaded the goods 200 yards above the bridge:—Held, that the goods were not imported into the harbour so as to be liable to dues. *Wilson* v. *Robertson*, 4 El. & Bl. 923; 24 L. J., Q. B. 185; 1 Jur. (N.S.) 755.

Goods Landed.]—A corporation was empowered by a local act to levy tolls on all goods landed within their harbour. In pursuance of a practice which had continued for many years, stones

brought along the coast into the harbour were shot from boats on to the shore, below high-water mark, and remained on the spot where they were deposited till they were shipped for exportation from the harbour:—Held, that the stones were not landed within the meaning of the act, and therefore that the corporation was not entitled to claim the toll on them. *Harvey* v. *Lyme Regis Corporation*, 38 L. J., Ex. 141; L. R. 4 Ex. 260; 17 W. R. 892.

Mersey Dock — Tonnage Rates — "Trading Inwards" and "Trading Outwards."]—Vessels took in part of their cargo at Glasgow, sailed to Liverpool, entered the appellants' docks, and there completed their loading, but discharged no cargo; they then proceeded to a port in India, there discharged and loaded a complete cargo, thence sailed to Liverpool, entered the appellants' docks, and there discharged the whole or part of their cargo, and then returned with the remainder of their cargo or in ballast to Glasgow:—Held, that under s. 230 of the Mersey Docks Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), such vessels using the appellants' docks as aforesaid on their way to India were liable to dock tonnage rates, not as vessels "trading inwards" from Glasgow, but as vessels "trading outwards" to India, and that such vessels using the docks as aforesaid on their return voyage from India were liable to rates as vessels "trading inwards" from India. *Mersey Docks* v. *Henderson*, 58 L. J., Q. B. 152; 13 App. Cas. 595; 59 L. T. 697; 37 W. R. 449; 6 Asp. M. C. 338—H. L. (E.)

Timber "Shipped or Unshipped."]—Where a statute gave trustees appointed for the improvement of a navigable river and harbour power to charge dues on all timber "shipped or unshipped within the harbour or river":—Held, that to attach a tow-rope to a log of timber, or a number of logs loosely connected at one of the ends, for the purpose of towing them, is not to "ship" those logs, and that to cast off the tow-rope is not to "unship" them. *Clyde Navigation Trustees* v. *Laird*, 8 App. Cas. 658—H. L. (Sc.)

Quære, whether a raft of logs so constructed as to be capable of being navigated, can be said to be "unshipped" when, on reaching its destination, it is taken to pieces and landed. *Ib.*

By an act dated 1770, the Clyde trustees had power to charge rates on "all timber or wood either carried in boats or other vessels, or floated in and upon the said river Clyde, within those points aforesaid" (that is above Dumbuck). By a statute in 1840, the Clyde trustees' jurisdiction was extended down the river to Newark Castle, and the duties were imposed by that act on "all goods carried or conveyed on the river." By the statute in force at present, dated 1858, all the prior acts are totally repealed. By s. 75 the limits of the river are to include the whole channel or waterway forming the harbour, and the whole works within certain given limits, and the whole lands acquired for the purposes of such works, or occupied by the trustees in connection with the navigation of the said river. By s. 98 it is enacted that the trustees are to have power to levy on goods "shipped or unshipped" in the river or harbour the rates specified in the first and second columns of part 1 of schedule H. Schedule H. is headed "Rates on goods conveyed upon or shipped or unshipped in the river or harbour." In 1876 the trustees, under their act of 1858, sought to levy rates on timber in logs, which were taken out of the vessels importing them from abroad, outside the jurisdiction of the trustees, and then floated or towed, chained together, over the old shallow channel of the river to storing ponds situate within the trustees' jurisdiction. In a note for suspension and interdict at the instance of the owners:—Held, that the word "river" as it occurs in s. 98, comprehended the whole waters of the Clyde within the limits defined in s. 75, and cannot be restricted to those portions of the channel which have been artificially deepened; but that the statute of 1858 confers no authority on the trustees to levy rates on timber towed in the manner mentioned. *Ib.*

Tolls for Beaching Boats—Providing Accommodation for.]—When the fishermen of a sea village had been immemorially accustomed to beach their boats in winter on ground adjoining the harbour, and where the proprietor had subsequently obtained a local act authorising his levy of five shillings yearly for each boat beached, the fishermen's rights were enforced against him; and it was held that he could not exclude the fishermen from the ground used for beaching without assigning to them other ground equally well adapted for the purpose. *Aiton* v. *Stephen*, 1 App. Cas. 456—H. L. (Sc.)

When an act authorises the exaction of a toll, the accommodation for which the toll is authorised must be provided. *Ib.*

Company Liable to Pay Deficiencies in Income of Harbour and Pier Board.]—A dock company was liable under an act of parliament to pay a harbour and pier board deficiencies of their income made up to a certain day in each year:—Held, that the board was bound to claim such deficiencies every year. *Southampton Dock Co.* v. *Southampton Harbour and Pier Board*, 41 L. J., Ch. 832; L. R. 14 Eq. 595; 26 L. T. 828; 20 W. R. 940.

The board had power to reduce or alter their tolls:—Held, that, as against the company, they had no power to remit tolls on particular classes of goods. *Ib.*

The board had power to compound for tolls:—Held, that, as against the company, they could not let the whole annual tolls. *Ib.*

Action to recover Rates Paid under Invalid Regulations.]—By several acts of parliament, all vessels entering into or leaving the Mersey docks were liable, according to the tonnage burden, and were compelled to pay certain fixed dues. By the Merchant Shipping Act, 1854, s. 26, whenever the tonnage of any ship has been ascertained and registered in accordance with the provisions of that act, the same shall thenceforth be deemed to be the tonnage of such ship, and be repeated in every subsequent registry, unless any alteration is made in the form or capacity of such ship, or unless it is discovered that the tonnage of such ship has been erroneously computed; and in either of such cases such ship shall be re-measured, and the tonnage determined and registered according to the rules in that act contained. By s. 27, re-measurement may be made upon desire of the shipowner. By s. 29, the commissioners of customs are empowered to make certain modifications and alterations in the tonnage rules prescribed by the act. Under that section the commissioners of customs in 1860 made regulations, which had the effect of increasing the registered tonnage of the

plaintiff's ships. In 1865, these regulations were, by a decision of a court of law, declared to be contrary to the act of parliament, and invalid. An action was brought to recover the excess of rates paid in accordance with these invalid regulations, over the amount which would have been due under the Merchant Shipping Act:—Held, that the action was not maintainable. *Moss* v. *Mersey Docks and Harbour Board*, 26 L. T. 425; 20 W. R. 700; 1 Asp. M. C. 605.

Metage.]—A corporation was, under an act passed in 1839, entitled to the right to take dues in respect of vessels lading or unlading upon or from the wharves of the harbour; a subsequent act passed in 1868, giving the corporation additional powers, and conferring upon them the exclusive appointment and regulation of meters and weighers within the harbour, and incorporating the 81st and 82nd sections of the Harbours, Docks, and Piers Clauses Act, 1847 (10 Vict. c. 27). The corporation thereupon made by-laws for the appointment, government, and payment of meters. In 1807, the corporation granted a lease to B. for 999 years of premises, in which there was a proviso that "all such goods, wares, and merchandise as shall be proved to be bonâ fide the sole property of B., his executors, administrators, or assigns, who shall be legally and beneficially entitled to the premises when such goods, &c., shall be landed, shipped, or unshipped, brought to, carried, or laden to, upon, or from certain premises in the harbour mentioned, shall be freed and discharged from all wharfage, cranage, petit customs, and other duties usually paid at any time or times heretofore, or which at any times hereafter during the respective terms shall become due or payable to the corporation." A party claiming under B. unloaded a cargo of coals at the premises in the harbour for his own use, and did not employ a corporation meter:—Held, that he was under no legal obligation to employ such meter. *Whiting* v. *Carpenter*, 24 L. T. 576.

By a charterparty it was agreed that a ship should load a cargo of oats, and proceed to a safe port on the east coast of Great Britain, London inclusive, or a safe port in the English Channel, or to Havre, and there "deliver the same always afloat on being paid freight," at certain rates per quarter of oats discharged. "The cargo to be brought to and taken from alongside at charterer's expense and risk." The ship sailed to Rochester, and discharged her cargo within that port. The corporation of Rochester, as owner of the port, is entitled to an ancient fee, toll, due or reward of 1*d.* per quarter upon corn brought by water to, and unloaded within the port, payable by the person bringing such corn, for the weighing of the corn, or being ready and willing to weigh it. This due having been paid by the captain, the shipowners' agent brought an action in the county court to recover the amount from the consignees of the cargo as and for money paid for them at their request. Judgment was given for the plaintiff. On appeal, the court, being of opinion that the question of liability arising between the shipowners and consignees depended upon whether the due was in ancient times a payment for actual metage service done by the corporation before a cargo was put over the side of a ship, or afterwards, remitted the case to the judge in order that he might ascertain the fact:—Held, that (having regard to the terms of the charterparty), if the due in its origin was for metage to be performed on board, the shipowners must bear it; but, if the metage was to be done ashore, then the charge should fall on the consignees, who would in that case be liable to repay to the shipowners the amount disbursed for the same. *Woodham* v. *Peterson*, 25 L. T. 26; 1 Asp. M. C. 93.

Payment of Harbour Dues more than once a Year.]—The 32 Geo. 3, c. lxxiv. s. 14, which exempted coasting vessels from payment of duty to Ramsgate harbour oftener than once in a year, including coasting vessels carrying only coal. *Shepherd* v. *Moore*, 1 H. & N. 125; 25 L. J., Ex. 264; 2 Jur. (N.S.) 617; 4 W. R. 570, n.—Ex. Ch. *And see* 2 El. & Bl. 382; 22 L. J., Q. B. 377; 17 Jur. 1179.

Ballastage—Trinity House.]—Validity of grant of monopoly to the Trinity house. See *Rex* v. *Trinity House Corporation*, 1 Keb. 137, 250, 270, 300, 331.

Clyde Navigation Dues—Exemption.]—See *New Dumbarton Steamboat Co.* v. *Clyde Navigation Trustees*, 8 Ct. of Sess. Cas. (3rd ser.) 850.

Limerick Harbour Dues—Limerick Harbour Act, 1867, 30 & 31 Vict. c. clv.—Shannon Navigation Act, 2 & 3 Vict. c. 61.]—Dues payable on vessels reported at the custom-house of Limerick were by statute payable to the Limerick Bridge commissioners, who by 10 & 11 Vict. c. cxcviii. were constituted Limerick Harbour commissioners, to be applied in the construction and maintenance of docks and other works of the port which the commissioners were empowered to execute. Under 2 & 3 Vict. c. 61, and acts amending the same, certain outports in the Shannon, including the harbour of Foynes and the conservancy thereof, are vested in commissioners of public works, who are empowered to levy rates on vessels using the outports. By the Limerick Harbour Act, 1867, the piers and harbours in the estuary of the Shannon then vested in the commissioners of public works are not comprised in the harbour and port of Limerick; and harbour rates are defined as including all rates and dues leviable in the port and harbour of Limerick under the act, and are made payable to the harbour commissioners in lieu of those payable under the former acts; and such rates and dues include dues leviable on "every vessel from any port in Great Britain or Ireland reporting at the custom-house of Limerick or discharging or loading within the port or at the quays." By custom-house regulations all vessels arriving at the outports, whether from foreign or from ports of the United Kingdom, are required to report themselves at the Limerick custom-house:—Held, that under the Act of 1867 the Limerick Harbour commissioners are not entitled to dues on a vessel arriving from a port of the United Kingdom and discharging at Foynes, though reported at the Limerick custom-house. *Limerick Harbour Commissioners* v. *Kane*, 2 L. R., Ir. 473.

Skerries Lighthouse Tolls.]—Vessels bound from Cork to Dublin through St. George's Channel are not subject to the toll given by 3 Geo. 2, c. 36, to the Skerries light proprietor. *Boyce* v. *Jones*, 4 L. R., Ir. 231.

Light Dues—Exemption—Landing Persons at Bunkering Port.]—On her voyage from Mediterranean ports to Aarhuus, in Denmark,

the s.s. "Chelona," laden with barley, put into Malta for bunker coals. The master there took three persons on board who desired to go to England. He charged them no passage-money, but made a substantial charge per head for their food, for which he did not account to the owners. The "Chelona" touched at Portland for bunker coals, and the three persons were there landed. The collector for the general lighthouse authority at Portland demanded light dues, which he alleged had been incurred by the owners of the ship in consequence of such landing:—Held, that the ship was exempt from light dues. The case was analogous to that of the master taking a friend on board and landing him, and did not fall within the proviso to the exemption in the order in council of the 16th of May, 1893. *Hay* v. *Trinity House Corporation*, 65 L. J., Q. B. 90; 73 L. T. 471; 44 W. R. 188; 8 Asp. M. C. 77.

Dungeness Lighthouse Dues — Grantee from Crown.]—Action claiming Dungeness lighthouse dues by grantee from James I. against customers collecting the same. *Gibs* v. *Osbaston*, 2 Keb. 114.

Tonnage—Measurement.]—See *Richmond Hill Steamship Co.* v. *Trinity House Corporation*, ante, col. 26.

3. Docks.

a. Reparation and Regulation.

Right to Moor.]—The 63rd section of the Harbour, Docks and Piers Clauses Act (10 & 11 Vict. c. 27), which imposes a penalty upon the master of any vessel who shall, without permission of the harbour-master, moor the same in the entrance (or within the prescribed limits) of any dock or harbour, and who shall not remove the same upon notice, overrides and extinguishes all local and private rights of property therein. *Gardner* v. *Whitford*, 4 C. B. (N.S.) 665.

The assertion of such local or private rights does not exclude the jurisdiction of the justices under the act. *Ib.*

Maintenance and Repair.]—A dock company was required to make and maintain a new channel, with equal depth and breadth at the bottom, and with equal inclination of the sides to the former channel:—Held, that a duty was cast upon the company to repair generally the banks of the new course. *Reg.* v. *Bristol Dock Co.*, 1 G. & D. 286; 2 Q. B. 64; 2 Railw. Cas. 599.

High Tide—Injury to adjoining Land.]—A dock company was authorised by its special act to make and maintain a dock and works connected therewith according to the levels defined in plans and sections deposited with the clerk of the peace. The dock communicated with the Thames by an artificial channel, through which the water was admitted. The sections shewed the retaining bank of the dock and channel at a uniform height of four feet above Trinity high-water mark. The level of the surrounding country was some feet below Trinity high-water mark, the river being kept from overflowing by means of a river wall four feet two inches above Trinity high-water mark. The company allowed its retaining bank to be at one point several inches below the level of four feet. In November, 1875, an extraordinary high-tide took place, and the river rose to four feet five inches above Trinity high-water mark, in consequence of which the water in the dock overflowed the bank and damaged the property of a neighbouring landowner. The tide had never been known to rise so high before, but in March, 1874, it had risen to four feet above Trinity high-water mark. On that occasion there was a small overflow from the dock, but no damage was done to the neighbouring landowner. Previously to that the tide had never risen above three feet four inches, and the water had never overflowed from the dock:—Held, first, that the company was bound to keep its bank up to the level of four feet above Trinity high-water mark, and was liable to the plaintiff for breach of its statutory duty in not doing so. *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katharine Dock Co.*, 9 Ch. D. 503; 39 L. T. 433; 27 W. R. 267—C. A.

Held, secondly, that, independently of the act, the dock company was bound as a riparian owner to keep the bank up to the level of four feet two inches, the height of the rest of the river wall, and that the company was liable to the plaintiff for negligence in not so doing. *Ib.*

Held, thirdly, that the extraordinary high tide of November, 1875, although an act of God, did not excuse the dock company from its liability; but that it ought to have an opportunity of shewing that the damage done by the act of God and the damage done through its negligence ought to be apportioned. *Ib.*

—— **Contract for.**]—A corporation constituted for the purpose of carrying on a particular trade, entered into a contract for cleansing and removing the filth and dirt accumulating in their docks and basins:—Held, that such a contract ought to have been under the corporation seal, as it was not a contract of a mercantile nature, nor was it with a customer of the company, nor was it of a character which created an impossibility that it should be under seal. *London Dock Co.* v. *Sinnott*, 8 El. & Bl. 347; 27 L. J., Q. B. 129; 4 Jur. (N.S.) 70; 6 W. R. 165.

Raising or Destroying Wrecks.]—See *Virian* v. *Mersey Docks and Harbour Board, and Cases* supra, cols. 893—896.

Piers—Liability to Repair—Trustees—Proprietor.]—By the Clyde Navigation Consolidation Act, 1858 (21 & 22 Vict. c. 149), s. 76, the undertaking of the Clyde trustees shall in terms of the recited acts (which include 3 & 4 Vict. c. 118), consist of (inter alia), "The construction and completion of the several wet docks or tidal basins, quays, wharfs, ferry slips, approaches, embankments of river dykes, and all other works and improvements shewn and described on the several plans and sections referred to in the recited acts, and thereby authorised to be made and maintained." By s. 11 of 3 & 4 Vict. c. 118, the trustees amongst other works were authorised to reconstruct the piers of the ancient ferry of Erskine. Sect. 50 enacted that "the said quays should, at the expense of the said trustees, but with the consent of the proprietors, be repaired, lengthened, altered, or reconstructed," where such repair, lengthening, altering, or reconstruction should be rendered necessary by the work carried out by the trustees for deepening the river. The trustees having enlarged and reconstructed the piers of Erskine ferry, one of the piers was damaged by a ship, and the proprietor brought an action for a declaration that

the trustees were bound to repair the pier as part of their undertaking. The trustees denied liability unless for damage done by their works:—Held, that the ferry was not part of the undertaking of the trustees, and they were not bound to repair the damage. *Clyde Navigation Trustees* v. *Blantyre (Lord)*, [1893] A. C. 703—H. L. (Sc.)

By-laws, Validity of—Discharge of Cargo—Employment of Lumpers.]—By 10 & 11 Vict. c. 27, s. 83, the undertakers authorised by any special act to construct a dock may from time to time make such by-laws as they shall think fit for (amongst other purposes) regulating the shipping, unshipping, and removing of all goods within the limits of the dock, and for regulating the duties and conduct of all persons, as well the servants of the undertakers as others, employed in the dock. A dock company, who were the undertakers under a special act, made by-laws that no lumpers should be allowed to work on board any vessel in the dock, but such as were authorised by the company, unless permission in writing had been previously obtained from the superintendent of the dock, and the servants of the company only should be allowed to work within the dock premises, whether on ship, lighter, or shore:—Held, that the by-laws were in excess of the powers conferred upon the dock company by s. 83, and were therefore invalid. *Dick* v. *Badart*, 10 Q. B. D. 387; 48 L. T. 391; 5 Asp. M. C. 49; 47 J. P. 422.

—— **St. Katharine's Docks—Dumb Barge with no one on Board—"Vessel."**]—A "dumb barge," a river craft which is simply propelled by means of oars, and having no rigging or other equipment, is not a "vessel" within the meaning of ss. 100 and 101 of the London and St. Katharine Docks Act, 1864 (27 & 28 Vict. c. clxxviii.), notwithstanding the definition of the word "vessel" in the interpretation clause (s. 3) of the Harbours, Docks and Piers Clauses Act, 1847, 10 Vict. c. 27, and consequently the owner is not liable to a penalty for allowing her to remain in the docks regulated by the former act without any person on board. *Hedges* v. *London and St. Katharine Docks Co.*, 55 L. J., M. C. 46; 16 Q. B. D. 597; 54 L. T. 427; 34 W. R. 503; 5 Asp. M. C. 539; 50 J. P. 580.

—— **Statutory Powers.**] — The statutory powers conferred by the legislature upon dock companies and other bodies created for public purposes, and authorised to acquire land for such purposes, are inserted in order to define—i.e. limit—the rights conferred, and as implying a prohibition against the exercise of more extensive rights which such companies might have by virtue of their ownership of property. *London Association of Shipowners* v. *London and India Docks*, [1892] 3 Ch. 242; 67 L. T. 238; 7 Asp. M. C. 195—C. A.

By-laws and Regulations—Validity—Confirmation.]—The power of making by-laws differs from the power which every owner of property has of making agreements with those persons who desire to use it. A by-law is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not. All regulations made by a corporate body, and intended to bind not only themselves and their officers and servants, but members of the public who come within the sphere of their operation, may be properly called "by-laws" whether they be valid or invalid in point of law, for the term "by-law" is not restricted to that which is valid in point of law. Under the two statutes—the London and St. Katharine Docks Act, 1864, and the Harbours, Docks and Piers Clauses Act, 1847 (10 Vict. c. 27)—the public have certain rights to use the docks belonging to the London and St. Katharine Dock Company, including the wharfs, quays, and warehouses, and the company are empowered to make by-laws and regulations and charges for their use; but such regulations and by-laws are not valid and binding until made, confirmed and published as by-laws in the manner prescribed by the act of 1847. *Ib.*

Duty to Repair.]—Mandamus to dock company to repair their canals. *Reg.* v. *Bristol Dock Co.*, supra, col. 903.

b. Tolls and Dues.

Liability and Amount.]—The 39 Geo. 3, c. 49, s. 137, gives to the West India Dock Company certain rates and duties of all goods imported from the West Indies which shall be landed from on board any ship entering into and using the docks; which rates are directed to be "accepted for the use of the docks, and the quays, wharfs and cranes, and other machines belonging thereto, and the land-waiter's fees on account of such goods after being unshipped, and all charges and expenses of wharfage, landing, housing and weighing such goods, and of such cooperage as the same may want after being unshipped, and all rent for warehouse room for twelve weeks, and all charges of delivering the same from the said warehouses." The latter words include a delivery of the goods into lighters in the dock, as well as an immediate delivery from the warehouses into land carriages placed under the cranes of the warehouses, although for the purpose of such delivery into lighters it is necessary to put the goods upon trucks in order to carry them across the quay, and afterwards crane them into the lighters. *Harden* v. *Smith*, 8 East, 16.

West India Ships—Stores—Necessaries.]—The statute giving to West India ships, which have discharged their homeward-bound cargoes, in the docks of the West India Company, the use of the light dock for a time not exceeding six months from the time of unloading, on payment of the tonnage duty of 6*s.* 8*d.* payable on the entrance of such ships into the import dock, does not entitle the owners to ship stores intended for the use of such ships as part of their outfit, over the wharfs of the light dock, without payment of wharfage and porterage, as in case of other goods shipped by way of merchandise on the outward-bound voyage; aliter, as to necessaries intended for the present use of such ships while lying in the dock during the time allowed by the act. *Blackett* v. *Smith*, 11 East, 553.

Hull Dock—Port of Goole.]—Vessels taking in the whole or a part of their cargo in the port of Goole, and proceeding therewith to Hull, are liable to pay to the Hull Dock Company the tonnage duties of 2*d.* per ton under 42 Geo. 3, c. xci. s. 44. *Hull Dock Co.* v. *Priestley*, 1 N. & M. 85; 4 B. & Ad. 178.

Vessels proceeding to Hull from a place above

Goole (as Leeds), and not touching at Goole, but merely passing the entrance into the port of Goole, are not liable to tonnage duty. *Ib.*

Goods of "Similar Nature, Value," &c.]—A company was empowered by an act to charge for the landing of goods in their dock, the several sums mentioned in the schedule annexed, and, for articles not therein particularised, such sums as should be equal to the sums affixed on goods "of a similar nature, package, value and quality," in the schedule. All the charges mentioned in the schedule were of small fixed sums, none being ad valorem except the charge for sculptured marble and marble slabs. At the end was a note, "Goods not included in the foregoing schedules to be charged in proportion to the rates therein specified, according to size and weight":—Held, that the company was not entitled to make an ad valorem charge for the landing of goods not enumerated, or at all approaching, in "nature, value and quality," to any of those enumerated in the schedule. *Southampton Dock Co.* v. *Hill*, 16 C. B. (N.S.) 567; 10 L. T. 462; 12 W. R. 800—Ex. Ch.

"Near the River Tyne."]—By a local act, a toll or tax of ¼*d.* per chaldron was imposed upon the owners or lessees of "any collieries or coal mines near the river Tyne," for every chaldron of coals sold or delivered by them to be exported from or out of the river, and which shall be so exported; such toll to be collected or received at the offices or places respectively when the contracts for the sale or delivery of such coals are usually made, in aid of the Tyne Keelmen's Charitable Fund. Since the formation of railways and docks, the services of the keelmen in the shipment of coals on the Tyne have become unnecessary, the coals being brought down to the wharfs or quays by railways, and shipped direct:—Held, that coals shipped on the Tyne from collieries "near" to the river were still liable to the payment; and that a colliery situate ten miles from the Tyne is "near the river Tyne," within the meaning of the act. *Tyne Keelmen* v. *Davison*, 16 C. B. (N.S.) 612.

Held also, that coals brought for shipment to the Tyne by a public railway, from collieries which before the formation of the railway had always shipped their coals on the river Wear, to which they had been conveyed by private tramways from the collieries, were equally liable to the keelmen's dues. *Tyne Keelmen* v. *Elliott*, 16 C. B. (N.S.) 612.

Lien on Goods in Name of Broker for Charges.]—The Commercial Dock Company was created by a statute, and empowered to distrain and sell ships for nonpayment of rates and charges due for dockage of ships, receiving, warehousing and storing goods, and if any owner, consignor or consignee of any goods or merchandise neglects or refuses to pay rates or charges, the company may detain the goods until paid, and, if removed before payment, may distrain any goods of the owner, consignor or consignee, and detain and sell the same, or may prosecute actions for those duties. The 10 & 11 Vict. c. 27 (Harbours, Docks and Piers Clauses Act, 1847), s. 45, contains similar provisions, which were by a subsequent private act extended to the dock company. D. having purchased from the owners some timber stored at the Commercial Docks, and which was entered in the books of the company in the name of a broker, the company refused to transfer the timber into D.'s name, on the ground that the broker was indebted to them for rent and charges in respect of other goods standing in his name in the books of the company, although D. tendered to them the specific rent and charges due in respect of the goods purchased by him:—Held, first, that the statutes conferred on the company no right to do so. *Dresser* v. *Bosanquet*, 4 B. & S. 460; 32 L. J., Q. B. 374; 9 Jur. (N.S.) 458; 11 W. R. 840—Ex. Ch.

Held, secondly, that the company could not rely on any general lien to that extent by the common law, supposing that such existed, as the statutes must be taken to displace such right. *Ib.*

Extent of Powers of Distress for Nonpayment of Rates.]—A dock company, by their act of incorporation, was empowered to receive for all goods deposited on their premises rates not exceeding those usually paid in the port of London for wharfage of such goods, and in case default was made in payment of the rates, the collectors or the company were to retain and sell the goods or any part of such goods, and out of the moneys thence arising to retain and pay the rates payable in respect of such goods, returning the overplus to the party entitled; and in case such goods shall be removed before the rates shall be paid, it shall be lawful for the company to take and distrain or sell any goods of the owner thereof in manner before mentioned. Certain rates payable in respect of goods belonging to A. which had previously been removed from the premises of the company being unpaid, the company claimed to distrain other goods of A. then on the premises until payment of the rates due in respect of both these sets of goods. A. had applied to have the goods then on the premises delivered up to him, and was informed by the company that no more goods would be delivered to his order until his debt was paid or reduced:—Held, that the statute enabled the company to distrain and sell any goods in their possession for the recovery of rates payable in respect of other goods of the same owner. *Green* v. *St. Katharine Dock Co.*, 19 L. J., Q. B. 53; 13 Jur. 1116.

Held also, that the above facts amounted to a distraining and detaining. *Ib.*

Action to recover Rates paid under Invalid Regulations.]—*Moss* v. *Mersey Docks and Harbour Board*, 26 L. T. 425; 20 W. R. 700; supra, col. 901.

Primage—Liability of Agent.]—Liability of gratuitous agent landing goods for London owners for primage at Newcastle. *Newcastle-on-Tyne (Master Pilots and Seamen of)* v. *Hammond*, supra, col. 885.

c. Liability of Dock Companies.

For Acts of Servants.]—The London Dock Company is liable for the negligence of their servants in unloading goods, although the company derives no profit from their labour. *Gibson* v. *Inglis*, 4 Camp. 72; 15 R. R. 727.

For Injuries to Vessels.]—Trustees incorporated for the purpose of constructing a dock, and who receive rates and have funds which they

are bound to apply in maintaining and cleansing the dock, so that it may be in a fit state for vessels to enter, are liable for injury to a vessel caused by an accumulation of mud in the dock, of which by their servants they had the means of knowing, and were negligently ignorant. The owner of a cargo, which was damaged by reason of the ship's stranding on a mud bank negligently left at the entrance of a harbour vested in the Mersey board by statute, sued the board for damage. The defence was, that the board acted under a statute; that they derived no personal benefit from the management of the docks; that they took no part personally in the management, but merely appointed servants and officers in discharge of their public duty; and that the negligence was not theirs, but was solely that of one of their servants:—Held, that the case of public statutory trustees, if not servants of the crown, did not differ from that of absolute owners levying tolls for their own benefit, and that the board was liable. *Mersey Docks* v. *Gibbs*, 11 H. L. Cas. 686; 35 L. J., Ex. 225; L. R. 1 H. L. 93; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872—H. L. (E.)

—— **Opening Dock before Channel Clear.**]—In an action by owners of a ship against the proprietors of a dock and tidal basin, made under the powers of an act, and for the use of which they were entitled to receive tolls, it appeared that the dock and basin were opened for public use on the 3rd of March, 1859. The basin opened into a river between two piers, distant 120 feet apart. In constructing the basin, a bank was put across it for keeping out the water during the excavation. When the excavation was completed, the operation of cutting through the bank was commenced; and at the time of the accident to the ship, a channel seventy feet wide had been cleared through the bank opposite the middle of the space between the piers at the entrance of the basin. At the time when the dock was opened, the seventy-feet channel had been excavated at about three feet six inches above the bottom of the rest of the basin, and the dredging of the channel was continued from that time until the plaintiff's ship went out. The ship, which was of 674 tons burden, entered the dock on the 9th of March, and having received a cargo, went out on the 19th of March, under the charge of a river pilot, and, whilst proceeding through the basin, grounded on the bank. The channel was not marked by buoys or otherwise. The pilot, who had taken a larger ship out on the 8th March, knew the state of the basin:—Held, first, that it was the duty of the proprietors of the dock to take reasonable care to make their dock and basin safe for navigation before they opened them to the public: and, therefore, they were liable for negligence in opening them before the channel had been well cleared. *Thompson* v. *N. E. Ry.*, 2 B. & S. 106; 31 L. J., Q. B. 194; 8 Jur. (N.S.) 991; 6 L. T. 127; 10 W. R. 404—Ex. Ch.

—— **Knowledge of Pilot.**]—Held, secondly, that assuming the knowledge of the state of the basin by the pilot to be the knowledge of the owners of the ship, it was no excuse for the dock proprietors, inasmuch as they contended that the state of the basin was not such as to make it imprudent to take the vessel out; and the jury had negatived mismanagement on the part of those who had charge of the vessel. *Ib.*

—— **Liability for Damage to Ship by Grounding.**]—By a local act for better preserving a harbour, trustees were appointed to carry the act into execution. They might elect a harbour-master, who might direct any person, having the command of any vessel entering into or being within the harbour, to anchor and place the same in such situation within the harbour as he should direct. After the passing of the act some coals were shot into a berth in the harbour, which rendered it dangerous. The trustees, at a board meeting, having had notice of the state of the berth, gave directions to their clerk to have the coals removed, and the coals were accordingly partly, but not sufficiently, removed at their expense. After this the harbour-master, without the knowledge of the trustees, directed the plaintiff to place his vessel in the berth. He did so, and the vessel, while lying there, sustained damage in consequence of the berth being unsafe. The harbour-master knew that the berth had been unsafe and what had been done to it, but neither he nor the trustees knew that the berth continued unsafe when he directed the plaintiff to place his vessel in it:—Held, that there was no evidence to warrant a verdict against the trustees. *Metcalfe* v. *Hetherington*, 5 H. & N. 719; 11 Ex. 257; 8 W. R. 475—Ex. Ch.

The trustees of a dock, being about to open a new one under the authority of parliament, issued a notice addressed to shipowners, merchants and others, describing the accommodation which their new dock would afford to shipping, and containing a statement that "the depth of water on the dock sill was twenty-six and twenty-three feet at the highest spring tides, and fifteen feet at the lowest neaps":—Held, that this amounted to a warranty that there was an available depth of water in the entrance channel approximating that mentioned in the notice; and that the trustees were responsible to the owners of a ship, who trusting to the representation contained in the notice, entered the dock to load, and were delayed and put to expense in consequence of the insufficiency of water in the channel to enable her to complete her loading in the dock. *Williams* v. *Swansea Harbour Trustees*, 14 C. B. (N.S.) 845.

The "R.," which was anchored in F. outer harbour, having to be beached in the inner harbour, S., the harbour-master, directed the master of the "R." where to beach her. Before the "R." left the outer harbour, S. came on board, although a Trinity house pilot was in the vessel, and, when she had arrived near the place where she was to be beached, gave directions as to the lowering of her anchor. The "R." overran her anchor and grounded on it, sustaining damage. In an action against the harbour commissioners and S., the court found, as a fact, that there was negligence on the part of S., and that the place where the "R." grounded was outside the jurisdiction of the harbour commissioners:—Held, that the duties of the harbour-master comprised directions as to the mooring and beaching of vessels; that, by giving directions when he went on board, S. had resumed his functions as harbour-master, and that he and the commissioners were therefore liable for the damage done to the "R." *The Rhosina*, or *Edwards* v. *Falmouth Harbour Commissioners*, 54 L. J., Adm. 72; 10 P. D. 131; 53 L. T. 30; 33 W. R. 794; 5 Asp. M. C. 460—C. A.

The plaintiffs' vessel, having fouled her propeller whilst entering the port and harbour of

Port Talbot, was, with the authority of the foreman docksman, in the absence of the harbour-master through illness, placed in a lock leading into the dock for the purpose of being put upon the ground for repairs. On the vessel taking the ground she sustained damage to her bottom by sitting upon the sill of the old lock gates, which had not been removed when the lock was lengthened. It appeared that the foreman docksman did not know the condition of the bottom of the lock, and informed the master of the ship of it. In an action by the shipowners against the dock authority:—Held, that the docksman had authority to allow such user, so as to render the defendants liable for the damage ensuing, and that he ought to have known of the sill and warned the plaintiffs' vessel of the danger. *The Apollo, Apollo (Owners)* v. *Port Talbot Co.*, 61 L. J., Adm. 25; [1891] A. C. 499; 65 L. T. 590; 7 Asp. M. C. 115; 55 J. P. 820—H. L. (E.)

By a private act of parliament, the defendants were appointed as guardians of the port and harbour of Wisbech, with prescriptive rights to receive tolls, to be applied to improving the harbour and port, and provision was made for the appointment of one or more harbour-masters for regulating the placing and mooring of vessels, and for preventing and removing obstructions. A later act gave the defendants the same rights over a channel called the New Cut, which had been constructed partly for better drainage and partly in place of the old channel forming part of the port and harbour, and was vested in commissioners. A vessel was berthed in the New Cut, under the direction of the defendants' harbour-master, and sustained damage to her bottom, owing to the unfit state of the berth. In an action brought by the shipowners against the harbour authority:—Held, that the defendants were liable for the damage arising from the neglected state of the channel. *The Burlington*, 72 L. T. 890; 8 Asp. M. C. 38—C. A.

—— **Admittance to Dock — Remoteness of Damage.**]—In an action for a breach of contract, in not admitting the plaintiff's ship into the defendant's dock, whereby she grounded when the tide ebbed, and was damaged, it appeared that the ship left in ballast a dry dock, where she had been repaired, and, in charge of a pilot, was towed by a steam-tug to the dock, where she arrived about high water. In consequence of the chain of the dock gate being broken, she could not be admitted. The captain was unacquainted with the navigation, and, considering that the ship was not sufficiently ballasted to go to sea, directed her to be anchored where she was. At the ebb of the tide she grounded and was damaged. There was conflicting evidence as to the state of the weather. The jury was asked, first, whether there was a place of safety to which the ship could have been taken before the tide ebbed? and, secondly, whose fault was it that she was not taken there? Upon the first question they returned no answer, being unable to agree, but replied to the second, that neither the captain nor the pilot was to blame:—Held, per Martin, B., that the damages were not too remote to be recovered by the plaintiff. Per Pollock, C.B., Channell, B., and Pigott, B., that the finding of the jury was not sufficient to enable them to come to a conclusion, and that there must be a new trial. *Wilson* v. *Newport Dock Co.*, 4 H. & C. 232; 35 L. J., Ex. 97; L. R. 1 Ex. 177; 12 Jur. (N.S.) 233; 14 L. T. 230; 14 W. R. 558.

Liability for Damage by Sunken Wrecks—Grounding.]—*See* XX. COLLISION, ante, col. 721; XXIII. WHARFINGER, ante, col. 879.

Injury to Goods — Stowing Wines and Spirits in Docks.]—The rate table of a dock company contained the following provisions: "Wines and spirits (rum and British spirits excepted) landed in the docks will be chargeable with the following rates: . . . The company will not be responsible for deficiencies on wines or spirits imported in casks not made of oak, nor on spirits exceeding 20 per cent. overproof; but is answerable for deficiencies in quantity on those contained in other casks housed with the company, beyond one gallon per cask for each year or part of a year the goods shall remain in their custody, provided such deficiencies be claimed of the company within six months after delivery, and shall be satisfactorily established by the customs' gauge on landing and delivery. . . . Rates and charges on rum. . . . When rum is imported in casks made of proper oak, the company engages to be responsible for deficiencies in measure, which shall exceed one gallon per cask for each year," &c.:—Held, in an action for loss of brandy housed with the company, that, under the above provisions, they would not be liable for a diminution in alcoholic strength, though exceeding one gallon per cask, the deficiency contemplated being a deficiency in actual bulk; but that if such diminution was caused by their negligence, they were liable, apart from contract. *Lamare* v. *London and St. Katharine Docks Co.*, 39 L. T. 330.

Delay of Persons Using Swing Bridge.]—A dock company having a swing bridge on a public highway, is bound, in the passing of vessels, to use all reasonable means (both as to the number of men employed and number of ships passed at a time) to prevent unnecessary delay; and if they do not do all which can be expected of reasonable men, and if anyone is obstructed in consequence, such obstruction will render them liable for the injury sustained. *Wiggins* v. *Boddington*, 3 Car. & P. 544.

Injury to Visitors.]—A dock company provided gangways from the shore to the ships lying in their dock, the gangways being made of materials belonging to the company and managed by their servants. The plaintiff went on board a ship in the dock at the invitation of one of the ship's officers, and, while he was on board, the servants of the company, for the purpose of the business of the dock, moved the gangway, so that it was, and to their knowledge, insecure. The plaintiff, in ignorance of its insecurity, returned along it to the shore, the gangway gave way, and he was injured:—Held, that there was a duty on the company towards the plaintiff to keep the gangway reasonably safe, and that he was entitled to recover damages from them for the injuries he received. *Smith* v. *London and St. Katharine Docks Co.*, 37 L. J., C. P. 217; L. R. 3 C. P. 326; 18 L. T. 403; 16 W. R. 728.

Licence to use Graving Dock—Interest in Land—Statute of Frauds—Contract with Corporation—Not under Seal.]—A municipal corporation received a fee from a shipowner to enter his vessel for her turn at a graving dock belonging to the corporation. The corporation allowed another vessel to take the turn of the

plaintiff's ship. In an action against the corporation for damages:—Held, that the contract, not being a contract concerning an interest in land, need not be in writing under the 4th section of the Statute of Frauds; or under seal, being a matter of constant occurrence and daily necessity. *Wells* v. *Kingston-upon-Hull Corporation*, 44 L. J., C. P. 257; L. R. 10 C. P. 402; 32 L. T. 615; 23 W. R. 562; 2 Asp. M. C. 580.

Poor Rate—Lighthouse Authority.]—A lighthouse tower containing, besides the rooms for the light and apparatus, a room for working a post-office telegraph used for the exclusive benefit of the owners of the tower, who were proprietors of docks having no power to make profits, held not ratable to the poor; but adjoining buildings occupied by the lighthouse keepers held ratable at their value as connected with the lighthouse and telegraph station. *Mersey Docks and Harbour Board* v. *Llanelian (Overseers)*, 54 L. J., Q. B. 49; 14 Q. B. D. 770; 52 L. T. 118; 33 W. R. 97; 3 Asp. M. C. 358; 49 J. P. 164.

17 & 18 Vict. c. 104, s. 430, applies only to lighthouses under the general lighthouse authorities. *S. C.*, in court below, 51 L. T. 62; 5 Asp. 248; 48 J. P. 301.

Poor Rate—Docks.]—Occupiers of a dock held not liable to pay poor rates in respect of harbour and tonnage dues, but only in respect of dues payable by ships using the dock. *Berwick Harbour Commissioners* v. *Tweedmouth (Churchwardens)*, 54 L. T. 159; 5 Asp. M. C. 532.

d. Duties of Dockmasters and Others.

Dockmasters—Discretion of—How Exercised.]—A dockmaster is invested with a discretion to be exercised for the benefit of all the ships in the harbour, and the master of a vessel is therefore bound to obey the dockmaster, and to assist in the removal of his ship, even though if the interests of the ship alone might be considered the removal was injudicious. *The Excelsior*, 37 L. J., Adm. 54; L. R. 2 A. & E. 268; 19 L. T. 87.

—— **Action against.**]—In an action against a harbour-master for loss of the cargo of a foreign merchant vessel through her heeling over upon taking the ground in the harbour, it being admitted that the master brought her in, in order to take the ground; and that being sharply built, she could not safely do so, unless there was mud of sufficient depth and strength to support her; and the case for the owner of the vessel being that at a certain point there was such mud, but that she took the ground before she could get there, owing to there not being sufficient depth of water for a vessel of her draught:—Held, that the question of negligence on the part of the harbour-master would depend upon the knowledge or information he had of the build and draught of the vessel; and that in the absence of knowledge on his part, it was the duty of the captain to inform him; and that, as it was materially misrepresented to him by the captain, he was not responsible for the result. *Lloyd* v. *Iron*, 4 F. & F. 1011.

Duty of Master of Ship—Damage—Liability.]—When a ship is moored in dock, it is generally the duty of her master to keep on board a sufficient crew to protect the vessel against ordinary risks. A ship after having been moored in a dock, was subsequently, by order of the dock-master, removed to another part, from which, by the negligence of her master and his disobedience of the dockmaster's orders, she broke loose and damaged the docks:—Held, that the ship was liable for the damage. *The Excelsior*, supra.

Harbour-master—Injury to Ship in attempting to enter Dock.]—The authority of a harbour-master over a vessel entering a dock is not limited by his knowledge that there are persons on board the vessel more familiar with the local circumstances of the place than he is. The latter are not at liberty to disregard the orders of the harbour-master because they think that he is making a mistake. It is only in the last resort, and when the danger is fully obvious, that the orders of the harbour-master should be disobeyed. *Reney* v. *Kirkcudbright Magistrates*, 61 L. J., P. C. 23; [1892] A. C. 264; 67 L. T. 474; 7 Asp. M. C. 221—H. L. (Sc.)

Semble, that the master of a vessel is not affected by the knowledge of a local pilot whom he has taken on board to assist him, so as to make the owners of the vessel responsible for the omission of such pilot to inform the master of a local danger. *Ib.*

—— **Collision caused by.**]—*See* XX. Collision, *The Cynthia, and Cases* ante, col. 723.

XXV. SHIPBROKERS AND AGENTS.

1. *Commission and Employment*, 914.
2. *Liabilities*, 919.

1. Commission and Employment.

Commission, whether Contingent.]—A shipbroker is entitled to 5*l.* per cent. on the gross freight of a ship, though payment of a part is contingent on the arrival of the vessel home. *Roberts* v. *Jackson*, 2 Stark. 225; 19 R. R. 706.

The actual earning of freight under a charterparty is not a condition precedent to the right of the shipbroker to his commission for procuring the execution of the charter. *Hill* v. *Kitching*, 3 C. B. 299; 15 L. J., C. P. 251.

A., a shipbroker, procured a charterparty to be made between B., a shipowner, and C., under which the owner contracted to bring home a cargo of guano, and the merchant agreed to pay freight at the rate of 4*l.* 15*s.* per ton, to be reduced to 4*l.* 12*s.* 6*d.* if the ship did not arrive off Cork or Falmouth on or before a given day. There was no express engagement on the part of C. to ship a cargo:—Held, that A. was entitled to recover from B. upon a quantum meruit for his procuring the charter to be executed, without shewing the arrival of the vessel on or before the day mentioned, and notwithstanding only a very small quantity of guano had been shipped and a small amount of freight actually earned; that the amount of compensation due to him was a question for the jury; and that, in estimating such compensation, they were properly guided by evidence of what was customary in similar cases. *Ib.*

If a broker charters ships at a commission of 2½ per cent. on their outward freight, and the like on their homeward freight, and the charterparty makes it contingent what the amount of freight shall be, the broker cannot sue for any sum till the contingency is determined. *Winter* v. *Mair*, 3 Taunt. 531.

Semble, the broker's commission on obtaining a charterparty is 5 per cent. on the freight, unless there is a special agreement or the ship is

chartered upon a tender. *Brown* v. *Nairne*, 9 Car. & P. 204. And see *Read* v. *Rann*, 10 B. & C. 438; 8 L. J. (o.s.) K. B. 144, infra; *Cohen* v. *Paget*, 4 Camp. 96.

The broker who first introduces the purchaser of a ship to the vendor is entitled to his commission, although the principals complete the negotiation, and other brokers unknown to each other also introduce the purchaser and vendor, who had communicated with each other, without and before the introduction of any broker. *Cunard* v. *Van Oppen*, 1 F. & F. 716.

If the negotiation goes off by the fault of the broker he is entitled to no commission or expenses, other than such as have been occasioned at shipowners' special request. *Dalton* v. *Irvin*, 4 Car. & P. 289.

The charter contained a provision that the ship should be consigned to C. & Co. at Liverpool, or their agents at her port of discharge in this country; and in the margin was a memorandum that "this charter is subject to 3*l*. per cent. payable by the ship":—Held, that the jury might infer from A.'s execution of the charter a contract by him to pay C.'s commission. *Smith* v. *Boutcher*, 1 Car. & K. 573.

Three shipbrokers agreed in writing with a shipowner to freight his ship at a certain commission, dividing profits of commission. One of the brokers alone paid and received money on account of the ship, and delivered to the owner an account, charging a sum for commission. The owner agreed to the account, but objected to the commission. There was no adjustment of account between the brokers:—Held, that an action for money had and received would not lie by the two brokers against the third for their share of the commission. *Bovill* v. *Hammond*, 9 D. & R. 186; 6 B. & C. 149; 5 L. J. (o.s.) K. B. 145.

—— **Actions for.**]—It is no answer to an action by a broker for commission for procuring freight that the charterparty procured was such that if the charterer failed to obtain certain licences the voyage would be illegal. *Haines* v. *Busk*, 5 Taunt. 521; 1 Marsh. 191.

When two brokers are referred to in advertisements by a shipowner, and one of them procures the cargo and receives the freight, and the other pays the charges for clearing out the ship, the latter must share the commission with the former, and cannot by usage of trade maintain an action against the shipowner. *Hall* v. *Benson*, 7 Car. & P. 711.

—— **When Earned.**]—To enable a broker to recover a commission on the sale of a ship, the mere fact of his having introduced the purchaser to the seller will not be sufficient; but if it appears that such introduction was the foundation on which the negotiations proceeded, the parties cannot afterwards, by agreement between themselves, withdraw the matter from the broker's hands and deprive him of his commission. The broker will be entitled to his commission if he was, up to a certain time, the agent or middleman between the parties, although the contract was afterwards completed without his instrumentality or interference. *Wilkinson* v. *Martin*, 8 Car. & P. 1.

The usage is that when a broker has brought the captain of a ship and a merchant together, and they by his means enter into some negotiation as to the intended voyage, the broker is entitled to commission if a charterparty is effected between them for that voyage, even though they may employ another broker to prepare the charterparty, or may write the charterparty themselves. *Burnett* v. *Bouch*, 9 Car. & P. 620.

If a broker is authorised by both parties, and, acting as the agent of each, communicates to the merchant what the shipowner charges, and also communicates to the shipowner what the merchant will give, and he names the ship and the parties so as to identify the transaction, and a charterparty is ultimately effected for that voyage, this broker is entitled to his commission; but if he does not mention the names so as to identify the transaction, he does not get his commission to the exclusion of another broker, who afterwards introduces the parties personally to each other. *Ib.*

A shipbroker employed to sell a ship which when put up for sale was bought in, is not entitled to a commission on the sale. *Mestaer* v. *Atkins*, 1 Marsh. 76; 5 Taunt. 381.

A shipbroker who has procured a bargain for the hire of a vessel is, by usage in the city of London, entitled to a certain commission on the amount of freight if the contract is perfected, but not otherwise. *Read* v. *Rann*, 10 B. & C. 438; 8 L. J. (o.s.) K. B. 144.

Even where the contract is not completed through the act of the owner. *Broad* v. *Thomas*, 7 Bing. 99; 4 M. & P. 732; 4 Car. & P. 338; 9 L. J. (o.s.) C. P. 32.

Shipbrokers were employed by shipowners to procure charterers for certain ships. The brokers introduced the owners to another firm of brokers, and negotiations were commenced at the office of the last-named firm with L. for the chartering of these ships. The negotiations with L. came to nothing; but L., from the knowledge thus acquired, informed M. that the owners had a ship in want of a charterer, and M. became the charterer of this ship of theirs. In an action by the brokers to recover their commission from the shipowners on the charter of this ship:—Held, that their services in the transaction were too remote. *Gibson* v. *Crick*, 1 H. & C. 142; 31 L. J., Ex. 304; 6 L. T. 392; 10 W. R. 525. *S.C.*, at nisi prius, 2 F. & F. 766.

Where by the terms of a charterparty a vessel is let for an indefinite period, and the voyage is general, the shipbroker who lets the vessel is entitled to claim commission as for a voyage of that description, and not for a specific voyage on bonds. *Holl* v. *Pincent*, 6 Moore, 228.

Provision in Charterparty as to Brokers.]—Ship to be "consigned to charterers' agents inwards and outwards, paying the usual commission." See *Cross* v. *Pagliano*, ante, col. 247.

Custom—Evidence as to.]—A declaration on a charterparty stated that it was agreed between the owner of the ship "Maggie," and charterers, that "the ship should load a cargo in London and proceed to Hong Kong and deliver the same, the ship to be consigned to the charterers' agents in China, free of commission on that charter"; that according to the custom of merchants in London, when a ship chartered in London for China is agreed to be consigned to the charterers' agents, whether consigned free of commission on that charter or not, it is the right and duty of such agents to procure a charter or a cargo for the ship, and they are entitled to be paid the usual brokers' commission

on the amount of freight payable under such charter, unless excluded by special contract; but in case the owners procure a charter or cargo for the ship, without any default of the consignees, the consignees are entitled to the brokers' commission on any freight payable under such charterparty, unless such right is excluded by special contract; that the ship arrived in China, and the owners' agents as consignees performed their duty free of commission on the outward voyage, and were ready to procure a charter or a cargo for Hong Kong; that the charterer did not permit them to procure such charter or cargo, but, without the default of the owners' agents, himself procured a cargo. Breach, nonpayment by the charterers of any commission on the cargo:—Held, that the parol evidence of the mercantile usage was not admissible to vary the terms of the charterparty. *Phillipps* v. *Briard*, 1 H. & N. 21; 25 L. J., Ex. 233; 4 W. R. 486.

The defendants, who were shipbrokers, being employed by the French government to charter two ships, L., who was also a shipbroker, informed them of two ships, the "New York" and the "Glasgow," open to charter. After correspondence between L., the defendants and the shipowners, the "New York" was chartered for six months, and the defendants wrote to L. that in consideration of his having assisted them in getting the "New York" charter they agreed to pay him a commission of 2½ per cent. The "Glasgow" was afterwards chartered and the "New York" charter was renewed for a further six months. L. claimed commission on the "Glasgow" charter and on the renewed "New York" charter:—Held, that evidence was admissible of a custom amongst shipbrokers that an introducing broker should receive further commission on renewed charters notwithstanding the written agreement. *Allen* v. *Sundius*, 1 H. & C. 123.

In order to prove a custom, it was proposed to ask a broker, "What is the custom with regard to payment of brokers' commission when the broker introduces another broker to a shipowner, which shipowner substantially negotiates with one of the brokers introduced?"—Held, that this question was rightly disallowed. *Gibson* v. *Crick*, supra.

Where A. employs B., a broker, to procure a charter, and B. employs C., another broker:—Semble, evidence of custom as to which broker is entitled to the commission is admissible. *Smith* v. *Boutcher*, 1 Car. & K. 573.

—— **Notice of Names of Vessels.**]—The defendants, London merchants, employed a broker at Liverpool to purchase some wool. The broker negotiated a sale by the plaintiff to the defendants of certain bales deliverable at Odessa, "the name of the vessels to be declared as soon as the wools were shipped." In this transaction, the broker acted for both the plaintiff and the defendants. By the custom of Liverpool, where a contract contains a stipulation that notice of an event should be given by the vendor to the vendee, it is usual for the vendor to give the notice to the broker, who communicates it to the vendee:—Held, that the defendants were bound by such usage, and therefore that a notice by the plaintiff to the broker of the names of the vessels on which the wools were shipped was a performance of that stipulation, although the broker omitted to communicate them to the defendants. *Graves* v. *Legg*, 2 H. & N. 210; 26 L. J., Ex. 316; 3 Jur. (N.S.) 519; 5 W. R. 597—Ex. Ch.

Payment on Behalf of Ship.]—A broker, who had received money for the shippage of goods on account of the owners of the ship, offered to pay it to the captain, who was also managing owner, by a cheque. This the captain declined, preferring that the broker should open a credit for him at a bank in New Brunswick in favour of H., which the broker did. The bank accordingly paid H. 250*l.*, for which H. gave a bill, drawn by him in favour of the bank upon the broker, who accepted and paid it when due. The broker having sued the co-owners for the balance of his account:—Held, that this was a good payment of 250*l.* by the broker, and binding on the co-owners. *Anderson* v. *Hillies*, 12 C. B. 499; 21 L. J., C. P. 150; 16 Jur. 819.

—— **Lien.**]—Shipbrokers have no lien on the certificate of registry for advances made by them to the owner for the use of the ship. *Gibson* v. *Ingo*, 6 Hare, 112.

—— **Lien on Cargoes—Agent for Sale.**]—A., in New Brunswick, employed an agent in London to charter vessels for carriage of deals from New Brunswick to be consigned to the agent for sale. A., in breach of this contract, consigned the deals to another person:—Held, that the agent had a lien on all the cargoes for expenses and loss incurred in respect of each vessel chartered by him, but not for commission and profits which he might have earned if the vessel had been consigned to him. *Young* v. *Neill*, 32 Beav. 529; 2 N. R. 212; 9 Jur. (N.S.) 976; 9 L. T. 9; 11 W. R. 1052.

Commission on Freight—Charterers acting as Brokers—Ship lost.]—See *Sibsons* v. *Ship Barcraig Co.*, ante, col. 383.

Introducing Buyer—Commission.]—Where the sale is not in consequence of the shipbroker's introduction commission is not payable. *White* v. *Munro*, 3 Ct. of Sess. Cas. (4th ser.) 1011.

Statutes as to Brokers.]—Shipbrokers are not within the statutes relating to brokers in London. *Gibbons* v. *Rule*, 4 Bing. 307; 5 L. J. (O.S.) C. P. 176; 29 R. R. 570.

Loss on Re-charter—Liability of Principal.]—The defendants chartered a ship to sail to T. and there load a cargo at 60*s.* per ton freight. They wrote to the plaintiffs asking them to instruct their firm at T. to re-charter the ship for the defendants at the best rate they could; and stating that if there should be a loss the plaintiffs' draft for the difference should be honoured. The rate of freight at T. being only 40*s.* per ton, the plaintiffs put their own cargo on board, drawing upon the defendants for the difference between 40*s.* and 60*s.* freight. The ship was lost, and the defendants refused to accept the draft:—Held, that the cargo when on board being liable to the shipowner for freight at 60*s.* instead of 40*s.*, there was such a loss as contemplated in the letter, and that the defendants were liable for not accepting the draft. *Yeames* v. *Linekay*, 3 L. T. 855; 9 W. R. 313.

Sale of Ship—Commission.]—See *Wilkinson* v. *Alston, and Cases* ante, col. 168.

Passage Broker.]—See *Morriss* v. *Howden*, supra, col. 873.

2. LIABILITIES.

In Forwarding.]—On a bailment to a shipping agent to forward goods, an action for not safely carrying and delivering is not maintainable. *Platzoff* v. *Le Bean*, 4 F. & F. 545.

Duty to Examine Goods.]—The defendant, who carried on business at B., and had acted there as agent for the plaintiffs, who were merchants at L., in the shipment of iron to Germany, wrote to the plaintiffs proposing to them to purchase a quantity of scrap iron, describing it as of a specified quality. The plaintiffs desired to have an offer of cost and freight to Rotterdam. The defendant stated the price, but his inability to make an offer as to freight, as he had then no ship available, but expressed his conviction that he should shortly be able to find a ship. Before the plaintiffs closed with the offer, the defendant proposed a ship for the conveyance of the iron. The plaintiffs accepted the purchase, but objected to the ship as too small to take the whole cargo, desiring the defendant to look out for another. Thereupon he, as agent for both parties, entered into and accepted the contract of sale, and transmitted it to the plaintiffs. He afterwards engaged a vessel to convey the iron, received the same, and caused it to be shipped, assuring the plaintiffs that the cargo was considered a first-rate description of scrap iron. The profit of the defendant was derived from commission from the seller and from the shipowner:—Held, that the defendant was not liable for damages on account of the iron shipped being inferior to the description in the contract, inasmuch as no obligation to see to the quality of the iron arose on the employment of the defendant as shipping agent, there being no evidence of usage, nor of an engagement by him, that he should do so. *Zwilchenbart* v. *Alexander*, 1 B. & S. 234; 30 L. J., Q. B. 254; 7 Jur. (N.S.) 1157; 4 L. T. 412; 9 W. R. 670—Ex. Ch.

Brokers acting as Owners.]—Shipbrokers, not being owners of a particular ship, though they were of others, having issued advertisements and tickets announcing the times of sailing, and describing the ships as their "line"; evidence was given that if they were owners the announcements would be in the same form:—Held, that it was for the jury to say whether the parties had held themselves out as owners, or had acted only as agents. *Simpson* v. *Young*, 2 F. & F. 426.

Warranty of Authority.]—In an action against a broker who had professed, on behalf of the owner of a ship, to charter her to the plaintiffs, not having authority so to do, and who had requested them to charter themselves some other ship, and they having chartered a much larger ship at a higher freight:—Held, that they could not recover from the broker more than the difference of freight on the tonnage of the former ship, if they could have procured one of similar size, or had neglected to give the broker notice of the substituted ship, so that he might use the surplus freight. *Mitchell* v. *Kahl*, 2 F. & F. 709.

Pilotage Dues.]—The fees to which pilots who are carried to sea against their will or beyond their distance are entitled, under 17 & 18 Vict. c. 104, s. 397, are not "pilotage dues" for which shipbrokers are liable under s. 363. *Morteo* v. *Julian*, 48 L. J., M. C. 126; 4 C. P. D. 216; 41 L. T. 71.

Cesser Clause—Effect of.]—See *Bryden* v. *Niebuhr*, col. 252; *Lockhart* v. *Falk, and Cases*, col. 446; *Hansen* v. *Harrold*, col. 402.

XXVI. ADMIRALTY LAW AND PRACTICE.

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1. HIGH COURT OF ADMIRALTY AND ADMIRALTY DIVISION.

a. Jurisdiction.

See also sub-heads, cols. 926, seq., 948—971, below.

i. *Subject-matter.*

Subject-matter — Bottomry.]—Whether the court has or has not jurisdiction, depends upon the subject-matter. *Meretone* v. *Gibbons*, 3 Term Rep. 267.

It has cognizance of an hypothecation-bond given in the course of a voyage, though executed on land and under seal. *Ib.*

—— **Freight—Prize.**]—So it has jurisdiction over the question of freight, claimed by a neutral master against the captor, who has taken the goods as a prize. *Smart* v. *Wolff*, 3 Term Rep. 323.

—— **Possession.**]—So it has, in a cause of possession, jurisdiction to take a ship from a wrong-doer and deliver her over to a person claiming as the right owner. *Blanshard, In re*, 2 B. & C. 244; 3 D. & R. 177; 26 R. R. 329.

—— **Torts at Sea.**]—The court has original jurisdiction over torts committed on the high seas, and therefore over a collision on the high seas where the vessel doing the damage was a keel, or a vessel without masts, usually propelled by a pole. *The Sarah*, Lush. 549. And see *Caule* v. *Cooke*, 2 Keb. 498, infra, col. 927.

But a suit to recover damages for a tort committed in a foreign country will not lie, if no such remedy is given by the English law. *The Halley*, 5 Moore, P. C. (N.S.) 262; 37 L. J., Adm. 33; L. R. 2 P. C. 193; 18 L. T. 879; 16 W. R. 998.

—— **Salvage—What is Subject-matter of.**]—See *Gas Float Whitton*, No. 2, infra, col. 595.

—— **Pilotage.**]—See *The Bee*, *Pierce* v. *Hopper*, ante, col. 143.

—— **Damage done by Negligence—Collision.**]—If through the negligence or misconduct of those on board a vessel another vessel receives or does damage, the owners of the wrongdoing vessel would be liable in the court of admiralty for the damage, even though there was no collision between the two vessels. *The Industrie*, 40 L. J., Adm. 26; L. R. 3 A. & E. 303; 24 L. T. 446; 19 W. R. 728; 1 Asp. M. C. 17.

The "Blue Bell," coming up the channel to Hartlepool on a dark morning, was compelled suddenly to port her helm by reason of the "Industry" being discovered across the fairway of the channel without any light exhibited; in consequence of this manœuvre the "Blue Bell" took the ground, and though her anchor was let go, dragged it and drove against the town wall of Hartlepool, suffering damage:—Held, that the court had jurisdiction to entertain the suit, and that a good ground of action was disclosed. *Ib.*

—— **Average.**]—The court of admiralty had no jurisdiction to enforce a claim for general average contribution, except, perhaps, where the proceeds of ship, cargo and freight were in court. *The Constancia*, 4 Not. of Cas. 677; 10 Jur. 845. *And see* XVII. AVERAGE, ante, col. 592.

—— **Damage by Tug to Tow.**]—A ship in tow of a tug was by the fault of the tug damaged by collision with a third ship. Held, that the admiralty court had jurisdiction in a suit by the owners of the ship in tow against the tug. *The Night Watch*, 32 L. J., Adm. 47; 8 Jur. (N.S.) 1161; 7 L. T. 396; 11 W. R. 189. See also *The Robert Row*, ante, col. 756.

ii. *Locality.*

Within Counties—Contract.]—The admiralty had no jurisdiction in cases of contracts and matters done within the bodies of counties, either by land or by water. *Ross* v. *Walker*, 2 Wils. 264.

—— **Collision.**]—Nor for running foul of and breaking a vessel in the river Thames, and in the body of the county of Kent. *Velthasen* v. *Ormsley*, 3 Term Rep. 315. See also *The Eliza Jane*, 3 Hag. Adm. 335, ante, col. 837; *The Public Opinion*, 2 Hag. Adm. 398, ante, col. 837.

Restriction—Onus.]—Where the ancient jurisdiction of the court is restricted by act of parliament, the burden is on those who wish to avail themselves of the restriction to give full proof of the circumstances (e.g. the distance of three miles from the shore) which give effect to the restriction, and in case of doubt the court will not consider its jurisdiction ousted. *The Argo*, Swabey, 112.

Cinque Ports.]—The court has a concurrent jurisdiction within the boundaries of the jurisdiction of the cinque ports; and this remains unaltered by 17 & 18 Vict. c. 104, s. 460. *Maria Luisa*, Swabey, 67; 2 Jur. (N.S.) 264; 4 W. R. 376.

Damage to Pier in Foreign Country.]—See *The M. Moxham*, infra, cols. 760, 890.

British Dominions Abroad—Arrest.]—Upon the arrest of a ship within the jurisdiction, the power of the court extends to acts done on the high seas, and to places within the British dominions abroad. *The Peerless*, 13 Moore, P. C. 484; Lush. 103; 30 L. J., Adm. 89; 3 L. T. 125.

Criminal Jurisdiction.]—The common law courts have concurrent jurisdiction with the admiralty in murders committed in creeks and havens, as Milford Haven. *Rex* v. *Bruce*, 2 Leach, C. C. 1093.

—— **Murder on Foreshore.**]—The admiral has not jurisdiction in case of one wounded at sea and dying on shore. *Peacock* v. *Lacy*, 2 Co. Rep. 93.

Indictment for wounding on board a ship lying in Penarth roads, three quarters of a mile from the shore:—Held, that the venue was rightly laid in Glamorganshire. *Reg.* v. *Cunningham*, Bell, C. C. 72.

—— **On High Seas and Foreign Rivers.**]—The admiralty jurisdiction of England extends over British ships, not only when they are sailing on the high seas, but also when they are in the rivers of a foreign territory, at a place below bridges, where the tide ebbs and flows, and where great ships go. *Reg.* v. *Anderson*, 38 L. J., M. C. 12; L. R. 1 C. C. 161; 19 L. T. 400; 17 W. R. 208; 11 Cox, C. C. 198. See also *Reg.* v. *Lopez*, 27 L. J., M. C. 48; 7 Cox, C. C. 431.

Coroner.]—In an estuary of the sea where both banks are visible, the admiralty and common-law coroner have a common jurisdiction. Inquisition on one hanged on board ship at Blackwall. *Rex* v. *Brown*, 1 Keb. 420.

Information against the captain of a man-of-war at Portsmouth for refusing to allow coroner to come on board to view a body. *Rex* v. *Saleguard*, Andrews, 231.

Accessories on Shore to Barratry on the Sea are not triable in Admiralty.]—Accessories before the fact on shore to the wilful destruction of a ship on the high seas are not triable by the admiralty jurisdiction under 11 Geo. 1, c. 29, s. 7; they not having done any act within admiralty jurisdiction. *Rex* v. *Easterby*, 2 Leach, C. C. 947 (*but see now* 43 Geo. 3, c. 113); East, P. C., Add. to Pref. xxvi.

Municipal Corporation Act, 5 & 6 Will. 4, c. 76—Transfer of Jurisdiction.]—See *Raft of Timber*, 2 W. Rob. 251, 255, n., infra, col. 949.

iii. *Maritime Lien.*

Judgment of Foreign Court.]—The plaintiffs brought an action and obtained judgment in the tribunal of commerce at Lisbon against the captain and owners of a British ship for damages for injury caused by a collision with the plaintiffs' ship. The Portuguese courts recognise no distinction between actions in personam and actions in rem. The defendants' ship having come into a British court the plaintiffs commenced an action in rem against the ship, claiming to enforce the judgment of the Portuguese court against it, and arrested the ship:—Held, that the action in the Portuguese court was a personal action, and that the writ in the present action and all proceedings under it must be set aside, the court having no jurisdiction to enforce a judgment in a personal action by proceedings in rem. *The City of Mecca*, 50 L. J., Adm. 53; 6 P. D. 106; 44 L. T. 750; 4 Asp. M. C. 412—C. A.

Collision—Damage Lien.]—All nations recognise and will enforce a damage lien when it has been declared by a foreign court; but it is essential that it should appear from the proceedings of the foreign court that the object of the suit was the sale of the ship, and not a personal remedy against the captain or owners. *The Bold Buccleugh* (7 Moore, P. C. 267) considered. *Ib.*

—— **Wrongdoing Ship—Wilful Act of Crew—Scotch Law.**]—The courts of Scotland have from the earliest times, in the exercise of admiralty jurisdiction, administered, not the municipal rules of Scotch law, but the law and custom of the sea generally prevailing among maritime states, including the law as to maritime lien, and now the admiralty law of Scotland is identical with that of England, *The Bold Buccleugh* (7 Moore, P. C. 267) approved. *The Dunlossit*, *Currie* v. *McKnight*, 66 L. J., P. C. 19; [1897] App. Cas. 97; 75 L. T. 457; 8 Asp. M. C. 193—H. L. (Sc.)

In order, however, to give rise to a maritime lien, the ship against which the lien is claimed must be the instrument of mischief, and some act of navigation of the ship itself must either mediately or immediately be the cause of the damage. *Ib.* *And see further* as to damage lien, ante, cols. 717, seq.

—— **Winding Up.**]—The proper mode of enforcing a maritime lien on a vessel belonging to a company which has been ordered to be wound up is by a proceeding in the winding-up, and not by a proceeding in rem in the admiralty court. *Australia Direct Steam Navigation Co., In re*, 44 L. J., Ch. 676; L. R. 20 Eq. 325.

The arrest of a vessel by the admiralty court is a sequestration within the meaning of the Companies Act, 1862, s. 163. *Ib.*

Suit in Ireland restrained by Injunction from Chancery in England—Payment out of Money in Court.]—A suit was instituted in admiralty in Ireland for the price of necessaries supplied in 1869 to "The Lion," then the property of the North-West of Ireland Deep Fishery Co. The defendants, liquidators of the company, lodged in court 208*l.* 7*s.* in lieu of bail and as security for the claim and costs, and to abide the judgment of the court. They then applied to the court of chancery in England and obtained an injunction against the plaintiffs from prosecuting the necessaries suit "until further order," and afterwards applied to the admiralty court in Ireland for payment out to them of the 208*l.* 7*s.* Application refused. *The Lion*, 19 W. R. 168; 1 Asp. M. C. 321.

Master's Disbursements and Wages—Lien.]—*See* V. MASTER, ante, cols. 97, seq.

Seamen's Wages—Lien.]—*See* VI. SEAMEN, ante, cols. 119, seq.

Necessaries—Lien.]—*See* 19. NECESSARIES, post, cols. 964, seq.

iv. *Between Foreigners.*

Court unwilling to adjudicate.]—The admiralty court was unwilling to exercise its jurisdiction in disputes between foreigners. *The Martin of Norfolk*, 4 C. Rob. 293.

Possession of Foreign Vessel.]—A plaintiff in an action in rem claimed to be the sole owner or mortgagee of a foreign vessel against which the suit was brought, and to be entitled to have possession of the same decreed to him. The defendants appeared under protest, and delivered a petition on protest alleging, as the fact was, that the plaintiff and defendants were foreigners resident abroad, and praying the court to pronounce against its jurisdiction. The consul of the foreign state where the ship was registered was desirous that the court should entertain the suit, and primâ facie evidence was given at the hearing that by a decree of a competent court of such foreign state possession of the vessel had been transferred to the plaintiff:—Held, that

the court would not decline to exercise jurisdiction in the suit. *The Evangelistria*, 46 L. J., Adm. 1; 35 L. T. 410; 25 W. R. 255.

A plaintiff, a foreigner, purchased of the defendant one fourth share of a ship. At the time of the purchase she was a British ship, but the defendant, a foreigner, subsequently procured a register for her as a foreign ship. In a suit by the plaintiff for possession, the court, upon the foreign consul refusing to interfere, declined to entertain the suit, which was dismissed, with costs, but not damages. *The Agincourt*, 47 L. J., Adm. 37; 2 P. D. 239.

Attachment.] — Attachment for contempt issued by the court of admiralty against a person resident in Scotland and executed with the consent of the court of admiralty jurisdiction in Scotland, the person attached being brought to England. Afterwards the court in Scotland revoked its consent:—Held, that a supersedeas of the attachment should issue. *The Mathesis*, 2 W. Rob. 286.

Wages.]—See *The Vrow Mina*, infra, col. 953.

Possession Suit.]—See *The See Reuter*, 1 Dods. 22, infra, col. 957.

v. *Mortgages.*

The admiralty court had formerly no jurisdiction in respect of ship mortgages. *The Portsea*, 3 Hag. Adm. 84. *The Exmouth*, 2 Hag. Adm. 83, n.

Under 3 & 4 Vict. c. 65, s. 3, the court has power to decide, not any question arising under a deed of mortgage, as for example the right of the mortgagee to freight, but only questions as to the mortgage of the ship herself. *The Fortitude*, 2 W. Rob. 217.

vi. *Assault and Ill-usage.*

Damages 100*l.* recovered in admiralty by a cook against the captain of an East India Company's ship for ill-usage. *The Agincourt*, 1 Hag. Adm. 271. S. P., *The Lowther Castle*, 1 Hag. Adm. 384.

Assault by master on seaman: 120*l.* damages awarded by admiralty court. *The Enchantress*, 1 Hag. Adm. 395.

Assault by master on mate. *The Centurion*, 1 Hag. Adm. 161.

The admiralty court has jurisdiction in case of assault by the master upon a passenger at sea. *The Ruchers*, 4 C. Rob. 73.

vii. *Personal Injury—Loss of Life.*

"Damage done by any Ship."]—A stranger whilst passing over the deck of a ship in dock in the Thames was injured by falling down a hatchway left unprotected by the negligence of those on board:—Held, that he could not sue the ship in rem; and that his injury was not damage done by a ship within the meaning of the Admiralty Court Act, 1861. *The Theta*, 63 L. J., Adm. 160; [1894] P. 280; 6 R. 712; 71 L. T. 25; 43 W. R. 160; 7 Asp. M. C. 480.

The admiralty court has jurisdiction to entertain an action in respect of injury to person done by a ship. *The Beta*, 38 L. J., Adm. 50; 20 L. T. 988; 17 W. R. 933—P. C. S. P., *The Sylph*, 37 L. J., Adm. 14; L. R. 2 A. & E. 24; 17 L. T. 519; *The Uhla*, 37 L. J., Adm. 16, n.; L. R. 2 A. & E. 29, n; 19 L. T. 89; *The Guldfaxe*, 38 L. J., Adm. 12; L. R. 2 A. & E. 325; 19 L. T. 748; 17 W. R. 578. *See also* cols. 725, 838, 990.

b. Actions for Wrongfully Suing in Admiralty.

Depredation at Sea.]—Contraband goods were condemned and sold in Scotland to the plaintiff. The defendant subsequently sued the plaintiff in admiralty for depredation at sea. Juror withdrawn, and plaintiff ordered to discontinue. *Radley* v. *Ecclesfield*, 1 Ventr. 173.

Taking Kelp in the Severn.]—Action for damages for suing in admiralty for taking kelp in the Severn. *Flemming* v. *Yates*, 3 Bulstr. 205.

Writ of error to reverse a judgment for damages for wrongfully suing in admiralty; all the errors assigned were overruled. N.B.—The suit in admiralty was for taking kelp in the Severn. *Ib.*

Charterparty Made Abroad.]—Action for suing in the admiralty upon a charterparty made abroad. *Cremer and Tookley's Case*, Godb. 385.

Contract for Sale of Ship and Cargo.]—Action against A. for wrongfully suing, together with B., in admiralty, upon a contract made at Melcombe in the county of Dorset for the sale of a ship and her cargo of fruit. Poyntell was attached to make answer as well to the king and queen as to the plaintiff. Billota. Cause agreed. *Poyntell* v. *Billota*, Benloe, pl. 111; Dyer, fo. 159, b.

Action for Wrongfully Suing in Admiralty.]—*Row* v. *Alport*, 1 Brownl. & G. 4.

Action for Arresting Ship as an Interloper—East India Company.]—A warrant to stay Sands' ship as an interloper was obtained from the king in council by Child on behalf of the East India Company, and she was afterwards arrested by admiralty process, upon which Sands appeared pro interesse suo. Sands thereupon sued Child for wrongfully suing him in admiralty and obtained judgment for 1,500*l.* damages and double costs under 2 Hen. 4, c. 11. *Child* v. *Sands*, Carth. 294; Lev. pt. 3, 351; Comb. 215; 4 Mod. 176; 1 Salk. 31.

He who procures the first process out of the admiralty doth prosecute and pursue therein within the meaning of the above statute. *Ib.*

c. Prohibitions.

Generally.]—The court of admiralty, although it possesses by statute in certain cases some of the powers of a superior court, is an inferior court, to which prohibition will lie. *James* v. *L. & S. W. Ry.*, 41 L. J., Ex. 186; L. R. 7 Ex. 287; 27 L. T. 382; 21 W. R. 25; 1 Asp. M. C. 226—Ex. Ch.

Courts of admiralty and courts of prize are all liable to the controlling authority which the courts of Westminster Hall have from time to time exercised for the purpose of preventing them from exceeding the jurisdiction given to them; the general ground of prohibition being an excess of jurisdiction when they assume to act

in matters not within their cognizance. *Grant* v. *Gould*, 2 H. Bl. 69, 100; 3 R. R. 342.

If a court of admiralty proceeds in a question where it has no jurisdiction, the court will grant a prohibition without imposing any terms. *Velthasen* v. *Ormsley*, 3 Term Rep. 315.

Prohibitions — Contract.] — Prohibition to admiralty court refused in suit upon a bond made in France, because the witness may be beyond sea, and cannot be examined in a common-law court. *Delaroche and Barney's Case*, Leon. pt. 3, 232. S. P., *The Admiral Court*, Br. & Gold., pt. 2, 16.

Suit in admiralty for possession of goods; contract by deed pleaded. Prohibition awarded. *Cambridge* (*Earl*) v. *Penrose*, cited, Dyer, fo. 159, b.

Suit in admiralty for wages earned at sea; contract made in Suffolk. Prohibition awarded. *Bene* v. *Wilcocks*, cited, Dyer, fo. 159, b.

Suit in admiralty upon obligation made at Beaumaris for appearance in admiralty. Prohibition awarded. *Shirt and Floyd's Case*, cited, Dyer, fo. 159, b.

Suit in admiralty upon obligation made at Lincoln, and suggested to have been made at sea. Prohibition awarded. *Brian* v. *Browne*, cited, Dyer, fo. 159, b.

Suit in admiralty for breach of contract made at sea or in foreign parts. Prohibition awarded. *Fane* v. *Pennoir*, 1 Keb. 479.

Prohibition to the admiralty where the issue is whether the contract is made on sea or land. *Susans* v. *Turner*, Noy, 67.

Semble, a contract made at sea is within admiralty jurisdiction. *Ib.*

Prohibition in suit upon charterparty. *Smithson* v. *Pain*, 1 Keb. 158.

Prohibition to the admiralty refused in a suit upon a charterparty made in Barbary and under seal, for non-delivery of sugars spoiled at sea. *Palmer* v. *Pope*, Hob. 79, 212. And see *Maldonado* v. *Slaney*, Benloe, 140.

Sale of ship alleged to be at sea. Prohibition awarded on suggestion that it was at land. *Green* v. *Colduck*, 1 Keb. 786.

Suit in admiralty on bill of lading for not delivering goods in as good condition, &c. Prohibition granted. *Caule* v. *Cooke and Sparke*, 2 Keb. 498.

Semble, if the libel had been in tort for damage to the goods, the admiralty would have had jurisdiction. *Ib.*

Semble, in a suit by cargo-owner against shipowner for non-delivery of goods through breach of duty as carrier, the admiralty has jurisdiction. *Ib.*

Suit in admiralty upon charterparty made on land, the contract being alleged to be at sea. Prohibition awarded. *Bushel* v. *Jay*, 1 Keb. 153. S. P., *Johnson* v. *Drake*, 1 Keb. 176.

The admiralty court had no jurisdiction upon a contract made on land abroad. *Ball* v. *Trelawny*, Cro. Car. 603.

If the libel alleges, contrary to the fact, that the contract was at sea, prohibition will go to the admiralty. *Godfrey's Case*, Latch, 11.

A contract made on shipboard at sea for victuals is triable in admiralty—per Doderidge, J. *Ib.*

Suit in admiralty upon a charterparty and ship arrested. Semble, the master cannot make the ship liable in admiralty for breach. *Watson* v. *Warner*, Sid., pt. 2, 161.

The admiralty had no jurisdiction in matters done beyond sea. *Thomlinson's Case*, 12 Co. Rep. 104.

The admiralty cannot hold plea for matters done on land, as of a suit for money lent to the master in Spain. *Bridgeman's Case*, Hob. 11.

—— **Collision.**]—Prohibition granted in case of damage by a foreign ship in collision in the Thames. *Velthasen* v. *Ormsley*, 3 Term Rep. 315.

Prohibition refused where the collision was in the Thames, on the ground that there was no remedy at common law. *Wharton* v. *Pits*, 1 Salk. 548 (not followed in *Velthasen* v. *Ormsley*, supra).

Prohibition granted in a collision suit, but only upon the undertaking of the applicants to give the names of the owners of the ship sued, so that they could be sued at common law. *Martin* v. *Green*, 1 Keb. 730.

—— **After Sentence.**]—Prohibition may issue to the admiralty after sentence. *Rex* v. *Broom*, or *Brome*, Comb. 444; 12 Mod. 135.

Prohibition to the admiralty refused after sentence on appeal, there being concurrent jurisdiction. *Chambers' Case*, 1 Keb. 10, 66.

Suit in admiralty for breach of charterparty, and sentence given. Prohibition refused. *Smithson* v. *Pain*, 1 Keb. 158.

Prohibition refused, after sentence and execution. *Walker* v. *Adams*, Siderf. 331; 2 Keb. 200, 722.

Prohibition after sentence refused, where the contract was alleged infra jurisdictionem admirallitatis. *Barber* v. *Wharton*, 2 Ld. Raym. 1452; 2 Barnard. 2.

Prohibition not granted upon a surmise after sentence passed. *Susans* v. *Turner*, Noy, 67.

An admiralty sentence, unless upon its face it appears to have been passed without jurisdiction, is presumed to have been made with jurisdiction. *Ladbroke* v. *Crickett*, 2 Term Rep. 649; 1 R. R. 571.

The court will not prohibit the admiralty after sentence upon mere surmise that the matter was infra corpus comitatus. *Case of the Admiralty*, 12 Co. Rep. 79.

Prohibition granted to the admiralty after sentence. *Keech* v. *Potts*, 1 Keb. 3.

—— **Enforcing and Giving Bail.**]—Prohibition refused in a suit to enforce bail given in admiralty. *Parre* or *Par* v. *Evans*, Sir Th. Raym. 78; 1 Keb. 489. Cf. *Barough* v. *Catlin*, 1 Keb. 88.

A stipulation taken in a vice-admiralty court in the colonies to abide the decision of the court of appeal in prize cases is not a recognizance, being taken in a court not of record; but it is enforceable by the court of appeal. Prohibition refused. *Brymer* v. *Atkins*, 1 H. Bl. 165.

As to the nature of stipulations or bail in admiralty; whether prohibition lies in a suit upon the bond. *Greenway and Baker's Case*, Godb. 193, 260.

Security for safe return enforceable in admiralty. See *Grave* or *Degrave* v. *Hedges*, infra, col. 929.

Prohibition to admiralty applied for in suit upon bond given by part owners taking ship to sea against wish of co-owners; suit stayed by consent. *Justice* v. *Brown*, Hardr. 473.

Whether a stipulation taken in the admiralty by a part owner for the return of the ship can be sued on in admiralty doubted. *Ib.*

—— **Necessaries.**]—Prohibition granted in suit in admiralty for supply of an anchor to a foreign ship at Radcliffe. *Justin* v. *Ballam*, 2 Ld. Raym. 805; 1 Salk. 34; 1 Keb. 511; 3 Mod. 244; 6 Mod. 79; 1 Sid. 453; 1 Lev. 267; 1 Vent. 32; Cro. Car. 296.

Action in admiralty in mayor's court of Hull by shipwright for repairs. Prohibition granted. *Ashton's Case*, Lit. Rep. 166.

Semble, a contract for the supply of victuals made on shipboard is triable in admiralty. *Godfrey's Case*, Latch, 11.

Prohibition granted. Libel against ship and master, and late and present owner (who had purchased her after necessaries supplied) for sails and other necessaries supplied in an English port. *Hoare* v. *Clement*, 2 Shower (3rd ed.) 559.

Prohibition to the admiralty in a suit for necessaries supplied within the body of a county. *Cradock's Case*, Brownl. & G. pt. 2, 37.

Libel against the ship in admiralty for provisions and mariners' wages. Semble, prohibition will be awarded. *Smith* v. *Tilly*, 1 Keb. 708.

Prohibition to the admiralty in a suit for supplies furnished on the Thames. *Leigh* v. *Burley*, Owen, 122.

—— **Bottomry.**]—Prohibition refused in a bottomry suit, except so far as necessary to make the master a party, in order to condemn the ship. *Johnson* v. *Shepney*, or *Shippen*, or *Shepway*, Holt, 48; 1 Salk. 35; Ld. Raym. 982; Mod. 79.

Prohibition to admiralty refused in a bottomry suit, the money having been lent at sea. *Scareborrow* v. *Lyrius*, Noy, 95.

Prohibition to admiralty refused in suit against master who had hypothecated the ship abroad. *Corset* v. *Huseley*, Holt, 48; Comb. 138.

See also *Benzen* v. *Jeffries*, 1 Ld. Raym. 152, and X. BOTTOMRY, supra, col. 225.

—— **Possession and Restraint.**]—Prohibition granted in a suit for possession of a ship adjudged prize and bought by the plaintiff in Scotland. *Thornton* v. *Smith*, 2 Keb. 158.

Prohibition does not lie to restrain the admiralty from proceeding in a cause of possession for the restoration of a vessel to a person claiming as true owner against a wrongdoer. *Blanshard, In re*, 3 D. & R. 177; 2 B. & C. 244; 26 R. R. 329. See *The Peggy*, 4 C. Rob. 304.

Prohibition refused in a suit in admiralty by a minority in value of part owners to get security for return of ship. *Ousten* v. *Hebden*, Wils. pt. 1, 101.

But granted as to an order by the admiralty for sale of the ship. *Ib.*

Suit in admiralty upon a bond given by majority of part owners to dissenting part owners for safe return of the ship, the ship having been lost. Applicant ordered to declare in prohibition. *Grave* or *Degrave* v. *Hedges*, Holt, 470.

Prohibitions formerly issued to the admiralty in suits of restraint, but subsequently the admiralty was allowed to proceed in such cases. *Anon.*, 1 Barnard. 410. S. P., *Knight* v. *Berry*, Holt, 647; Carth. 26; Comb. 109.

Prohibition refused; suit in admiralty by dissenting part owner, to compel his co-owner to give security for return of ship. *Dimmock* v. *Chandler*, Strange, 890; Fitzg. 197. S. P., *Anon.*, 2 Chitty, 359.

—— **Spoil and Piracy.**]—Prohibition to the admiralty in a suit by Frenchmen, whose goods had been taken at sea by the servants of the defendant, an Englishman, to whom letters of marque had been granted to take the ships of Spaniards. *Waltham* v. *Mulgar*, Moore, 776.

The question whether goods have been captured by pirates or in war is not triable in admiralty. Aliter, where the claim is by the owner of goods taken at sea by pirates. *Ednian* v. *Smith*, 3 Keb. 744.

Semble, prohibition would issue in case of a claim by the French owner of a ship captured by a Dunkirker and driven into Weymouth before being taken infra præsidia of the king of Spain, the goods having been sold at Weymouth by the captor. *Anon.*, March, 110.

Trespass for taking, as alleged, at sea money and cloths; prohibition nisi awarded. *Tridahan* v. *Top*, 1 Keb. 202; cf. *Rex* v. *Wainwright*, 1 Keb. 607, 624.

A fisherman was indicted for piracy; ignoramus found; he was nevertheless detained in prison upon suspicion of piracy; habeas corpus applied for and refused, the suspicion being well founded. *Rex* v. *Marsh*, Bulstr., pp. 3, 27.

A pirate imprisoned by the Admiralty Court was assisted to escape by S., who being also imprisoned, applied for a habeas corpus:—Held, that the offence was of the same character as the principal offence, piracy, over which the admiralty had jurisdiction. Prisoner remanded. *Scadding's Case*, Noy, 131.

Suit in admiralty, before spoil commissioners, by Spanish owner of goods taken at sea by Sir John Gilbert:—Prohibition awarded. *Gilbert's, Sir John, Case*, cited Dyer, fo. 159 (b).

Capture by pirates does not change the property. *Greenway and Baker's* (or *Barker's*) *Case*, Godb. 193, 260.

Prohibition refused where the alleged taking of the goods by pirates was at a foreign port, of which the court could not take notice, whether it were at sea or on land.

Prohibition refused in a case of piracy, because no security at common law. *Pellagii's Case*, cited in *Rex* v. *Marsh*, Bulstr. pt. 3, 27, 29.

The admiral, by his patent, takes bona piratarum, that is, the pirate's own goods, not the goods of others in the pirate's possession; and the pirate must be attainted of piracy before the admiral can take them. The admiral cannot sue for them in his own court:—Prohibition granted. *Prinston* v. *The Court of Admiralty*, Bulstr., pt. 3, 147.

Prohibition to the admiralty refused in a case that was incidental to piracy. *Spark* v. *Stafford*, Hardr. 183.

Prohibition refused in a piracy case, after sentence. *Villiers, In re*, cited Hob. 79.

Salt was taken at sea by pirates, brought to land, and sold. The owner sued the purchaser in admiralty:—Prohibition granted, and afterwards consultation awarded. The original cause having arisen at sea, the sale on land was incidental thereto. *Anon.*, Cro. Eliz. 685.

Prohibition to the admiralty in a suit for buying on land goods taken by pirates at sea:—Refused, as to the taking of the goods by the pirates. *Don Diego Serviento de Acuna* v. *Joliffe and Tucker*, Hob. 78, 113, 212.

Semble, the admiralty had jurisdiction in a

suit for possession of ship that had been taken by pirates, carried to Tunis, and there sold; the sale on land being incidental to the taking by pirates. *Anon.*, 1 Ventr. 308.

But the taking must be alleged in the libel to be super altum mare, or prohibition will issue. *Ib.*

Brome, sent out by the African Company, who had letters of marque to take prizes, took a French ship, and had her condemned as prize. Brome was sued in admiralty to make satisfaction to the king for her value, and sentence was given against him. He applied for prohibition; prohibition refused; the taking at sea gives the admiralty jurisdiction, and the subsequent conversion is to be coupled with it. *Rex* v. *Brome* or *Broom*, Comb. 444; Carth. 398.

Subjects of the Chilian government who had risen in rebellion, held to be pirates within 13 & 14 Vict. c. 26. Piracy discussed. *The Magellan Pirates*, 1 Spinks, 81.

See also 9. WRECK, infra, col. 948; 10. DROITS, infra, col. 948; 21. SLAVE TRADE—PIRACY—BOUNTIES, infra, col. 971.

—— **Prize.**]—The question of prize or no prize is triable in admiralty, and not at common law; prohibition refused. *Brown* v. *Franklyn*, Carth. 474; *Thermoulin* v. *Sands*, Carth. 423; 1 Ld. Raym. 271; cf. *Mitchell* v. *Rodney*, 2 Bro. P. C. 423.

Prohibition to the admiralty refused in case of prize. *Thompson* v. *Smith*, Sid. pt. 1, 320. S. P., *Turner* v. *Smith*, Sid. pt. 1, 367; and see *Ednian* v. *Smith*, supra, col. 930.

Prohibition to the admiralty for not admitting a plea as to an agreement for sharing a prize taken by two ships in consortship. *Somers and Buckley's Case*, 2 Leon. pt. 2, 182.

Prohibition will usually be granted in a suit relating to a ship captured and not brought infra præsidia; sale within body of a county. *Anon.*, March, 110; (not granted here because of misconduct of vendee).

Goods claimed in Admiralty Court by Spanish ambassador as having been bought by Englishmen of a pirate; defence that the alleged pirate was ambassador of the king of Morocco sent to the Netherlands; that there was war between Spain and Morocco, and that the goods were taken jure belli; sentence in the admiralty for the Spanish ambassador; prohibition applied for by the English purchaser of the goods refused. *Pellagli's Case*, cited *Rex* v. *Marsh*, Bulstr., pt. 3, 27.

A suit for an account of prizes taken by a private man-of-war between owner and master lies in the admiralty. *Berkeley and Morrice's Case*, Hardr. 502; 2 Keb. 441.

Suit in admiralty for money due for prize goods. Denial of Act of Oblivion pleaded in admiralty. Question whether buyers who had paid for the goods or defaulting receiver liable. Consultation awarded. *Rex* v. *Wainwright*, 1 Keb. 607.

Illegal seizure of British ship by British commissioned ship. See *Faith* v. *Pearson*, ante, col. 83; *Dockwray* v. *Dickenson*, ante, col. 27.

—— **Wages of Seamen—Special Contract.**]—Mariners may sue for their wages in admiralty, except where the contract is special and unusual, or by deed. *Opy* v. *Child*, 1 Salk. 31.

Where the seaman agreed with the master on a voyage from London to the Danube for 30*l.*:—Held, that the contract was special, and the Admiralty Court had no jurisdiction, *The Debrecsia*, 3 W. Rob. 33.

A prohibition would go to the court, in a suit there for seamen's wages, if the agreement was special or under seal. *Howe* v. *Napier*, 4 Burr. 1944. S. P., *Bens* v. *Parre*, 2 Ld. Raym. 1206.

Prohibition granted in wages suit in the admiralty, because a plea that the contract was special was not admitted. *Blackwell* v. *Clerk*, 1 Keb. 684.

Mariners formerly could not sue in admiralty where the contract was special. *The Sydney Cove*, 2 Dods. 11. S. P., *The Mona*, 1 W. Rob. 137.

Prohibition granted to the admiralty in a wages suit, where the contract was by deed with unusual covenants. *Day* v. *Searl*, Cunn. 53; Strange, 968; Ca. t. Hardw. 53.

Prohibition to admiralty in wages suit refused after sentence, though contract by deed, that objection not being taken in admiralty. *Bennet* v. *Buggin*, 4 Burr. 2033.

Seaman cannot sue for wages at common law and admiralty at the same time; in such case prohibition would formerly have gone to the admiralty. *Edmonton* v. *Franklyn*, Fortesc. 231.

—— **Ordinary Contract—Prohibition Refused.**]—Mariners may sue for wages in the admiralty, unless there is a special contract, even where the contract is in writing:—Prohibition refused. *The Mariners' Case*, 8 Mod. 379. S. P., *Rex* v. *Pike*, 2 Keb. 779. And see *Bens* v. *Parre*, 2 Ld. Raym. 1206.

Prohibition refused after judgment in admiralty in a case of mariners' wages by favour of the court and as a privilege to mariners. *Jones' Case*, Winch, 8; *Ewer* v. *Vaughan*, Winch, 8.

Where the seaman's wages were agreed to be paid as to part by a share of a whaling adventure, the Admiralty Court had no jurisdiction; but as to the part of the wages payable under the ordinary seamen's contract there was jurisdiction. *The Riby Grove*, 2 W. Rob. 52.

Wages earned in Thames.]—Seamen may sue in admiralty for wages earned on the Thames. It is a privilege to seamen to prevent their being put to the expense of separate actions. *Mills* v. *Gregory*, Sayer, 127.

Reason for Jurisdiction—Lien on Ship.]—A mate or a mariner may sue in admiralty for his wages, although he sues alone, and the contract was made on land, because the ship is liable in admiralty. *Hook* v. *Moreton*, 1 Ld. Raym. 397.

Seaman Discharged before Voyage Begun.]—A seaman discharged after signing articles and before commencement of voyage may sue in admiralty. *The City of London*, 1 W. Rob. 88.

Prohibitions Refused.]—*Coke* v. *Cretchet*, Lev. pt. 3, 360; *Middleton* v. *Scolly*, cited, *ibid.*; *Anon.* 1 Ventris, 343. *And see* per Eyres, J., Comb. 255.

—— Though voyage not begun. *Wells* v. *Osman* or *Osmond*, 2 Ld. Raym. 1044; 6 Mod. 238.

—— Where port of arrival not port of delivery. *Brown* v. *Benn*, 2 Ld. Raym. 1247.

Prohibition refused; mariners had by deed contracted to forfeit wages in certain events;

sentence in admiralty that the deed was obtained by fraud. *Buck* v. *Atwood*, Strange, 761.

Prohibition refused; libel by mariner for wages earned in a ship seized for smuggling, and afterwards released on payment of fine. *Minnett* v. *Robinson*, Bunb. 121.

Semble. If a ship is condemned for smuggling, the mariners' lien for wages is gone, and prohibition will issue. *Ib.*

Prohibition refused; suit by one mariner hired by the freighters and not by the owners. Semble, the ship liable, though not the shipowner. *Smith* v. *Crosby*, Fort. 230.

Arrest of Freight—Wages.]—Suit against freighters to arrest freight in their hands for master's and mariners' wages. Prohibitions granted, both as to the master, and, on the freighters' application, as to the seaman. *Meclanham* v. *Foliam* or *Neclanham* v. *Foldamb*, Gibb. 9; 6 Vin. Abr. 539.

—— **Wages of Master and Others—Surgeon.**]—A surgeon may sue in admiralty for wages. *Mills* v. *Long*, Sayer, 136; *The Wharton*, 1 Hag. Adm., 141 n.; but not for medicines supplied to crew. *The Lord Hobart*, 2 Dods. 100.

—— **Carpenter.**]—A carpenter may sue for wages in admiralty. Prohibition refused. *Wheeler* v. *Thompson*, 2 Str. 707; *The Lord Hobart*, 2 Dods. 104. And see *Creed* v. *Mallet*, Fort. 231.

—— **A Woman.**]—A woman serving on board ship entitled to wages in admiralty. *The Jane and Matilda*, 1 Hag. Adm. 187.

—— **Mate.**]—Prohibition refused in suit by mate in admiralty for wages. *Hook* v. *Moreton*, 1 Ld. Raym. 397. And see *The Favourite*, 2 W. Rob. 232; *Read* v. *Chapman*, Str. 937; Keb. 394.

—— **Mate may Sue for Wages in Admiralty.**]—The mate may sue in admiralty for wages on a contract made on land. *Baily* v. *Grant*, 1 Ld. Raym. 632; Salk. 33; Holt, 48; 12 Mod. 440.

—— **Boatswain.**]—Prohibition refused in suit by boatswain for wages. *Ragg* v. *King*, infra, S. P., *Alleson* v. *Marsh*, 2 Ventr. 181.

—— **Master.**]—The master formerly could not sue for his wages in admiralty. Prohibition granted. *Ragg* v. *King*, 2 Str. 858; 1 Com. 740; 2 Barnard. 297. S. P., *Barber* v. *Wharton*, supra, col. 928; *Clay* v. *Snelgrove*, 12 Mod. 405; Holt, 595; Carth. 518; *The Favourite*, 2 W. Rob. 232; *Read* v. *Chapman*, Str. 937; 3 Barnard. 160; Kel. 324.

Cutting Wood in Brazil.]—Prohibition to the admiralty in a suit for wrongfully cutting log wood in Brazil, belonging to the King of Spain. *Don Degue Servient Deacuno* (*Spanish Ambassador*) v. *Buntish and Points*, 2 Bulstr. 322.

Claim by Spanish King to Forfeited Goods by Spanish Subject.]—Property brought to England by a Spanish subject whose goods had been forfeited to the King of Spain and bought by Watts. The Spanish Ambassador sues Watts in admiralty. Prohibition granted. *Don Alonso* v. *Cornero*, Hob. 79, 212. S. P., *Don Pedro de Sunega*, cited, *In re*, *ib.*

Detinue of Ship at Limehouse.]—Prohibition to the admiralty in a suit for detinue of a ship in the Thames at Limehouse. *Violet* v. *Blague*, Cro. Jac. 514.

Office of Measuring Coals.]—Prohibition to the admiralty in a suit by the judge against an officer of the Lord Mayor of London for measuring coals in the Thames, the judge being grantee of the office from the admiral. *Cæsar's Case*, *Sir Julius*, Leon. pt. 1, 106.

Obstructing Wharf in Thames.]—Prohibition granted in a suit in the admiralty for laying a ship alongside a wharf in the Thames, so as to prevent other ships approaching it. Consultation awarded, but afterwards superseded and prohibition allowed. *Goodwin* v. *Tomkins*, Noy, 148.

Validity of Letters Patent to Vice-admiral.]—Prohibition to the admiralty in a matter as to the validity of letters patent granted to vice-admirals by a deceased admiral. *Bacon's Case*, *Sir Thomas*, Leon. pt. 2, 103; pt. 3, 192.

Suit by Master for Disbursements.]—A master libelled the charterers in admiralty for disbursements. Prohibition granted. *Woodward* v. *Bonitham*, Sir Th. Raym, 3.

Ransom.]—Prohibition in a case of ransom, before appearance, the cargo having been arrested by the admiralty at the instance of the hostage, refused. *Trantor* v. *Watson*, 6 Mod. 13; 2 Ld. Raym. 931.

Suit in the admiralty by a master for money borrowed by him to ransom himself and his ship from pirates. Prohibition refused. *Spark* v. *Stafford*, Hardr. 185.

The ship could be sued in admiralty for non-payment of his ransom, because the contract was made at sea—Per Holt. *Wilson* v. *Bird*, 1 Ld. Raym. 22.

Executing Sentence of Foreign Admiralty.]—Prohibition to the admiralty for executing an interlocutory sentence as to carriage of goods alleged to have been passed by an admiralty court of Spain. *Jurado* v. *Gregory*, Sid. pt. 1, 418; 2 Keb. 511.

Allegation of "Infra Fluxum et Refluxum Maris."]—Libel in admiralty alleging the cause infra fluxum et refluxum maris. Prohibition awarded. *Ball* v. *Blackmore*, 1 Keb. 14.

Goods Awarded by Admiral.] — Suit in admiralty for possession of goods in hands of I. at Dartmouth, which had been allotted to him by award of the admiral on the high sea, acting as arbitrator. *Summes* v. *Martham*, cited, Dyer, fo. 159, b.

Wreck—Royal Fish.]—Suit in admiralty for wreck of the sea (royal fish) cast up on shore. Prohibition awarded. *Browne's Case*, cited Dyer, fo. 159 b.

Beaconage.]—Suit in admiralty for beaconage in respect of a beacon at Falmouth, the title being in question; prohibition awarded; aliter

where the suit is only for the profits. *Crosse* v. *Bigs* (or *Digges*), 1 Keb. 575; 1 Sid. 158.

Sentence of Foreign Court—Average.]—Suit in admiralty to execute sentence of a foreign court for average on a ship run aground; prohibition refused on the ground that averages should be by the foreign usage. *Gold* v. *Goodwin*, 2 Keb. 678.

Breach of Navigation Act—Forfeiture.]—Semble, prohibition will not be granted to the admiralty in a suit for forfeiture of the ship for trading contrary to the Navigation Acts. *Pidgeon* v. *Trent*, 3 Keb. 640, 647, 651.

Nuisance in the Exe River.]—Presentment of nuisance in the river Exe at an inquest held by the vice-admiral of Devon, by lime boats grounding at low tide.

Semble, prohibition will not be awarded, the jurisdiction being in admiralty as well as at common law. *Sheers* v. *Martyn*, 1 Keb. 789.

Collusive Suit.]—After an action for freight had been commenced by a shipowner against a charterer, a monition issued from the Court of Admiralty, requiring him to bring the freight into that court, in a suit there by the holder of a bottomry bond on the ship. The charterer pleaded to that suit, paid in the money, and the cause stood for hearing. The court refused a prohibition; though it was suggested that the suit in the Admiralty Court was brought by collision between the holder of the bottomry bond and the charterer, to deprive the plaintiff in the action of his freight. *Place, In re*, 8 Ex. 704; 22 L. J., Ex. 241; 17 Jur. 328.

Suit for Ballastage.]—Prohibition to the admiralty in a suit by the Trinity House against a Dutch ship for ballast. *Trinity House (Corporation)* v. *Boreman*, Brownl. & G. 2, pt. 2, 13; as to the validity of the grant to the Trinity House of the ballasting monopoly, see 1 Keb. 137, 250, 270, 300, 331.

Derelict.]—Derelict ship found three miles from land; claim in admiralty by the admiral and first decree given; prohibition refused; *York (Duke of)* or *Linstred* v. *Le Seigneur Admiral*, 1 Keb. 657; 1 Sid. pt. 1, 178.

Property in Ship.]—Question of property in ship cannot be tried in admiralty; prohibition granted. *Thomson* v. *Smith*, 2 Keb. 158; 2 Ld. Raym. 805.

Admiralty of Cinque Ports.]—Prohibition to the admiralty of the Cinque Ports in a suit for debt, the goods of the debtor being arrested afloat. *Ding* v. *Merryweather*, 2 Keb. 305, 312.

Refused after Defendant had Pleaded.]—Prohibition to the admiralty refused where the defendant had pleaded, and it did not appear upon the libel that the jurisdiction was exceeded. *Jennings* v. *Audley*, 2 Brownl. & G. 30.

Citation for Contempt.]—Prohibition to the admiralty granted for citing one to appear to answer for contempt in suing elsewhere. *Hills' Case*, Style, 207.

Trover of Goods at Sea.]—Suit in admiralty for trover and conversion of ship goods alleged to be at sea; prohibition awarded. *Lepool and Tryan's Case*, Style, 470.

Criminal Case.]—Prohibition refused in a criminal case alleged to be not triable in admiralty. Semble, certiorari would issue in such case. *Dethick's Case*, Style, 233

Refusal to Admit Plea.]—Refused by the admiralty to admit a plea of the act of oblivion; prohibition refused; contra if the admiralty undertakes to expound an Act of Parliament. *Anon.*, 1 Keb. 393.

Refusal of Admiralty Court to entertain a plea as to the ownership of sails detained by one to whom they had been pawned. Prohibition granted. *Edmundson* v. *Walker*, Carth. 166.

Incidental Matter.]—Where the principal suit is within the admiralty jurisdiction prohibition refused in incidental suit. *Turner* v. *Neale*, Lev. pt. 1, 243; *Rex* v. *Brome* or *Broom*, Carth. 398; Cumb. 244, supra, col. 931.

Proceedings for Contempt.]—Prohibition refused in proceedings by the admiralty against one for contempt in resisting the process of the court. *Sparks* v. *Martyn*, 1 Ventr. 1.

Prohibition granted in the same case upon a suggestion that the court was proceeding in the principal suit without jurisdiction. *Ib.*

Ship of Foreign Sovereign—Collision—Immunity from Arrest—Admiralty Jurisdiction.]—See *The Charkieh*, supra, col. 724.

Habeas Corpus.]—Collusive proceeding to defeat process of admiralty; habeas corpus refused. *Keach's Case*, Holt, 335.

Habeas Corpus—Suit in Admiralty for Embezzlement.]—One libelled in admiralty in a "causa damni sive spolii civili maritimæ" (sic) for embezzlement was afterwards sued in the King's Bench for debt. Habeas corpus awarded, and defendant taken from custody of the admiralty to the Marshalsea. *Rotherford*, or *Rutherford* v. *Scot*, or *Scott*, Kel. pt. 2, 214; 2 Str. 936.

Pirate Goods.]—The admiral in his patent has granted to him bona piratarum. Resolved by all the judges that the goods of pirates pass by this grant; and not piratical goods. The king shall have piratical goods, if the owner be not known. In this case the admiral ought to sue at common law and not in admiralty. *Anon.*, Jenk. 325.

Prohibition before Libel.]—Prohibition granted before libel exhibited, the admiralty having issued a warrant to seize a ship. *Powell* v. *Robinson*, Bunbury, 9; prohibition refused in a similar case. *Roberts* v. *Cadd*, Bunb. 247.

Pilotage.]—See *Pierce* v. *Hopper*, ante, col. 144.

d. Chancery Jurisdiction in Admiralty Matters.

Control of Court of Chancery over Admiralty Courts. *Blad's Case*, *Blad* v. *Bamfield*, 3 Swanst. 603, 604; *Haly* v. *Goodson*, 2 Mer. 77.

Letters of marque and reprisal may be vacated in Chancery. *Rex* v. *Carew*, 3 Swanst. 669.

No relief in equity against a security given for performing the sentence of Court of Admiralty, although reversed on appeal, the court to which appeal had been made not having jurisdiction. *Denew* v. *Stock*, 3 Swanst. 662. See *Love* v. *Baker*, 1 Ch. Ca. 67; Nels. 103.

Where jurisdiction was given in respect of a particular kind of proceeding, by an act passed before the passing of the Judicature Acts, to the Court of Chancery alone, but, by a later act, still before the passing of the Judicature Acts, the jurisdiction was extended to the Court of Admiralty, the Chancery Division now has jurisdiction under the Judicature Acts. *Santon, In re*, 26 W. R. 810.

The Court of Chancery had power to issue a special injunction to the Court of Admiralty. *Blad* v. *Bamfield*, supra; *Macnamara* v. *Macqueen*, Dick. 223.

Part Owners refusing to Navigate—Jurisdiction in Chancery.]—See *Goodhart* v. *Lowe* and Cases supra, col. 53.

2. County Courts.

Jurisdiction—Amount of Claim.]—A county court, to which admiralty jurisdiction is given by 31 & 32 Vict. c. 71, has admiralty jurisdiction over a claim, not exceeding 300*l.*, for damages for negligence, causing a collision between a barge and a ship in a river, within the body of a county forming part of its district. *Purkis* v. *Flower*, 43 L. J., Q. B. 33; L. R. 9 Q. B. 114; 30 L. T. 40; 22 W. R. 239; 2 Asp. M. C. 226.

Therefore, when an action was brought in respect of such a claim for a collision in the Thames, in which, after judgment in default of a plea, the damages were assessed, on a writ of inquiry, at 15*l.*, and no certificate was given that the cause was a proper one to be brought in the superior court, the plaintiff was held not entitled to the costs of the action under 31 & 32 Vict. c. 71, s. 9. *Ib.* See also *Flower* v. *Bradley*, post, col. 942.

In pursuance of s. 9 of 31 & 32 Vict. c. 71, application may be made to the Court of Admiralty for an order to institute in that court proceedings that might have been taken without agreement in a county court, and the Court of Admiralty will, if it sees fit, make such order. *The Bengal*, L. R. 3 A. & E. 14; 21 L. T. 727.

An action of damage was instituted in the Admiralty Court in a sum exceeding 300*l.* It was admitted that the defendant's ship was to blame, and that the damage sustained by the plaintiff's ship exceeded 300*l.* The defendant proved by affidavit that he was entitled to have his liability limited to a sum less than 300*l.*, and a tender of less than 300*l.* was accepted by the plaintiff:—Held, that the suit was not a proceeding which the plaintiff might, without agreement, have taken in a county court; and that the above section did not disentitle the plaintiff to costs. *The Young James*, 39 L. J., Adm. 1; L. R. 3 A. & E. 1; 21 L. T. 397; 18 W. R. 52.

When a suit has been commenced in the Court of Admiralty for an amount within the county court jurisdiction, the plaintiff cannot obtain an order for leave to proceed so as to relieve him from liability for costs. *The Loretta*, 40 L. J., Adm. 24 L. T. 447; 1 Asp. M. C. 19.

—— **Collision.**]—The County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), does not deprive county courts not having admiralty jurisdiction of their original jurisdiction to try actions to recover damages for injuries caused by collision between vessels where the amount claimed does not exceed 50*l.* *Scorell* v. *Beran*, 56 L. J., Q. B. 604; 19 Q. B. D. 428; 36 W. R. 301.

—— **Freight.**]—The statutes 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, do not deprive county courts not having admiralty jurisdiction, of their jurisdiction to try actions to recover freight under charterparties, where the amount claimed is less than 50*l.* *Reg.* v. *Southend County Court (Judge)*, 53 L. J., Q. B. 423; 13 Q. B. D. 142; 32 W. R. 754.

Breach of Charterparty.]—The second section of the County Courts Admiralty Jurisdiction Amendment Act, 1869, gives the county courts jurisdiction in cases of claims arising out of charterparties or other agreements for the use or hire of ships, although the Admiralty Division may have no original jurisdiction in such cases. *Argos, Cargo ex*, infra, followed. *Simpson* v. *Blues* and *Gunnestad* v. *Price*, infra, disapproved. *The Alina*, 49 L. J., Adm. 40; 5 Ex. D. 227; 42 L. T. 517; 29 W. R. 94; 4 Asp. M. C. 256—C. A.

The County Court Acts (31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51) do not give a county court, appointed to have admiralty jurisdiction under those statutes, a jurisdiction which the Court of Admiralty never possessed; therefore, such county court has no jurisdiction to entertain a suit for damages for breach of a charterparty, nor a suit for payment of freight and demurrage. *The Madge Wildfire, Simpson* v. *Blues*, 41 L. J., C. P. 121; L. R. 7 C. P. 290; 26 L. T. 697; 20 W. R. 680.

——**Demurrage.**]—By 32 & 33 Vict. c. 51, s. 2, it is enacted, "that any county court appointed, or to be appointed, to have admiralty jurisdiction, shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:—1. As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of any goods in any ship . . . provided the amount claimed does not exceed 300*l.*:"—Held, that this section gives the county court jurisdiction in cases of claims arising out of charterparties or other agreements for the use or hire of ships, although the Court of Admiralty may have no original jurisdiction in such cases. *Argos, Cargo ex, Gaudet* v. *Brown*, 42 L. J., Adm. 1; L. R. 5 P. C. 134; 28 L. T. 77; 21 W. R. 420.

A claim for demurrage is not within the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2 which only gives jurisdiction to county courts to try and determine causes which are within the jurisdiction of the Admiralty Court. *Gunnestad* or *Gunstead* v. *Price*, 44 L. J., Ex. 44; L. R. 10 Ex. 65; 32 L. T. 492; 23 W. R. 470; 2 Asp. M. C. 543. Approving *Simpson* v. *Blues*, supra, and dissenting from *Argos, Cargo ex*, supra.

A loading agreement between a colliery company and the charterers of a ship, by which the colliery company undertake to load the ship in a certain time, and pay demurrage if that time

is exceeded, is not an "agreement made in relation to the use or hire" of a ship within s. 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and hence the county court has no jurisdiction on the admiralty side to entertain a claim for demurrage against the colliery company. *The Zeus*, 13 P. D. 188; 59 L. T. 344; 37 W. R. 127; 6 Asp. M. C. 312.

A county court, exercising admiralty jurisdiction under the County Courts Admiralty Jurisdiction Act, 1868, and the County Courts Admiralty Jurisdiction Amendment Act, 1869, has jurisdiction under s. 2, sub-s. 1, of the latter Act to entertain a claim for demurrage arising out of a bill of lading. *The Alina*, supra, col. 938, followed. *Pugsley* v. *Hopkins*, 61 L. J., Q. B. 645; [1892] 2 Q. B. 184; 67 L. T. 369; 40 W. R. 596; 7 Asp. M. C. 215—C. A.

—— **Necessaries.**]—When a cause of necessaries is instituted in a county court, and is transferred to the Court of Admiralty, and the petition shews the claim to be based on a bottomry bond (the county court having no jurisdiction over bottomry bonds), the court will reject the petition. *The Elpis*, 42 L. J., Adm. 43; L. R. 4 A. & E. 1; 27 L. T. 664; 21 W. R. 576.

County courts exercising admiralty jurisdiction cannot, as such, entertain a claim for necessaries supplied either to a vessel in her own port, or when an owner of the vessel is domiciled in this country. *The Dowse*, 39 L. J., Adm. 46; L. R. 3 A. & E. 135; 22 L. T. 627; 18 W. R. 1008.

The court of passage has not a more extensive jurisdiction as to any claim for necessaries than that exercised by the Court of Admiralty. *Ib.*

—— **Supplied to British Ship — Owners Domiciled in Great Britain.**]—A county court having admiralty jurisdiction has no greater jurisdiction in respect of a claim for necessaries than that possessed by the Admiralty Division of the High Court, and consequently cannot entertain an action for necessaries supplied to a British ship, the owners of which are domiciled in Great Britain. *The Dowse*, supra, followed. *The Alina*, supra, distinguished. *Allen* v. *Garbutt*, 50 L. J., Q. B. 141; 6 Q. B. D. 165; 29 W. R. 287; 4 Asp. M. C. 520, n.

—— **Damage to Cargo—Owner Domiciled in England.**]—The county courts have jurisdiction in admiralty to entertain cases up to the amount of 300*l.*, where damage to cargo is caused by, and the claim arises out of, an agreement made in relation to the carriage of goods in a ship, notwithstanding that an owner or part owner of the ship is domiciled in England or Wales. The County Court Admiralty Jurisdiction Amendment Act, 1869, is not limited to cases in which the High Court of Admiralty had jurisdiction at the time. *The Rona*, 51 L. J., Adm. 65; 7 P. D. 247; 46 L. T. 601; 30 W. R. 614; 4 Asp. M. C. 520.

—— **Wages.**]—A county court has no jurisdiction in admiralty over a claim for a master's disbursements, and therefore, in an action for master's wages and disbursements in the High Court, a certificate under the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), is not necessary to entitle a successful plaintiff to his costs, although he recovers less than 150*l.*, the limit of the county court jurisdiction over wages under s. 3. *The Dictator*, 38 L. T. 947; 4 Asp. M. C. 19.

The words "any claim for wages" in s. 3 of the County Courts Admiralty Jurisdiction Act, 1868, include a claim for damages for wrongful dismissal by the master of a vessel engaged under a special wages agreement. *The Blessing*, 3 P. D. 35; 38 L. T. 259; 26 W. R. 404; 3 Asp. M. C. 561.

—— **Mate—Services rendered in Dock after Payment off of Crew.**]—The chief mate of a vessel, who, on her arrival in port, was paid off with the rest of the crew, by direction of the owner remained on board at the same rate of wages as he had received during the voyage. While the vessel was loading for another voyage it was found necessary to take her into dock for repairs, and the officer went with her into dock and remained with her there for more than three months, at the end of which time the mortgagee entered into possession and dismissed him:—Held, on a rule for mandamus, that the City of London Court had jurisdiction under the County Courts Admiralty Jurisdiction Act, 1868, to entertain an action in rem instituted by him to recover wages in respect of the time during which the vessel was in dock. *Reg.* v. *City of London Court Judge*, 59 L. J., Q. B. 427; 25 Q. B. D. 339; 63 L. T. 492; 38 W. R. 638; 6 Asp. M. C. 547.

—— **Master's Wages.**]—See *The Sir Chas. Napier*, 5 P. D. 73; 43 L. T. 364; 28 W. R. 713; 4 Asp. M. C. 321; supra, col. 92.

—— **Master's Disbursements.**]—The county court has no jurisdiction in admiralty in a claim for master's disbursements. *The Dictator*, 38 L. T. 947; 4 Asp. M. C. 19.

—— **Towage.**]—A tug having entered into a contract to tow a ship from A. to B. for a specified sum, the ship, during the performance of the agreed towage, was injured by collision, and the tug was detained nearly three days in attendance on the ship. In an action of towage instituted by the owner of the tug in a county court, and transferred to the Admiralty Division:—Held, that it had no jurisdiction to award, in addition to the sum agreed to be paid for towage, any remuneration for the delay. *The Hjemmett*, 49 L. J., Adm. 66; 5 P. D. 227; 42 L. T. 514; 4 Asp. M. C. 274.

A county court has under 32 & 33 Vict. c. 51, s. 2, sub-s. 1, jurisdiction to entertain a claim for damage for breach of a contract of towage. *The Iseu*, 56 L. J., Adm. 47; 12 P. D. 34; 55 L. T. 779; 35 W. R. 382; 6 Asp. M. C. 63.

—— **Salvage.**]—A county court having admiralty jurisdiction under the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), has jurisdiction, under s. 3, in claims for salvage wherein the property salved does not exceed 1,000*l.*, or in the alternative where the amount claimed does not exceed 300*l.* *The Glannibanta, Elmore* v. *Trim*, 46 L. J., Adm. 75; 2 P. D. 45; 36 L. T. 27; 25 W. R. 513.

The word "or" in s. 3, sub-s. 1, must be read as indicating the alternative. *Ib.*

A salvage suit was instituted in the Court of Admiralty in a sum exceeding 300*l.*; the value of the property was less than 1,000*l.*:—Held, that the court had jurisdiction to entertain the suit. *The Empress*, 41 L. J., Adm. 32; L. R. 3

A. & E. 502; 25 L. T. 885; 20 W. R. 553; 1 Asp. M. C. 183.

—— **Subject-matter of.**]—The county court has no jurisdiction with regard to any other subject-matter than that which might be entertained by the High Court of Admiralty. *Gas Float Whitton (No. 2)*, 65 L. J., Adm. 17; [1896] P. 42; 73 L. T. 698; 44 W. R. 263; 8 Asp. M. C. 110—C. A. See *S. C.* in H. L., supra, col. 595.

—— **Necessaries.**]—See *Michael, Ex parte*, ante, col. 966.

—— **Collision—With Barge.**]—The 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, do not give the county court, which has an admiralty jurisdiction under those acts, jurisdiction to try cases of damage by collision between vessels of a different class from those over which the Court of Admiralty has jurisdiction, and therefore a county court is not empowered by those acts to try a question of collision between barges propelled by oars only. *Everard* v. *Kendall*, 39 L. J., C. P. 234; L. R. 5 C. P. 428; 22 L. T. 408; 18 W. R. 892.

—— **With Dock Wall.**]—A ship, whilst under the control of the servants of a dock company, was through their negligence damaged by coming into collision with the dock company's wall whilst entering their dock. The shipowner brought an action in the Admiralty Division of the High Court and recovered a sum less than 300*l.*:—Held, that a county court having admiralty jurisdiction had, under s. 3 of the County Courts Admiralty Jurisdiction Act, 1868, and s. 4 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, jurisdiction to try such a case, and therefore an order depriving the shipowner of his costs of the action in the high court was rightly made. *The Robert Pow* (Br. & Lush. 99) and *The Ida* (Lush. 6) commented on and disapproved. *The Zeta, Mersey Docks and Harbour Board* v. *Turner*, 63 L. J., Adm. 17; [1893] A. C. 468; 1 R. 307; 69 L. T. 630; 57 J. P. 660—H. L. (E.) Reversing 40 W. R. 535—C. A.

—— **With object Ashore.**]—Damage occasioned to an object on the bank of a river by contact with the sailing gear of a vessel afloat in the river is not "damage by collision" within s. 3, sub-s. 3, of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), and a county court has not admiralty jurisdiction in respect of such damage. *The Kate, Robson* v. *Kate (Owner)*, 57 L. J., Q. B. 546; 21 Q. B. D. 13; 59 L. T. 557; 36 W. R. 910; 6 Asp. M. C. 330.

—— **Collision in Dock.**]—A collision occurred in a dock connected with the river Thames by channels provided with gates and locks. An action was brought in a county court having admiralty jurisdiction in respect of damages arising out of the collision. On an application for a prohibition:—Held, that the claim was within the Admiralty Court Act, 1861, s. 7, and that the county court had jurisdiction. *Reg.* v. *City of London Court Judge*, or *Kerr*, 51 L. J., Q. B. 305; 8 Q. B. D. 609; 30 W. R. 566.

—— **Amount Claimed.**]—See *Scovell* v. *Bevan*, supra, col. 938.

—— **Action against Pilot for Negligence.**]—An action against a pilot for collision damage caused to a barge by a vessel under his charge is not an "admiralty cause" within the meaning of 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, which confer admiralty jurisdiction upon county courts. *Flower* v. *Bradley*, 44 L. J., Ex. 1; 31 L. T. 702; 23 W. R. 74; 2 Asp. M. C. 489.

The High Court of Admiralty had no jurisdiction to entertain an action in personam against a pilot to recover damages arising from a collision between ships upon the high seas caused by his negligence; nor has a county court exercising admiralty jurisdiction under the County Courts Admiralty Jurisdiction Act, 1868, and the County Courts Admiralty Jurisdiction Amendment Act, 1869, jurisdiction to entertain such an action. *Reg.* v. *City of London Court Judge*, 61 L. J., Q. B. 337; [1892] 1 Q. B. 273; 66 L. T. 135; 40 W. R. 215; 7 Asp. M. C. 140—C. A. And see *The Alexandria*, infra, col. 945.

—— **Carriage of Passengers' Luggage.**]—Passengers' luggage carried on board a ship is not "goods" within the meaning of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and consequently the act does not confer jurisdiction to try a claim arising out of the loss of such luggage, as a court having admiralty jurisdiction. *Reg.* v. *City of London Court Judge*, 53 L. J., Q. B. 28; 12 Q. B. D. 115; 51 L. T. 197; 32 W. R. 291; 5 Asp. M. C. 283.

—— **What Court—Residence of Parties.**]—Under s. 74 of the County Courts Act, 1888, an admiralty action may be commenced in the county court (having admiralty jurisdiction) within the district of which the defendant resides or carries on business. *The Hero*, 60 L. J., Adm. 99; [1891] P. 294; 65 L. T. 499; 40 W. R. 143; 7 Asp. M. C. 86.

—— **Property to which Action Relates.**]—By the County Courts Admiralty Jurisdiction Act, 1868, s. 21: "Proceedings in an admiralty cause shall be commenced (1) in the county court having admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings; (2) if the foregoing rule be not applicable, then in the county court having admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates . . . resides." The plaintiffs, owners of a steamship, commenced an action on the admiralty side of the county court within the district of which they resided, under s. 21, sub-s. 2, of the Act of 1868, against the defendants, assignees of a cargo of timber under a bill of lading, to recover damages for the detention of their ship in discharging the cargo. At the commencement of the action the plaintiffs' ship was on the high seas, and the cargo was at the port of discharge, which was not within the jurisdiction of the county court in which the action was commenced. On a motion for a prohibition on the ground that the cargo was the "property to which the cause related" within the meaning of s. 21, sub-s. 1, of the Act of 1868, and that consequently the action should have been commenced in the county court within the district of which the cargo lay at the commencement of the action:—Held, that the cause of action, being in respect of the detention of the plaintiffs' ship, related to the ship only and not to "property" within the meaning of s. 21, sub-s. 1; and as the ship was on the high seas

when the proceedings were commenced, s. 21, sub-s. 1 was not applicable, and the action was properly commenced, under s. 21, sub-s. 2, in the county court within the district of which the plaintiffs resided. *Pugsley* v. *Ropkins*, 61 L. J., Q. B. 645; [1892] 2 Q. B. 184; 67 L. T. 369; 40 W. R. 596; 7 Asp. M. C. 215—C. A.

The defendants, who resided at Poole, where they also owned a wharf, entered into a charter-party with the plaintiffs, the owners of the "C. D.," in which they warranted the depth of water at their wharf. The "C. D.," while at the defendants' wharf, in pursuance of this charter-party, took the ground and was damaged. The "C. D." being subsequently at Newcastle-on-Tyne, the plaintiffs commenced an action in the county court of Northumberland against the defendants for breach of warranty in the charterparty:—Held, that the county court of Northumberland had jurisdiction to try the case. *The County of Durham*, 60 L. J., Adm. 5; [1891] P. 1; 64 L. T. 146; 39 W. R. 303; 6 Asp. M. C. 606.

—— **Receiver of Wreck in another District.**]—Semble, that a county court of one district has no jurisdiction over the receiver of wreck in another district. *The John Evans*, 43 L. J., Adm. 9; 30 L. T. 306; 2 Asp. M. C. 234.

—— **Jurisdiction to Restrain Proceedings in Court of Admiralty.**]—A debtor to the estate of a bankrupt seized in the vice-admiralty court in Sierra Leone a vessel which formed part of the bankrupt's estate, for a debt claimed to be due to him for necessaries supplied to such ship, and thereupon the trustee in the bankruptcy obtained an interim injunction from the county court of Manchester, in which the bankruptcy proceedings had been instituted, to restrain the debtor from prosecuting his suit in the vice-admiralty court at Sierra Leone; and, pending the continuance of such injunction, issues were directed by the judge of such county court to be tried before him as to whether he had a lien on such ship for necessaries. Upon an application by the debtor for a prohibition to prohibit such county court proceedings:—Held, that the county court judge had jurisdiction under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 72), to grant the injunction and to try such issues, if he deemed it expedient to do so for the purpose of doing complete justice or making a complete distribution of the bankrupt's property, and that if such court was improperly exercising its jurisdiction in the matter the remedy of the debtor was by appeal to the Court of Appeal in bankruptcy. *Halliday* v. *Harris*, 43 L. J., C. P. 350; L. R. 9 C. P. 668; 30 L. T. 680; 22 W. R. 756.

Transfer to Admiralty Division.]—Where a necessaries action against a ship in the City of London court has proceeded to judgment by which a sale of the ship is ordered, and subsequently another action is commenced in the high court by material-men having a possessory lien upon the ship, and an appearance has been entered to the action in the City of London court by the plaintiffs in the High Court, the sale will be stayed, and the City of London Court action transferred to the High Court upon the application of the plaintiffs in the High Court. *The Immacolata Concezione*, 8 P. D. 34; 47 L. T. 388; 31 W. R. 642; 4 Asp. M. C. 593.

The court of admiralty may transfer to itself an admiralty or a maritime cause pending in a county court, notwithstanding that the suit may relate to matters over which the court of admiralty has not original jurisdiction. *The Swan*, 40 L. J., Adm. 8; L. R. 3 A. & E. 314; 23 L. T. 633; 19 W. R. 424.

—— **Transfer.—Pleadings.**]—See *The Carisbrook*, infra, col. 992.

Affidavit of Value—Evidence to Contradict Affidavit.]—In a salvage action in the county court, if the defendant makes an affidavit of value, and the plaintiff does not apply for an appraisement, the Judge is not bound to admit evidence at the trial directed to show that the value of the ship salved was greater than that stated in the affidavit. *The Argo*, 64 L. J., Adm. 12; [1895] P. 33; 11 R. 675; 71 L. T. 640; 43 W. R. 415; 7 Asp. M. C. 534.

Semble, he has a discretion to admit such evidence if he thinks proper to do so. *Ib.*

Trial by Jury.]—Sect. 101 of the County Courts Act, 1888, does not give a party to an admiralty action the right to require a trial by judge and jury where the other party has, under s. 11 of the County Courts Admiralty Jurisdiction Act, 1868, requested the judge to summon assessors. *The Tynwald*, *Kelly* v. *Isle of Man Steam Packet Co.*, 64 L. J., Adm. 1; [1895] P. 142; 11 R. 690; 71 L. T. 731; 43 W. R. 509; 7 Asp. M. C. 539.

Sect. 101 of the County Courts Act, 1888, does not confer a right upon the plaintiff or the defendant in an action brought on the admiralty side of a county court under s. 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869, to have the case tried by a jury. *The Theodora*, 66 L. J., Adm. 50; [1897] P. 279; 76 L. T. 627.

Costs—Amount of Claim.]—An action was brought in the Queen's Bench, in which an amount less than the sum of 300*l.* was claimed in the particulars of demand for damage by collision, and a further sum not exceeding 300*l.* for salvage services, and further sums for depreciation in value of ship and for demurrage. The causes of action arose within the district of a county court having admiralty jurisdiction. The defendant paid 254*l.* 12*s.* 10*d.* into court in respect of the claim for damage by collision, which the plaintiff accepted in full satisfaction, and entered a nolle prosequi as to the rest:—Held, that the superior courts of common law at Westminster were superior courts within s. 9, and that the right to costs depended upon the amount recovered and not the amount in the particulars of demand, and that the plaintiffs were therefore not entitled to costs. *Hewitt v. Corry* or *Cory*, 39 L. J., Q. B. 279; L. R. 5 Q. B. 418; 22 L. T. 666; 18 W. R. 954.

Held, also, that no suggestion of the facts necessary to shew that a county court had jurisdiction over the district where the cause of action arose was required to be entered on the record. *Ib.*

Sect. 7 of the County Courts Admiralty Jurisdiction Act, 1868, which deprived a plaintiff of and also rendered him liable to be condemned in costs, where in an action brought in a superior court, which might by that act be tried by a county court having admiralty jurisdiction, he did not recover a sum exceeding what a county court had by that act jurisdiction to try without agreement, is repealed by the effect of Ord. LV.

of the Judicature Act, 1875. *Tenant* v. *Ellis*, 50 L. J., Q. B. 143; 6 Q. B. D. 46; 43 L. T. 506; 29 W. R. 121.

3. PASSAGE COURT.

Suit against Pilot.]—A ship by compulsion of law in charge of a duly licensed pilot in the river Mersey, came into collision with and damaged another vessel. The owners of the damaged vessel instituted an admiralty suit against the pilot in the court of passage:—Held, that the court of passage had not jurisdiction to entertain the suit as an admiralty suit. *The Alexandria*, 41 L. J., Adm. 94; L. R. 3 A. & E. 574; 27 L. T. 565; 1 Asp. M. C. 464.

Claim for Necessaries.]—The court of passage has not a more extensive jurisdiction as to any claim for necessaries than that exercised by the Court of Admiralty. *The Dowse*, 39 L. J., Adm. 46; L. R. 3 A. & E. 135; 22 L. T. 627; 18 W. R. 1008.

Appeal from.]—The appeal from the court of passage of Liverpool exercising admiralty jurisdiction is under the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 26, and security for costs must be given before the instrument of appeal is lodged. *The Ganges*, 5 P. D. 247; 43 L. T. 12; 4 Asp. M. C. 317—C. A.

From the decision of the court of passage in an admiralty cause, an appeal lies to the Court of Admiralty. *The Dowse*, 39 L. J., Adm. 46; L. R. 3 A. & E. 135; 22 L. T. 627; 18 W. R. 1008.

Action in rem—Power to make Order that no Defence.]—Neither the County Courts Admiralty Jurisdiction Act, 1868, nor the Amendment Act, 1869, enabled orders to be made purporting to apply to admiralty actions in rem and in personam, a procedure similar to that under R. S. C. Ord. XIV. enabling a plaintiff, on shewing that there was no defence to the action, to obtain judgment for the amount claimed. *Fellows* v. *Lord Stanley* (*Owners*), [1893] 1 Q. B. 98; 5 R. 115; 67 L. T. 857; 41 W. R. 253; 7 Asp. M. C. 298.

Distribution of Salvage Awarded by High Court—Jurisdiction.]—Injunction issued by the Admiralty Division to restrain one of the officers of a tug, to which a salvage award of 3,000*l.* had been made by the High Court, from proceeding with an action for distribution of salvage instituted in the Liverpool court of passage against the tug owners. *The Theresa*, 11 R. 681; 71 L. T. 347; 7 Asp. M. C. 505.

4. CINQUE PORTS.

Admiralty Jurisdiction of.] — The Cinque Ports have an admiralty jurisdiction. *Stock* (or *Storke*) v. *Cullen*, Jones, 66; 3 Keb. 598.

Enemies' Goods Stranded on the Goodwins—Droits.]—See *The Ooster Ems*, 1 C. Rob. 284, n.; Hay and Marriott, Preface, xxvii., infra, col. 950.

Appeal from.] — Appeals from the Cinque Ports admiralty lay to the privy council. *Cinque Ports, Lord Warden* v. *Rex*, 3 Hag. Adm. 438, 446.

There is no appeal from the Cinque Ports Admiralty Court to the High Court. *Denew* v. *Stock*, 3 Swanst. 662. *S. C.*, nom. *Stock* v. *Denew*, Ca. in Ch. 305. S. P., *Stock* or *Storke* v. *Cullen*, Jones, 66; 3 Keb. 598.

5. VICE-ADMIRALTY, COLONIAL, AND CONSULAR COURTS.

Jurisdiction—Necessaries.] —Vice-admiralty courts have not (apart from statute) more than the ordinary admiralty jurisdiction, i.e. as it existed before 3 & 4 Vict. c. 65 enlarged it. The Vice-Admiralty Act, 1863 (26 & 27 Vict. c. 24), s. 10, sub-s. 10, does not create a maritime lien with respect to necessaries supplied within the possession. *The Rio Tinto*, *Laws* v. *Smith*, 9 App. Cas. 356; 50 L. T. 461; 5 Asp. M. C. 224—P. C.

A vice-admiralty court has no jurisdiction under 24 & 25 Vict. c. 24, s. 10, to entertain a suit for necessaries supplied at a port out of the possession, that is, the British possession, in which the court is established. *The Albion*, 27 L. T. 723; 1 Asp. M. C. 481.

Wages and Compensation.] — By an order in council, s. 15, passed in pursuance of 2 Will. 4, c. 51, the Vice-Admiralty Court has jurisdiction to entertain a suit brought by any number of seamen, not exceeding six, to recover their wages. The Merchant Shipping Act, 1854, s. 189, does not take away such right of suit so long as the total aggregate amount claimed by such seamen exceeds 50*l.* Where, in a suit brought by six seamen in the Vice-Admiralty Court, the judge found that a total amount of 203*l.* 19*s.* 8*d.* was due to them, partly for wages and partly for wrongful dismissal, but that the amount due to each was less than 50*l.*:—Held, that, under the above rule and section, the judge was wrong in dismissing the suit for want of jurisdiction, and that a decree for 203*l.* 19*s.* 8*d.* should be made. *The Ferret*, *Phillips* v. *Highland Ry.*, 52 L. J., P. C. 51; 8 App. Cas. 329; 48 L. T. 915; 31 W. R. 869; 5 Asp. M. C. 94—P. C.

The 17 & 18 Vict. c. 104, applies to the colonies; and by s. 191, a master has a lien for his wages in the Vice-Admiralty Court, whatever may be the municipal law of the colony. *The Rajah of Cochin*, Swabey, 473.

—— **Title to Ship.**] —The vice-admiralty court at Hong Kong had only the ordinary admiralty jurisdiction possessed by admiralty courts previously to the passing of the 3 & 4 Vict. c. 66; it had no jurisdiction to entertain a suit for possession for the purpose of trying a ship. *The Australia*, *Lapraik* v. *Burrows*, Swabey, 480; 13 Moore, P. C. 132; 7 W. R. 718.

Vice-Admiralty Court not of Record—Stipulation Enforceable by the Delegates.] — See *Brymer* v. *Thompson*, 1 H. Bl. 165. S. P., *Smith* v. *Nicholls*, 5 Bing. (N.C.) 208; 7 Scott, 147; 7 D. P. C. 282; 8 L. J., C. P. 92.

—— **Offences against Revenue Laws.**]—The vice-admiralty courts in the West Indies had no jurisdiction over offences against revenue laws committed out of their respective islands. *The Fabius*, 2 C. Rob. 245.

—— **Sale of Ship.**] —Vice-admiralty courts have no power to order a sale of the ship in case

of distress—*see* per Sir W. Scott. *The Fanny and Elmira*, Edwards, 117.

The vice-admiralty courts abroad have no authority, upon the mere petition of the captain of a ship bound on a foreign voyage, to decree the sale of such a ship reported upon survey to be seaworthy or repairable, so as to carry the cargo to its place of destination, but at an expense exceeding the value of the ship when repaired. *Reid* v. *Darby*, 10 East, 143.

High Courts in India.]—Observations on the admiralty jurisdiction of the high courts in India. *The Brinhilda*, 45 L. T. 389; 4 Asp. M. C. 461—P. C.

Procedure — Colonial Courts.] — It may be presumed that the procedure in the vice-admiralty court of Victoria is so far analogous to that in the maritime courts of Great Britain and Ireland, that a shipwright of Melbourne would be entitled to arrest a British ship and detain her until his legal demands upon her were satisfied. *The Staffordshire, Smith* v. *Bank of New South Wales*, 8 Moore, P. C. (N.S.) 443; 41 L. J., Adm. 49; L. R. 4 P. C. 194; 25 L. T. 137; 20 W. R. 557; 1 Asp. M. C. 365—P. C.

Breach of Revenue Laws—Security for Costs.] —Decree of the vice-admiralty court of Sierra Leone in a proceeding in rem for breach of the revenue laws of the colony, condemning the goods seized, and the owners in penalties, reversed by the committee, so far as the penalties were concerned, with costs, it appearing that though the claim of the owner of the goods was rightly rejected, because he failed to comply with the rule of the Vice-Admiralty Court requiring security for costs, yet that such rule did not apply, so far as regarded the penalties, against which he was entitled to be heard in the court below without giving any such security. *George* v. *Reg.*, 4 Moore, P. C. (N.S.) 287; L. R. 1 P. C. 389.

—— **Probable Cause for Seizure.**]—An appeal from a decree of the vice-admiralty court of Sierra Leone, restoring property seized for breach of the custom laws, but without damages or costs, the judge below being of opinion that there was probable cause for the seizure, was dismissed by the judicial committee with costs, on the ground that it appearing from the evidence that there was probable cause for the seizure, the judge of the Admiralty Court was justified in refusing to decree damages and costs to the appellants, the owners of the goods seized. *Wilson* v. *Reg.*, L. R. 1 P. C. 405.

Appointment of Deputy Judge.]—The chief justice for the time being for Sierra Leone may lawfully appoint a deputy judge of the vice-admiralty court of that colony. *Rolet* v. *Reg.*, 4 Moore, P. C. (N.S.) 41; L. R. 1 P. C. 198; 12 Jur. (N.S.) 715; 15 W. R. 233.

Practice.]—The form of preliminary acts in use in the Admiralty Division of the High Court in collision cases should be used in similar cases in the vice-admiralty courts. *The Norma*, 35 L. T. 418; 3 Asp. M. C. 272—P. C.

In collision causes in the vice-admiralty courts witnesses should, as far as possible, be examined vivâ-voce before the court, not upon written interrogatories before an officer of the court prior to the hearing. *Ib.*

Consular Courts.] — The consular court at Constantinople possesses a jurisdiction in rem, in cases of collision between British and foreign ships; but although that court has such jurisdiction, it does not involve the administration of the common law of England. *The Laconia, Papayanni* v. *Russian Steam Navigation and Trading Co.*, 2 Moore, P. C. (N.S.) 161.

6. Registrar, Office of.

Registrar of Admiralty—Ouster of.]— Tenure of office of registrar of the admiralty; bond given that plaintiff should enjoy the same for his life; ouster by granter of admiral subsequently appointed. *Parker and Harrold's Case*, 2 Leon. pt. 2, 114.

7. Law Applicable.

Bankruptcy Law.] — The Admiralty Court, being a court of law and equity, will follow the decisions of the courts of law and equity in deciding questions under the bankruptcy law. *The Heart of Oak*, 39 L. J., Adm. 15; 21 L. T. 727.

General Maritime Law.]—There is a general maritime law administered alike by English and foreign courts, having admiralty jurisdiction, distinct from the municipal law of nations. *The Patria*, 41 L. J., Adm. 23; L. R. 3 A. & E. 436; 24 L. T. 849.

Generally, the Court of Admiralty is governed by the civil law, the law marine, and the law merchant. *The Neptune*, 3 Hag. Adm, 129, 135. *S. C.*, reversed on App. 3 Knapp 94, infra, col. 960.

Equity.—The court, although influenced by equitable considerations, is not a court of equity, so as to allow matters, foreign to the issue, to be introduced in order that complete justice may be done between the parties; it follows rather in its pleadings and practice the courts of common law. *The Don Francisco*, Lush. 468; 31 L. J., Adm. 14; 5 L. T. 460.

By the ancient maritime law the Court of Admiralty would have an equity to moderate contracts made under pressure of necessity—per Sir W. Scott, *The Nelson*, 6 C. Rob. 217, 231.

8. High Court, not of Record.

The admiralty was no court of record. *Thomlinson's Case*, 12 Co. Rep. 104. S. P., *Greenway and Baker's Case*, Godb. 193, 261; and, semble, *Jobson's Case*, Noy, 24.

The Admiralty Court is not a court of record, and cannot fine or imprison. Empringham, vice admiral Yorkshire, and Kettlewell, his marshal, fined and imprisoned for citing persons wrongfully to the admiral's court. *Empringham's Case*, 12 Co. Rep. 84.

The Court of Admiralty could not proceed criminally against one in contempt. *Tench* v. *Hubrison's Case*, Style, 340.

Habeas corpus to bring up one imprisoned by the admiralty. *Anon.*, Style, 183.

9. Wreck.

Generally.] — Nothing is wriccum maris but what is cast on land by the sea. *Constable's Case, Sir Henry*, 5 Co. Rep. 106 a; 1 Anders. 86.

The Court of Admiralty has no jurisdiction of wreck. *Ib.*

Below low water mark the admiral has sole jurisdiction, between high and low water the common law and the admiral have jurisdiction according as the tide is. *Ib.*

Infants, feme covert, executrix, men in prison and beyond sea are bound by nonclaim of wreck within a year and day. *Ib.*

Effect as against the office of admiralty of a grant from the Crown to a lord of a manor of "wreck of the sea." Claim by grant to flotsam within three miles from low water mark rejected. Wreck of the sea must have touched ground; goods afloat are droits. *Rex* v. *Forty-nine Casks of Brandy*, 3 Hag. Adm. 257.

Habeas corpus awarded to the lord warden of the Cinque Ports for the imprisonment of one for stealing wrecks. *Bourn's Case*, Cro. Jac. 543; Palmer, 96.

Over wreck and derelict, when landed, the admiralty had no jurisdiction. *The Two Friends*, 1 C. Rob. 271.

Municipal Corporations Act.]—The Municipal Corporations Act, 5 & 6 Will. 4, c. 76, does not transfer to the High Court all the jurisdiction (e.g. in wreck and salvage) formerly exercised by the vice-admiralty courts—per Dr. Lushington. *Raft of Timber*, 2 W. Rob. 251.

Grant of Wreck — Wreck appurtenant to Manor.]—Wreck belonging to a manor by prescription does not pass under a grant (to Lord Lisle, high admiral) of all wrecks of the sea, and other profits to the said office appertaining. *Wiggon* v. *Branthwait*, 1 Ld. Raym. 473; 12 Mod. 259; Holt, 758.

Owner entitled to.]—The owner of wreck is entitled thereto as against a grantee from the Crown, although no living creature comes ashore. *Hamilton* v. *Davis*, 5 Burr. 2732.

Right to—Trespass.] — A grantee of wreck may maintain trespass against a wrongdoer for taking away goods cast ashore, although people escaped from the ship alive, and although the goods were claimed by the owners within a year and day, and although the plaintiffs never seized them. *Dunwich (Bailiffs)* v. *Sterry*, 1 B. & Ad. 831; 9 L. J. (o.s.) K. B. 167.

Customs Duty — 3 & 4 Will. 4, c. 52, s. 50.]—Tobacco landed from a stranded ship held not to be wreck within the above act, so as to be liable to duty. *Legge* v. *Boyd*, 1 C. B. 92; 14 L. J., C. P. 138; 9 Jur. 30.

But the term "wreck" in the above statute is not confined to goods that would pass to the Crown or the crown's officer by virtue of the prerogative. It includes goods imported into England, entered and shipped for export, and afterwards picked up partly afloat and partly on shore from the wreck of the ship in an English port. *Barry* v. *Arnaud*, 10 A. &. E. 646; 2 P. & D. 633; 9 L. J., Q. B. 226.

Evidence of Right to.]—Parol evidence to support a prescriptive claim to wreck cannot be given where the property to wreck was in the crown at the time of Charles I. *Alcock* v. *Cooke*, 2 M. & P. 625; 5 Bing. 340; 7 L. J. (o.s.) C. P. 126; 30 R. R. 625.

Dollars in the Sand.]—Dollars more than 100 years old found in the sand of the seashore will be presumed to have come from a wrecked ship, though no trace of the ship is found near them. *Talbot* v. *Lewis*, 6 Car. & P. 603.

10. Droits.

Enemies' Goods.]—By the common law, enemies' property taken by a subject vests in the captor; by admiralty law, in the king, if taken without letters of marque, the captor holding it in trust for the king; for breach of this trust a suit in the admiralty is very proper. *Rex* v. *Broom* or *Brome*, 12 Mod. 135; Carth. 398; Comb. 444.

Broom, by authority from the African Company, who, by patent, had power to take enemies' ships and dispose thereof at their will, took a French ship on the high sea, carried it into a river beyond sea and sold her there. The ship was condemned in the admiralty for prize; the grantee of the perquisites of the admiralty sued Broom in admiralty for conversion of the ship and non-delivery of her, claiming her as a droit. Sentence against Broom; appeal to the delegates; prohibition refused. *Ib.*

A Prussian ship was stranded on the Goodwins. Some specie on board was sent ashore and claimed by the warden of the Cinque Ports as enemies' goods. The master obtained a monition from the High Court of Admiralty to remove the cause to the prize court, where he claimed the goods as Prussian property. The delegates reversed the decree of the High Court on the ground that it had no jurisdiction. *The Ooster Ems*, 1 C. Rob. 284, n.: Hay and Marriott, Preface, xxvii.

An enemy's ship captured by a non-commissioned ship is a droit of the Admiralty. *The Twee Gesusters*, 2 C. Rob. 284, n.

A queen's ship, during the Russian war, fell in with a raft of timber belonging to the Russian government:—Held, that the timber was a droit of the Crown and not of the admiralty. *Raft of Russian Timber, In re*, 5 Jur. (N.S.) 1109.

A capture made by crews of king's ships stationed at the island of St. Marcon adjudged to be prize, and not an admiralty droit. *The Rebeckah*, 1 C. Rob. 227.

A ship captured by the Gibraltar garrison in Gibraltar bay condemned to the admiralty as a droit. *The Nostra Signora del Carmen*, 1 C. Rob. 228, n.

A non-commissioned captor of an enemy's ship and gunpowder cargo rewarded by the whole of the proceeds; one-third to the owner, two-thirds to the crew. *The Hause*, 1 C. Rob. 286.

Breach of Navigation Act.]—A ship arrested as an admiralty droit was afterwards seized as forfeited for breach of a navigation act:—Held, that the forfeiture gave the prior title. *Score* v. *Lord Admiral*, Parker, 273. Quære as to the accuracy of this report, see per Thompson, B., 3 Anstr. 864.

Droits or Wreck.]—A log floating in the sea was drawn upon a rock by a person wading; another log cast upon the beach was afterwards swept out to sea, and being found floating was brought back to shore:—Held, that both logs were droits of the admiralty and did not belong to grantees of wreck. *Stackpoole* v. *Reg.*, Ir. R. 9 Eq. 619.

Goods floating are not Wreck.]—Goods floating in the sea are not wreck; when grounded they are wreck, though water be round them; if again

afloat they cease to be wreck. Two casks of tallow picked up afloat off the Norfolk coast condemned as droits of the admiralty. *Rex* v. *Two Casks of Tallow*, 3 Hag. Adm. 294. Cf. *Rex* v. *Forty-nine Casks of Brandy*, 3 Hag. Adm. 257; supra, col. 949. And see *York (Duke of)* v. *Linstred*, 1 Keb. 657, supra, col. 935.

An Anchor.] — Imprisonment for taking an anchor in the Cinque Ports. Habeas corpus awarded. *Bourn's Case*, Cro. Jac. 543; Palmer, 96.

Pirate Goods — Slave Ship.] — Unclaimed residue after recapture from pirates are admiralty droits. *The Marianna*, 3 Hag. Adm. 206.

A condemnation of a ship for engaging in the slave trade does not found title in the seizors. *Ib.*

Goods taken from Pirates.]—Property taken from pirates, the owners of which were unknown, held to be a droit of the admiralty. *The Panda*, 1 W. Rob. 423. Cf. *The Helen*, 1 Hag. Adm. 142.

A grant of pirates' goods to the admiral does not pass goods in the possession of pirates taken from others. *Anon.*, 12 Co. Rep. 73.

There is no limit of time within which the owners may claim them. *Ib.*

11. Beaconage.

The Admiralty Court formerly had jurisdiction in suits for beaconage, but the jurisdiction is gone; prohibition granted. *Crosse* v. *Digges (or Bigs)*, 1 Sid. 158; 1 Keb. 575.

Action at common law for Dungeness lighthouse tolls. *Gibs* v. *Osbaston*, 2 Keb. 114.

12. Illegal Colours.

Warrant to arrest a merchant ship wearing illegal colours. *Reg.* v. *Ewen*, 2 Jur. (N.S.) 454.

A master fined for wearing illegal colours. *Reg.* v. *Benson*, 3 Hag. Adm. 96.

13. Foreign Enlistment.

A ship was fitted out as a transport for persons in Cuba who had revolted from Spain and were exercising powers of government in Cuba, and conducting hostilities against Spain :—Held, a breach of the Foreign Enlistment Act, 59 Geo. 3, c. 69, s. 69; and the vessel forfeited. *The Salvador*, *Reg.* v. *Carlin*, 39 L. J., Adm. 33; L. R. 3 P. C. 218; 23 L. T. 203; 18 W. R. 1054.

As to the mode of proceeding in a claim for indemnity for detention of a ship under the Foreign Enlistment Act, see *The Great Northern and The Midland*, 26 L. T. 201; 1 Asp. M. C. 246; infra, col. 1004.

14. Prize.

The Court of Admiralty has no original jurisdiction in matters of booty of war. Its jurisdiction is derived solely from 3 & 4 Vict. c. 65, and orders in council issued in pursuance of that statute. *Banda and Kirwee Booty*, *In re*, 44 L. J., Adm. 41; L. R. 4 A. & E. 436; 33 L. T. 332.

The matter of the "Banda and Kirwee" booty had been by order in council referred to the court to determine the persons entitled to share, and in what proportions, and as to costs. Certain moneys, the proceeds of the booty, had, as alleged, not been paid to the parties who had been declared by the court entitled to the booty: —Held, that the order in council gave the court no power to order that these moneys should be brought into court for distribution, and that, therefore, the court had no jurisdiction to make such an order. *Ib.*

A captured ship not taken infra præsidia is not lawful prize. *Anon.*, March, 110.

No interest in a prize vests before condemnation; but upon condemnation it is taken to have vested at the capture. *Stevens* v. *Bagwell*, 15 Ves. 139; 10 R. R. 46.

The sentence of a foreign admiralty court is conclusive as to prize or no prize. *Weston* v. *Wilty*, Skinner, 152; and cases infra, col. 1109.

Action for False Imprisonment in Case of Wrongful Capture.]—An action will not lie at common law for false imprisonment, where the imprisonment was merely the consequence of taking a ship as prize. *Le Caux* v. *Eden*, 2 Dougl. 594.

Prize Jurisdiction—History and Origin.]—The foundation and nature of prize jurisdiction in the Court of Admiralty explained by Lord Mansfield. *Lindo* v. *Rodney*, 2 Dougl. 612, n.

15. Wages and Disbursements.

See also Prohibitions, supra, cols. 932, 933; VI. Seamen, supra, cols. 106, seq.; V. Master, supra, cols. 92, seq.

Jurisdiction as to.]—The gist of the admiralty jurisdiction in wages is service at sea. *Howe* v. *Nappier*, 4 Burr. 194.

Payment by Bill.]—A seaman took payment of his wages at Calcutta by a bill of exchange on his owners, in preference to cash. The bill was dishonoured and the owners became bankrupt :—Held, that he could not sue the ship. *The William Money*, 2 Hag. Adm. 136.

Paid out of Proceeds of Droit.]—Wages prior to 1 Will. 4, c. 25, paid out of proceeds of a derelict condemned as an admiralty droit. *The Speculator*, 3 Hag. Adm. 330, n.

Additional Sum promised to prevent Desertion —Wages Recoverable in Admiralty.]— The master at a foreign port where his crew was deserting gave each seaman a promissory note for 40*l.* in addition to the wages payable under the articles to induce them to remain with the ship. On arrival in England the owners tendered to the seamen their wages, upon condition that they should sign a release and give up the promissory notes. The seamen refused, and brought an action in admiralty for their wages: —Held, that in the admiralty action they were entitled to recover their wages and costs. *The Mobile*, Swabey, 256; 5 W. R. 830.

Arrest of Post-office Packet.]—A post-office packet may be arrested in a suit for mariners' wages. *The Lord Hobart*, 2 Dods, 100.

Suit pending Abroad.]—A suit in Canada against the master for wages was pending when a suit in rem against the ship for the same wages was instituted in England :—Held, that the suit in rem abated. *The Lanarkshire*, 2 Spinks, 189.

Second Mate Serving as First Mate.]—A second mate during the voyage becoming and

serving as first mate, in the place of the former first mate, who had deserted :—Held, entitled to the same wages as first mate as his predecessor received, there being no new agreement. *The Gondolier*, 3 Hag. Adm. 190.

Purser not on Articles.]—Purser's wages pronounced for, though no figure specified for his wages in the articles. *The Prince George*, 3 Hag. Adm. 376. S. P., *Alleson* v. *Marsh*, 2 Ventr. 181.

Jurisdiction of Justices.]—Under 6 Will. 4, c. 19, ss. 15, 16, the Admiralty Court could not entertain a suit for wages under 20*l.*, except where justices were unable to administer full justice. *The King William*, 2 W. Rob. 231.

Master suing Owner for Seamen's Wages paid.]—The master having paid the mariners their wages could not (formerly) sue the owner in admiralty. *Anon.*, Fort. 230.

Mate's Claim for Wages Paid and Disbursements.]—The Court of Admiralty has no jurisdiction to adjudicate upon a mate's claim for wages paid to the crew, and necessary disbursements in foreign ports. *The Victoria*, 37 L. J., Adm. 12.

Foreign Seamen in Ship of alien Enemy.]—The court will entertain a suit for wages of a foreign seaman on a ship of an alien enemy coming to this country under a licence. *The Vrow Mina*, 1 Dods. 234.

Wages claimed by foreign seamen. Objection to jurisdiction overruled. *The William Frederick*, 1 Hag. Adm. 138.

16. RESTRAINT.

And see IV. OWNERS, supra, col. 52 ; PROHIBITIONS, supra, col. 929 ; 17. POSSESSION, infra, col. 955.

Admiralty Jurisdiction.]—A dissenting part owner may sue in admiralty to compel his co-owners setting the ship to sea to give security for her safe return, or for a sale. *Lambert* v. *Aeretree*, 1 Ld. Raym. 223 ; *Blacket* v. *Anstey*, *Ib.* 235.

The majority of the part owners desiring the ship to go to sea may institute a suit in admiralty to compel a dissenting part owner to give up the certificate of registry. Prohibition refused. *Anon.*, 2 Chit. 359.

Where there are several part-owners, the owners of the less shares may arrest the ship in the Admiralty Court, and compel a security to be given by the others before they will be permitted to navigate out of port. *Ouston* v. *Hebden*, 1 Wils. 101.

The Court of Admiralty is open all the year round to applications by part owners to restrain the sailing of ships without their consent, until security is given to the amount of the respective shares. *Hale* v. *Goodson*, 2 Mer. 77.

The court has jurisdiction to arrest a vessel in an action of restraint at the suit of a part owner holding a minority of shares, notwithstanding that the vessel is about to proceed on a voyage approved by a majority of the part owners. *The Talca*, 5 P. D. 169 ; 42 L. T. 61 ; 29 W. R. 123 ; 4 Asp. M. C. 226.

Dissenting part owners who have obtained security for the ship's return may sue thereon in admiralty. *Grave* or *Degrave* v. *Hedges*, 2 Ld. Raym. 1285 ; Holt, 470.

A stipulation taken from a dissenting part owner for the return of the ship not suable in admiralty. *King* v. *Perry*, 3 Salk. 23. *And see c.* PROHIBITIONS, supra, cols. 928, 929.

The admiralty always had jurisdiction in an action of restraint to detain a ship from sailing at the instance of a dissenting part owner, until the other part owners gave a bond to the full value of his share for her safe return ; upon her loss such bond is immediately payable. *The Apollo*, 1 Hag. Adm. 306.

Foreign Ship.]—The Admiralty Court had no jurisdiction, at the suit of a British part owner of a foreign ship, to arrest her until bail was given for her safe return to her own port abroad. *The Graff Arthur Bernstorff*, 2 Spinks, 30.

Bail, who can obtain—Ship's Husband.]—The plaintiff and all the other owners of a vessel appointed two persons as ship's husbands and managers by an agreement, which stated that they should be, and should at all times thereafter discharge the duties of, ship's husbands and managers of the said vessel and of agents for the owners, their executors and administrators. The agreement also gave the managers authority to perform all the usual duties of ship's husbands :—Held, that this agreement did not debar the plaintiff as owner of two sixty-fourth shares in the ship from obtaining in an action of restraint bail from the other part owners in the value of his shares. *The England*, 56 L. J., Adm. 115 ; 12 P. D. 32 ; 56 L. T. 896 ; 35 W. R. 367 ; 6 Asp. M. C. 140.

—— **Part Owners.**]—The court has jurisdiction to arrest a vessel in an action of restraint at the suit of a part owner holding a minority of shares, notwithstanding that the vessel is about to proceed on a voyage approved of by a majority of the part owners, and is being employed under a charter entered into by the ship's husband, appointed to act on behalf of all the owners. *The Talca*, 5 P. D. 169 ; 42 L. T. 61 ; 29 W. R. 123 ; 4 Asp. M. C. 226.

—— **Charterer.**]—In a cause of restraint the charterer of the vessel, if he has a substantial interest in the question before the court, is entitled to intervene in the suit. *The Innisfallen*, 35 L. J., Adm. 110 ; L. R. 1 A. & E. 72 ; 12 Jur. (N.S.) 653.

A vessel having been arrested in a cause of restraint between co-owners, the court, on a motion by the charterer, to whom the vessel had been let for a voyage, ordered her release, it appearing that the alleged co-owner was only a mortgagee. *Ib.*

Bail Bond.]—Where the defendants in an action of restraint have given a bond for the safe return of the ship they are still at liberty to dispute the plaintiffs' right to bring the action, and the court, if satisfied that the plaintiffs have no such right, will set aside the bond. *The Keroula*, 55 L. J., Adm. 45 ; 11 P. D. 92 ; 55 L. T. 61 ; 35 W. R. 60 ; 6 Asp. M. C. 23.

—— **Release of Sureties.**]—In an action of restraint two sureties executed a bail bond for the safe return of the ship. No time was fixed in the bond at which the liability of the sureties should cease. After the bond had been in existence for nearly three years, and when the vessel was in this country, and the owners of the

majority of shares were changed, the sureties applied to be released from the bond:—Held, that the application was reasonable, and the bond was ordered to be cancelled. *The Vivienne*, 56 L. J., Adm. 107; 12 P. D. 185; 57 L. T. 316; 36 W. R. 110; 6 Asp. M. C. 178.

—— **How long it Continues—Second Action.**]—Where minority owners have instituted an action of restraint, claiming security for the safe return of the ship to a named port within the jurisdiction, and a bond is given by the defendants for that purpose, such bond remains in force until the ship returns to that port, and the plaintiffs are not entitled to institute another action for further security upon the ship's return to another port within the jurisdiction, and if such second action is instituted, it will be dismissed with costs. *The Regalia*, 51 L. T. 904; 5 Asp. M. C. 338.

—— **Form.**]—In an action of restraint the bail bond should not be given to pay what may be adjudged against the defendant in an action, but simply for the appraised or agreed value of the plaintiff's shares, in case the ship does not return to the particular port named in the bond. *The Robert Dickinson*, 54 L. J., Adm. 5; 10 P. D. 15; 52 L. T. 55; 33 W. R. 400; 5 Asp. M. C. 341.

As to the form of bonds given for the safe return of a ship, to dissenting part owners; and of decree upon her not returning. *The Margaret*, 2 Hag. Adm. 275. *The Anne*, 2 Hag. Adm. 279, n; *The Waterhen*. *Ib.*

17. POSSESSION.

See also PROHIBITIONS, supra. col. 929; IV. OWNERS, supra, cols. 52, seq.

Wrongdoer in Possession.]—The Admiralty Court had jurisdiction to take a ship from a mere wrongdoer and deliver her to her owner. *Blanshard, In re*, 2 B. & C. 244; 2 D. & R. 177; 26 R. R. 329.

Majority in Interest of Owners can Change.]—The Admiralty Court would not interfere to change the possession of a ship except at the instance of a majority of the part owners in interest. *The Valiant*, 1 W. Rob. 64, infra. S. P., *The Elizabeth and Jane*, 1 W. Rob. 278.

Owner of Moiety.]—The Admiralty Court in a default cause declined to decree possession to the owner of a moiety of a ship, but granted a monition calling upon the other interest to shew cause. *The Egyptienne*, 1 Hag. Adm. 346, n.

Where no adverse Title.]—The Admiralty Court would entertain a suit of possession where no adverse title was set up. *The Frances*, 2 Dods. 420. S. P., *The Sisters*, 3 C. Rob. 213; 4 C. Rob. 275; 5 C. Rob. 155. S. P., *The Valiant*, 1 W. Rob. 64, infra.

The court gave effect to a legal title without taking notice of equitable claims. *The Valiant*, 1 W. Rob. 64.

The Admiralty Court had no jurisdiction to interfere in cases of adverse title. Warrant of arrest refused to a mortgagee claiming under 6 Geo. 4, c. 110, s. 45, to arrest and sell the ship. *The Fruit Preserver*, 2 Hag. Adm. 181; *The Guardian*, 3 C. Rob. 93.

The Admiralty Court always had and retained its jurisdiction to interpose to transfer possession when no direct question of property was involved; but direct questions of property belonged to the courts of common law and chancery—per Sir W. Scott. *The Martin of Norfolk*, 4 C. Rob. 293. S. P., *The Pitt*, 1 Hag. Adm. 240; *The Warrior*, 2 Dods. 288.

Ownership of vessel formerly not triable in admiralty. *Smith* v. *Gibson*, Ca. t. Hardwicke, 271, 317. *And see* per Holroyd, J. *Anon.*, 2 Ch. 359, 361; and *Thompson* v. *Smith*, supra, col. 935.

Attachment Refused.]—The court declined to issue an attachment in execution of a decree in a possession suit. *The John of London*, 1 Hag. Adm. 342.

Bonâ fide Possession not disturbed.]—In a cause of possession the Admiralty Court will not examine the title of a person in bonâ fide possession of a ship until it is impeached. Where the only title rests on a conditional assignment of a ship as a security not reduced into possession, the court has no jurisdiction to disturb the person in possession under a subsequent sale; nor does it vary the case that it is an appeal from a vice-admiralty court that has exercised the jurisdiction. *The John*, 2 Hag. Adm. 305.

Equitable and Legal Owners.]—The Court of Admiralty will not dispossess the equitable owner of the moiety of a ship at the instance of the legal owner of more than a moiety. *The Victoria*, Swabey, 408; 5 Jur. (N.S.) 204; 7 W. R. 330.

The court inclines against dispossession, and requires the plaintiff's claim to be clearly proved. *Ib.*

Owner dispossessed by Violence or Fraud.]—The court had, even when its jurisdiction was more restricted, authority to decree possession of a vessel to the owner, who had been deprived of it by force, violence or fraud. *The Beatrice*, otherwise *The Rappahannock*, 36 L. J., Adm. 9.

Against Master, Part owner.]—The majority of part owners in interest, are entitled to possession of the ship, as against the master who owns the remaining shares and is in possession, although he offers security for her safe return. *The Kent*, Lush. 495. S. P., *The New Draper*, 4 C. Rob. 287.

Order for Production of Ship's Papers.]—See *The Lusitano; m.* INSPECTION AND DISCOVERY, infra, col. 997.

Sale by Court without Jurisdiction.]—A ship sold under sentence of a pretended admiralty court at St. Domingo, stayed on her arrival at Liverpool at the instance of her former owner. *The Thomas*, 1 C. Rob. 322.

Sale by Master abroad.]—The ship was sold by the master abroad. Possession decreed to the original owner as against the purchaser, upon bail given. *The Partridge*, 1 Hag. Adm. 81.

Possession of a ship decreed to her former owners; it appearing that she had been sold without authority by Lloyds' agent at Archangel, having been ashore and abandoned by her master. *The Lagan* or *Mimax*, 3 Hag. Adm. 418.

Foreign Ship.]—Suit of possession not entertained by the court in the case of a foreign ship. *The Johan and Siegmund*, Edwards, 242.

The court interferes in a cause of possession of a foreign ship between foreign owners with reluctance; an order of the admiralty of Rostock executed by the admiralty of England. *The See Reuter*, 1 Dods. 22.

—— **Default of Appearance by Part Owner.**]—Action in admiralty against the ship, claiming possession, and an account against A., the managing owner; default of appearance by A. Possession given to plaintiffs holding majority of shares. Order to join A. as defendant, and for an account to be taken. Sale of A.'s shares before the reference, to satisfy costs, and any sum found due from A., refused. *The Native Pearl*, 37 L. T. 5 42; 3 Asp. M. C. 515.

Abortive Sale—Suit by Vendors.]—Vendors of shares in a ship sold by auction, the purchase-money having been partly paid, but the transfers not having been completed, institute a possession suit in admiralty. The ship was sold, but produced a few shillings only. Application that the purchaser at the auction be condemned in costs refused. *The Virtue*, 1 Spinks, 77.

Proceedings in Chancery.]—The master being unable to repair the plaintiffs' ship, sold her abroad, and executed a bill of sale to the defendants. The ship came to England, and the defendants, refusing to ratify the sale or consent to the registry, took possession of her. The plaintiffs applied to the Court of Chancery for an injunction:—Held, that the plaintiffs had no equitable, as distinct from legal, title: and that their title, if any, being legal, they must sue at law. *Ridgway* v. *Roberts*, 4 Hare, 106.

Bail.]—In suits for possession the Court of Admiralty can take bail. *The Evangelistria*, 46 L. J., Adm. 1; 35 L. T. 410; 25 W. R. 255; 3 Asp. M. C. 264.

18. Co-ownership.

Co-owners disagreeing—Sale of Ship by Court.]—The court will not exercise the power of selling a ship given by 24 Vict. c. 63, s. 8 (2), except in a very strong case; mere disagreement of co-owners not sufficient. *The Marion*, 54 L. J., Adm. 8: 10 P. D. 4; 51 L. T. 906; 33 W. R. 432; 5 Asp. M. C. 339.

Sale of Ship at Instance of Minority Owners—Majority Owners transformed into Limited Company.]—Where the owners of the majority of the shares in a ship had, without the consent of or notice to their co-owners converted themselves into a limited liability company, to which they had transferred their shares, the court, at the instance of the minority owners, ordered the ship to be sold. *The Hereward*, 64 L. J., Adm. 87; 11 R. 798; 72 L. T. 903; 44 W. R. 288; 8 Asp. M. C. 22.

Registered Owners.]—Quære, whether s. 8 of the Admiralty Court Act, 1861, giving the Admiralty Court jurisdiction to decide questions between co-owners is not confined to registered owners. *The Bonnie Kate*, 57 L. T. 203; 6 Asp. M. C. 149.

Petition to Restrain Sale of Ship—17 & 18 Vict. c. 104, s. 65.]—A petition presented under 17 & 18 Vict. c. 104, s. 65, by a part owner of a ship, which was the subject of a joint adventure, to have the other part owner restrained from dealing with his joint interest in the ship, held to be incompetent; because sub-s. 65 applied only where it was sought to prevent the sale of a ship under ss. 62, 63, and 64, alleged to be vested in a person not qualified to own a British ship. *McPhail* v. *Hamilton*, 5 Ct. of Sess. Cas. (4th ser.) 1017. And see *Roy* v. *Hamilton*, 5 Ct. of Sess. Cas. (3rd ser.) 573.

Claim for Damages.]—In a co-ownership suit brought for sale of the ship by some of the part owners against the others, the latter set up in their defence a claim for damages alleged to have been caused by the wrongful act of the former:—Held, that under 24 Vict. c. 10, s. 8, the court had jurisdiction to entertain the claim. *The Ceylon*, 18 L. T. 417.

Under 24 Vict. c. 10, s. 8, the Admiralty Court ordered an account to be taken between co-owners relating to matters which took place before the date assigned for the act to come into operation, and relating to a ship lost before the institution of the cause. *The Idas*, Br. & Lush. 65.

Bill of Sale, Absolute or Mortgage.]—A bill of sale of shares in a ship was executed by the defendant, the sole owner, to T., with a declaration of ownership as required for registration. T. did not register the instrument for four years. In a co-ownership suit he sought to have the ship sold, and accounts taken between himself and the defendant. The bill of sale, though in form absolute, was really given as security for a debt. Application refused. *The Jane*, 23 L. T. 791 (Irish).

Sale of Ship—Registered in Guernsey.]—The Admiralty Division has no jurisdiction over an action in rem, instituted under s. 8 of the Admiralty Court, 1861, claiming an account of the earnings and sale of a ship when the ship is registered at the port of Guernsey, and not at any port in England or Wales. *The Robinsons and The Satellite*, 51 L. T. 905; 5 Asp. M. C. 338.

Receiver.]—The court will appoint a receiver in a co-ownership suit where the circumstances exist which in the opinion of the court render such a course just and convenient. *The Ampthill*, 5 P. D. 224.

Account—After Sale of Share.]—A. and B. were co-owners of a ship. A. sold his share to a third person, and afterwards instituted a suit in rem in the Court of Admiralty to have an account taken between himself and B. in relation to the employment and earnings of the ship during the time he and B. were co-owners:—Held, that as the suit related to questions which arose between the parties while they were co-owners, the court had jurisdiction to entertain the suit, notwithstanding A. had ceased to be a co-owner at the time of the institution of the suit. *The Lady of the Lake*, 39 L. J., Adm. 40; L. R. 3 A. & E. 29; 21 L. T. 683; 18 W. R. 528.

—— **What should be Included—Account of Ship's Agent.**]—In an action for settlement of accounts between co-owners under s. 8 of the Admiralty Court Act, 1861, the plaintiff is entitled only to settlement of such accounts as are or ought to be rendered before the writ. If a co-owner is ship's agent for a coasting steamer at a port of call the amount due to him as agent

cannot be recovered in a co-ownership action. *The Eider*, 40 L. T. 463 ; 4 Asp. M. C. 104.

Of Managing Owner.]—See *The Mount Vernon*, and cases ante, cols. 59, et circa.

Reference—Report—Stay of Execution—Costs.]—A managing owner, who had not delivered accounts for nine years, instituted a co-ownership action for settlement of accounts, and for payment of the balance found due to him, and claimed certain items in respect of materials supplied to the ship for which he had not paid, and for which the defendants were being sued in the Queen's Bench Division. The registrar in his report allowed the plaintiff these items. Upon application to confirm the report, and for judgment, the court decreed payment of the amount found due by the registrar, but stayed execution until the defendants were protected against the claims in the Queen's Bench Division, and refused the plaintiff the costs of the action upon the ground of delay in rendering his accounts. *The Charles Jackson*, 52 L. T. 631 ; 5 Asp. M. C. 399.

—— **Objection to Report.**]—Where an action is instituted in an admiralty district registry by part owners of a ship against the managing owner for an account, and the writ claims an account under Ord. III. r. 8, and an order for the filing of the accounts is made under Ord. XV. r. 1, and the account is proceeded with pursuant to order, and the district registrar reports thereon, such report is to be treated as the usual report in an Admiralty Court action, and if the defendant seeks to take objection thereto, he must do so according to the provisions of Ord. LVI. r. 11, otherwise the plaintiff will be entitled to judgment thereon. *Gowan* v. *Sprott*, 51 L. T. 266 ; 5 Asp. M. C. 288.

—— **Objecting to—Extension of Time.**]—The court will not extend the time for objecting to the registrar's report in a co-ownership action without special grounds being shewn by the party seeking to object. *Ib.*

Charterparty—Authority of Managing Owner.]—The managing owner of the ship "V.," with the authority of his co-owners, entered into negotiations abroad with the view of chartering the ship. These negotiations were carried on by an agent abroad. On the 17th July, 1884, a form of charter, signed by the managing owner, was offered to the proposed charterers. They objected to certain provisions in it, to which objections the agent, with the managing owner's authority, assented. On the 19th July the charterers signed the charter, having previously introduced into it certain further alterations which had never been suggested to the managing owner's agent. On the same day certain of the co-owners gave notice to the managing owner that they refused to be bound by any charter. The managing owner, considering himself bound to sign the charterparty, signed it on the 22nd July. The execution of the charterparty was prevented by the arrest of the "V." by the dissentient owners, and damages resulted therefrom :—Held, in a co-ownership action, that there was no binding contract until the managing owner signed the charter on the 22nd July, and that, as the dissenting owners had revoked their authority on the 19th July, they were not bound by the charter. *The Vindobala*, 58 L. J., Adm. 51 ; 14 P. D. 50 ; 60 L. T. 657 ; 37 W. R. 409 ; 6 Asp. M. C. 376—C. A.

Citation.] — In a cause between co-owners, under 24 & 25 Vict. c. 10, s. 8, the court granted a citation in personam on the defendant, and a monition on the London Dock Company to bring in freight detained by them under a stop-order from the defendant. *The Meggie*, L. R. 1 A. & E. 77.

19. Necessaries.

See also, I. Building, Repairs and Tonnage ; V. Master ; VIII. Sale and Transfer.

a. Generally.

Material Men have no Lien on the Proceeds of the Ship sold by the Court.]—Material men have no lien for supplies furnished in England on the proceeds of a ship sold by decree of the Admiralty Court in a wages suit. *The Neptune, Hodges* v. *Sims*, 3 Knapp, P. C. 94.

Lien — Practice of Admiralty Court.] — Although there was no lien for necessaries, the Admiralty Court previously to *The Neptune* (supra), allowed material men to claim against the proceeds of a ship remaining in the registry. *The Wharton*, 3 Hag. Adm. 148, n.

—— **Arrest for general Balance of Account.**]—The agents of a foreign ship, being also part owners, supplied her from time to time with coals, and made disbursements, receiving freight, and crediting the same in their accounts. They arrested the ship for a balance due upon the same account :—Held, that the arrest was invalid. *The West Friesland* or *The Twentje*, *Van Hasselt* v. *Sack*, Swabey, 456 ; 2 L. T. 613 ; 8 W. R. 423—P. C. Reversing *S. C.*, nom. *The West Friesland* (otherwise *Twenje*), Swabey 454 ; 5 Jur. (N.S) 658. See also *The Ella A. Clark*, infra, col. 965 ; *The Princess Charlotte*, infra, col. 965.

3 & 4 Vict. c. 65—Necessaries Supplied before the Act.]—The statute 3 & 4 Vict. c. 65, enabled the admiralty to entertain a claim for necessaries supplied to a foreign ship before the passing of the act. *The Alexander*, 1 W. Rob. 288, 346.

Inquiry whether any Sum Due.] — Under Ord. XXXIII., Judicature Act, 1875, in an action for necessaries, the court, in its discretion, ordered enquiries to be made before judgment, whether any and what sum is due. *The Sully*, 48 L. J., Adm. 56.

Necessaries Supplied to Foreign Ship — Jurisdiction.]—See *The Anna*, infra, col. 965.

Jurisdiction of Court of Passage.]—See *The Dowse*, supra, col. 945.

Title of Suit—Repairs.]—The institution of a suit as a cause of necessaries does not estop the plaintiff from afterwards pleading, and proving that his claim is in respect of repairs ; but the title of the cause must be amended. *The Shipworth*, 10 Jur. (N.S.) 445 ; 10 L. T. 43.

Contempt of Court by Master.]—Where, on a claim for necessaries, the master, in contempt of the warrant, sailed out of the jurisdiction, the

court allowed a cause for necessaries to be set down, and the plaintiff to file proofs; and, upon such proof of the facts, condemned the ship in the claim and costs. *The Lady Blessington*, 34 L. J., Adm. 72.

Bankruptcy Jurisdiction of County Court—Vice-Admiralty Court—Injunction.]—A county court had jurisdiction in bankruptcy under 32 & 33 Vict. c 71, s. 72, to restrain a person trading in London from enforcing in a vice-admiralty court at Sierra Leone a claim for necessaries supplied abroad, on the order of the master, to a ship belonging to the bankrupt after the filing of the petition. *The Albion, Halliday* v. *Harris*, or *Harris* v. *Halliday*, 43 L. J., C. P. 350; L. R. 9 C. P. 668; 27 L. T. 732; 22 W. R. 756; 1 Asp. M. C. 481.

Vice-Admiralty Court—24 & 25 Vict. c. 24.]—A vice-admiralty court in a British possession has no jurisdiction under 24 Vict. c. 24, s. 10, to entertain a suit for necessaries supplied at a port out of that possession. A master can only claim against the ship for disbursements from the date at which he is on the ship's register as master. *Ib.*

b. What are.

Meaning of Term Generally.] — The term "necessaries," in the statutes giving the admiralty court jurisdiction over such claims, has the same meaning as is given to it by the common law courts, and signifies whatever the owner of a vessel, as a prudent man, if present under circumstances in which his agent in his absence is called upon to act, would have ordered. *The Riga*, 41 L. J., Adm. 39; L. R. 3 A. & E. 516; 26 L. T. 202; 20 W. R. 927; 1 Asp. M. C. 246.

"Necessaries," in 3 & 4 Vict. c. 65, s. 6, mean articles immediately necessary for the ship, as contradistinguished from those merely neccessary for the voyage. *The Comtesse de Trègeville*, Lush. 329; 4 L. T. 713.

The statute does not apply to ordinary mercantile accounts between shipowner and agent. *Ib.*

Premiums on Insurance—Ship Dues—Brokerage.]—Premiums paid by a shipbroker at the owner's request to procure insurance on freight are necessaries. *Mackintosh* v. *Mitcheson*, 4 Ex. 175; 18 L. J., Ex. 385.

Charges paid by a shipbroker at the owner's request for entering, reporting, and piloting a ship, and for tonnage and light-dues, and for noting protest, are within the term. *Ib.*

Advances at the owner's request for travelling expenses of the master and goods supplied for the ship's use are necessaries. *Ib.*

Brokerage charges made by a ship's broker for acting as ship's agent, and for negotiating a charterparty may be necessaries within the meaning of the statutes, but must be proved to come within the definition. *Ib.*

Premiums on insurance not necessaries. *The Heinrich Bjorn*, supra, col. 966.

Coppering Ship.]—When it is necessary that a wooden ship bound upon a particular voyage should be coppered, the coppering is a necessary for the voyage, which gives the material-man doing the work to a foreign ship, upon the orders of the master, a maritime lien. *The Turliani*, 32 L. T. 341; 2 Asp. M. C. 603.

Copper sheathing is a necessary. *The Perla*, Swabey, 353; 4 Jur (N.S.) 741.

Agent's Expenses — Collision Suit.] — The expenses of an agent for coming from Newcastle to London to assist the master in the defence of a vessel prosecuted in a cause of collision, and for attending the trial are not necessaries. *The Bonne Amélie*, 35 L. J., Adm. 115; L. R. 1 A. E. 19; 14 L. T. 191; 6 Asp. M. C. 149.

Supplies Generally.]—Necessaries are whatever is fit and proper for the service of the ship, and whatever a prudent owner would provide. The onus of proving the necessity is on the material-man. *The Alexander*, 1 W. Rob. 288, 346.

Butcher's Meat.]—*The N. R. Gosfabrick*, Swabey, 344; 4 Jur. (N.S.) 742; 6 W. R. 871.

Coals.]—See *The Twentje*, or *West Friesland*, supra, col. 960.

Expenses of Defending Collision Action.]—The expenses of an agent coming from Newcastle to London to assist the master in a suit against the ship in admiralty:—Held, not to be necessaries. *The Bonne Amélie*, 35 L. J., Adm. 115; L. R. 1 A. & E. 19; 14 L. T. 191; 6 Asp. M. C. 149.

Repairs to Machinery.]—Repairs to machinery of a steamship, in order to make her seaworthy, are necessaries within 3 & 4 Vict. c. 65. *The Flecha*, 1 Spinks, 438.

Charterparty — Broker's Commission.] — The "M.," while on a voyage, was chartered by her owners, through shipbrokers, for a future voyage. Subsequently the shipbrokers arrested the "M." in a suit for necessaries, to recover their commission on obtaining the charterparty:—Held, that the commission was not a "necessary." *The Marianne*, 60 L. J., Adm. 39; [1891] P. 180; 64 L. T. 539; 7 Asp. M. C. 34.

Money Advanced.]—Money advanced to provide necessaries, held to be "necessaries" within 3 & 4 Vict. c. 65, s. 6. *The Sophie*, 1 W. Rob. 369.

Advances in a foreign port to procure necessaries may be recovered as necessaries. *The Masonic*, 5 L. T. 460.

Moneys obtained by means of a bill of exchange to procure necessaries are necessaries within 3 & 4 Vict. c. 65, s. 6. *The Anna*, 46 L. J., Adm. 15; 1 P. D. 253; 34 L. T. 895; 3 Asp. M. C. 337—C. A.

A simple contract creditor for payment of seamen's wages and board has no lien on the ship. The proceeds of a ship salved as a derelict therefore (following *The Neptune*, supra, col. 960) paid out to salvors and mortgagees. *The New Eagle*, 2 W. Rob. 441.

The agents of a foreign ship in a British port, who have paid for necessaries supplied to her, or who have rendered themselves liable to pay for such necessaries, may sue the ship for such advances as were made on her account, but not for the balance of a general account against her owners. *The Underwriter*, 25 L. T. 279; 1 Asp. M. C. 127.

A firm in England having accepted and paid a bill of exchange drawn on them by the master of a foreign ship abroad, to procure necessaries, may sue the ship in the admiralty court, as for

necessaries. *The Onni*, Lush. 154; 3 L. T. 447. *S. C.*, infra.

A repayment of a debt due from the ship for the supply of necessaries does not place the person making such repayment in the position of a person supplying the necessaries, even though such repayment was required by the law of the country where the supply was made, and the ship could not leave the port until such repayment had been made. *The Pacific*, Br. & Lush. 243; 33 L. J., Adm. 120; 10 Jur. (N.S.) 1110; 10 L. T. 541; cf. *The Flor de Funchal*, infra, col. 967.

A claim for money advanced to a master to pay average dismissed, such advances not being necessaries within 3 & 4 Vict. c. 65, s. 6. *The Aaltje Willemina*, L. R. 1 A. & E. 107.

—— **Liabilities of Master.**]—Necessaries having been supplied to a ship in a foreign port, they were paid for by the agents at that port, the master indorsing the accounts to the agents, when sent to him, with a request to them to pay, and signing them. The master was accredited to the agents by his owners, and the former were to draw bills on the owners for the amounts advanced. No money passed through the master's hands. When the ship arrived in England, the mortgagees took possession of her and the freight:—Held, that as the master became personally liable for the amounts so paid, he had a right to proceed in rem against the ship. *The Marco Polo*, 24 L. T. 804; 1 Asp. M. C. 54.

—— **To Release Ship.**]—A master and sole owner of a vessel put her into a shipwright's dock for repair. The shipwright repaired the vessel, and refused to allow her to leave his dock until his bill for the repairs was paid for. The master having no funds the plaintiff lent him money to pay the shipwright's bill, and the master paid the bill with the money lent:—Held, that the plaintiff was entitled to recover the amount of the loan in a suit for necessaries. *The Albert Crosby*, L. R. 2 A. & E. 37; 18 W. R. 410.

—— **To pay off Bondholder.**]—Money advanced to the master of a foreign ship in London to pay off a bondholder who had arrested the ship, is not necessaries within 3 & 4 Vict. c. 65. But the persons interested not opposing, moneys in court representing proceeds of the ship were paid out to the lender. *The Henry Read*, 7 W. R. 180.

A Dutch ship, on her voyage to Liverpool, was driven to Stornoway, where she had to refit. Merchants at Liverpool advanced 200*l.* for the purpose, and afterwards, at Liverpool, a further sum to defray port charges, and other necessary expenses. The ship was arrested and sold in a necessaries suit, under 3 & 4 Vict. c. 65, s. 8, at the instance of the merchants:—Held, in the absence of opposition by the shipowners, that the 200*l.*, as well as the further sum advanced at Liverpool, could be paid out to the lenders. *The Afina Van Singe*, Swabey, 514; 1 L. T. 340.

An advance of money to pay off a bottomry bond for which a ship is arrested, being made under a contract to pay off claims outstanding on the ship, and outfit her for a new voyage, in consideration of receiving brokerage and the prepaid freight for the new voyage, is not within 3 & 4 Vict. c. 65, s. 6, and cannot be recovered in the admiralty court. *The Onni*, Lush, 154; 3 L. T. 447, *S. C.* supra.

—— **To get Master out of Gaol.**]—A foreign ship cannot be sued for money advanced to the master to enable him to come out of gaol, where he was imprisoned for a debt incurred for necessaries supplied to the ship. *The N. R. Gosfabrick*, Swabey, 344; 4 Jur. (N.S.) 742; 6 W. R. 871.

c. Lien.

There is no maritime lien for necessaries. *Buxton* v. *Snee*, 1 Ves. Sen. 154. But see *Benzen* v. *Jeffries*, aliter, and cases supra, col. 929.

One who supplies necessaries has no lien upon the ship. *Wood* v. *Hamilton*, H. L. 15th June, 1789, cited, Maclachlan on Shipping (3rd Ed.), 68.

One who supplied necessaries to a ship formerly held to have a lien on her. *Watson* v. *Warner*, Sid. pt. 2, 161; *Farmer* v. *Davies*, 1 Term Rep. 108; *Anon.*, Sid. pt. 1, 453; *Rich* v. *Coe*, 2 Cowp. 636; 1 Term R. 108, n.

—— Or, in equity, upon her earnings, in case of the bankruptcy of her owner. *Hill*, *Ex parte*, 1 Madd. 61.

No lien for necessaries can be created by parol, or by bills drawn by the master. *Hallett*, *Ex parte*, 19 Ves. 474; 3 V. & B. 135; 2 Rose, 194, 229.

The ship cannot be sued in admiralty for provisions supplied to her. Nature of process against the ship considered. *Smith* v. *Tilly*, 1 Keb. 708.

The jurisdiction conferred on the court of admiralty by the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 5, "over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs," does not create a maritime lien, nor render the ship chargeable for necessaries. *The Two Ellens*, *Johnson* v. *Black*, 8 Moore, P. C. (N.S.) 398; 41 L. J., Adm. 33; L. R. 4 P. C. 161; 26 L. T. 1; 20 W. R. 592; 1 Asp. M. C. 208—P. C.

The material-man has no maritime lien, his right to the res as a security only arises upon his instituting a suit; any security he may thus obtain is subject therefore to any then existing claims; and a registered mortgage takes precedence as an existing encumbrance over a claim for necessaries, though supplied previously to the register of the mortgage. *The Pacific*, Br. & Lush. 243; 33 L. J., Adm. 120; 10 Jur. (N.S.) 1110; 10 L. T. 541.

The lien of the plaintiff in an action in rem, under s. 4 of the Admiralty Court Act, 1861, takes effect from the moment of the arrest of the ship. Where, therefore, such an action was commenced against a vessel belonging to a limited company, and the company, after a warrant of arrest had been served, was ordered to be wound up:—Held, that the official liquidator had no claim to the proceeds of the vessel in the hands of the court as against the plaintiff. *The Cella*, 57 L. J., Adm. 55; 13 P. D. 82; 59 L. T. 125; 36 W. R. 540; 6 Asp. M. C. 293—C. A.

No maritime lien attaches to a ship in respect of costs or other necessaries supplied to it. *The Rio Tinto*, *Laws* v. *Smith*, 9 App. Cas. 356; 50 L. T. 461; 5 Asp. M. C. 224—P. C.

Necessaries do not ab origine give a lien, but only a statutory remedy against the ship. *The Gustaf*, Lush. 506; 31 L. J., Adm. 207; 6 L. T. 660.

A material-man, who supplies stores and materials for the equipment of a British ship, having no maritime lien, cannot enforce his claim against the ship in the hands of a subsequent purchaser, even though such purchaser has notice at the time of purchase that the

claim is still unpaid. *The Aneroid*, 47 L. J., Adm. 15; 2 P. D. 189; 36 L. T. 448; 3 Asp. M. C. 418.

Court of Chancery—Jurisdiction.]—The court of equity had concurrent jurisdiction with the admiralty in cases of necessaries and wages, creating a lien on the ship. *Allport* v. *Thomas*, Gilbert, Eq. 227.

Proceeds of Ship sold by Court.]—Proceeds of a ship sold for wages, and bottomry not paid out to material-men. *The Maitland*, 2 Hag. Adm. 253. See also *The Neptune*, supra, col. 960.

d. Foreign Ships.

Ship Colonial built and owned.]—A vessel built and registered at New Brunswick and owned in Nova Scotia:—Held, not to be a foreign ship or sea-going vessel, within 3 & 4 Vict. c. 65, s. 6. *The Ocean Queen*, 1 W. Rob. 457.

Transfer to British Owner.]—A claim for necessaries supplied to a foreign ship may be enforced by proceedings in rem under 3 & 4 Vict. c. 65, s. 6, notwithstanding a subsequent and bonâ fide transfer to a British owner, and this remedy is not taken away by 24 & 25 Vict. c. 10, s. 5, though the British owner is domiciled in England at the time of the institution of the cause. *The Ella A. Clark*, Br. & Lush. 32; 32 L. J., Adm. 211; 9 Jur. (N.S.) 312; 8 L. T. 119; 11 W. R. 524.

The 24 & 25 Vict. c. 10, s. 5, does not apply to ships foreign owned at the time when the necessaries were furnished. *Ib.*

A vessel foreign owned at the time when necessaries are supplied to her, cannot, by a subsequent sale, change her legal position so as to deprive the person supplying the necessaries of the remedies given by 3 & 4 Vict. c. 65, s. 6. *The Princess Charlotte*, 33 L. J., Adm. 188.

Supplied in Foreign Port.]—The court of admiralty has no jurisdiction, either under 3 & 4 Vict. c. 65, or under 24 & 25 Vict. c. 10, to entertain a claim for repairs done, and necessaries supplied, to a foreign ship in a foreign port. *The India*, 32 L. J., Adm. 185; 9 Jur. (N.S.) 417; 9 L. T. 234; 11 W. R. 536. Overruled by *The Mecca*, infra.

Articles supplied for the equipment of a vessel building in a foreign dockyard are not necessaries within the meaning of 3 & 4 Vict. c. 65, s. 6. *The Ocean*, 2 W. Rob. 368; 9 Jur. 381.

—— **Supplied in Colonial Ports.**]—The court has jurisdiction to entertain a claim against a foreign ship to recover payments made to enable the master of the ship to supply her with necessaries while lying in a British colonial port. *The Anna*, 46 L. J., Adm. 15; 1 P. D. 253; 34 L. T. 895—C. A.

The admiralty division of the high court has jurisdiction to entertain an action brought for necessaries supplied to a foreign ship in a British colonial port. *Ib.*

The master of a foreign vessel lying in the port of Quebec, being without funds or credit, by means of a bill of exchange drawn upon a firm of shipbrokers in London, procured the advance of a sum of money for necessaries for the ship. The bill was accepted and paid, but the acceptors, not having received the amount of the bill from the shipowners, instituted an action against the ship for the amount of the bill:—Held, that the court of admiralty had jurisdiction to entertain the action. *Ib.*

An American ship, supplied with necessaries at the Cape of Good Hope by an English firm having an establishment there, on her arrival in the port of London, was arrested at the suit of the merchant who supplied the necessaries, and, with the consent of the owner, sold. Payment to him out of the proceeds was opposed by the mortgagees of the vessel; but the court held that it had jurisdiction on a claim for necessaries supplied to a foreign vessel in the colonial as well as in British ports, and decreed payment accordingly. *The Wataga*, Swabey, 165; 5 W. R. 155.

—— **Supplied to Foreign Vessel in English Port.**]—The statute 3 & 4 Vict. c. 65, s. 6, does not give a maritime lien in respect of necessaries supplied to a foreign ship in an English port. *The Heinrich Björn*, *Northcote* v. *Heinrich Björn* (*Owners*), 55 L. J., Adm. 80; 11 App. Cas. 270; 55 L. T. 66; 6 Asp. M. C. 1—H. L. (E.)

The plaintiffs advanced to the part-owner of a foreign ship, then at Liverpool, money for necessaries for the ship. The part-owner having sold his interest in the ship to the defendants, the plaintiffs brought an action in rem for the amount of the advances:—Held, that the action could not be maintained. *Ib.*

—— **Supplied in Foreign Port—"High Seas."**]—An action in rem may be maintained against a foreign ship, if found in this country, in respect of necessaries supplied to such ship in a foreign port (not being the port to which the ship belongs), whether or not such foreign port be on the high seas. *The India*, supra, col. 965, overruled. As to what constitutes a place "on the high seas," quære. *The Mecca*, 64 L. J., Adm. 40; [1895] P. 95; 11 R. 742; 71 L. T. 711; 43 W. R. 209; 7 Asp. M. C. 529—C. A.

Owners domiciled in England or Wales—Meaning of Term.]—The term "domiciled," in 24 & 25 Vict. c. 10, s. 5, is used in its known legal sense; and an action for necessaries will not lie against a ship, the owner of which is temporarily absent from this country. *The Pacific*, Br. & Lush. 243; 33 L. J., Adm. 120; 10 Jur. (N.S.) 1110; 10 L. T. 541.

—— **County Court.**]—When a suit is instituted in a county court, under 31 & 32 Vict. c. 71, s. 3, for necessaries supplied to a ship, the objection that the owner or part-owner of the ship is domiciled in England or Wales must be taken before judgment is pronounced. *Michael, Ex parte*, 41 L. J., Q. B. 349; L. R. 7 Q. B. 658; 26 L. T. 871; 1 Asp. M. C. 337.

When the objection is taken for the first time after judgment has been pronounced, a prohibition will not be granted. *Ib.*

Agent of Foreign Ship on the Spot ready to supply Necessaries.]—Semble, an action will not lie against a foreign ship for necessaries, under 3 & 4 Vict. c. 65, although there is an agent of the owner upon the spot ready to supply the necessary funds. *The Helena Sophia*, 3 W. Rob. 265.

The lender of money to buy necessaries has the same right against the ship as a material-man. *Ibid.*

e. Priorities.

Between Necessaries Men.]—Amongst several claimants for necessaries, he who first established his claim has precedence. *The Queen*, 19 L. T. 705.

Where one only of several plaintiffs in different causes of necessaries has obtained a decree of the court, he is entitled to be paid in priority; the others, being in pari conditione, share ratably. *The William F. Safford*, Lush. 69; 29 L. J., Adm. 109; 2 L. T. 301.

Plaintiff in possession of a ship, arrested for necessaries, under first decree; subsequent arrests by other claimants for necessaries; proceeds of sale of ship insufficient; pro rata payment ordered. *The Desdemona*, Swabey, 158.

Ship sold and Proceeds brought into Court—Order and Distribution of Fund.]—Where a ship has been sold and the proceeds paid into court, claims for necessaries, in respect of which actions have been brought, take priority inter se, neither according to priority of writ nor of judgment, but the fund is to be distributed pro ratâ as between the persons who assert their claims before an unconditional decree is pronounced. *The Africano*, 63 L. J., Adm. 125; [1894] P. 141; 6 R. 767; 70 L. T. 250; 42 W. R. 413; 7 Asp. M. C. 427.

Even if the decree in an action for necessaries were in any instance made in unconditional terms, it would appear that, so long as the fund remains in court, the decree could and should be modified so as to let in other persons who without laches put forth claims of a like character. *Ib.*

Quære, whether, when, as in the present case, a judgment has been obtained in the county court, and the action is subsequently transferred to the high court, such a judgment gives any priority. *Ib.*

Mortgagee.]—A claim by the plaintiff in an action for necessaries brought under s. 4 (or, semble, under s. 5) of the Admiralty Court Act, 1861, even though it includes wages paid to the ship's crew at the request of the owner, is not entitled to precedence of a mortgagee's claim. Semble, precedence might have been gained by obtaining prior permission from the court to make the payment. *The Lyons*, 57 L. T. 818; 6 Asp. M. C. 199. *And see* IX. MORTGAGE, ante, cols. 189, seq.

Advance of Freight to enable Master to Pay Disbursements.]—An advance of freight to enable a master to pay his ship's disbursements before sailing does not give the charterer a claim against the ship which will take precedence of the claim of a mortgagee; nor does an advance for a similar purpose made by an insurance company. *The Turliani*, 32 L. T. 841; 2 Asp. M. C. 603.

Necessaries Lien ranks after Bottomry.]—See *The William F. Safford*, supra.

A claim against a ship for necessaries supplied, when made, not by the person who actually supplies them, but by the broker who procured them to be supplied, and paid for them on account of the ship, does not take precedence of a claim under a bottomry bond. *The Flor de Funchal*, 35 L. J., Adm. 119; 13 W. R. 1000.

Ship Agent postponed to Shipwright.]—A ship's agent was appointed by the master on his arrival at Bristol. He had no previous knowledge of either master or owner, but made no inquiries as to how he was to be repaid his advances for necessaries. He allowed the vessel to be placed in the hands of a shipwright to be repaired, and when her value was by this means increased, caused her to be arrested:—Held, that he was not entitled to be paid his claim in priority to the shipwright. *The Panthea*, 25 L. T. 983; 1 Asp. M. C. 133.

Shipwright's Lien.]—A foreign ship in a builder's yard at Grimsby was arrested for necessaries. It appearing that the claim was for an amount exceeding her value, an order was made for her sale, without prejudice to the builder's right to claim against the proceeds. *The Nordstjernen*, Swabey, 260.

Time of Attachment of Claim.]—The lien of the plaintiff in an action in rem, under s. 4 of the Admiralty Court Act, 1861, takes effect from the moment of the arrest of the ship. Where, therefore, such an action was commenced against a vessel belonging to a limited company, and the company, after a warrant of arrest had been served, was ordered to be wound up:—Held, that the official liquidator had no claim to the proceeds of the vessel in the hands of the court as against the plaintiff. *The Cella*, 57 L. J., Adm. 55; 13 P. D. 82; 59 L. T. 125; 36 W. R. 540; 6 Asp. M. C. 293—C. A.

20. BREACH OF CONTRACT; DAMAGE TO CARGO.

24 Vict. c. 10, s. 6—Breach of Contract by Part Owner.]—Semble, that the court of admiralty has jurisdiction to proceed in rem against a ship for breach of contract within the above act, although that breach is committed by one of the part owners of the ship only (the master), and for which the other part owners would not be responsible. *The Emilien Marie*, 44 L. J., Adm. 9; 32 L. T. 435; 2 Asp. M. C. 514.

—— **Master Refusing to Sail to Loading Port.**]—A ship was chartered to proceed to a port abroad and there take in cargo. The charterers instituted a suit against the ship, and in their petition alleged that the master of the ship improperly refused to proceed with the ship to the agreed port of loading, and proceeded with her to another port:—Held, that such conduct on the part of the master did not constitute a breach of duty or breach of contract within the above act, and that the court had no jurisdiction to entertain any claim for damages arising therefrom. *The Dannebrog*, 44 L. J., Adm. 21; L. R. 4 Adm. 386; 31 L. T. 759; 23 W. R. 419; 2 Asp. M. C. 452.

—— **Contract referred to—Bill of Lading.**]—The general words of the Admiralty Court Act, 1861, s. 6, "any claim . . . for any breach of contract on the part of the owner, &c. of the ship," have relation to the contract in the bill of lading. *The Pieve Superiore, Dapueto* v. *Wyllie*, 43 L. J., Adm. 20; L. R. 5 P. C. 482; 30 L. T. 887; 22 W. R. 777; 2 Asp. M. C. 319.

—— **Breach of Duty—Improper Abandonment.**]—A petition alleged that a master who was also the owner of the vessel had wilfully, improperly

and fraudulently injured and abandoned her on the high seas. She was subsequently taken into port by salvors, and the owners of cargo were compelled to pay salvage to get possession of their cargo, and its delivery was consequently delayed. The master and vessel were both foreign :—Held, that the allegation "fraudulently" might be struck out of the petition; that the court had jurisdiction over the cause; and that the owners of the cargo might sue the ship in the admiralty court for the constructive damage. *The Princess Royal*, 39 L. J., Adm. 43; L. R. 3 A. & E. 41; 22 L. T. 39.

——**Stoppage in Transitu—Refusal to Deliver.**]—Upon a vendor asserting his right to stop in transitu, the master, unless aware of some legal defeasance of such right, is bound to deliver the goods to him, and his refusal to deliver constitutes a breach of duty for which the ship will be liable. *The Tigress*, Br. & Lush. 38; 32 L. J., Adm. 97; 9 Jur. (N.S.) 361; 8 L. T. 117; 11 W. R. 538.

—— **With respect to Protest.**]—But the omission by the master of certain particulars in his protest is not a breach of duty or contract on the part of the shipowner or his servants, so as to give the owner of the damaged goods a right of action, even if such omission has been made from improper motives. *The Santa Anna*, 32 L. J., Adm. 198.

Collision—Damage to Cargo.]—Under 24 Vict. c. 10, s. 7, the admiralty division has no jurisdiction to entertain an action in rem by the owners of cargo against the vessel on which it was laden for damage done to such cargo. *The Victoria*, 56 L. J., Adm. 75; 12 P. D. 105; 56 L. T. 499; 35 W. R. 291; 6 Asp. M. C. 120.

Carriage into English Port.]—The admiralty court has jurisdiction under 24 Vict. c. 10, s. 7, in case of short delivery of cargo to be carried into an English port, although the goods are not in fact so carried into port. *The Danzig*, Br. & Lush. 102; 32 L. J., Adm. 164; 9 L. T. 236.

A ship under charter to proceed to certain ports in England for orders to discharge at a port in England or on the continent, entered Falmouth with her cargo for orders, and was ordered to discharge at Bremen, where she did discharge her cargo. She then sailed for Cardiff, where she was arrested by process of the admiralty court :—Held, that inasmuch as the cargo was deliverable at a port in England, and as the ship with her cargo had entered such a port for orders, the cargo had been "carried into a port" in England within the meaning of the above section. *The Piere Superiore*, supra.

The court has jurisdiction only where the breach of contract complained of has been committed by the ship which actually brings the goods into a port in England and Wales. *The Ironsides*, Lush. 458; 31 L. J., Adm. 129; 6 L. T. 59.

Where, therefore, a part of goods shipped on board vessel "A." was lost, and the remainder was transhipped and brought into an English port on board vessel "B." :—Held, that no jurisdiction was given to it to arrest "B." to satisfy the owner of the goods lost. *Ib.*

But the court of admiralty has jurisdiction over a claim for short delivery of cargo as per bill of lading in a British port, though the goods not delivered were not in fact carried into port. *The Danzig*, Br. & Lush. 112; 32 L. J., Adm. 164; 9 L. T. 236.

A foreign vessel was chartered to carry coals on the charterer's account to a foreign port, and bring home to England a return cargo of timber; the charterers sued the ship claiming damages for nondelivery of certain coals on the outward voyage and for the improper delivery of the timber on the return voyage :—Held, that they were not entitled to sue in respect of the nondelivery of the coals abroad, as the 24 & 25 Vict. c. 10, s. 6, did not give the court of admiralty such jurisdiction. *The Kusan*, Br. & Lush. 1; 32 L. J., Adm. 97; 9 Jur. (N.S.) 234.

To a claim for damage to goods imported, instituted under the above provision, a claim of set-off for freight due under the bills of lading will not be allowed. *The Don Francisco*, Lush. 468; 31 L. J., Adm. 14; 5 L. T. 460.

The words "goods carried into any port in England," in 24 & 25 Vict. c. 10, s. 6, do not mean goods imported into England exclusively. *The Bahia*, Br. & Lush. 61.

When, therefore, the master of a foreign ship having a cargo consigned from New York to Dunkirk, in France, put into Ramsgate and landed the cargo, and refused either to carry it on to Dunkirk or to give delivery to the owners at Ramsgate :—Held, that for such breach of duty by the master the ship could be sued in the Admiralty Court. *Ib.*

No Lien.]—The Admiralty Court Act, 1861, s. 6, does not confer a maritime lien. It only gives to the court of admiralty jurisdiction to entertain a suit either in personam or in rem by arrest of the ship whenever it comes within reach of process. The arrest cannot avail against any valid charge on the ship, nor against a bonâ fide purchaser. *The Cella*, ante, col. 968. S. P., *The Piere Superiore*, supra.

Who may Sue.]—An indorsee of a bill of lading may sue for damage to cargo under the Bills of Lading Act, 1856 (18 & 19 Vict. c. 111), and in the case of a foreign ship, take proceedings in rem under the Admiralty Court Act, 1861 (24 Vict. c. 10), although at the institution of the suit he has sold the cargo. *The Marathon*, 40 L. T. 163; 4 Asp. M. C. 75.

Where the plaintiffs in an action for damage to cargo had indorsed their bills of lading to a bank to secure advances :—Held, that they retained an interest in the cargo sufficient to enable them to maintain their suit, the money recovered to be for the benefit of the parties shewn to be entitled thereto. *The Glamorganshire*, 13 App. Cas. 454; 59 L. T. 572; 6 Asp. M. C. 344—P. C.

Interpleader.]—Where proceedings in admiralty have been taken against a ship by two persons claiming to be owners of cargo, for breach of duty by the master in not delivering the cargo :—Semble, interpleader will not lie because the suit is against the ship and not against the master. *Sablicich* v. *Russell*, L. R. 2 Eq. 441; 14 W. R. 913.

Damages referred to Registrar.]—In cases brought under 24 & 25 Vict. c. 10, s. 6, the damages will be referred to the registrar and merchants, with instructions to follow the rules of the courts of common law as to the measure of damage. *The St. Cloud*, Br. & Lush. 4; 8 L. T. 54.

Shipowner residing in England.]—See *Michael, Ex parte*, ante, col. 966. *The Ella A. Clark*, ante, col. 965.

Inspection.]—See *Daniel* v. *Bond*, post, col. 997.

Limitation of Liability—Stay.]—See *The Alne Holme*, post, col. 749.

Preliminary Act.]—See *The John Boyne*, post, col. 843.

County Court Jurisdiction.]—See *The Rona*, and cases, ante, col. 939.

21. SLAVE TRADE; PIRACY; BOUNTIES.

Slave Trade.]—The treaty with Portugal as to slave trade relates to seizures on the high sea and not in territorial waters. *The Ricardo Schmidt*, 4 Moore, P. C. 121; L. R. 1 P. C. 268. Approved, *The Ovareuse, Reg.* v. *Casaca*, 49 L. J., P. C. 41; 5 App. Cas. 548; 43 L. T. 290; 4 Asp. M. C. 308—P. C.

Evidence sufficient to justify seizures on the high sea is not sufficient when the vessel is in harbour and her papers may be examined. *Ib.*

A seizor may be condemned in costs and damages for wrongful seizure, notwithstanding the presence of suspicious articles on board. *Ib.*

In cases of joint capture of slave ships the same principles applied, as nearly as may be, as in cases of joint capture of a prize in war; statement of the principles. *The Sociedade Feliz*, 1 W. Rob. 303.

In a case of joint capture of a slave ship it is not necessary that the claimant should have been seen by the prize. *Brig, name unknown*, Br. & Lush. 370.

Ship condemned for Slave Trading—Title to Proceeds.]—*The Marianna*, ante, col. 951.

Pirates—Bounties for Capture of.]—Bounties under 6 Geo. 4, c. 49, decreed for destruction of pirates. *Piratical Proahs*, 3 Hag. Adm. 426. *Vessel, name unknown*, 1 W. Rob. 461. *The Serhassan Pirates*, 2 W. Rob. 354. *The Illeanon Pirates*, 6 Moore, P. C. 471.

Bounties for capture of pirates by boats detached from their ships distributable amongst the whole ship's company. *Two Piratical Gunboats*, 2 Hag. Adm. 407.

Meaning of "Piracy"—Extradition Act.]—In the Extradition Act, 6 & 7 Vict. c. 76, 81, "piracy" means piracy by the law of the United States, and not piracy by the law of nations. In time of peace any act of depredation to a ship is piracy; in time of war, aliter. *Tivnan, In re*, 5 B. & S. 645.

Claim of Admiral to share Bounty.]—The provisions of 6 Geo. 4, c. 49, as to salvage on rescue from pirates are not retrospective. The claim of the admiral to share as a constructive salvor rejected. *The Calypso*, 3 Hag. Adm. 209.

22. PRACTICE.

a. Practitioners.

Proctor's Lien.]—A proctor has the same lien for his costs as an attorney has on sums of money decreed by the court to be paid. *The Araminta*, Swabey, 81; 2 Jur. (N.S.) 310; 4 W. R. 396.

The court will give effect to a proctor's lien notwithstanding a garnishee order obtained against money in the registry. *The Jeff Davis*, L. R. 2 A. & E. 1; 17 L. T. 151.

Where, in a suit for master's wages, upon a counter-claim for purchase-money of shares in the vessel (contracted to be purchased) being set up by the owner, a reference to the registrar and merchants resulted in a balance being found against the master:—Held, that the solicitors for the master were entitled under 23 & 24 Vict. c. 127, s. 28, to a charge upon such shares for their costs. *The Philippine*, L. R. 1 A. & E. 309; 16 L. T. 34; 15 W. R. 462.

After payment of the amount awarded for salvage and costs, the defendant's proctor has against the property salved a lien in priority to average expenses or necessaries incurred since the salvage. *The Soblomsten*, 36 L. J., Adm. 5; L. R. 1 A. & E. 293; 15 L. T. 393; 15 W. R. 591.

A plaintiff having obtained a decree for payment by the defendant of a sum of money and costs, he paid part of the sum to the judgment creditors of the plaintiff, under the authority of two garnishee orders. The plaintiff's attorneys had a lien for their costs at the time the orders were made, but no notice had been given to them previously to the application for the orders, nor was the existence of their lien mentioned to the judge who made the orders:—Held, that the defendant ought to have caused notice to be given to the attorneys, or ought to have apprised the judge of the existence of their lien before the orders were finally made, and that the payment under the orders was not a valid satisfaction of the judgment of the court. *The Leader*, 37 L. J., Adm. 57; L. R. 2 A. & E. 314; 18 L. T. 767; 17 W. R. 61.

The freight and proceeds of sale of a ship were insufficient to pay the following claims: first, solicitor's costs of successfully defending the ship in the first action, for breach of contract; second, necessaries supplied before and after the first suit; third, money advanced to pay harbour dues, &c.; fourth, wages of master, also part owner:—Held, that the solicitor's lien had priority to the necessaries supplied after, but not to those furnished before, the institution of the first suit, and to the claim for wages, but not to the claim for moneys advanced for harbour dues. *The Heinrich*, 41 L. J., Adm. 68; L. R. 3 A. & E. 505; 26 L. T. 372; 20 W. R. 759; 1 Asp. M. C. 79.

Solicitors for defendants in a salvage suit against a foreign ship, who are entitled to a charge upon the ship or the proceeds thereof for their costs and expenses incurred in the preservation of the property, do not take priority of the claim of the foreign government, who, on the abandonment of the ship by her owners, are entitled by the provisions of their code to a lien upon the ship or the proceeds for the expenses of sending back the ship's crew to their own country. *The Livietta*, 52 L. J., Adm. 81; 8 P. D. 209; 49 L. T. 411; 5 Asp. M. C. 151—C. A.

Exhibition of Proxies.]—A proctor in the admiralty court is not usually required to exhibit a proxy, but if called upon for a proxy, he satisfies the law by stating the name of the party for whom he is authorised to appear. *The Euxine, Harvey* v. *Euxine (Owners)*, 41 L. J., Adm. 17.

L. R. 4 P. C. 8; 25 L. T. 516; 20 W. R. 561; 8 Moore, P. C. (N.S.) 189; 1 Asp. M. C. 155.

In the vice-admiralty courts proctors are not bound to do more than this under rule 40 of the vice-admiralty rules and regulations, unless upon a strict order of the court. *Ib.*

The production of a proxy, purporting to be duly signed and sealed, but without proof of the handwriting of those who appear to have subscribed the instrument, is a primâ facie compliance with an order to produce a proxy, and throws the onus of disproving its authenticity on the opponents. *Ib.*

An objection to a suit on the ground of the non-production of a proxy is a preliminary objection, to be raised on motion, and not on protest, and the utmost a court can do where such proxies are produced is to stay proceedings until further information can be obtained. *Ib.*

Changing Solicitors.]—A suit was instituted against a vessel, and an appearance entered by a firm of solicitors on behalf of the owner. A sum of money was paid into court in lieu of bail, and the solicitors thereupon procured the release of the vessel, and incurred costs in defending the suit on behalf of the owner. Whilst the suit was pending, and before any sum had been paid to the firm of solicitors on account of such costs, another firm of solicitors entered a second appearance in the same suit on behalf of the same defendant. On an application on behalf of the firm of solicitors by whom the first appearance had been entered, the court made an order setting aside the second appearance, and condemned the defendant in the costs of the motion. *The Oneiza*, L. R. 4 A. & E. 36; 27 L. T. 632; 21 W. R. 232; 1 Asp. M. C. 470.

b. Parties.

See also XVIII. SALVAGE, 19. PRACTICE; XX. COLLISION, 13. JURISDICTION AND PRACTICE, col. 840.

Parties—Joinder of Plaintiffs.]—The practice which existed in the admiralty court before the judicature acts, permitting several plaintiffs to sue collectively, has not been affected or altered by the judicature acts, or the rules made thereunder. *Smurthwaite* v. *Hannay* (63 L. J., Q. B. 737; [1894] A. C. 494) distinguished. *The Maréchal Sucket*, 65 L. J., Adm. 94; [1896] P. 233; 74 L. T. 789; 45 W. R. 141; 8 Asp. M. C. 158.

Appearance—Action in Rem.]—When a proceeding in rem is instituted in the admiralty court to enforce a maritime lien, it is wholly immaterial to whom the res belongs. The owner or other person interested may intervene to defend the suit, but the court deals with the res only, and it is the res and not the owner that is liable in the suit. *The Mullingar*, 26 L. T. 326; 1 Asp. M. C. 252.

Appearances in Local Registry.]—When a cause in rem has been instituted in the Liverpool district registry of the court of admiralty, the owners of the ship proceeded against, if resident out of the limits of the Liverpool district, may appear in the London registry of the admiralty division of the high court of justice, but the præcipe to enter an appearance must contain a recital of the institution of the cause in the Liverpool district registry of the court of admiralty, shewing the title under which the cause was entered at Liverpool. *The General Birch*, 33 L. T. 792; 24 W. R. 24; 3 Asp. M. C. 99.

Appearance under Protest to Jurisdiction.]—A defendant in an admiralty action desiring to object to the jurisdiction of the court, may enter an appearance under protest, in accordance with the practice in force in the high court of admiralty before the coming into operation of the judicature acts. *The Virar*, 2 P. D. 29; 35 L. T. 782; 25 W. R. 453; 3 Asp. M. C. 308—C. A.

A collision took place at sea, about ten miles from the South Stack lighthouse, between an American and a Spanish vessel. Both vessels sank in consequence of the collision, and the owners of the American vessel applied in the registry for leave to issue a writ for service out of the jurisdiction in an action to recover compensation for the loss of their vessel, against a British subject resident in Spain, who was alleged to be one of the owners of the Spanish vessel. The registrar having granted the necessary leave, the writ was issued and service was effected on the defendant in Spain. Thereupon an appearance under protest was entered on his behalf. Afterwards, on these facts being brought before the judge of the admiralty court, the court ordered the action to be dismissed:—Held, on appeal, that the order was right. *Ib.*

An action of co-ownership was instituted on behalf of a foreigner against a foreign vessel. On the vessel being arrested an appearance under protest was entered for another foreigner, who applied that the action should be dismissed. It appeared that the representative of the state to which the ship belonged declined to interfere, and the court dismissed the action with costs. *The Agincourt*, 47 L. J., Adm. 37; 2 P. D. 239.

Semble, the practice of the court of admiralty with regard to pleadings on protest is still in force in admiralty actions in the high court of justice. *The Evangelistria*, 46 L. J., Adm. 1; 35 L. T. 410; 25 W. R. 255; 3 Asp. M. C. 264.

Petitions on Protest.]—When a petition on protest is filed on the ground of want of jurisdiction, before the plaintiff's petition setting forth the particulars of his damage, the petition on protest ought to state the facts which shew want of jurisdiction. *The Piere Superiore, Dapueto* v. *Wyllie*, 43 L. J., Adm. 20; L. R. 2 P. C. 482; 30 L. T. 887; 22 W. R. 777; 2 Asp. M. C. 319—P. C.

Effect of Appearance—Jurisdiction.]—Substantive objections to the jurisdiction entertained after absolute appearance. *The Ida*, Lush. 6; 1 L. T. 417.

An absolute appearance once given cannot be recalled. *The Blakeney*, Swabey, 428; 5 Jur. (N.S.) 418.

Formal objections to jurisdiction not allowed to be taken after an absolute appearance given. *The Bilbao*, Lush. 149; 3 L. T. 338.

Where the court has no jurisdiction, the defendant is not prejudiced in his claim for damages by having appeared absolutely. *The Eleonore*, Br. & Lush. 185; 33 L. J., Adm. 19; 9 L. T. 397; 12 W. R. 218. S. P., *The Empire Queen*, 3 Ir. Eq. R. 71.

An objection to the jurisdiction may be taken at any time during the progress of the cause. *The Mary Anne*, 34 L. J., Adm. 73; 12 L. T. 238.

—— **Cross Actions.**]—Where on a collision between an English and a foreign vessel cross

actions were brought by the owners of the two vessels, and in the action by the English vessel the foreign vessel did not put in an appearance:—Held, that the court could not stay the action brought by the foreign vessel until she had entered an appearance in the action against her. *The Heart of Oak*, 29 L. J., Adm. 78. *The Maria*, 39 L. T. 549; 4 Asp. M. C. 94.

Appearance in Default Actions.] — *See h.* DEFAULT PROCEEDINGS, infra, col. 987.

c. Writ and Appearance.

Issue and Service of Writ of Summons against Foreign Owners.]—A ship sailing under a foreign flag, and belonging to a foreign company established abroad, came into collision with, and did damage to, an English ship on the high seas. The owners of the English ship applied for leave to issue a writ of summons, of which notice should be given out of the jurisdiction, claiming compensation for the damage against the foreign company. Leave refused. *Smith, In re, City of Mecca, In re*, 45 L. J., Adm. 92: 1 P. D. 300; 35 L. T. 380; 24 W. R. 903; 3 Asp. M. C. 259.

The phrase, "within the jurisdiction," used in R. S. C., 1876, Ord. XI. r. 1, means territorial jurisdiction. *Ib.*

The ordinary courts of this country have no jurisdiction over acts done by foreigners on the high seas below low-water mark; consequently, Ord. XI. r. 1, does not warrant an order for the service of a writ on a foreigner residing abroad, in respect of a cause of action arising at sea below low-water mark, though within three miles of the English coast. *Harris* v. *Franconia* (*Owners*), 46 L. J., C. P. 363; 2 C. P. D. 173.

The court will not exercise jurisdiction over a foreign river, if the parties are foreigners and the subject-matter of the action is of doubtful cognizance by the court. *The Ida*, Lush. 6; 1 L. T. 417.

Writ in Admiralty Court — Claim within Jurisdiction of County Court.] — When there are circumstances rendering it advisable that an action which a county court has jurisdiction to try under the County Courts Admiralty Jurisdiction Act, 1868, s. 3, should be commenced in the high court, such as the necessity for a commission abroad, the court will grant leave for a writ to issue under 31 & 32 Vict. c. 71, ss. 3, 9, though the cause of action may be of less amount than the limit of the county court jurisdiction. *Ellis* v. *General Steam Navigation Co.*, 38 L. T. 570; 3 Asp. M. C. 581.

In such a case notice of the order made by the court should be given when the writ is served. *Ib.*

The court, in pursuance of the provisions of 31 & 32 Vict. c. 71, s. 9, will, should it think fit, grant an order for instituting proceedings before it, which might have been taken without agreement in the county court. *The Bengal*, L. R. 3 A. & E. 14; 21 L. T. 727.

Writ in Personam, Setting aside—Misdescription of Party.] — A shipowner, residing and carrying on business in Scotland, having been described on the face of a writ of summons for service within the jurisdiction, sued out against him in an action of damage in personam, as "of the city of London," applied before service of the writ and after a cross action of damage in respect of the same collision had been instituted on his behalf, that the writ should be set aside. The court refused the motion. *The Helenslea, The Catalonia*, 51 L. J., Adm. 16; 7 P. D. 57; 47 L. T. 446; 30 W. R. 616; 4 Asp. M. C. 594.

Consolidation before Service of Writ.]—See *S.C.*, infra, col. 1102.

Election of Remedies in Rem or in Personam.] —Where there is a remedy both in personam and in rem, a person who has resorted to one of these remedies may, if he does not get thereby full satisfaction, resort to the other; but if a person has resorted to one of these remedies, and has recovered full compensation, and such compensation has been paid, no further proceedings can be taken. *Yeo* v. *Tatem, The Orient*, 8 Moore, P. C. (N.S.) 74; 40 L. J., Adm. 29; L. R. 3 P. C. 696; 24 L. T. 918; 20 W. R. 6; 1 Asp. M. C. 108.

Writ in Rem.]—Ord. IX. r. 10, as to service of writs of summons in admiralty actions in rem, is to be strictly followed. *The Marie Constance*, 37 L. T. 366; 3 Asp. M. C. 505.

Service of a writ of summons on the captain on board, and nailing the warrant of arrest on the mast, are not sufficient notice of a suit in rem against the ship to all whom it may concern. *Ib.*

—— **Amendment—Adding Parties.**]—Plaintiffs commenced an action in rem under Lord Campbell's Act, on the 4th January, 1884, in respect of loss of life by collision at sea on the 10th January, 1883. After the 10th January, 1884, it having been decided in the interim that the admiralty court had no jurisdiction in such actions, the plaintiffs applied to add as defendants the owners of the wrong-doing ship personally:—Held, that the court had no power to add parties as defendants in personam in an action in rem, and that even if such power existed, the proceedings against the owners would be deemed to commence from the date of service on them of the writ of summons, and would be too late. *The Bowesfield*, 51 L. T. 128; 5 Asp. M. C. 265.

—— **Amount claimed — Amendment after Judgment.**] — After judgment in a salvage action the court allowed an amendment of the indorsement on the writ by increasing the amount claimed therein. *The Dictator*, 61 L. J., Adm. 73; [1892] P. 64; 66 L. T. 863; 7 Asp. M. C. 175.

Service — Default Action in Rem.] — Where the proceeds of a vessel sold by the court are in the admiralty registry, and no owner has appeared, a writ, original or amended, must be personally served on the registrar. R. S. C., Ord. IX. r. 13 (1879). *The Cassiopeia*, 48 L. J., Adm. 39; 4 P. D. 118; 40 L. T. 869; 27 W. R. 703; 4 Asp. M. C. 148.

Service out of the Jurisdiction—R. S. C., 1875, Ord. XI. r. 1.] — In an action by a first mortgagee of a British ship and her freight against a second mortgagee, claiming an account, an order was made for service of the amended writ upon merchants at Antwerp, claiming to retain part of the cargo for a debt due from the second mortgagee. *MacStephen* v. *Carnegie*, 42 L. T. 309; 4 Asp. M. C. 215.

d. Arrest.

Collision — Cargo — Arrest of.] — Cargo consigned to Hamburg was shipped on board a

barque which came into collision with a ship off Cornwall. The barque put into Plymouth, and was with her cargo arrested there, and remained under arrest. The consignees of the cargo declined to accept it at Plymouth, and the barque was subsequently held to blame for the collision. The court decreed a release of the cargo, without costs. *The Flora*, 35 L. J., Adm. 15; L. R. 1 A. & E. 45; 14 L. T. 192.

Cargo on board a ship to blame for a collision can only be arrested to obtain payment of the freight due to the shipowner; and therefore, if no freight has accrued, the court will decree a release of the cargo. *Ib.*

A vessel was arrested in a cause of collision. At the time of the collision she had a cargo on board; at the time of the arrest a portion only of such cargo remained on board. The vessel and cargo belonged to the same owner:—Held, that the freight due upon the whole cargo must be paid into court, before the portion on board at the time of the arrest could be released. *The Roecliff*, 38 L. J., Adm. 56; L. R. 2 A. & E. 363; 20 L. T. 586; 17 W. R. 745.

—— **Freight.**]—A vessel under charterparty as to both her outward and homeward cargo, whilst on the outward voyage came into collision with another vessel:—Held, that the freight for the homeward voyage was liable to arrest for the damage. *The Orpheus*, 40 L. J., Adm. 24; L. R. 3 A. & E. 308; 23 L. T. 855.

If a ship is arrested for ship and freight, a party shewing a primâ facie right to freight is entitled to a release of the ship on giving bail for payment thereof, without bringing it into court. *The Ringdove*, Swabey, 310.

—— **Receiver in Chancery—Arrest in Admiralty.**]—The court of chancery appointed receivers of a freight which was arrested in admiralty before they had obtained possession of it. Release decreed in admiralty. *The Bloomer*, 11 L. T. 46.

Wrongful Arrest of Cargo.]—Where in a cause of collision between two vessels, foreign owned, the value of the vessel that was found solely to blame, and of her freight, was not sufficient to satisfy the damages, the court discharged the cargo from an arrest which had been made on the ground of the deficiency (even though the owner of the ship was also the owner of the cargo), with satisfaction for all loss caused by the detention. *The Victor*, Lush. 72; 29 L. J., Adm. 110; 2 L. T. 331.

Re-arrest—Allegation of Insufficiency of Bail.]—Ship released from arrest upon bail re-arrested upon suggestion that the bail was objected to. The objection being unfounded, plaintiff condemned in costs and damages. *The Corner*, Br. & Lush. 161; 33 L. J., Adm. 16; 12 L. T. 62.

In a collision suit, the ship having been released upon bail for the full sum claimed, she cannot be re-arrested if the damages prove to exceed that sum; nor, after sale of the ship in another suit, can the court apply the proceeds remaining in court towards satisfying damages, interest or costs in the collision suit. *The Wild Ranger*, Br. & Lush 84.

When a suit has been instituted against a vessel, and bail has been given for an estimated amount to cover damages and costs, and the damages recovered and the costs taxed are a larger sum than the bail given, and there has been no carelessness on the part of the plaintiffs, the court will issue a writ for the re-arrest of the ship to satisfy the costs, and will direct the writ to the marshal for execution. *The Freedom*, 41 L. J., Adm. 1; L. R. 3 A. & E. 495; 25 L. T. 392; 1 Asp. M. C. 136.

The jurisdiction which the court undoubtedly possesses, to order a second arrest in respect of the same cause of action, should be cautiously exercised. *The Flora*, 35 L. J., Adm. 14; L. R. 1 A. & E. 45; 14 L. T. 191.

An application for such arrest should generally be made to the court itself. *Ib.*

No Bail—Caveat.]—When an admiralty cause, instituted in rem against a ship, has been transferred from a county court to the court of admiralty, and no bail has been given in either court, and the ship is already under the arrest of the high court in other suits, the high court will order the issue of a caveat to prevent her release, in case the other causes should be withdrawn. *The Rio Lima*, 28 L. T. 775; 2 Asp. M. C. 34.

Appeal from County Court.]—In an appeal by a plaintiff from a county court in a cause in rem, in which there was a decree for the defendant, and the ship had in consequence been released, the court of admiralty, on an ex parte application of the plaintiff ordered a warrant to issue for the detention of the ship, and, as the ship proceeded against was a foreign one, did not require notice of the intention to arrest to be given to the defendant. *The Freir*, *The Albert*, 44 L. J., Adm. 49; 32 L. T. 572; 2 Asp. M. C. 589. S. P., *The Miriam*, 43 L. J., Adm. 35; 30 L. T. 537; 2 Asp. M. C. 259.

Companies Act, 1862 — Sequestration.]—The arrest of a vessel by the admiralty court is a sequestration within the meaning of the Companies Act, 1862, s. 163. *Australian Direct Steam Navigation Co., In re, Baker, Ex parte*, 44 L. J., Ch. 676; L. R. 20 Eq. 325.

Transfer from County Court.]—When causes of necessaries and wages had been instituted against a ship in the court of admiralty, and other causes of necessaries in a county court against the same ship, and the latter had been transferred after decree made to the court of admiralty for the purpose of enforcing the decrees, the ship being under the arrest of that court, the latter court ordered all the causes to be referred to the registrar and merchants to report the amount due thereon. *The Turliani*, 32 L. T. 841.

Semble, that where a ship is under the arrest of the court of admiralty, and causes are also instituted in the county court against the ship, she should not be arrested by the county court, as it is not probable that the ship will be removed out of the jurisdiction of the county court without satisfaction of the several claims, within the meaning of the County Courts Admiralty Jurisdiction Act, 1868, s. 22. *Ib.*

Amount Due.]—Where a ship is arrested for a specific demand, the amount cannot be referred to the registrar unless it appears that something in any event is due. *The West Friesland* or *The Twentje*, Swabey, 456; 5 Jur. (N.S.) 658—P. C.

Warrant of Arrest—Service.]—A warrant of arrest in an action in rem was issued from the city of London court directed to the high bailiff, and others the bailiffs thereof, but was, without authority from the court, served by a clerk in the high bailiff's office:—Held, that this was not a proper service of the warrant. Per Sir James Hannen: "Any officer" mentioned in 31 & 32 Vict. c. 71, s. 23, means any officer duly authorised by the court. Per Butt, J.: "That it means any officer whose ordinary duty it is to serve processes, or one duly authorised so to do." *The Palomares*, 54 L. J., Adm. 54; 10 P. D. 36; 52 L. T. 57; 33 W. R. 616; 5 Asp. M. C. 343.

Notice—Telegram.]—When the marshal sends by telegram to his substitute at an outport notice of the issue of a warrant, and such substitute communicates it to the master of the ship against which it is issued, it is a contempt of court to move the ship from the place where it is lying. *The Seraglio*, 54 L. J., Adm. 76; 10 P. D. 120; 52 L. T. 865; 34 W. R. 32; 5 Asp. M. C. 421.

Arrest of Person.]—The proceeding by arrest of the person in admiralty is obsolete. *The Clara*, Swabey, 1.

Release—Expense caused by Delay.]—The defendants having occasioned great delay and extra expense, so that the amount in which the action had been entered proved insufficient to cover the amount pronounced to be due to the plaintiff, with his costs of suit, the court ordered that the ship should not be released from arrest until payment of the plaintiff's claim and costs should have been made. *The Helen*, 14 W. R. 502.

Possessory Lien—Sailmaker.]—A sailmaker with a possessory lien on the sails cannot retain them against the officer of the admiralty who is in possession of the ship under warrant from the court. *The Harmonie*, 1 W. Rob. 178.

Seizure by Sheriff on fieri facias.]—After sentence by the admiralty in a bottomry suit, and warrant to sell, the sheriff cannot seize the ship upon a fieri facias. *Ladbroke* v. *Crickett*, 2 Term. Rep. 649; 1 R. R. 571.

Ship belonging to Khedive of Egypt—Sovereign Prince—Arrest.]—In a collision suit instituted by the owners, master and crew of "The Batavier" against "The Charkieh," belonging to the Khedive of Egypt, an appearance under protest was entered on behalf of the khedive and his minister of marine. "The Charkieh," carrying the Ottoman navy flag, had come to England for repairs with a cargo on board, and at the time of the collision, which was in the Thames, was on her outward voyage to Alexandria under charter to a British subject, and advertised to carry cargo to Alexandria:—Held, that the khedive was not entitled to the privilege of a sovereign prince; protest overruled. *The Charkieh*, 42 L. J., Adm. 17; L. R. 4 A. & E. 59; 28 L. T. 513; 1 Asp. M. C. 581.

Semble, a suit in rem to enforce a damage lien may be entertained though the owner of the res be a foreign sovereign. *Ib.*

Semble, if the sovereign assumes the character of a trader, and uses the ship for trade to this country, he waives the privilege which might otherwise belong to the ship. *Ib.*

Mail Packet belonging to Foreign State.]—A packet conveying mails and carrying on commerce, which belongs to the sovereign of a foreign state, and is officered by officers commissioned by him, comes within the category of vessels which are exempt from process of law. *The Parlement Belge*, 5 P. D. 197; 42 L. T. 273; 28 W. R. 642; 4 Asp. M. C. 234—C. A.

The immunity of a public ship is not lost by her being used subordinately and partially for trading purposes. *Ib.*

Setting aside Warrant.]—Warrant to arrest not set aside on allegation of agreement to refer salvage claim to arbitration. *La Parissima Concepcion*, 13 Jur. 545.

Wrongful Arrest—Want of Reasonable and Probable Cause—Damages.]—In an admiralty action in personam for the wrongful arrest of a ship by admiralty process without reasonable and probable cause, it is not necessary to prove actual damage. *The Walter D. Wallet*, 62 L. J., Adm. 88; [1893] P. 202; 1 R. 627; 69 L. T. 771; 7 Asp. M. C. 398. *And see* XX. COLLISION, ante, cols. 852, 856.

The plaintiff in an action in rem is not condemned in damages for the arrest of the property unless he has been guilty of gross negligence or malice. *The Evangelismos, Xenos* v. *Aldersley*, 12 Moore, P. C. 352; Swabey, 378.

—— **Damages.**]—Where an arrest was made without notice of claim, and for a sum disproportionate to the value of the vessel and the services rendered, the court awarded damages. *The Eleonore*, Br. & Lush. 185; 33 L. J., Adm. 19; 9 L. T. 397; 12 W. R. 218. *And see* ante, col. 856.

Where it appeared upon affidavits that the plaintiffs were mistaken as to the identity of the vessel proceeded against, and the defendants offered to disclose the real wrongdoer, the court refused to accede to an application to extend the security to be given by the plaintiffs to meet the costs, if unsuccessful, so as to cover the damages caused by the wrongful arrest. *The Peri*, 32 L. J., Adm. 46; 8 Jur. (N.S.) 1230; 11 W. R. 44.

No claim for demurrage or detention of a ship under warrant of arrest issued by the unsuccessful promoters of a salvage suit can be allowed in the absence of mala fides or malicious negligence. *The Strathnaver*, 1 App. Cas. 58; 34 L. T. 148; 3 Asp. M. C. 113—P. C.

Damages given for wrongful arrest and detention of a ship by a plaintiff in a collision action, the detention being in order that he might consider whether he would appeal. *The Cheshire Witch*, Br. & Lush. 362; 11 L. T. 350.

—— **Problematical Earnings.**]—A vessel was wrongly arrested as a slaver, and 20,000*l.* damages claimed for wrongful arrest, mainly in respect of possible earnings she might have made:—Held, that damages were not recoverable in respect of possible but problematical earnings. *The Levin Lank*, Swabey, 45.

Wrongful Arrest of Cargo.]—See *The Victor*, supra, col. 977.

Ship's Gear lost by Marshal.]—Decree against the marshal for a long boat and cable lost from a ship in his possession. *The Hoop*, 4 C. Rob. 145; cited, 6 C. Rob. 157.

Arrest in High Court and also in County Court—Possession Fees.—When an admiralty suit is instituted in a county court against a vessel

which is under the arrest of the court of admiralty, it is unnecessary, so long as the vessel remains under such arrest, for the officer of the county court to incur expense in placing a person in possession, and a double set of possession fees will not be allowed. *The Rio Lima*, 43 L. J., Adm. 4; L. R. 4 A. & E. 157; 29 L. T. 517; 22 W. R. 303; 2 Asp. M. C. 143.

Arrest at Out-Port.]—Where a vessel is arrested in an out port, and not by the marshal of the court, the detention fees are to be paid by the arresting party, though successful in the cause. *The North American*, Swabey, 466; 2 Asp. M. C. 589.

Co-ownership—Accounts.]—Where a ship is arrested on a specific demand before a reference of accounts to the registrar and merchants can be made, it must be shewn to the court that something is due, although the actual amount may be the proper subject of inquiry. The practice differs from a reference by a court of equity on an unsettled account, where the court directs an account to be taken, leaving it to be shewn by the result on which side the balance lies. *The Twentje, Van Hasselt* v. *Sack*, 13 Moore, P. C. 185; 2 L. T. 613; 8 W. R. 423. Reversing 5 Jur. (N.S.) 658.

Mortgagee intervening—Right to Release of Ship.]—See *The Eastern Belle*, ante, col. 158.

Material—Man—Lien—Arrest of Ship.]—See *The Acacia*, ante, col. 23.

Action of Restraint—Arrest of Ship.]—*See* ante, cols. 52, seq., and infra, cols. 953, seq.

e. Breaking Arrest.

Attachment — Against Harbour-Master.]—Attachment against a harbour-master for carrying off gear from a ship under arrest, in order to pay harbour dues. *The Harmonie*, 1 W. Rob. 179.

—— **Against Master.**]—Attachment against a master, part owner, who took the ship to Jersey whilst under arrest. *The Petrel*, 3 Hag. Adm. 299.

Attachment against the master for contempt in taking the ship out of possession of the officer of the court. *The Bure*, 14 Jur. 1123.

—— **Against Marshal of Queen's Bench Prison.**]—Attachment addressed to the marshal of the queen's bench prison held valid. *The Plym*, 2 W. Rob. 345.

Power to Supersede Attachment.]—The admiralty court had no power to supersede an attachment issued in aid of a decree, except where it was wrongly executed. *Ib.*

Attachment or Monition to shew Cause.]—Contempt in breaking arrest of goods. Monition to shew cause why attachment should not issue, and not attachment in the first instance. *Ship unknown*. 1 C. Rob. 331.

Rescue of Ship arrested—Admiralty Jurisdiction.]—Conusance of rescue on land of a ship properly arrested by the admiralty belongs to the admiralty. *Rigden* v. *Hedges*, 1 Ld. Raym. 446; 12 Mod. 246.

f. Bail.

Possession Suit.]—In suits for possession the court of admiralty can take bail. *The Evangelistria*, 46 L. J., Adm. 1; 35 L. T. 410; 25 W. R. 255; 3 Asp. M. C. 261.

—— **Conditional—Offer by Mortgagee refused.**]—A mortgagee, although entitled to intervene in a cause in rem for equipment and repair, is not entitled to claim a release of the vessel upon giving bail conditioned to pay the claim of the material men, in the event of its being held to have priority over the mortgage. *The Acacia*, 42 L. T. 264; 4 Asp. M. C. 254.

—— **Discharge of.**]—Bail given to answer judgment in a cause where the appearance is under protest will not be discharged on account of a change in the indorsement on the writ of summons, which renders the protest of no avail. *The City of Mecca*, 50 L. J., Adm. 53; 6 P. D. 106; 44 L. T. 750; 4 Asp. M. C. 412—C. A.

—— **By whom given.**]—A ship's husband and managing owner caused a bail bond to be given in the admiralty court, in the names of his co-owner and himself, in a suit for a collision, and the suit terminated in favour of the plaintiffs, and the bail were called upon to pay damages, interest and costs:—Held, that the co-owner was responsible to the bail for the money so paid. *Barker* v. *Highley*, 15 C. B. (N.S.) 27; 32 L. J., C. P. 270; 10 Jur. (N.S.) 391; 9 L. T. 228; 11 W. R. 968.

Where the interests are distinct, separate bails should be given. *The Royal Arch*, Swabey, 269; 6 W. R. 191.

Sureties to a bail bond must not be partners. *The Corner*, Br. & Lush. 161; 33 L. J., Adm. 16; 12 L. T. 62.

—— **Objection to Sufficiency.**]—A vessel released from arrest upon a bail bond taken before a commissioner in the country, and signed by two persons in partnership, ordered to be re-arrested, notwithstanding the twenty-four hours' notice of the bail tendered had been given to the plaintiff's agent in London, the plaintiff's solicitor in the country having within that time given to the defendant's solicitors formal notice of objection to the bail. *Ib.*

The objection to the bail having proved to be unfounded, the plaintiff was condemned in costs and damages. *Ib.*

—— **Amount.**]—The bail is only liable to the extent of the value of the ship and freight, and not for the full amount of the damage done, even though bail may have been given for a sum beyond the value of the ship and freight. *The Duchesse de Brabant*, Swabey, 264; 6 W. R. 329.

—— **Reducing.**]—Where, in an action against the ship, bail was given for the amount claimed, and a great proportion of this claim was not recoverable, the court ordered the bail to be reduced to an amount sufficient to cover the rest of the claim and costs. *The Chieftain*, Br. & Lush. 104; 32 L. J., Adm. 106; 9 Jur. (N.S.) 388; 8 L. T. 120; 11 W. R. 537.

—— **Enlarging.**]—An appellant will not be required to enlarge any security which he gave as defendant in the court of admiralty to answer judgment and costs in that court notwithstanding such security has proved insufficient for that purpose. *The Hélène*, infra.

—— **Caveat Release.**]—Where a caveat release is entered, and groundless objections are taken to the sufficiency of bail, the party entering the caveat will be condemned in damages and costs. *The Don Ricardo*, 49 L. J., Adm. 28; 5 P. D. 121; 42 L. T. 32; 28 W. R. 431; 4 Asp. M. C. 225.

The omission of the plaintiff's country solicitor to order by electric telegraph a caveat release to be entered does not amount to negligence. *The Corner*, supra.

—— **Cross Actions.**]—By 24 & 25 Vict. c. 10, s. 34, when bail to answer judgment has been given by the defendant in the principal cause, the same party, when plaintiff in a cross-action, may obtain a similar security, notwithstanding that he may be resident within the jurisdiction of the court. *The Cameo*, Lush. 408; 5 L. T. 773.

—— **To answer Counter-claim.**]—Where, in a damage action, the ship proceeded against is not arrested, and the plaintiffs do not require bail to be given, the defendants cannot compel the plaintiffs to give security to answer a counter-claim in the action under the provisions in the Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 34, although they voluntarily give bail. *The Alne Holme*, 47 L. T. 307; 4 Asp. M. C. 591.

The power of the admiralty division under s. 34 of the Admiralty Court Act, 1861, to order an action to be stayed until bail has been given to answer a cross-action or counter-claim, does not extend to making an absolute order to give bail; and in a damage action in which the plaintiffs had discontinued after the defendants had counterclaimed, the court refused to enforce an order, made by the registrar, to give bail to answer such counter-claim. *The Alexander*, 48 L. T. 797; 5 Asp. M. C. 89.

Form of Bond.]—A bail bond to lead the supersedeas of an arrest, signed before a commissioner by the sureties simply, without the addition of their descriptions and addresses, is good. *The Tamarac*, Lush. 28.

The form of a bail bond appointed to be given in the admiralty court by the rules of 1859, to answer judgment with costs, does not receive a new interpretation from 24 & 25 Vict. c. 10, s. 33, and does not extend to cover the costs of an appeal. *The Hélène*, Br. & Lush. 425; 3 Moore, P. C. (N.S.) 240; 35 L. J., Adm. 1; 13 W. R. 931.

—— **What Bail — Value.**] — A wrongdoing vessel was arrested in a cause of collision, having been herself injured in the collision. She was then repaired, and her value was materially increased by the repairs:—Held, that she was only liable to the extent of her value at the time when she was arrested, and that she ought to be released on bail to that amount being given. *The St. Olaf*, 38 L. J. Adm. 41; L. R. 2 A. & E. 360; 20 L. T. 758; 17 W. R. 743.

Prize Suit.]—A bail bond given in a prize suit is not a mere security given to the party, but is regarded as a pledge or substitute for the thing itself, in all matters fairly in adjudication before the court. *The Ned Elwin*, 1 Dods. 50.

Misdemeanour of Master or of Ship.]—A ship arrested for misdemeanour of the master is bailable; aliter, where the misdemeanour is of the boat and the king makes title. *Anon.*, 1 Keb. 44.

Liability of Sureties.]—The sureties in a bail bond are not liable in respect of any action against the vessel other than that in which they have given bail. *The Saracen*, 6 Moore P. C. 56; 4 Not. of Cas. 498; 2 W. Rob. 451.

Costs of excessive Bail.]—*See* 24. COSTS, infra, col. 1022.

Privy Council—Dispensing with bail.]—See *Hunter* v. *Hesketh Steamship*, infra, col. 1012.

Action of Restraint—Bail for safe Return.]—*See* 16. RESTRAINT, infra, col. 953.

g. Appraisement and Sale.

Appraisement.] — A vessel which had been salved was valued by a receiver of wreck at less than 1,000*l*. The salvors obtained an order for a commission of appraisement, but did not execute it, and after three weeks gave notice that they proceeded no further in the suit:—Held, that they might, within four days of obtaining the order, have ascertained the value, and that therefore they must be condemned in damages for detention of the vessel during the rest of the three weeks. *The Margaret and Jane*, 38 L. J., Adm. 38; L. R. 2 A. & E. 345; 20 L. T. 1017; 17 W. R. 1064. *See also Cases* ante, cols. 670, seq.

The owner of a ship arrested in a damaged suit alleged the value of the ship to be one-fifteenth less than it was afterwards shewn to be upon a commission of appraisement obtained by the plaintiffs: the amount claimed by the plaintiffs was less than the sum for which the owners were willing to give security; but, assuming the claim to be sustained, the costs would extend the claim greatly beyond that sum:—Held, on a motion by the plaintiffs to condemn the defendants in the costs of the appraisement, that the proper order was that the costs should be costs in the cause. *The Rapid*, 18 W. R. 150.

An appraisement by order of the court is binding on both parties. Appeal by an owner to have the property sold, and the value so determined, rejected, *The R. M. Mills*, 3 L. T. 513. S. P., *Venus, Cargo ex*, L. R. 4 A. & E. 50; 12 Jur. (N.S.) 379; 14 W. R. 460.

Value of salved Property — Appraisement—Court will not open.]—See *The Endeavour*, ante, col. 634.

Default of Appearance—Order for Sale.]—Ship arrested on the 6th; motion for sale on the 7th in default of appearance, and no affidavit that the owners could not be found. Sale decreed, it appearing that underwriters on cargo were consenting to a sale of the cargo. *The Bessy*, 4 W. R. 92.

Appraisement after Sale.] — Appraisement made after sale held void. *The Queen*, 19 L. T. 705.

Costs of Appraisement.]—See *The Persian*, infra, col. 1021.

Co-owners—Sale by Court.]—*See* VIII. SALE AND TRANSFER, supra, col. 164.

Sale, when Ordered.]—An order will not be made for the sale of a vessel even upon the application of the owner, where such vessel is not proceeded against in the court. *The Wexford*, 57 L. J., Adm. 6; 13 P. D. 10; 58 L. T. 28; 36 W. R. 560; 6 Asp. M. C. 244.

Sale of Ship and Cargo—Freight.]—Where in an action in rem for collision against ship and freight, in which the defendants' ship was held solely to blame, the ship being still under arrest with the cargo on board, was ordered to be sold; the court on motion directed the marshal to discharge the cargo, to retain the same in his custody as security for the payment of the landing and other charges and freight, if any, due from the owners and consignees of the cargo in respect of the same, and that in default of any application for the delivery of the cargo within fourteen days, the marshal should be authorised to sell such part of the cargo as might be necessary to pay the said charges and freight, if any, due. *The Gettysburg*, 52 L. T. 60; 5 Asp. M. C. 347.

—— **Foreign Ship—Affiadvit.**]—The court ordered the sale of a foreign ship on the report of the marshal that it was desirable she should be sold, and subject to the filing of an affidavit, verifying the cause of action and stating that no appearance had been entered. *The Hercules*, 11 P. D. 10; 54 L. T. 273; 34 W. R. 400; 5 Asp. M. C. 545.

Sale by Private Contract.]—In an action for master's wages and disbursements, where the ship proceeded against was subject to other claims by mortgagees and material men, the court upon motion, no opposition being offered, ordered an official appraisement of the ship to be made, and the ship to be sold by the marshal by private contract for a sum of money not less than the appraisement, upon proof that the mortgagees assented to such sale, and that notice of the motion had been served upon all the claimants. *The Planet*, 49 L. T. 204; 5 Asp. M. C. 144.

Expenses—Marshal's Fees—Mortgagees.]—The "C." was arrested in an action for necessaries supplied by the plaintiff. The owners appeared but did not give bail or deliver pleadings. The mortgagees of the "C." intervened, and took possession under the mortgage, but the "C." still remained in the custody of the marshal, and was subsequently sold by him under an order of the court obtained by the interveners. Judgment with costs, by consent, for the interveners was afterwards entered. Under it the interveners claimed from the plaintiff the amount due to the marshal for the expenses of the sale:—Held, that as the interveners, though able to obtain the release of the "C." by giving bail, had not done so, but had obtained an order for the sale of the "C.," and had received the proceeds of such sale, they must bear the expenses of it. *The Colonsay* 55 L. J., Adm. 31; 11 P. D. 17; 54 L. T. 338; 5 Asp. M. C. 545.

Fund in Court—Priorities.]—When a fund, by a sale of a ship, is placed in court by one set of claimants, so as to be available for other claimants, the former are entitled to their costs up to and inclusive of the sale, though they do not rank first in respect of their actual claim. *The Immacolata Concezione*, 53 L. J., Adm. 19; 9 P. D. 37; 50 L. T. 539; 32 W. R. 705; 5 Asp. M. C. 208.

Sale—Practice to ascertain Priorities.]—Sale of vessel by decree of the high court of admiralty restrained in order to ascertain the respective priorities of material men and mortgagees before appraisement and sale, such priorities to be ascertained by petition and answer in the high court of admiralty. *The Acacia. Hamilton* v. *Harland*, 42 L. T. 264; 4 Asp. M. C. 254—C. A.

Sale of Ship—Proceeds of.]—When there are several claimants against the proceeds of a vessel in the registry, and she has been sold at the suit of one, the costs of such sale will be paid before all claims, as such sale was for the benefit of all. *The Panthea*, 25 L. T. 389; 1 Asp. M. C. 133.

In a cause of collision, the ship having been released from arrest upon bail given in the full sum in which the cause was instituted, cannot be re-arrested by the plaintiff to answer his damages, if, after the ordinary decree and reference, they prove to exceed that sum, and if the ship has been sold by the court in another action, brought by other parties, the court cannot order the proceeds of the ship to be applied to satisfy such damages, or interest, or costs of the first action. *The Wild Ranger*, Br. & Lush. 84.

Where a ship has been sold by order of the court, and the proceeds are in the registry, such proceeds are not money belonging to the owners of the ship under 1 & 2 Vict. c. 110, s. 12, nor a debt owing to them under 17 & 18 Vict. c. 125, s. 61. *Ib.*

Where, after judgment against a ship in a damage action where bail had been given and the ship released, judgment is given against the same ship in a necessaries action, in which the ship is sold and the proceeds of the sale of the ship paid into court, the plaintiffs in the damage action cannot be paid out of the proceeds, to the prejudice of other claimants still having maritime liens upon the proceeds. *The Falk*, 47 L. T. 308; 4 Asp. M. C. 592.

—— **Default Action—Sale before Judgment.**]—Where in a salvage action, in which no appearance had been entered, it was alleged upon affidavit that the ship and cargo were daily deteriorating in value, and that large expenses were being incurred in respect of the charge of the property, and that the plaintiffs had been in communication with the owners as to a sale, the court, on motion by the plaintiffs prior to decree, ordered an appraisement and sale of the property. *The Anna Helena*, 48 L. T. 681; 5 Asp. M. C. 61.

Sale and Unlivery of Cargo.]—Order made on application of the respondents in a pending appeal, for unlivery of the sargo and sale of a mortgaged ship, the unlivery and sale of which had been decreed by the court of admiralty. *The Jeff Davies*, 5 Moore, P. C. (N.S.) 25; L. R. 2 P. C. 19.

Attachment of Funds in Registry.]—A fund lying in the registry of the court cannot be attached by process of foreign attachment out of the mayor's court of London. *The Albert Crosby*, Lush. 101.

Injunction to restrain Removal of Ship sold Abroad.]—An Englishman entered into a contract abroad with a foreigner for the purchase of a ship, then on her homeward voyage to Cork, the purchaser to take possession of the ship immediately after the delivery of the homeward cargo at any place whither she might be ordered

The ship was ordered to Sunderland, where she discharged her cargo. On a motion by the purchaser for an injunction to restrain the removal of the ship from Sunderland:—Held, that substituted service on the captain in charge of the vessel was sufficient, and that the court had jurisdiction to restrain the removal of the ship pending the suit. *Hart* v. *Herwig*, 42 L. J., Ch. 457; L. R. 8 Ch. 860; 29 L. T. 47; 21 W. R. 663; 2 Asp. M. C. 63.

Prohibition from dealing in Shares.] — The court of probate, as a division of the high court of justice, to which the jurisdiction formerly exercised by the court of chancery has been transferred by the Judicature Act, s. 16, has power to issue an order prohibiting the dealing in any share of a ship for a time and on conditions to be named therein, and the registrar of shipping on being served with such order, or an official copy thereof, must obey the same. *Nicholas* v. *Dracachis*, 45 L. J., Adm. 45; 1 P. D. 72; 24 W. R. 461.

Ship sold in another Suit—Service of Writ.] —After the writ in an action in rem had been served on the ship, she was sold in another action and the proceeds brought into court. The writ was then amended and refiled, but was not served upon the registrar, nor indorsed with the date of service under Ord. IX. r. 13. The defendants did not appear:—Held, that the service was not sufficient, and the plaintiff not entitled to judment in default. *The Cassiopeia*, 48 L. J., Adm. 39; 4 P. D. 188; 40 L. T. 869; 27 W. R. 703; 4 Asp. M. C. 148.

Fieri facias—Claim of Sheriff.]—Upon sale of a ship in a wages suit by admiralty process issuing after seizure of the ship under a writ of fieri facias:—Held, that the claim of the sheriff to the surplus proceeds was good as against the late owner. *The Flora*, 1 Hag. Adm. 298.

Vice-Admiralty Courts—Power to order Sale of Ship in Distress.]—See *The Fanny and Elmina*, ante, col. 947.

Co-owners disagreeing—Sale by Court.]—See *The Marion*, ante, col. 957.

h. Default Proceedings.

Signing Judgment in Default.]—Proceedings by default in admiralty actions in rem are regulated by the practice which prevailed in the court of admiralty immediately before the passing of the Judicature Act, 1875. *The Polymede*, 1 P. D. 121; 34 L. T. 367; 24 W. R. 256.

Ord. XXIX. r. 2, as to signing judgment in default of pleading, does not apply to proceedings in rem. When in an action in rem for a liquidated sum for necessaries supplied, the defendant makes default in delivering his statement of defence, the plaintiff cannot at once sign final judgment, but must bring the case on for hearing before the judge upon affidavit. *The Sfactoria*, 2 P. D. 3; 35 L. T. 431; 25 W. R. 62; 3 Asp. M. C. 271.

Affidavit of Service.]—The affidavit of service required to be filed in the registry before proceedings can be taken to obtain judgment by default in an action in rem must have the original writ in rem annexed to it. *The Eppos*, 49 L. T. 604; 32 W. R. 154; 5 Asp. M. C. 180.

Service of Writ in rem.] — In an action in rem the writ of summons was served in the manner provided by Ord. IX. r. 12, no appearance was entered, and the action came on for judgment by default under Ord. XIII. rr. 12, 13. The affidavit of service of the writ was made by the solicitor's clerk who had served such writ:—Held, that service of a writ in rem by a solicitor or his clerk, and not by the marshal or his substitute, was a valid service, and that the affidavit was sufficient. *The Solis*, 54 L. J., Adm. 52; 10 P. D. 62; 52 L. T. 440; 33 W. R. 659; 5 Asp. M. C. 368.

Action in rem—Registrar and Merchants.]— In a default action in rem the admiralty court will not before judgment refer the plaintiff's claim to the registrar for assessment. *The Titia*, 64 L. T. 148; 7 Asp. M. C. 32.

Ten Days to elapse — Notice of Trial.] — In order to obtain judgment by default of appearance in an action in rem under Ord. XIII. r. 12, the ten days stated in Ord. XXI. r. 6, must elapse, and a notice of trial under Ord. XXXVI. r. 11, must be filed in the registry. *The Avenir*, 53 L. J., Adm. 63; 9 P. D. 84; 50 L. T. 512; 32 W. R. 755; 5 Asp. M. C. 218.

—— **Motion for Judgment.**]—As under Ord. XIII. r. 12, default actions in rem are to proceed as if the defendant had appeared, Ord. XXVII. r. 11, as to settling down an action on motion for judgment where the defendant makes default in pleading, applies to such actions, and judgment therein is to be obtained under the provisions of that rule. *The Spero Expecto*, 49 L. T. 749; 32 W. R. 524; 5 Asp. M. C. 197.

Where in an action in rem for collision the defendant makes default, the plaintiff should on moving for judgment, support his claim by affidavit. *Ib.*

Statement of Claim.]—Where the plaintiff in a default action in rem for necessaries had complied with all the formalities entitling him to judgment save service of a statement of claim, but it appeared that the writ, though not specially indorsed, contained particulars of the claim the court gave judgment for the plaintiff. *The Hulda*, 58 L. T. 29; 6 Asp. M. C. 244.

Writ served but Warrant not served—Judgment.] — Judgment by default given in an action in rem against a ship, after service of the writ within the jurisdiction, where afterwards and before service of the warrant to arrest she was taken out of the jurisdiction. *The Nautik*, 64 L. J., Adm. 61; [1895] P. 121; 11 R. 716; 72 L. T. 21; 43 W. R. 703; 7 Asp. M. C. 591.

Wages—Foreign Consul.] — A foreign ship was sold in a default action and the proceeds were in the registry. Upon an application by the master and crew for their wages, an order was made for payment out of the sum due to the solicitor for the applicants upon his undertaking to pay the foreign consul, who had advanced money to the crew for their expenses, waiving the preliminary steps in a default action. *The Juliana*, 35 L. T. 410; 3 Asp. M. C. 264.

Order for Sale of Ship and Cargo—Discovery of Owners—Ship.]—Arrest on the 5th; application for sale of ship and cargo on the 7th refused, there being no affidavit that the owners could not be found. *The Bessy*, 4 W. R. 92.

Assessment of Damages — Lord Campbell's Act.]—An action for damages under Lord Campbell's act was commenced in the admiralty division, and no application was made to transfer the cause to any other division:—Held, that upon default in pleading by the defendants the plaintiffs were entitled, under Ord. XXVII. r. 4, to enter interlocutory judgment and to have the damages assessed and apportioned by a jury. *The Orwell*, 57 L. J., Adm. 61; 13 P. D. 80; 59 L. T. 312; 36 W. R. 703; 6 Asp. M. C. 309.

Notice of Action required in some Cases.]—See *The Longford*, col. 1005.

Nature of Action in rem.] — See *Smith* v. *Tilly*, 1 Keb. 708, supra, col. 964.

Salvage Suit.]—See *The Anna Helena*, ante, col. 986.

i. Stay and Transfer.

Two Proceedings for Same Matter—Estoppel.]—To an action for an injury to a vessel by a collision in the Thames, the defendant pleaded that the merits in respect of the demand by the action sought to be enforced, had been tried and determined, and proceedings, to which the plaintiff and the defendant were parties, had been had in the admiralty court, and that the merits upon which the plaintiff sought to recover were thereby tried, and after due proceedings had and taken in that court, and in due form of law, determined by that court in favour of the defendant, and it was held and adjudged by the court that the collision occurred through the negligence of the plaintiff and not through the negligence of the defendant:—Held, that the plea was no answer, inasmuch as it did not shew upon the face of it that the admiralty court had jurisdiction over the matter. *Harris* v. *Willis*, 15 C. B. 710; 3 C. L. R. 609; 24 L. J., C. P. 93; 3 W. R. 238.

A. brought an action for freight. After action, the assignees of the freight to whom it had been assigned on a bottomry bond for necessary repairs while the ship was in a foreign port, commenced proceedings against the defendant in the admiralty court. That court issued a monition to the defendant to pay the freight into court. He did so, and then pleaded to the action the proceedings in the admiralty court and the payment of the freight into court:—Held, that the plea was a good answer. *Place* v. *Potts*, 5 H. L. Cas. 383; 24 L. J., Ex. 225; 3 W. R. 574.

—— **Action In rem and Action In personam.**]—A suit having been brought in rem, in which the proceeds of the res are insufficient to satisfy the claim, a separate suit in personam may be brought to recover the remainder. *The Pet*, 20 L. T. 961; 17 W. R. 899.

—— **Arbitration.**]—A claim for personal injury done by a ship was referred to arbitration, with a condition reserving the claimant's rights and remedies in case the award should not be performed. The arbitrator awarded a sum of money which had not been paid:—Held, that the claimant had not barred himself of his right to sue in the admiralty court. *The Sylph*, 37 L. J., Adm. 14; L. R. 2 A. & E. 24; 17 L. T. 519.

—— **Award of Commissioners of Salvage.**]—Salvage services had been rendered to a vessel by several sets of salvors off Ramsgate. The owners of the vessel summoned a meeting of the commissioners of salvage for the Cinque Ports, to adjudicate on the matter. No notice of the intended meeting was given to any of the salvors, and it was proved that it was not usual to give any such notice. At the meeting of the commissioners one set of salvors was unrepresented, but it was proved that they were aware of ths meeting, and were at hand. The commissioners made an award upon the whole matter. The salvors so unrepresented refused to accept their share of the money awarded, and brought their action in the admiralty court:—Held, that the award was no bar to the action, the plaintiffs not having been parties to the first decision. *The Elise*, Swabey, 436.

—— **Collision—Lis Alibi Pendens.**]—A collision occurred on the high seas between the "C." and the "J.," two foreign veseels. The "C." was arrested in Holland in an action brought by the owners of the "J." and her cargo, but was released with the consent of the agent of the "J." on the guarantee of a firm of underwriters interested in the "C." to answer judgment in the action. Cross proceedings were instituted in the Dutch court by the owners of the "C." and the "J." An action was subsequently commenced in this country against the owners of the "C." by the owners of the "J." and her cargo, and the "C." was arrested in respect of the same collision. The plaintiffs expressed their willingness to abandon the action in Holland:—Held (dissentiente Brett, M.R.), that the proceedings in this country must be stayed and the ship released. *The Christiansborg*, 54 L. J., Adm. 84; 10 P. D. 144; 53 L. T. 612; 5 Asp. M. C. 491—C. A.

In an action of damage in personam by the owners of the ship "G.," against the owners of the ship "P.," it appeared that a cause of damage in rem relating to the same collision had, prior to the proceedings in this court, been instituted by the owners of the "P." against the "G." in a vice-admiralty court abroad, and was then pending. The court, on the application of the owners of the ship "P.," stayed the proceedings in this court until after the hearing of the cause in the vice-admiralty court abroad. *The Peshawur*, 52 L. J., Adm. 30; 8 P. D. 32; 48 L. T. 796; 31 W. R. 660; 5 Asp. M. C. 89.

—— **Guarantee given Abroad—Arrest of Ship in United Kingdom.**]—The fact that the defendants have given a guarantee abroad to put in bail to answer the judgment of a foreign court in a case of collision is not a ground for ordering the release of their ship from an arrest in an action commenced in this country, where no legal proceedings have been instituted in the foreign court. *The Christiansborg* (supra), distinguished. *The Mannheim*, 66 L. J., Adm. 6; [1897] P. 13; 75 L. T. 424; 8 Asp. M. C. 210.

—— **Suits in Ireland and England.**]—When a plaintiff in a cause of damage has commenced two actions; one, first in order of date, in the court of admiralty of Ireland, and a second

in the high court of justice in England, he will not be allowed to proceed with the latter until he has abandoned proceedings in the former. It is not sufficient that he is desirous of abandoning proceedings in the former, and that he is not allowed to do so by the Irish court; such refusal should be corrected by appeal. *The Cattarina Chiazzaro*, 45 L. J., Adm. 105; 1 P. D. 268; 34 L. T. 588; 3 Asp. M. C. 130.

—— **Foreign Ships—One Sunk—Actions In rem and In personam.**]—When a collision has occurred between two vessels, each belonging to foreign owners not resident within the jurisdiction of the court, and one of the vessels has been arrested in a cause of damage in rem, but the other has, in consequence of the collision, become a total wreck and cannot be arrested, the court may, on a cause in personam being properly instituted on behalf of the owners of the vessel arrested against the owners of the vessel which cannot be arrested, stay the proceedings in the principal cause in rem until security is given to answer judgment in the cross cause in personam. *The Charkieh*, 42 L. J., Adm. 70; L. R. 4 A. & E. 120; 29 L. T. 404; 22 W. R. 63; 2 Asp. M. C. 121.

—— **Judgment in Vice-Admiralty Court.**]—A judgment in a colonial vice-admiralty court is no bar to an action in a common law court in this country. *Smith* v. *Nicholls*, 5 Bing. (N.C.) 208; 7 Scott, 147; 7 D. P. C. 282; 8 L. J., C. P. 92.

—— **Collision — Actions by Shipowner and Cargo Owner—Limitation of Liability.**]—Where owners of cargo have recovered judgment in a collision action brought by them, and the owners of the ship carrying the cargo subsequently bring an action against the same ship to recover damages in respect of the same collision, and the damages in both actions would exceed the value of the defendant's ship at 8*l.* per ton, and the damage in the cargo action alone would not exceed that amount, the court will not stay proceedings in the cargo's action until after judgment in the ship's action, on the ground that without such stay the defendants have to institute a limitation of liability action, which would be unnecessary if the defendants obtained judgment in the ship's action. *The Alne Holme*, 47 L. T. 309; 4 Asp. M. C. 593.

And see further, as to stay and transfer in collision actions, XX. COLLISION, ante, cols. 841, 853.

Stay Pending Appeal.]—See *The Annot Lyle*, post, col. 1011.

Damage to Cargo — Staying Common Law Actions.]—In an action for loss of goods shipped on board a vessel, the court refused to stay proceedings on the ground that the court of admiralty had made an order, in a suit for determining the liability of the shipowners, declaring that they were entitled to limited liability, and ordering that all actions or suits pending in other courts in relation to the subject-matter of such suits should be stopped. *Milburn* v. *L. & S. W. Ry.*, 40 L. J., Ex. 1; L. R. 6 Ex. 4; 23 L. T. 418; 19 W. R. 105.

Transfer from Inferior Court—Consolidation—Plaintiff.]—When an action is transferred from an inferior court and consolidated with a cross action begun in the high court, the plaintiffs in the action in the inferior court will be placed in the position of plaintiffs in the consolidated actions, if they began the action in the inferior court before the cross action in the high court. *The Never Despair*, 53 L. J., Adm. 30; 9 P. D. 34; 50 L. T. 369; 32 W. R. 599; 5 Asp. M. C. 211. S. P., *The Bjorn*, 9 P. D. 36, n.; 5 Asp. M. C. 212, n.; and *The Cosmopolitan*, 9 P. D. 35, n.; 5 Asp. M. C. 212, n.

Subject of Action—Jury.]—Although an action in which the sole question is a question of salvage may, under Ord. LXIX. r. 3, be properly transferred to the admiralty division, such a transfer should not be ordered where there are other questions in the action capable of being tried by a jury. *Ocean Steamship Co.* v. *Anderson*, 33 W. R. 536—C. A. And see *S. C.* in H. L. ante, col. 992.

Transfer from County Court—Pleadings.]—Where a case is transferred to the admiralty division of the high court under s. 8 of the County Courts Admiralty Jurisdiction Act, 1868, pleadings must be delivered as in actions originally commenced in the high court. *The Carisbrook*, 59 L. J., Adm. 37; 15 P. D. 98; 62 L. T. 843; 38 W. R. 543; 6 Asp. M. C. 507.

Damage to Cargo—Transfer to Queen's Bench Division.]—An action for damage to cargo on board a British ship whose owners resided in England was instituted in the admiralty division. Upon an application to transfer it to the queen's bench division an order for transfer was made upon the ground that it had been wrongly brought in admiralty: but not on the ground suggested that it could not be tried there by a jury. *The Seaham*, 40 L. T. 38; 4 Asp. M. C. 58.

Witness Abroad.]—It was a common case in the admiralty court to delay a cause till a material witness who was absent beyond sea came home—per Sir George Lee. *Martin* v. *Robinson*, 2 Lee, 397.

j. Preliminary Act.

Amendment.]—The defendants in a cause of damage applied to the court when the cause was called on for hearing, and before any evidence had been taken, for leave to amend a statement in their preliminary act, and to make a similar amendment in the answer. The court allowed the amendment to be made in the answer, but refused to allow any amendment to be made in the preliminary act. *The Frankland*, 41 L. J., Adm. 3; L. R. 3 A. & E. 511; 25 L. T. 889; 20 W. R. 592; 1 Asp. M. C. 207, 489.

The court will refuse to allow a mistake in a preliminary act to be amended, even though the application for an amendment be made before the hearing of the suit, and be supported by affidavit. *The Miranda*, 51 L. J., Adm. 56; 7 P. D. 185; 47 L. T. 447; 30 W. R. 615; 4 Asp. M. C. 595.

An application to amend a mistake in a preliminary act must be made immediately upon discovery, and must be supported by affidavit. *The Vortigern*, Swabey, 518; 1 L. T. 307.

When Necessary—"Actions for Damage by Collision between Vessels."]—An action was brought by the owner of a barge and her cargo against the owners of a tug for negligence in

towing, in consequence of which, as the plaintiff alleged, the barge came into collision with another vessel, and was lost with her cargo:—Held, that the action was not one "for damage by collision between vessels" within the meaning of Ord. XIX. r. 28, and that the parties were not required to file preliminary acts as prescribed by the rule. *Armstrong* v. *Gaselee*, 58 L. J., Q. B. 149; 22 Q. B. D. 250; 59 L. T. 891; 37 W. R. 462; 6 Asp. M. C. 353.

The principle of filing a preliminary act, under Ord. XIX. r. 28, applies to every division of the high court, and is not confined exclusively to actions in the admiralty division. The plaintiff had a quantity of goods on board a barge. This barge was sunk by a vessel belonging to the defendants, and the plaintiff's goods were damaged. Cross-actions were brought by the owners of the barge and vessel respectively; but these actions were dismissed, as both parties were to blame. Afterwards an action was brought in the queen's bench division by the plaintiff, the owner of the goods, against the owners of the vessel for the damage to his goods. The defendants required the plaintiff to file a preliminary act under Ord. XIX. r. 28:—Held, that the damage sued for was "damage by collision" within the meaning of the rule, and that the plaintiff must file a preliminary act. *Secretary of State for India* v. *Hewitt*, 60 L. T. 334; 6 Asp. M. C. 384.

In an action by owners of cargo on board a ship that had been in collision against the other ship:—Held, that Ord. XXIX. r. 30, as to filing preliminary acts, did not apply. *The John Boyne*, 36 L. T. 29; 25 W. R. 756; 3 Asp. M. C. 341.

When Opened.]—Preliminary acts ordered to be opened in court upon examination of plaintiff's witnesses, after petition and answer filed. *The Two Friends*, Lush. 552.

k. Pleadings.

Form of Pleadings.]—Pleadings should be so framed as to assist not only the party in his statements of the case, but also the court in investigating the truth between the litigants; the defendant in a collision cause cannot rely on a simple negative, but must state the circumstances of the collision. *The Why Not*, 38 L. J., Adm. 26; L. R. 2 A. & E. 265; 18 L. T. 861.

In a suit for damage to cargo, the petition ought in general to state, so far as is practicable, the cause to which the plaintiff attributes the loss or damage. *The Helene*, Br. & Lush. 415; 4 Moore, P. C. (N.S.) 70; 35 L. J., P. C. 63; L. R. 1 P. C. 231; 12 Jur. (N.S.) 675; 14 L. T. 875; 15 W. R. 202.

The rule that a party seeking redress for an injury can only recover secundum allegata et probata, applies only to cases where the averments alleged in the pleadings are material to the issue raised. *The Alice and The Rosita*, 5 Moore, P. C. (N.S.) 300; 38 L. J., Adm. 20; L. R. 2 P. C. 214; 19 L. T. 753.

The pleadings should be so framed as, if necessary, to enable an examiner to elicit in evidence all the facts of the case. *The Claus Thomesen*, 32 L. J., Adm. 106; 9 Jur. (N.S.) 388; 8 L. T. 121; 11 W. R. 538.

In answer to a suit for damage to cargo, it is not sufficient to allege that the damage was caused by accidents and perils by the bill of lading excepted. The defendant must specify the particular accidents or perils. *The Hakon Adelsteen*, 43 L. J., Adm. 9.

In a cause of damage, where the evidence is taken before an examiner, the rule applies, that if it is intended to rely upon a defence of inevitable accident, such defence must be in terms distinctly raised on the pleading. *The E. Z.*, 33 L. J., Adm. 200; 10 L. T. 790.

—— **Since Rules of Supreme Court, 1883.**]—A statement of claim in a salvage action was drawn in the Form No. 6 of Appendix C to the Rules of the Supreme Court, 1883; on motion by the defendants under Ord. XIX. r. 7, for a further and better statement of claim or particulars:—Held, that the plaintiffs must deliver a fuller statement of claim, and that in salvage actions a fuller form than that given in Appendix C, No. 6, should generally be followed. *The Isis*, 53 L. J., Adm. 14; 8 P. D. 227; 49 L. T. 444; 32 W. R. 171; 5 Asp. M. C. 155.

—— **Admissions in.**]—Where the answer does not deny the truth of the preceding allegation, but draws a conclusion from it, it must be taken to admit the truth of the allegation. *The Peerless*, Lush. 103; 13 Moore, P. C. 484; 30 L. J., Adm. 89; 3 L. T. 125.

Admission by pleading extends to matters of fact, but not of law. *Ib.*

Counter-claim.]—Under the Judicature Act and rules, the defendant, where he admits his liability for the damage done by a collision, but claims to have his liability limited to 8*l.* or 15*l.* per ton of his vessel under the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), s. 54, can so claim by counter-claim instead of by instituting a separate suit for limitation of liability. *The Clutha*, 45 L. J., Adm. 108; 35 L. T. 36; 3 Asp. M. C. 225.

Application to amend statement of defence by adding counter-claim at trial, refused. *The Leon*, 50 L. J., Adm. 59; 6 P. D. 148; 44 L. T. 613; 29 W. R. 916; 4 Asp. M. C. 414.

Default of Pleading.]—Ord. XXIX. r. 2, does not apply to proceedings in an admiralty action in rem where no statement of defence has been delivered. In such a case, the practice prevailing in the high court of admiralty immediately before the coming into operation of the Judicature Acts must be followed. *The Sfactoria*, 2 P. D. 3; 35 L. T. 431; 25 W. R. 62. S. P., *The Polymede*, 1 P. D. 121; 34 L. T. 367; 24 W. R. 256.

Amendment—Time.]—When the court orders a pleading to be amended, without naming a time within which the amendment is to be made, and there is unnecessary delay in making the amendment, the proper course is for the other party to apply to the court for a peremptory order. *The Justyn*, 11 W. R. 44.

Where a long delay had taken place through misapprehension or neglect in amending a replication in accordance with the direction of the court, but no application had been made for a peremptory order specifying a time within which the amendment was to be made, the court refused to strike out the amended replication. *Ib.*

Rejoinder.]—In a rejoinder the matter pleaded must be in answer to the plea of the adverse

party; new matter not allowed. *The Aurora*, 1 W. Rob. 322.

Proof secundum allegata.]—Where the plaintiff alleged that the collision was caused by the defendant starboarding, and it was not proved that he did starboard, the suit was dismissed. *The Ann*, Lush. 55; 13 Moore, P. C. (N.S.) 198; 3 L. T. 128; 8 W. R. 567.

Statute of Limitations.]—The Statute of Limitations must be pleaded and sentence given accordingly in admiralty. *Barkeley* v. *Morrice*, Hardr. 502.

Amendment — Withdrawing Plea.] — Leave given under special circumstances to withdraw answer and plead de novo. *The Castiglione and Cargo*, 20 L. T. 180 (Irish).

1. Particulars.

Rules same as in Queen's Bench Division—Damage to Cargo.]—The rule as to giving the opposite party particulars of any general allegation in pleadings ought to be the same in the admiralty as in the queen's bench division. Where, therefore, in an action in the admiralty division by cargo owners against shipowners for delivery of cargo in a damaged condition, the statement of claim alleged that the damage was not occasioned by any of the excepted perils mentioned in the bill of lading under which the cargo had been shipped, but was occasioned by the defective condition of the vessel, or by the negligence or breach of duty of the defendants or their servants, it was held that the defendants were entitled to particulars of the defects rendering the vessel not fit to carry the cargo. *The Rory*, 51 L. J., Adm. 73; 7 P. D. 117; 46 L. T. 757; 4 Asp. M. C. 537—C. A.

Collision.]—When a ship was totally lost in a collision, the court, contrary to the practice of the court, made an order, in an action by the shipowners against the vessel doing the damage, for particulars of the plaintiff's claim to be delivered to the defendants. *The N. P. Neilsen*, 34 L. T. 588; 24 W. R. 324; 3 Asp. M. C. 169.

Damage to Cargo.]—In an action for damage to cargo, the plaintiffs are not bound to set out the particular acts or character of the negligence which caused the damage. *The Freedom*, 38 L. J., Adm. 25; L. R. 2 A. & E. 346; 20 L. T. 220, 1018; 18 W. R. 48.

In action for damage to cargo, particulars of damage ordered to be delivered by the plaintiff, in order to enable the defendant to pay into court the amount for which he admitted liability. *The Wetterhorn*, 34 L. T. 587; 24 W. R. 323; 3 Asp. M. C. 168.

Action by Passenger against Shipowner.]—In an action by a passenger against a shipowner for damages by reason of the improper condition of the ship and negligent navigation, an application for particulars of negligence refused. *George* v. *Watts*, 30 L. T. 60; 2 Asp. M. C. 243.

m. Inspection and Discovery.

Depositions made before Receiver of Wreck.]—Depositions of the master and crew of a British ship, the "R.," in regard to a collision, had been taken by the receiver of wreck, and the board of trade refused to give copies of such depositions to the owners of the "P." in an action arising out of the collision between these vessels. Copies had however been obtained for the purpose of the action by the solicitors to the owners of the "R.," whose master and crew had made the depositions. On motion by the owners of the "P." for leave to inspect and take copies of the depositions in the possession of the solicitors of the owners of the "R.":—Held, that these copies were privileged. *The Palermo*, 53 L. J., Adm. 6; 9 P. D. 6; 49 L. T. 551; 32 W. R. 403; 5 Asp. M. C. 165—C. A.

Against Foreign Shipowners.]—In an action in rem against a foreign ship whose owners are resident abroad, the court will make an order for discovery of documents against such owners, but will always allow a reasonable time for making the affidavit of documents. *The Emma*, 34 L. T. 742; 24 W. R. 587; 3 Asp. M. C. 218.

Form of Affidavit.]—To obtain discovery of documents, the affidavit in support of the application must allege some one particular document to be in the possession of the party from whom discovery is sought. *The Cordelia*, 28 L. T. 776; 2 Asp. M. C. 35.

Costs of Motion.]—The court, where a motion is made for leave to inspect documents without a previous application to the person in possession, will condemn the party moving in costs of the motion. *The Memphis*, L. R. 3 A. & E. 23; 21 L. T. 727; 18 W. R. 74.

Compromise — Actions by Cargo Owner and Shipowner.]—In an action by the owner of cargo against a shipowner, he alleged damage in consequence of a collision with another ship, caused by the defendant's negligent navigation. A compromise of cross-suits in the admiralty court in respect of the collision had been entered into by the respective owners of the two ships:—Held, that the plaintiff had a right to inspect the terms of this compromise. *Hutchinson* v. *Glover*, 45 L. J., Q. B. 120; 1 Q. B. D. 138; 33 L. T. 605; 24 W. R. 185. Affirmed, 33 L. T. 834; 3 Asp. M. C. 120—C. A.

Court will examine Documents.]—Upon an application for inspection of documents, the court will order them to be brought into the registry, and after perusal of them decide whether or not the application should be granted. *The Macgregor Laird*, 36 L. J., Adm. 10; L. R. 1 A. & E. 307; 15 W. R. 262.

Private Documents.]—In a suit for damage to cargo, it is no answer to a claim for production of letters with reference to the shipment of the cargo that those letters disclose the private secrets of their owners. *The Don Francisco*, Lush. 468; 31 L. J., Adm. 205; 5 L. T. 466. *See also Cases*, cols. 998, 1317.

Damage to Cargo—Documents shewing Unseaworthiness.]—In an action for damage to cargo through the ship's unseaworthiness, copies of surveys, average statement, shipwright's bill for repairs and captain's protest, ordered to be produced for inspection by the plaintiff. *Daniel* v. *Bond*, 17 C. B. (N.S.) 716.

Possession Suit—Ship Papers.]—In a suit of possession the court of admiralty had power to compel production of the ship's papers; but it would not order production except in such a cause, or on an ex parte affidavit. *The Lusitano*, 1 W. Rob. 166.

False Representations as to Ship—Passenger induced to take Passage.]—In an action for making false representations respecting a ship whereby the plaintiff was induced to take a passage in her, and was afterwards obliged (with other passengers) to leave her, inspection was refused of letters written by other passengers to the defendants: also of letters of the captain to the defendants, written after the plaintiff left the ship, touching the plaintiff leaving the ship; also of letters to the defendants, who were agents for the ship, from the owner written after the plaintiff left her. *Richards* v. *Gellatley*, L. R. 7 C. P. 127; 26 L. T. 425; 1 Asp. M. C. 277.

Inspection of Ship by Trinity Masters.]—Before the hearing of an action an application was made under 24 Vict. c. 10, s. 18, by the plaintiffs, that two Trinity masters should inspect the lights of the defendants' ship:—Held, that the application was premature, and ought to be refused. *The Victor Covacevich*, 54 L. J., Adm. 48; 10 P. D. 40; 52 L. T. 632; 5 Asp. M. C. 417.

The court has power to order an inspection of a vessel by Trinity masters, and will direct that they be attended by the proctors, and a viewer on behalf of each party. *The Germania*, 37 L. J., Adm. 59; 19 L. T. 20.

An inspection to ascertain whether the lights carried by a ship were such as the regulations require, ought to be made at night. *The Germania*, 21 L. T. 44—P. C.

n. Interrogatories.

Striking Out.]—Interrogatories relating to the circumstances of the collision, will not be struck out as scandalous or unreasonable or vexatious, because the information sought to be obtained would for the most part be afforded by the preliminary act. *The Radnorshire*, 49 L. J., Adm. 48; 5 P. D. 172; 43 L. T. 319; 29 W. R. 476; 4 Asp. M. C. 338.

In an action of damage by collision, interrogatories which seek to obtain information given in the preliminary act of the party interrogated are inadmissible, and will be struck out on the application of the party sought to be interrogated. *The Biola*, 34 L. T. 185; 24 W. R. 524; 3 Asp. M. C. 125.

The plaintiffs applied for leave to deliver interrogatories to the defendant, stating, in an affidavit of themselves and their solicitor, that the deponents believed that they would derive material benefit in the cause from the discovery which they sought, and that there was a good cause of action upon the merits. The interrogatories asked, whether any and what documents relating to the cause were in possession of the defendant. The defendant opposed the application upon the ground that the court ought not to grant leave to deliver interrogatories for the discovery of documents without an affidavit by the plaintiffs of their belief that some document, to the production of which the plaintiffs were entitled, was in the possession or power of the defendant. The court overruled the objection, and granted the application. *The Minnehaha*, L. R. 3 A. & E. 148; 23 L. T. 747; 19 W. R. 304.

The court has power to order interrogatories to be administered to a defendant before the plaintiff has filed his petition. *The Murillo*, 28 L. T. 374; 1 Asp. M. C. 579.

When a cause of collision was instituted in personam against an owner of a ship, and he entered an appearance, alleging himself to be "improperly sued as one of the owners" of the ship, the court allowed interrogatories to be administered by the plaintiff to him for the purpose of ascertaining the ownership before the petition was filed. *Ib.*

The court will allow interrogatories to be administered rather in accordance with the practice of the courts of equity than of common law; and the principle by which the court will be governed is, that the interrogatories should be such as tend bonâ fide to support the case of the party seeking to administer them, and to favour a complete inquiry into the truth of the issue which the court has to decide. *The Mary* or *Alexandra*, 38 L. J., Adm. 29; L. R. 2 A. & E. 319; 18 L. T. 891; 17 W. R. 551.

On objection by a defendant to interrogatories tendered in a cause of possession, that his answers to them might subject him to penalties under the Foreign Enlistment Act:—Held, that the interrogatories should be administered, but that if the defendant stated upon his oath his belief that an answer to any particular interrogatory would subject him to such penalties, he should not be compelled to answer it. *Ib.*

In an action against a shipowner for non-delivery an interrogatory as to whether the cargo was insured is not admissible. *Bolckow, Vaughan & Co.* v. *Young*, 42 L. T. 690; 3 Asp. M. C. 301.

In an action for damage to cargo the defendants, shipowners, refused to answer interrogatories upon the ground that they had no personal knowledge of the facts inquired about, namely, the details of the navigation of the ship shortly before her loss:—Held, that if the information had been supplied to them in the ordinary course of business by their agents they were bound to answer. *Bolckow, Vaughan & Co.* v. *Fisher*, 52 L. J., Q. B. 12; 10 Q. B. D. 161; 47 L. T. 724; 31 W. R. 235; 5 Asp. M. C. 20—C. A. Cf. *The Minnehaha*, supra, col. 998.

o. Assessors.

Duties of Judge and Assessors.]—The duty of Trinity masters, sitting as assessors, is to assist the judge in questions of nautical skill. In case of a difference of opinion between the judge and the assessors, the judge is not at liberty to act upon any inferences which they may draw from the evidence, except they accord with his own. It is the duty of the judge to decide the case on his own responsibility. *The Magna Charta*, 25 L. T. 512; 1 Asp. M. C. 153—P. C.

The judgment is that of the judge, and he may decide in accordance with the advice of one or more of the assessors or not, as he thinks fit. *The Philotaxe*, 37 L. T. 540; 3 Asp. M. C. 512; 4 Asp. M. C. 321.

Nautical assessors summoned under the County Court Admiralty Jurisdiction Act, 1868, to attend at the hearing of an admiralty action tried by a county court judge, are present merely to advise the judge, and the judge ought to decide the case

in accordance with his own opinion as to the law and merits of the case. *The Aid*, 50 L. J., Adm. 40 ; 6 P. D. 84 ; 44 L. T. 843 ; 29 W. R. 614 ; 4 Asp. M. C. 432.

If the judge who tries the case differs from his assessors, he is bound to decide in accordance with his own opinion. *The Beryl*, 53 L. J., Adm. 75 ; 9 P. D. 137 ; 51 L. T. 554 ; 33 W. R. 191 ; 5 Asp. M. C. 321—C. A. S. P., *The Alfred*, 7 Not. of Cas. 354. And see *The Fred*, infra.

The judge decides questions of fact ; function of nautical assessors in admiralty. *The James Watt*, 2 W. Rob. 271.

Evidence—Matters of Nautical Skill—Trinity Masters.]—In admiralty actions, where the court is assisted by nautical assessors, evidence as to matters of nautical skill and knowledge is not admissible. *The Assyrian*, 63 L. T. 91 ; 6 Asp. M. C. 525—C. A. S. P., *The Kirby Hall*, 52 L. J., Adm. 31 ; 8 P. D. 75 ; 48 L. T. 797 ; 31 W. R. 658 ; 5 Asp. M. C. 90. *The Earl Spencer*, L. R. 4 A. & E. 431 ; 33 L. T. 235 ; 3 Asp. M. C. 4—C. A. Affirming 32 L. T. 370 ; 23 W. R. 661. *The Ann and Mary*, 2 W. Rob. 189. *The Ivo*, 1 Spinks, 184. *The Sir Robert Peel*, 43 L. T. 364 ; 4 Asp. M. C. 321—C. A. *The Nimrod*, 14 Jur. 942.

Where in a damage to cargo action the judge found on the advice of his assessors that all screw alleys, however well made, may emit smells which may damage sensitive cargo stowed in the vicinity, the court of appeal, being assisted by assessors, refused to allow the appellants, the shipowners, at the hearing of the appeal, to call evidence to shew that the particular screw alley did not emit a smell, on the ground that it was a question of nautical skill. *The Assyrian*, 63 L. T. 91 ; 6 Asp. M. C. 525.

Assessors Disagreeing.]—Semble, that where two assessors disagree, the court can call in a third, and, after submitting the evidence already given to him, have the case re-argued before the three assessors. *The Philotaxe*, supra, col. 998.

Engineer Assessor.]—In an action of wages which involved questions as to the state of machinery of a steamship, engineer assessors were summoned to assist the court. *The Marina*, 50 L. J., Adm. 33 ; 29 W. R. 580.

Inspection by Trinity Masters—Report.]—Where Trinity masters are desired to inspect and report to the court, their report may include all matters in their opinion affecting the merits of the case. *The Marathon*, 40 L. T. 163 ; 4 Asp. M. C. 75.

Admission of Plea—Attendance of Assessors.]—Application for attendance of Trinity masters, upon a question as to the admissibility of a plea, refused. *The Vargas*, 15 Jur. 710.

Advice as to Entries in Log.]—Trinity masters called in to advise as to the effect of entries in the log-book as to the ship's course and probable destination. *The Edward*, 4 C. Rob. 68.

Appeal—Reasons of Nautical Assessors.]—See *The Banshee*, infra, col. 1012.

Advise only when Requested.]—Trinity masters advise the court when requested, and no more. *The Alfred*, 7 Not. of Cas. 354 ; 3 W. Rob. 232.

Judgment of Assessors, not of Judge—Power of Divisional Court to alter Judgment.]—In a collision action brought in the county court the judge formed an opinion on the evidence in favour of the plaintiffs, but the nautical assessors took the view that the plaintiffs' vessel was to blame for a wrong manœuvre. The judge found himself bound to give judgment in accordance with the view of the assessors, expressing at the same time his dissent therefrom. The plaintiffs appealed :—Held, that, on these facts, the court had no power to alter the decision of the learned judge. *The Fred*, 72 L. T. 153 ; 7 Asp. M. C. 550.

p. Evidence.

Examination of Witness before Examiner—Correction of Transcript—Application to take off File—Costs.]—If, after filing in the admiralty registry the transcript of the shorthand notes of the evidence of a witness taken before an examiner, a mistake is discovered to have been made by the shorthand writer in transcribing his notes, application should be made by the party grieved to the court for an order directing that the transcript be taken off the file and returned to the examiner for amendment, and the costs thereby incurred will be costs in the cause. *The Knutsford*, [1891] P. 219 ; 64 L. T. 352 ; 39 W. R. 559 ; 7 Asp. M. C. 33.

Evidence in Prior Suit when Admitted.]—The court cannot, except by consent, order that evidence in one suit that has been heard, shall be admitted as evidence in a subsequent suit. Two suits in rem by the owners of two ships which came into collision were instituted, and judgment had been given. An application that the evidence in those suits be admitted in a suit in personam by the owners of cargo on board of one of the ships was refused. *The Demetrius*, 41 L. J., Adm. 69 ; L. R. 3 A. & E. 523 ; 26 L. T. 324 ; 20 W. R. 761 ; 1 Asp. M. C. 256.

Admissions in Pleadings.]—When the defendant admits all the facts pleaded in the statement of claim in a salvage action, the plaintiff will not be allowed to call evidence except by permission of the court, and on special grounds. *The Hardwick*, 53 L. J., Adm. 23 ; 9 P. D. 32 ; 50 L. T. 128 ; 32 W. R. 598 ; 5 Asp. M. C. 199.

Letter of Captain to Owners.]—A letter written by the captain of a ship to his owners is admissible in evidence against the owners ; though all the statements contained in the letter may not be evidence. *The Solway*, 54 L. J., Adm. 83 ; 10 P. D. 137 ; 53 L. T. 680 ; 34 W. R. 232 ; 5 Asp. M. C. 482.

Engineer's Log.]—In an action of damage the engineer's log is admissible as evidence against the shipowner by whom the engineer is employed. *The Earl of Dumfries*, 54 L. J., Adm. 7 ; 10 P. D. 31 ; 51 L. T. 906 ; 33 W. R. 568 ; 5 Asp. M. C. 342.

Rejection of Evidence—New Trial.]—See *The Sir Robert Peel*, post, col. 1014.

Reference—Cross-Examination of Deponent.]—Under Ord. XXXVII. r. 2, which enables the evidence in references in admiralty actions to be given by affidavit, it is in the discretion of the registrar to refuse if he thinks fit to give weight

to such evidence unless and until the deponent has been cross-examined on his affidavit, and where the deponent is a party to the action, he may, though resident abroad, be required to attend in this country for such cross-examination. *The Parisian*, 57 L. J., Adm. 13 ; 13 P. D. 16 ; 58 L. T. 92 ; 36 W. R. 704 ; 6 Asp. M. C. 249.

Extra Articulate Evidence—Application to strike out.]—In a proceeding by plea and proof each party has a right to have extra articulate evidence struck out at the hearing or previously. *The Neptunus*, 6 W. R. 262.

Rules of, in Admiralty.]—The rules of evidence as to what is admissible were not always the same in the admiralty and common-law courts. *The Peerless*, Lush. 30.

On Appeal from the Registrar.] — On an appeal from the registrar new evidence is admissible. *The Ironmaster*, Swabey, 441. And see *The Thuringia*, *The Newport*, infra, cols. 1005, 1006.

Questions of Seamanship.]—See *o.* ASSESSORS, supra, col. 999.

In Default Suits.]—See *h.* DEFAULT PROCEEDINGS, supra, col. 987 ; *The Spero Expecto*, col. 988.

On Appeal.]—See *The Scindia*, and cases, post, col. 1013, and *The Endeavour*, ante, col. 634 (as to the value of salved ship) ; *The Eclipse*, post, col. 1016 ; *The Busy Bee*, post, col. 1016.

In Collision Actions.]—*See* ante, cols. 847, seq.

q. Consolidation.

Reference to Registrar.] — The court will, where it is convenient to do so, order one of several consolidated causes to be referred to the registrar separately. *The Helen R. Cooper*, L. R. 3 A. & E. 339 ; 40 L. J., Adm. 46.

After Judgment.]—When judgment has been given in one of two suits, the court cannot order the two suits to be consolidated. *The Demetrius*, 41 L. J., Adm. 69 ; L. R. 3 A. & E. 523 ; 26 L. T. 324 ; 20 W. R. 761 ; 1 Asp. M. C. 251.

Discretion as to.]—The court will, in the exercise of its discretion, make such order for consolidation as it considers will meet the justice of the case, and protect the interest of the suitors. *The Vildosala*, *The Emerald*, *The Satellite*, *The Toiler*, 42 L. T. 95 ; 4 Asp. M. C. 228.

Refusal of Consolidation Order before Service of Writ.]—The court will refuse to consolidate cross-actions of damage in personam where there has been no service of the writ in the principal action. *The Helenslea*, *The Catalonia*, 7 P. D. 57 ; 47 L. T. 446 ; 30 W. R. 616 ; 4 Asp. M. C. 594.

In Salvage Suits.]—See *The Strathgarry* and cases ante, col. 668.

r. Amendment of Proceedings.

Error in Decree.] — To entitle a party to amend an error in a decree, the mistake should be brought to the notice of the court with the utmost possible diligence. An application to alter a decree five months after the decree was made was rejected. *The Orient*, 39 L. J., Adm. 10 ; 21 L. T. 762.

Amount for which Damage Suit entered increased.] — An action for damage had been entered in a sum which was subsequently found to be insufficient to cover the damages ; an appearance had been entered, but no bail given, and the ship had not been arrested. Motion to increase the amount granted. *The Florence Nightingale and The Mœander*, 2 Br. & Lush. 29 ; 1 Moore, P. C. 63 ; 6 L. T. 400. And see *The Dictator*, supra, cols. 851, 976.

Præcipe.]—In a cause of collision after their vessel had been arrested and released on bail, the defendants admitted their liability and consented to a reference. The court afterwards, under special circumstances, granted leave to the plaintiff to amend the præcipe to institute, by increasing the amount in which the suit was instituted. *The Johannes*, 39 L. J., Adm. 41 ; L. R. 3 A. & E. 127 ; 23 L. T. 26.

In a præcipe to institute the cause the plaintiffs stated the suit as one of damage to cargo, and the affidavit to lead warrant alleged that they had sustained damage by breach of duty and breach of contract. After the arrest of the ship, and appearance entered on behalf of her owners, leave to amend by striking out of the præcipe to institute the words "damage to cargo," and substituting the words "breach of duty and breach of contract on the part of the master and crew," granted on payment of the costs occasioned by the misstatement in the præcipe. *The Princess Royal*, 39 L. J., Adm. 29 ; L. R. 3 A. & E. 27 ; 22 L. T. 29.

The præcipe to institute an action having been by mistake entered in a smaller sum than that intended, the defendant's ship was arrested and bailed in that sum. On the mistake being discovered before the hearing of the cause, the court gave permission (on payment of costs occasioned by the mistake) for the præcipe to be amended, and the ship to be re-arrested. *The Hero*, Br. & Lush. 447 ; 13 W. R. 927.

Amendment of Title of Action—Necessaries or Repairs.]—A suit instituted as for necessaries, but really in respect of repairs : the title must be amended. *The Shipwith*, 10 Jur. (N.S.) 445 ; 10 L. T. 43.

Amendment of Decree.]—See *The Georg*, ante, col. 633 ; *The Monarch*, post, col. 1022.

s. Jury.

Trial by Jury—Discretion.]—The plaintiff in an action in rem for disbursements in the probate, divorce, and admiralty division, applied for an order that the action should be tried by a judge with a jury :—Held, that Ord. XXXVI. r. 6, gives no absolute right to a jury in actions which before the passing of the Judicature Act, 1873, would have been tried without a jury ; that the case fell within Ord. XXXVI. rr. 4 and 7a, and that the judge had a discretionary power only, to allow trial by a jury. *The Temple Bar*, 55 L. J., Adm. 1 ; 11 P. D. 6 ; 53 L. T. 904 ; 34 W. R. 68 ; 5 Asp. M. C. 509—C. A.

Power to Summon—30 & 31 Vict. c. 114, s. 61, Admiralty Court (Ireland) Act.] — There is no

power given by the above act to the judges of the admiralty in Ireland to summon a jury. *The Anderida*, 20 L. T. 180.

County Court—Right to a Jury in.]—See *The Tynwald*, ante, col. 944.

Assessment of Damages by Jury under Lord Campbell's Act.]—See *The Orwell*, ante, col. 989.

t. Right to Begin.

Collision.]—Where it appeared on the pleadings in a cause of damage by collision that at the time of the collision the plaintiff's vessel, a fishing smack, was riding attached to her nets, and stationary, with a single white light exhibited, but one of the charges made against her by the defendants in their answer was that she improperly neglected to exhibit the lights required by the Sea Fisheries Acts, 1868, two lights, one above the other:—Held, that as it must be implied that the neglect to exhibit such lights contributed to the collision, the plaintiff ought to begin. *The Bottle Imp*, 42 L. J., Adm. 48; 28 L. T. 286; 21 W. R. 600; 1 Asp. M. C. 571.

In a cause of collision, where the defendants plead inevitable accident alone, it lies upon the plaintiff to shew a primâ facie case of negligence against the defendants, and the plaintiffs must therefore begin. *The Abraham*, 28 L. T. 775; 2 Asp. M. C. 34.

In a cause of damage the defendant, by his pleading, made no charge of negligence against the plaintiff, but denied generally the averments in the petition, and pleaded inevitable accident:—Held, that the plaintiff ought to begin. *The Benmore*, 43 L. J., Adm. 5; L. R. 4 A. & E. 132; 22 W. R. 190.

In a damage suit the practice of the court requires the plaintiff to begin, notwithstanding that the defendant raises no other defence than that of inevitable accident. *The Otter*, L. R. 4 A. & E. 203; 30 L. T. 43; 22 W. R. 557; 2 Asp. M. C. 4.

Salvage.]—Where there are rival salvors the salvor who first enters his suit has the right to begin, unless special circumstances are shewn. *The Morocco*, 24 L. T. 598; 1 Asp. M. C. 46.

u. Tender.

Effect of.]—A tender in admiralty admits that something is due to the plaintiff. *The Porcupine*, 1 Hag. Adm. 378.

Payment out of Court.]—Rules of the supreme court, Ord. XXII. rr. 1 and 2, do not apply to the practice of the admiralty division as to tender by act in court. Where a collision action is settled upon the terms that the defendant shall pay to the plaintiff a specified percentage of his damages, and the defendant pays into court a sum which by notice, filed in court, he tenders to the plaintiff in satisfaction of his claim, in the event of such sum exceeding that which the registrar finds to be due to the plaintiff for damages and interest, the defendant is entitled to the balance. *The Mona*, 63 L. J., Adm. 137; [1894] P. 265; 6 R. 707; 71 L. T. 24; 43 W. R. 173; 7 Asp. M. C. 478.

Money paid into court in a wages suit not paid out until conclusion of the suit. The seamen continuing to claim a larger sum, motion to pay out refused. *The Annie Childs*, Lush. 509.

Tender in Salvage Suits.]—See ante, col. 669.

Plea of Tender without Payment into Court.]—Is bad. *The Nasmyth*, 54 L. J., Adm. 63; 10 P. D. 41; 52 L. T. 392; 33 W. R. 736; 5 Asp. M. C. 364.

v. Proceedings in Actions—Various.

Repairs to Damaged Ship—Bankruptcy of Shipowner—Money in Court in Collision Suit.]—Where in the registrar's report in a collision action it appears that the claimant claims (inter alia) as part of his damages the cost of repairing his ship, but has not paid the shipwright, and has since the repairs were effected become insolvent, and the registrar allows such item, the court has no power to do anything to ensure the money being paid over by the claimant to the shipwright, and will not retain the money in the registry until the claimant has given satisfactory evidence that he has paid the shipwright. *The Endeavour*, 62 L. T. 840; 6 Asp. M. C. 511.

Garnishee Order.]—Where the proceeds of a ship are in court, effect will be given to a prior lien, so as to give effect to a garnishee order. *The Jeff Davis*, L. R. 2 A. & E. 1; 17 L. T. 151.

Discontinuance.]—The plaintiffs in an action of co-ownership having obtained an order requiring the defendant to deliver up the certificate of registry of the ship to them, before delivering a statement of claim wholly discontinued the action without leave of the court. The defendant thereupon applied to have the action dismissed with costs:—Held, that the action must be dismissed, and that, under Ord. XXIII. r. 1, he was entitled as of right to all the costs of the action. *The St. Olaf*, 46 L. J., Adm. 74; 2 P. D. 113; 36 L. T. 30; 3 Asp. M. C. 341.

Re-hearing.]—The admiralty court had a discretion as to allowing a re-hearing; but it would only allow it upon fraud or its equivalent being shewn. *The Fortitudo*, 2 Dods. 58, 70.

Scotch Law—Arrestment—Bottomry Bondholder—Priority.]—See *Ranking* v. *Todd*, 8 Ct. of Sess. Cas. (3rd ser.) 914; X. BOTTOMRY, supra, col. 217.

Foreign Enlistment—Indemnity for Detention.]—An application to the court of admiralty for an indemnity by the crown for detention of a vessel under 33 & 34 Vict. c. 90, s. 24, should be made by motion upon affidavit. *The Great Northern and The Midland*, 26 L. T. 201; 1 Asp. M. C. 246.

Third Party Procedure—Collision.]—See *Spiller* v. *Bristol Steam Navigation Co.*, supra, col. 552; *The Curtsburn*, supra, col. 758; *The Bianca*, supra, col. 668; *The Hereward*, supra, col. 958.

Action in rem—Notice of Action—City of Dublin Steam Packet Company.]—By 6 & 7 Will. 4, ch. c., s. 8, no action shall be brought in which the City of Dublin Steam Packet Company shall

be liable for any damage to any ship against such company, unless one month's notice in writing shall have been given to the company :—Held, that the word "action" in s. 8 did not apply to an action in rem. *The Longford*, 58 L. J., Adm. 33 ; 14 P. D. 34 ; 60 L. T. 373 ; 37 W. R. 372 ; 6 Asp. M. C. 371—C. A.

Affidavits—Adjournment of Motion.]—The adjournment of the hearing of a motion for the convenience of counsel does not preclude the parties making the motion from filing and using a further affidavit. *The Thuringia*, 41 L. J., Adm. 20 ; 25 L. T. 605 ; 1 Asp. M. C. 166.

Parties—Minor.]—A minor sues by proxy. *The Albert Crosby*, Lush. 44.

Assignment of Cause of Action.]—In a suit for building and equipping a vessel, the defendant pleaded that the plaintiffs'.claim vested in their trustee under a composition deed ; and the plaintiffs in their reply alleged that they assigned the causes of action before the execution of the deed, and that the suit was brought in their names as trustees for the assignee :—Held, that the assignment of the causes of action carried with it all rights of action, which though inchoate at the time might subsequently become complete. *The Wasp*, L. R. 1 A. & E. 367 ; 16 L. T. 854.

Winding up Company—Enforcing Lien.]—The proper mode of enforcing a maritime lien on a vessel belonging to a company which has been ordered to be wound up, is by a proceeding in the winding-up, and not by a proceeding in rem in the admiralty court. *Australia Direct Steam Navigation Co., In re, Baker, Ex parte*, 44 L. J., Ch. 676 ; L. R. 20 Eq. 25.

In Damage to Cargo Actions.]—See ante, cols. 550 seq., 968 seq.

In Collision Actions.]—*See* XX. COLLISION.

In Salvage Actions.]—*See* XVIII. SALVAGE.

w. Reference to Registrar.

In what Cases.]—It is not an inflexible rule of practice that all questions of damage should be referred to the registrar and merchants. Therefore when the question of consequential damages was distinctly raised by the pleadings, and the court, assisted by Trinity masters, was admittedly the best tribunal to determine the issues so raised, the court ruled that evidence with respect to such issues might be given at the hearing, and that it would itself decide them, and not refer them to the registrar and merchants. *The Maid of Kent*, 50 L. J., Adm. 71 ; 6 P. D. 178 ; 45 L. T. 718 ; 29 W. R. 897 ; 4 Asp. M. C. 476.

A reference will not be ordered when the court can itself satisfactorily dispose of the question. *The Eleonore*, Br. & Lush. 185 ; 33 L. J., Adm. 19 ; 9 L. T. 397 ; 12 W. R. 218.

Objections to, and Appeals from, Report.]—A French fishing brig of 142 tons, employed in the cod fishery off the banks of Newfoundland, came into collision on the 6th of July, 1881, with an Italian barque, and in consequence of the collision was compelled to put into port for repairs, but, her repairs having been completed, returned to the fishing ground before the close of the fishing season. In an action of damage instituted on behalf of the owners of the brig against the barque, the court pronounced the barque solely to blame for the collision, and referred the question of damages to the registrar and merchants. At the reference the plaintiffs claimed 1,200*l.* for demurrage of their vessel from the date of the collision to the 26th of August, 1881, the date of her return to the fishing ground ; and of the amount so claimed, the registrar, by his report, allowed the plaintiffs 880*l.* as the loss sustained by the interruption of their fishing. The defendants moved the court in objection to the report :—Held, that the motion must be dismissed. *The Resolute*, 52 L. J., Adm. 46 ; 8 P. D. 109 ; 48 L. T. 909 ; 31 W. R. 657 ; 5 Asp. M. C. 93.

Upon appeal from the report of the registrar and merchants, the court will not admit additional evidence unless satisfied that such evidence could not by proper diligence and application have been produced before the registrar and merchants. *The Thuringia*, 41 L. J., Adm. 20 ; 25 L. T. 605 ; 1 Asp. M. C. 166.

An affidavit in support of a motion for leave to produce further evidence, where the object is to vary the evidence already given, should be clear and precise as to the witnesses it is proposed to call, and the nature of their testimony. *Ib.*

An affidavit of a witness, who is not tendered for cross-examination, and who deposes to a fact material to the inquiry before the registrar and merchants, should be filed before the hearing. *Ib.*

On an appeal from a report of a registrar and merchants, new evidence is admissible. *The Newport*, Swabey, 317. S. P., *The Ironmaster*, Swabey, 441.

When a cause has been referred to and heard by the registrar and merchants, it is competent to the judge, in considering the report thereon, in his discretion, to admit fresh evidence. *H.M.S. Flying Fish*, Br. & Lush. 436 ; 2 Moore, P. C. (N.S.) 77 ; 34 L. J., Adm. 113 ; 12 L. T. 619—P. C.

In a cause of limitation of liability arising out of a collision, where, the fund in court being insufficient to satisfy the claims against it, a reference has been made to the registrar and merchants to assess the damages as to time and rate, the court will review the registrar's report and correct it, if it should appear that any portions of the report are founded on what the court deems to be an erroneous view of the evidence. *The City of Buenos Ayres*, 25 L. T. 672 ; 1 Asp. M. C. 169.

On appeal from the report of the registrar, disallowing a claim for total loss in a cause of damage by collision :—Held, that the master of the plaintiff's vessel was not justified in abandoning her after the collision. Report confirmed with costs. *The Thuringia*, 41 L. J., Adm. 44 ; 26 L. T. 446 ; 1 Asp. M. C. 283.

Report of registrar amended on motion by adding items for which no vouchers had been produced at the reference. *The Englishman*, 38 L. T. 756.

On appeal from a report of the registrar and merchants, no objection can be made before the court to an item which was not questioned before them. *The Princess Helena*, Lush. 190 ; 30 L. J., Adm. 137 ; 4 L. T. 869.

An objection to the registrar's report cannot be heard on motion, except by consent. *The*

Edmond, Lush. 211; 30 L. J., Adm. 128; 2 L. T. 521.

In an appeal from his report, the court will not allow a party to set up a case which he did not endeavour to establish at the reference. *The Glenmanna*, Lush. 115.

The court will not interfere with the report of registrar and merchants, unless it is fully convinced that they are in error. *The Clyde*, Swabey, 23.

Cross-Examination of Deponent.]—Under Ord. XXXVII. r. 2, which enables the evidence in references in admiralty actions to be given by affidavit, it is in the discretion of the registrar to refuse, if he thinks fit, to give weight to such evidence unless and until the deponent has been cross-examined on his affidavit, and where the deponent is a party to the action, he may, though resident abroad, be required to attend in this country, for such cross-examination. *The Parisian*, 57 L. J., Adm. 13; 13 P. D. 16; 58 L. T. 92; 36 W. R. 704; 6 Asp. M. C. 249.

Report referred back for further Evidence.]—Report of registrar referred back for reconsideration for the production of further evidence, the applicant paying costs of previous reference and application to refer back. *The Matchless*, 10 Jur. 1017.

Objection to Registrar's Report.]—Where an action is instituted in an admiralty district registry by part owners of a ship against the managing owner for an account, and the writ claims an account under Ord. III. r. 8, and an order for the filing of the accounts is made under Ord. XV. r. 1, and the account is proceeded with pursuant to order, and the district registrar reports thereon, such report is to be treated as the usual report in an admiralty court action, and if the defendant seeks to take objection thereto, he must do so according to the provisions of Ord. LVI. r. 11, otherwise the plaintiff will be entitled to judgment thereon. *Gowan* v. *Sprott*, 51 L. T. 266; 5 Asp. M. C. 288.

—— **Time for.**]—A report of the registrar and merchants does not necessarily stand confirmed by reason of the defendants failing to take objection thereto within the time provided for in r. 117 of the Admiralty Court Rules, 1859, so as to absolutely entitle the plaintiffs to payment to them by the defendants of a sum of money which the court is of opinion ought not to have been allowed them in the report. *The Thyatira*, 49 L. T. 713; 5 Asp. M. C. 178.

—— **Extension of Time.**]—The court will not extend the time for objecting to the registrar's report in a co-ownership action without special grounds being shewn by the party seeking to object. *Gowan* v. *Sprott*, supra.

The court has power to extend the time within which objection to the report of the registrar and merchants may be taken. *The Thyatira*, supra.

Appeal from—New Evidence.]—See *The Ironmaster*, ante, col. 1006.

Costs of Reference.]—*See* post, col. 1022.

x. Decree—Judgment—Execution.

Priority.]—The rule that the court will give priority to the suitor who first obtains a decree applies only as between claimants in pari conditione. *The Markland*, L. R. 3 A. & E. 340; 24 L. T. 596; 1 Asp. M. C. 44.

Varying.]—Where in a suit in rem, a decree has been made per incuriam for the payment of money out of the proceeds in court to satisfy the claim of the plaintiff, the court may, before the money has been paid, revoke or vary the decree. *Ib.*

Rescinding or Setting Aside.]—Fraud sufficient to set aside in the court of admiralty the decree of a competent court of vice-admiralty, must be fraud in procuring the decree. *The Justyn*, 6 L. T. 553.

By Consent.]—Final as well as interlocutory decrees and orders may be obtained by consent, without an order of the judge in person, but the consent must be express. *The Buenos Ayres*, 17 W. R. 627.

The court refused an application to rescind a decree pronouncing for the validity of a bottomry bond, founded upon an affidavit by the defendants' solicitor that there was a good defence on the merits, the decree having been pronounced with the consent of the defendants. *The Glenburn*, Br. & Lush. 62; 11 W. R. 685.

Amendment of.]—See *The Georg*, ante, col. 633.

Execution.]—The admiralty court has no power of levying execution upon a defendant's goods and chattels, to satisfy the judgment of the court. *The Victor*, Lush. 72; 29 L. J., Adm. 110; 2 L. T. 331. *But see* 24 & 25 Vict. c. 10, s. 15.

Interest on Damages.]—In an action in the admiralty division, which could not, prior to the Judicature Acts, have been tried in the admiralty court, the defendant made no objection to the jurisdiction, and interest was, according to the practice in the admiralty registry, allowed on the assessed damages from the time when the plaintiff's claim arose. In another action transferred by consent, after verdict for the plaintiff, to the admiralty division for the assessment of the damages by the registrar and merchants, the same practice was followed in regard to the interest:—Held, that interest on the damages was properly awarded by the registrar, on the ground that the parties, in both cases, having proceeded on the understanding that the admiralty practice should apply, had impliedly consented to abide by such practice. *The Gertrude, The Baron Aberdare*, 13 P. D. 105; 59 L. T. 251; 36 W. R. 616; 6 Asp. M. C. 315—C. A. Affirming 56 L. J., Adm. 106.

In Collision Actions.]—*See* ante, cols. 719, 853 et seq.

Effect of Judgment in Rem—Salvage Action.]—A judgment in rem of the admiralty division in a salvage action, is conclusive against all the world as to the status of the res, but is not conclusive as to the grounds of the decision except as between the parties to the action. A judgment in rem by a court of competent jurisdiction is conclusive against all the world as to the status of the res, but there is no distinction between a judgment in rem and a judgment in

personam as to its being only conclusive as to the point adjudicated upon, except that in the case of a judgment in rem the point adjudicated upon, which is always as to the status of the res, is conclusive against all the world as to that status, whereas in the case of a judgment in personam the point adjudicated upon, not being as to the status of the res, is only conclusive as between parties or privies. *Ballantyne* v. *Mackinnon*, 65 L. J., Q. B. 616; [1896] 2 Q. B. 455; 75 L. T. 95; 45 W. R. 70; 8 Asp. M. C. 173—C. A. And see *Castrique* v. *Imrie*, supra, cols. 162, 165.

y. Security for Costs.

To answer Counter-claim—Bail.]—Where in a damage action the ship proceeded against is not arrested, and the plaintiffs do not require bail to be given, the defendants cannot compel the plaintiffs to give security to answer a counter-claim in the action under the provisions in the Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 34, although they voluntarily give bail. *The Alne Holme*, 47 L. T. 307; 4 Asp. M. C. 591.

The power of the admiralty division under s. 34 of the Admiralty Court Act, 1861, to order an action to be stayed until bail has been given to answer a cross-action or counter-claim, does not extend to making an absolute order to give bail; and in a damage action in which the plaintiffs had discontinued after the defendants had counter-claimed, the court refused to enforce an order, made by the registrar, to give bail to answer such counter-claim. *The Alexander*, 48 L. T. 797; 5 Asp. M. C. 89.

When the owners of a ship which has sunk, and the owners of the cargo laden on board her join in an action against another ship for damages, sustained by collision, the court will order the claim by the owner of the ship to be dismissed, unless security for the counter-claim is given, but will allow the owner of cargo to proceed without security. *The Carnarvon Castle*, 38 L. T. 736; 26 W. R. 876; 3 Asp. M. C. 607—C. A.

Foreigners.]—In a suit instituted in 450*l.* for recovery of wages by German seamen against a German ship, the court ordered the plaintiffs to give security for costs. *The Zufall*, 44 L. J., Adm. 16; 32 L. T. 571; 23 W. R. 328; 2 Asp. M. C. 589.

Where a plaintiff has recently executed a deed of assignment of all his property, he will be required to give security for the costs of suit, unless he satisfy the court that he is solvent. *The Lake Megantic*, 36 L. T. 183; 3 Asp. M. C. 382.

A defendant is not bound to give security for costs, even though, from the circumstances of the case, it may happen that the burden of proof of the issues in the case lies upon him. *Ib.*

Plaintiffs beyond the jurisdiction of the court, in a cause of possession, though liable to give security for costs, will not be required, as a general rule, to give security for damages. *The Mary* or *Alexandra*, L. R. 1 A. & E. 335; 16 L. T. 98. *The Peri*, 32 L. J., Adm. 46; 8 Jur. (N.S.) 1230; 11 W. R. 44.

The master of a foreign ship suing for his wages will be required to give security for costs. *The Franz et Elize*, Lush. 377; 5 L. T. 290.

It is in the discretion of the court to allow the mate of a foreign vessel, though not domiciled in England, to prosecute an action for wages without giving security for costs. *The Don Ricardo*, 49 L. J., Adm. 28; 5 P. D. 121; 42 L. T. 32; 28 W. R. 431; 4 Asp. M. C. 225.

Where, in a suit against the owners of a foreign vessel for damage done in collision, the owners had filed a petition for a limitation of their liability, the court ordered them to give security for costs. *The Wild Ranger*, Lush. 553; 31 L. J., Adm. 206; 6 L. T. 164.

Foreigners resident out of the jurisdiction who have intervened as defendants in an action of collision in rem instituted on behalf of foreign plaintiffs by whom security for costs has been given, must, if they seek relief by way of counter-claim, give security for the whole costs of the action. *The Julia Fisher*, 2 P. D. 115; 36 L. T. 257; 25 W. R. 756.

In an action and cross-action, if the proceedings are in personam, and the ship has not been arrested nor bail given in the principal cause, the court cannot stay the proceedings in the cross-action until the plaintiff in the principal cause has given security for costs as defendant in the cross-cause. *The Amazon*, *The Osprey*, 36 L. J., Adm. 4.

Plaintiffs resident out of the jurisdiction must give security for costs. *The Sophie*, 1 W. Rob. 326. Cf. *Mylander* v. *Barnes*, 6 H. & N. 509.

—— **Foreign Government.**]—A foreign government ordered to give security for costs as plaintiffs; not as defendants. *The Beatrice*, otherwise *The Rappahannock*, 36 L. J., Adm. 10.

—— **Appeal to Privy Council.**]—In a proceeding in rem, a bail bond given in court below only covering the costs in that court, the appellants, who were foreigners, were called upon to give security for the costs of the appeal; the court of appeal will not, however, entertain any question as to uncovered costs in the court below. *The Hélène*, Br. & Lush. 425; 3 Moore, P. C. (N.S.) 240; 35 L. J., Adm. 1; 13 W. R. 931.

—— **To Court of Appeal.**]—The court refused to direct a defendant who had appealed from a judgment of the admiralty division, although his ship had been arrested and released on bail, and although he had obtained a stay of execution pending the appeal, to give security for the costs of the appeal. *The Victoria*, 1 P. D. 280; 34 L. T. 931; 24 W. R. 596; 3 Asp. M. C. 230—C. A.

23. Appeals.

a. To Court of Appeal.

When it Lies.]—An appeal will not lie from a refusal by the judge of the admiralty division to allow, under 31 & 32 Vict. c. 71, s. 27, an appeal from a county court judgment to be prosecuted. *The Amstel*, 47 L. J., Adm. 11; 2 P. D. 186; 37 L. T. 138; 26 W. R. 69; 3 Asp. M. C. 488—C. A.

Leave.]—In cases raising important points of law, the court will give leave to appeal to the court of appeal where, on a proper construction of the acts governing appeal, such leave is necessary. *The Rona*, 51 L. J., Adm. 65; 7 P. D. 247; 46 L. T. 601; 30 W. R. 614; 4 Asp. M. C. 520.

Principle of Court in dealing with Decisions appealed against.]—When the judge of the court below has come to a conclusion of fact after hearing witnesses, the court of appeal will not, except in cases of extreme pressure, reverse his decision; but where the decision of the court does not depend upon the credibility of the witnesses, but on the inferences from the evidence drawn by the judge, his decision may, even without such pressure, be reversed by the court of appeal. *The Glannibanta and The Transit*, 1 P. D. 283; 34 L. T. 934; 24 W. R. 1033; 3 Asp. M. C. 339—C. A.

The court of appeal will not reverse a judgment of the court of admiralty which has been arrived at after hearing witnesses and on their credibility. *The Sisters*, 45 L. J., Adm. 39; 1 P. D. 117; 34 L. T. 338; 24 W. R. 412; 3 Asp. M. C. 3220—C. A.

The reasons for judgment of the county court judge, as well as for that of the high court, should be before the court of appeal when a further appeal is allowed to that court. *The Swallow*, 36 L. T. 231; 3 Asp. M. C. 371—C. A.

When the court of admiralty has given no opinion on a question, which in the opinion of the court of appeal is a vital one in the cause, the court of appeal will decide that question on the evidence before them. *The C. M. Palmer and The Larnax*, 29 L. T. 129; 21 W. R. 702; 2 Asp. M. C. 94.

In Claims for Salvage as to the Quantum.]—*See* XVIII. SALVAGE.

—— **To Court of Appeal from Divisional Court.**]—Where, on appeal from a county court in an admiralty cause, the probate, divorce and admiralty division alters the judgment, an appeal lies without leave to the court of appeal under s. 10 of the County Courts Acts, 1875, notwithstanding s. 45 of the Judicature Act, 1873. *The Lydia*, 58 L. J., Adm. 37; 14 P. D. 1; 59 L. T. 843; 37 W. R. 161—C. A.

From County Court.]—See col. 1014; *The Dart*, infra, col. 1017.

Collision—Reasons of Nautical Assessors.]—Where in a collision action the nautical assessors sitting in the admiralty division reduce their reasons into writing, parties appealing from their decision are not entitled to see these reasons or have copies of them for the purposes of the appeal. *The Banshee*, 56 L. T. 725; 6 Asp. M. C. 130—C. A.

Staying Proceedings pending Appeal to House of Lords.]—When an appeal is brought from the court of appeal to the house of lords in an admiralty action in which bail has been given by the parties, an application by the appellant to stay execution pending the appeal will not be granted, unless special circumstances are shewn by affidavit. *The Annot Lyle*, 55 L. J., Adm. 62; 11 P. D. 114; 55 L. T. 576; 34 W. R. 647; 6 Asp. M. C. 50—C. A.

Appeal from an Inferior Court—Application to adduce fresh Evidence.]—An application to allow fresh evidence to be adduced at the hearing of an admiralty appeal from an inferior court may be made to a single judge of the admiralty division. *The Eclipse*, 14 P. D. 71; 60 L. T. 899; 6 Asp. M. C. 409.

Appeals in Prize Cases.]—Origin and history considered. *Brymer* v. *Atkins*, 1 H. Bl. 164.

b. To Privy Council.

Time for—From Vice-Admiralty Court.]—The time for appealing from the judgment of a vice-admiralty court is governed strictly by the rules and regulations made by order in council, June 27, 1832. *The Brinhilda*, 45 L. T. 389; 4 Asp. M. C. 461—P. C.

—— **Excuse for Delay.**]—Where the time for appealing from a vice-admiralty court has expired, owing to a delay by counsel in advising on the success or failure of such appeal, such delay being caused by counsel's waiting for the decision of another appeal pending before the privy council, which decision it is reasonably possible may throw light on the appeal to be advised upon, such apology may, in the absence of circumstances to destroy its effect, induce the committee to allow the prosecution of the appeal under 26 & 27 Vict. c. 24, s. 23. *The Ricardo Schmidt, Cassanova* v. *Reg.*, L. R. 1 P. C. 115; 12 Jur. (N.S.) 127; 14 W. R. 617.

—— **From Admiralty Courts.**]—The time for appealing from any court of admiralty jurisdiction is limited to fifteen days by the practice of the court. *The Brinhilda*, supra.

An appeal from the high court of admiralty asserted after ten, but before fifteen days from the sentence, was in time. *The Ulster*, *Laird* v. *Brownlie*, Lush. 424; 1 Moore, P. C. (N.S.) 31; 8 Jur. (N.S.) 1067; 10 W. R. 794.

A plaintiff in one of two cross-suits for damage arising out of a collision, lodged an appeal within fifteen days of the decree, but did not give to the defendants notice thereof till after the expiration of fifteen days from the date of the decree. On a petition by the defendants for leave to lodge a cross appeal:—Held, first, that the 24 Hen. 8, c. 12, s. 7, which provides that appeals shall be made by the parties aggrieved within fifteen days after judgment, is confined to causes cognizable in the ecclesiastical courts. *The Florence Nightingale and The Mœander*, 1 Moore, P. C. (N.S.) 42; 32 L. J., Adm. 1; 8 Jur. (N.S.) 1067; 6 L. T. 765; 10 W. R. 794.

Held, secondly, that the limitation of the time of appealing from a decree of the high court of admiralty to fifteen days depends not upon legislative enactment, but upon long-established practice. *Ib.*

The judicial committee is not precluded either by statute or by practice from recommending an extension of the time in which an appeal may be made in cases which call for such indulgence. *Ib.*

The time for appealing from the high court of admiralty to the privy council was fifteen days. *The Ulster*, 1 Moore, P. C. (N.S.) 31; 10 W. R. 794.

From Vice-Admiralty Court—Bail.]—Rule 15 of the Privy Council Rules of 1865, regulating appellate procedure from vice-admiralty courts, by which an appellant is required to give bail in 200*l.* to answer the costs of appeal, is not impliedly repealed by rule 150 of the Vice-Admiralty Court Rules of 1883, by which an appellant may be required to give security not exceeding 300*l.* for the costs of the appeal, but the judicial committee has a discretion in fitting

cases to release the appellant from giving security under rule 15 of the Privy Council Rules, 1865. *The Hesketh, Hunter* v. *The Hesketh*, 61 L. J., P. C. 84; [1891] A. C. 628; 66 L. T. 305; 7 Asp. M. C. 160—P. C.

Report of Vice-Admiralty Court.]—Where, upon the hearing of an appeal to the privy council from a judgment upon the report of the registrar of a vice-admiralty court the privy council is of opinion that the report must be referred back for the finding of other facts and figures, such reference will be to the registrar of her majesty in ecclesiastical and maritime appeals, if convenient and less expensive than a reference back to the vice-admiralty court. *The City of Peking*, 59 L. J., P. C. 88; 15 App. Cas. 438; 63 L. T. 722; 6 Asp. M. C. 572—P. C.

Appeal from Vice-Admiralty Court—Security to restore Ship — Nature of Recognizance.]—Though the security taken was in the form of a debt to the king, not being taken in a court of record, it was not a recognizance, but operated as a stipulation to abide the decision of the court of appeal. Origin and history of appeals in prize cases considered. *Brymer* v. *Atkins*, 1 H. Bl. 164.

When it Lies.]—In any admiralty or vice-admiralty cause the right of appeal to the privy council is perempted by any proceedings being taken by the appellant under the decree to be appealed from. *The Brinhilda*, supra.

An offer by a defendant out of court to pay the plaintiff a specific sum and costs, made after judgment pronouncing the defendant liable in general damages, does not perempt his right of appeal. *Laird* v. *Brownlie*, supra.

—— **Interlocutory Matters.**]—Before 24 & 25 Vict. c. 10, s. 30, there was no appeal from an interlocutory order, which was a mere grievance: but the cause being appealed on the merits, the party might bring the grievance to the notice of the superior court. Failing to do so, the party was held to adopt the interlocutory order; and, upon the cause being remitted, was estopped from moving the court to rescind such order. *The William Hutt*, Lush. 25; Swabey, 696; 2 L. T. 448.

Adduction of Fresh Evidence.]—A special libel of appeal, with allegation and responsive allegation, pleading new matter, admitted by the court of appeal, and evidence taken thereon. *The Newport*, Swabey, 317.

An allegation pleading facts noviter ad notitiam perventa, admitted by the appellate court, and evidence taken vivâ voce thereon. *Dionissis* v. *Reg., The Laura*, 3 Moore, P. C. (N.S.) 181.

On a motion for leave to adduce fresh evidence before the hearing of an appeal, it appeared that the evidence might have been adduced at the hearing in the court below, if application had been made to postpone the hearing for that purpose, but that no such application was made. The committee, therefore, refused to admit further evidence, and dismissed the motion, with costs. *The Scindia*, 35 L. J., P. C. 53; L. R. 1 P. C. 241; 12 Jur. (N.S.) 534.

Semble, where an objection is taken to the exclusion of evidence by the judge of the admiralty division, the proper course is to apply for a new trial on that ground, and not to tender the evidence afresh in the court of appeal. *The Sir Robert Peel*, 43 L. T. 364; 4 Asp. M. C. 321—C. A.

Principles of Dealing with Judgment or Decree appealed against.] — Where a disputed fact, involving nautical questions, is raised by an appeal, as in a case of collision, the court will not reverse the decree appealed from, unless conclusively satisfied that the decree is wrong, even though the court may entertain doubts as to the finding of the admiralty court. *The Julia*, 14 Moore, P. C. 210; Lush. 224.

The court must be satisfied that the decree is founded on some substantial mistake, either in law or fact. *General Iron Screw Co.* v. *Moss*, 15 Moore, P. C. 122.

Although there may be considerable doubt in the estimate taken by the court, in respect of the evidence of the witnesses upon questions of nautical skill, yet, considering the advantage that court has with the assistance of the Trinity masters, the appeal court must be satisfied that the court below was wrong, to justify a reversal of such finding. *The Constitution, Dean* v. *Mark*, 2 Moore, P. C. (N.S.) 453.

Though the judicial committee will not lay down any exclusive rule as to appeals from judgments of the court of admiralty, upon questions which are entirely of fact, yet they are most reluctant to come to a conclusion different from that of the judge of the court below, merely on a balance of testimony: the judge having had the opportunity of seeing and testing the conduct and demeanour of the witnesses. *The Alice and The Princess Alice*, 38 L. J., Adm. 5; L. R. 2 P. C. 245; 19 L. T. 678; 17 W. R. 209.

Security for Costs.]—See *The Hélène*, ante, col. 1011.

c. From County Court.

When it Lies.]—Cross causes of damage heard together in a county court are, as to the right of appeal, to be considered distinct. *The Elizabeth*, 39 L. J., Adm. 53; L. R. 3 A. & E. 33; 21 L. T. 729.

The plaintiffs in a cause of damage in a county court claimed 100*l.*, and recovered an amount under 50*l.*:—Held, that no appeal lay to the court of admiralty. *Ib.*

The County Courts Admiralty Jurisdiction Act, 1868, s. 27, provides that the judge of the court of admiralty may, on sufficient cause being shewn to his satisfaction, allow an appeal from a final decree or order of a county court in an admiralty cause to be prosecuted, notwithstanding that the instrument of appeal has not been lodged in the registry of the court of admiralty within ten days from the date of the decree or order appealed from:—Held, that an application for leave to appeal under this section was rightly made to the judge of the court of admiralty sitting as a judge of the high court of justice. *The Two Brothers*, 45 L. J., Adm. 47; 1 P. D. 52; 33 L. T. 792; 24 W. R. 112; 3 Asp. M. C. 99.

No appeal lies from the decision of a county court in a salvage cause where there is a tender of less than 50*l.* and that tender is upheld, the amount tendered being the amount "decreed or ordered" within the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), s. 31. *The Fyenword*, 34 L. T. 918; 3 Asp. M. C. 218.

A plaintiff claiming an amount not exceeding 50*l.* in an admiralty cause in a county court, is precluded from appealing from the decision of the court by s. 31 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71). *The Falcon*, 47 L. J., Adm. 56; 3 P. D. 100; 38 L. T. 294; 26 W. R. 696; 3 Asp. M. C. 566.

By a decree of the city of London court an action of damage instituted in that court in the sum of 30*l.* was, after having been heard on the merits, dismissed with costs. The plaintiff appealed. At the hearing of the appeal the respondent objected to the jurisdiction of the court to entertain the appeal. The court dismissed the appeal on the ground that as the appellant, if successful, could not have recovered more than 30*l.* in the action, he was precluded from appealing by the County Courts Admiralty Jurisdiction Act, 1868, s. 31. *Ib.*

The restriction as to amount due applies only to appeals by defendants. *The Doctor Van Thunnen Tellow*, 20 L. T. 960; 17 W. R. 899.

Extension of Time.]—The power of extending the time for appealing from a decree or order of a county court in an admiralty suit, conferred on the judge of the court of admiralty by the County Courts Admiralty Jurisdiction Act, 1868, s. 27, may, since the coming into operation of the Judicature Act, 1873, be exercised by the judge of the court of admiralty sitting as a judge of the high court of justice. *The Two Brothers*, supra.

The power conferred by s. 27 of the County Courts Admiralty Jurisdiction Act, 1868, to extend the time within which an instrument of appeal may be lodged, provided sufficient cause be shewn, is not altered or curtailed by s. 6 of the County Courts Act, 1875, this latter section providing an alternative mode of appeal. *The Humber*, 53 L. J., Adm. 7; 9 P. D. 12; 49 L. T. 604; 32 W. R. 664; 5 Asp. M. C. 181.

Security for Costs.]—Upon appeal from a county court to the court of admiralty, security for the costs of the appeal must be given in the county court, and not in the court of admiralty. *The Forest Queen*, 40 L. J., Adm. 17; L. R. 3 A. & E. 299; 23 L. T. 544; 19 W. R. 167.

Judge's Notes on Appeal.]—In an appeal to the court of admiralty from a county court where there is a conflict between the transcript of the notes of evidence and the judgment taken by a shorthand-writer in the county court, and the county court judge's own notes, the version given by the county court judge must be accepted as binding; and if the county court judge alters the shorthand-writer's notes so as to correspond with his own version, the court of admiralty will order the alteration so made to be carried into effect in the printed copies of the appendix. *The Raithwaite Hall*, 30 L. T. 233; 2 Asp. M. C. 210.

In the absence of the judge's notes of evidence, the court of admiralty on the appeal allowed a witness to be examined who had given evidence in the court below. *The C. S. Butler*, L. R. 4 A. & E. 238; 31 L. T. 549; 23 W. R. 113; 2 Asp. M. C. 408.

Where there were no notes of the evidence taken before the county court and no judge's notes, the judge of the admiralty division ordered the appeal to be heard in vivâ voce evidence. *The Confidence, The Susan Elizabeth*, 40 L. T. 201; 4 Asp. M. C. 79.

Evidence on Appeal.]—The court may order witnesses to be examined vivâ voce at the hearing of a cause of appeal from the county court. But such order will not be made except under special circumstances. *The Busy Bee*, L. R. 3 A. & E. 527; 26 L. T. 590; 20 W. R. 803; 1 Asp. M. C. 293.

Wherever there is a probability of an appeal, notes of the evidence given in the county court should be taken by a reporter duly appointed according to the provisions contained in the rules for regulating the admiralty jurisdiction of the county court. *Ib.*

The court of admiralty is very cautious as to admitting fresh evidence at the hearing of an appeal from the county court, and will not do so unless the principles of justice require the admission of such evidence. *The Moorsley*, 29 L. T. 663; 1 Asp. M. C. 471.

Semble, that surprise is a ground for the admission of fresh evidence. An application for admission of evidence refused on the ground that there was no surprise shewn. *Ib.*

An application to allow fresh evidence to be adduced at the hearing of an admiralty appeal from an inferior court may be made to a single judge of the admiralty division. *The Eclipse*, 14 P. D. 71; 60 L. T. 899; 6 Asp. M. C. 409.

Leave to Appeal.]—As a general rule, the court of admiralty will not grant permission to appeal from a decree or an order of the court made on appeal from a county court except in cases where the law is doubtful, or where the facts are such as to leave a substantial doubt on the mind of the court whether the conclusion at which it has arrived is right, or where the pecuniary interest involved is large. *The Samuel Laing*, 39 L. J., Adm. 42; L. R. 3 A. & E. 284; 22 L. T. 891.

Leave to set down an appeal from a county court judge in admiralty, which could not be set down without leave, was refused by the judge of the admiralty division. On appeal from this decision, the court of appeal held they had no jurisdiction to interfere. *The Amstel*, 47 L. J., Adm. 11; 2 P. D. 186; 37 L. T. 138; 26 W. R. 69; 3 Asp. M. C. 488. And see *The Rona*, supra, col. 1010.

—— **From County Court.**]—Appeal lies by permission of the judge below to the high court from an interlocutory order made by a county court in an admiralty action, although the action is for a less sum than 50*l.* *The Alert, United Steam Tug Co.* v. *The Alert (Owners)*, 11 R. 702; 72 L. T. 124; 7 Asp. M. C. 544.

—— **Interlocutory Matter.**]—Under s. 26 of the County Courts Admiralty Jurisdiction Act, 1868, leave to appeal from an interlocutory order in county court actions on the admiralty side must be obtained from the county court judge, and this enactment is still applicable to such actions, notwithstanding the general provisions of s. 120 of the County Courts Act, 1888, and hence a party cannot appeal from such orders without leave. *The Cashmere*, 59 L. J., Adm. 57; 15 P. D. 121; 62 L. T. 814; 38 W. R. 623; 6 Asp. M. C. 515.

—— **Judgment of County Court varied by Divisional Court—Appeal to Court of Appeal**

without Leave.]—Where a divisional court of the probate, divorce and admiralty division "alters" on appeal the judgment of a county court in an admiralty action, an appeal lies without leave from the judgment of the divisional court to the court of appeal. *The Dart*, 62 L. J., Adm. 32 ; [1893] P. 33 ; 1 R. 572 ; 69 L. T. 251 ; 41 W. R. 153 ; 7 Asp. M. C. 353—C. A. And see *The Lydia*, supra, col. 1011.

Amount decreed not exceeding £50—Question of Law.]—The effect of s. 120 of the County Courts Act, 1888, is to give an appeal from a decision of the county court on a point of law in an admiralty action, although the amount decreed to be due does not exceed 50*l.* *The Eden*, 61 L. J., Adm. 68 ; [1892] P. 67 ; 66 L. T. 387 ; 40 W. R. 415 ; 7 Asp. M. C. 174.

An appeal now lies to the high court from the decision of a county court on a question of law in an admiralty action, although the amount of the judgment does not exceed 50*l.*, and although no security for costs has been given ; the general words of s. 120 of the County Courts Act, 1888, by implication repealing, so far as regards appeals on questions of law, the special provisions contained in ss. 26 and 31 of the County Courts Admiralty Jurisdiction Act, 1868. *The Delano*, 64 L. J., Adm. 8 ; [1895] P. 40 ; 6 R. 810 ; 71 L. T. 544 ; 43 W. R. 65 ; 7 Asp. M. C. 523—C. A.

Per Lord Esher, M.R. : An appeal on a question of law in an admiralty action in the county court is now governed by the act of 1888, whether the amount does or does not exceed 50*l.* ; an appeal on a question of fact in such an action is still governed by the act of 1868, and must comply with the conditions in ss. 26 and 31. *Ib.*

Cross-appeal — Jurisdiction.] — The divisional court has no jurisdiction to hear a cross-appeal the subject-matter of which it has no jurisdiction to hear as an original appeal. *The Alne Holme*, 62 L. J., Adm. 51 ; [1893] P. 173 ; 1 R. 607 ; 68 L. T. 862 ; 41 W. R. 572 ; 7 Asp. M. C. 344.

Judgment of Assessors, not of the Judge.]—See *The Fred*, ante, col. 1000.

24. Costs.

a. Generally.

In Salvage Actions.]—*See* XVIII. Salvage, ante, cols. 674, seq.

In Collision Actions.]—*See* XX. Collision, ante, cols. 855, seq.

In Possession Suit.]—See *The Virtue*, ante, col. 957.

Certificate for.]—The defendants in an action for damage, before any statement of claim had been delivered, admitted their liability for the damage, and by consent the question of amount was by an order of court referred to the registrar and merchants to report thereon. At the reference before the registrar the plaintiffs claimed as damages 295*l.* 18*s.* 1*d.*. The registrar reported to the court that there was due to the plaintiffs 199*l.* 18*s.* 6*d.* Afterwards they moved the judge to condemn the defendants in the costs of the action and of the reference. Evidence was given on affidavit in support of the motion to the effect that the plaintiffs at the time their action was instituted were liable to a claim for salvage in respect of services rendered to their vessel after the collision, and that subsequently and before the reference 60*l.* had been paid and accepted in settlement of such claim :—Held, that the court had jurisdiction to certify that the case was a fit case to be tried before it, and that the proper order to be made was that the plaintiffs should have the costs of the action, but that each party should bear their own costs of the reference. *The Williamina*, 3 P. D. 97.

Since the Judicature Acts it is not necessary to obtain a certificate to enable a plaintiff to recover his costs in an action in the high court, where such action is within the admiralty jurisdiction of the county court, but not within its common law jurisdiction. *The Englishman*, 38 L. T. 756. See also *The Naomi*, infra, col. 1022.

Costs in Cross Causes of Damage.]—In cross causes of damage the defendants in the principal suit alleged various defences, and established only the defence of compulsory pilotage. The court refused to apportion the costs, so as to allow the plaintiffs the costs of the defences they had established. *The Schwan*, *The Robert Morrison*, 43 L. J., Adm. 18 ; L. R. 4 A. & E. 187 ; 30 L. T. 537 ; 22 W. R. 743 ; 2 Asp. M. C. 259.

Separate Appearance at Trial.] — Where a party obtains leave to appear separately at the trial, he does so subject to his costs being disallowed. *The Longford*, 50 L. J., Adm. 28 ; 6 P. D. 60 ; 44 L. T. 254 ; 29 W. R. 491 ; 4 Asp. M. C. 385.

Liability of Co-Plaintiffs.]—Immunity of a co-plaintiff from costs does not create a like immunity for the remaining co-plaintiffs. In the admiralty court each co-plaintiff is severally liable for the whole of the costs. *The Leda*, Br. & Lush. 19 ; 32 L. J., Adm. 58 ; 9 Jur. (N.S.) 208 ; 7 L. T. 864 ; 11 W. R. 302.

Proof of Documents.]—The plaintiffs, in a collision suit, subpœnaed the receiver of wreck to produce the original depositions, and did not call upon the defendants to admit copies. The court pronounced the defendants' vessel alone to blame, and condemned the defendants in the costs of suit. The registrar disallowed the costs of the subpœna and the expenses of the attendance of the receiver of wreck, and the court refused to interfere with his decision. *The Cromwell*, L. R. 3 A. & E. 316.

Tender in Salvage Suit.]—Where a tender in a salvage suit is pronounced for, the usual practice is to condemn the plaintiffs in the costs incurred since the time of tender, but this practice is not invariable, and where the court is of opinion that the tender is not a liberal one, it will, in its discretion, make no order with regard to such costs. *The Lotus*, 7 P. D. 199 ; 47 L. T. 447 ; 30 W. R. 892 ; 4 Asp. M. C. 595. *See also* ante, col. 669.

Form of Tender—Offer to Pay Costs.]—A tender which does not contain an offer to pay costs must specify the grounds upon which the defendant contends the plaintiff is not entitled to costs. *The Thracian*, 41 L. J., Adm. 71 ; L. R.

3 A. & E. 504; 25 L. T. 889; 20 W. R. 380; 1 Asp. M. C. 207.

Collision—Inevitable Accident.]—*See Cases* ante, cols. 858, seq.

—— **Co-defendants — Costs of Successful Defendant.**]—The dumb barge "E.," while in tow of the steam tug "S.," was damaged by a collision with the steamship "R. L." The owners of the "E." commenced an action joining the owners of both vessels as defendants. At the trial the "R. L." was found alone to blame:—Held, that the owners of the "R. L.," having endeavoured to throw the blame on the "S.," must pay her costs as well as those of the plaintiffs. *The River Lagan*, 57 L. J., Adm. 28; 58 L. T. 773; 6 Asp. M. C. 281.

—— **Defence of Compulsory Pilotage.**]—*See Cases* ante, cols. 856, seq.

Costs of Motion.]—The court will not give the costs of appearing to consent to a motion where the party appearing is not in any way prejudiced by the motion. *The Achilles*, 25 L. T. 605; 1 Asp. M. C. 165.

Action in High Court—Less than £300 recovered—High Court Scale.]—Where in action of damage by collision instituted in the high court less than 300*l.* is recovered, the court, in exercising its discretion as to costs, will regard the size of the vessels, the nature of the collision, the length of time occupied at the trial, and the judgment delivered by the court. *The Saltburn*, [1892] P. 333; 1 R. 543; 69 L. T. 88; 7 Asp. M. C. 325.

Taxation.]—In an outport bill brought into the registry for taxation by a proctor who acted as proctor for parties in a cause, charges were made for work done in the cause by a notary at an outport. The notary was neither a proctor, an attorney, nor a solicitor. A portion of the work for which these charges were made was work connected with the preparation of briefs and affidavits in the cause, and was such as is usually done by solicitors. The charges for this portion of the work the court disallowed. *The City of Brussels*, 42 L. J., Adm. 72; L. R. 4 A. & E. 194; 29 L. T. 312; 22 W. R. 71.

On a taxation between solicitor and client of the costs of a cause, objections were taken on behalf of the client to charges occasioned by the postponement of the trial and the amendment of the pleadings, on the ground that the postponement of the trial and the amendment of the pleadings had been rendered necessary by the negligence of the solicitor; the registrar refused to disallow the items, on the ground that it was not within his province as taxing-master to inquire into the question of negligence:—Held, that the ruling of the registrar was right. *The Papa de Bossie*, 3 P. D. 160; 27 W. R. 367.

Upon disallowance of a fee to counsel for advising as to the admissibility of a plea, the court reviewed the registrar's taxation, and directed the allowance of the fee and the costs attendant thereon. *The Rouen*, 31 L. J., Adm. 132; 6 L. T. 508.

The costs of an issue, upon which he is unsuccessful, may be taxed against a party, though successful in the suit. *The Laurel*, Br. & Lush. 191; 33 L. J., Adm. 17; 9 L. T. 457.

—— **Country Solicitor attending Trial in London—Discretion.**]—In taxing costs between party and party a charge for the attendance of the country solicitor at the hearing in London is discretionary. Where in admiralty cases the attendance of the country solicitor, who has taken the examination of the witnesses and managed the proceedings up to the trial, is necessary for the proper conduct of the case, his charges for such attendance ought to be allowed. *The Soto*, 62 L. J., Adm. 17; [1893] P. 73; 1 R. 579; 69 L. T. 231; 41 W. R. 479; 7 Asp. M. C. 335.

—— **Printing Evidence.**]—The parties to an action between the owners of the "B." and the "C." agreed that the evidence taken in an action between the owners of the "A." and the "C.," and printed for the purpose of an appeal, should be used in the action between the "B." and the "C." The plaintiffs paid the solicitors of the "A." for such prints, and charged the sums so paid in addition to the regular charge of 3*d.* per folio, as though the printing had been done in this action, under Ord. LXVI. r. 7:—Held, on objection to the taxation, that the charge of 3*d.* per folio was not improper. *The Mammoth*, 53 L. J., Adm. 70; 9 P. D. 126; 51 L. T. 549; 33 W. R. 172; 5 Asp. M. C. 289.

—— **Third Counsel.**]—In an action arising out of a collision where damage had been done to the amount of 2,700*l.*:—Held, that the charges of a third counsel should not be disallowed. *Ib.*

—— **Counsel's Fees.**]—In an action for damage by collision, where the damage to one vessel amounted to 20.000*l.*, the registrar, on taxation, reduced counsels' fees to sixty guineas, forty guineas, and twenty-seven guineas; the court, on appeal from the taxation, allowed the original fees, holding that they were proper fees in a case of that magnitude. *The City of Lucknow*, 51 L. T. 907; 5 Asp. M. C. 340.

—— **Retainers — Refreshers.**] — Refreshers allowed in the admiralty division to senior and junior counsel; but not where the hearing of a case though taken on two days does not amount in the whole to one day. *The Neera*, 5 P. D. 118; 42 L. T. 743; 4 Asp. M. C. 277.

Discontinuance—Commissions for Bail.]—The expenses of procuring bail for the release of a ship cannot be recovered as costs against a plaintiff who has discontinued his action, though in certain circumstances they may be recovered as damages. *The Numida*, *The Collingrove*, 54 L. J., Adm. 78; 10 P. D. 158; 53 L. T. 681; 34 W. R. 156; 5 Asp. M. C. 483.

On Higher Scale.]—Costs on the higher scale will only be allowed under exceptional circumstances. *The Raisby* or *Cardiff Steamship Co.* v. *Barwick*, 54 L. J., Adm. 65; 10 P. D. 114; 53 L. T. 56; 33 W. R. 938; 5 Asp. M. C. 473.

Costs on the higher scale will only be granted when special grounds of urgency or importance are shown, as it was intended that the lower scale should be the ordinary scale. An award of 2,400*l.* having been made in a salvage action, an application under Ord. LXV. r. 9, for costs on the higher scale was made to the court:—Held, that this was not a special ground so as to

take the case out of the ordinary rule. *The Horace*, 53 L. J., Adm. 64; 9 P. D. 86; 50 L. T. 595; 32 W. R. 755; 5 Asp. M. C. 218.

Detention Fees at Outport.]—Detention fees at an outport are paid by the party arresting; but where the marshal arrests he has the security of the ship for his fees. *The North American*, Swabey, 466; Lush. 79.

Costs of Appraisement.]—Costs of appraisement, where it does not shew a greater value than that stated by the owners, are to be borne by the salvors. *The Persian*, 1 Not. of Cas. 304.

Decree against Defendant Personally.]—The admiralty court could decree a defendant personally to pay costs, though the ship was arrested and bail given. *The Volant*, 1 W. Rob. 383.

Marshal's Expenses.]—See *The Queen*, 19 L. T. 705.

Costs of Witnesses.]—The expenses of detaining a witness will not be allowed, unless it can be shewn that his detention was absolutely necessary to insure his attendance as a witness, and was not for any other purpose, e.g. merely to watch the proceedings in a suit. *The Bahia*, L. R. 1 A. & E. 15; 11 Jur. (N.S.) 1008; 14 W. R. 411.

A master's expenses, at the rate of 1*l.* per week, allowed from the arrest of the vessel in March, 1863, to July, 1864, when the defendant applied to have the cause put off. *Ib.*

A party in a cause is not bound to examine any of his witnesses before the hearing; and if judgment is given in his favour with costs, he is in general entitled, with respect to seamen who are reasonably detained by him as necessary witnesses, to the expenses of maintaining them to the time of the hearing. *The Karla*, Br. & Lush. 367; 13 W. R. 295.

In the case of the witnesses being foreign seamen, a reasonable charge incurred for agency or interpretation may be allowed. *Ib.*

In estimating the allowance and compensation for loss of time in the case of a seaman detained to give evidence, the rate of wages is a fair criterion. *The Olive*, Swabey, 292.

The expenses of material and necessary witnesses may be allowed, though they may not have been called at the trial. *The Biddick*, 38 L. J., Adm. 24; 19 L. T. 705.

Enforcing Payment—Attachment.]—In a suit for wages brought by a master a tender was made, and accepted. Proceedings were then taken in the court of exchequer, under 17 & 18 Vict. c. 125, ss. 61, 65, to attach these costs in the hands of the party from whom they were due, and such party was compelled to pay them over to the judgment creditors of the master. The proctor for the master having received notice of these proceedings, but not having opposed them:—Held, that the court of admiralty was bound by the order of the court of exchequer, and could not enforce payment of costs against the mortgagee in possession of the vessel, the party proceeded against. *The Olive*, Swabey, 423; 5 Jur. (N.S.) 445.

Excessive Bail.]—A ship was arrested, and bail required for an exorbitant sum:—Held, that the plaintiffs must pay the costs and expenses incurred by the defendants in giving this bail. *The George Gordon*, 53 L. J., Adm. 28; 9 P. D. 46; 50 L. T. 371; 32 W. R. 596; 5 Asp. M. C. 216; and see *The Earl Grey*, 1 Spinks, 180.

Varying Decree as to.]—A decree made by a former judge, as to costs in a collision cause where both ships were held in fault, varied. *The Monarch*, 1 W. Rob. 21.

Solicitors' Lien—Charging Order—Solicitors Act, 1860, s. 28.]—A collision action was compromised upon the terms that the defendants, the owners of the "Paris," should pay 50 per cent. of the damage, each party to bear their own costs, and the amount to be ascertained by an arbitrator. After the compromise the plaintiff wrote to the defendants' solicitors, who were pressing for payment of money due from the plaintiff to certain clients of theirs, and also for payment of certain costs due to them from the plaintiff in other matters, that they might settle these claims "out of money coming in from 'Paris' s.s." After the arbitrator had made his award the defendants' solicitors sent to the plaintiffs' solicitors a cheque for a small sum, being the balance after payment of the above-mentioned claims. The plaintiffs' solicitors took out a summons under the Solicitors Act, 1862, s. 25, for a charging order for the amount of their costs:—Held, that they were entitled to the order. *The Paris*, 65 L. J., Adm. 42; [1896] P. 77; 73 L. T. 736.

b. Of Reference.

Damage.]—It is within the discretion of the registrar to order that all the costs of a reference shall be borne by the defendants, though more than one-fourth of the plaintiff's claim be disallowed. *The Amelia*, 23 L. T. 544; 19 W. R. 216.

When more than one-third of the claim is struck off at a reference by the registrar and merchants, the court will consider itself bound by the rule of practice as to costs, and condemn the plaintiff in the costs of the reference, notwithstanding hardship in the particular case. *The Englishman*, 38 L. T. 756. See also *The Williamina*, supra, col. 1018.

A ship was damaged by another outward bound, and the owners of the injured vessel, in the bonâ fide belief that their damage was greater than it actually was, instituted a suit in the court of admiralty and arrested the ship for a large amount, but accepted bail and released the ship at once on ascertaining their actual damage; the defendants admitted liability, and the damage was referred to the registrar; the claim made by the plaintiffs was a little over 300*l.*, but the registrar reduced the amount claimed by more than one-third, and made no report as to costs. On application by the plaintiffs, the court certified for the costs of suit, under the County Courts Admiralty Jurisdiction Act, 1868, but condemned the plaintiffs in the costs of the reference. *The Naomi*, 32 L. T. 836; 23 W. R. 387; 2 Asp. M. C. 588.

Where in an action of damage, the defendant sets up a counter-claim relating to the collision in respect of which the action is brought, and both ships are held to blame, and a reference is

ordered to ascertain the amount of damage sustained by each ship, each party is, as a general rule, entitled to the costs of establishing his claim before the registrar, provided that not more than one-fourth of his claim has been disallowed. *The Mary*, 7 P. D. 201; 48 L. T. 28; 31 W. R. 298; 5 Asp. M. C. 33.

Where a plaintiff in a reference in a collision action withdraws a large item of his claim at the reference, and not before, and he recovers less than two-thirds of the amount originally claimed, but more than two-thirds of the amount which remains after his withdrawal of the above item, the original amount of his claim before withdrawal is the claim upon which costs are to be given, and he is not entitled to his costs. *The Eilean Dubh*, 49 L. T. 444; 5 Asp. M. C. 154.

As by Ord. LXV. r. 1, of the Rules of the Supreme Court, 1883, the costs of all proceedings are in the discretion of the court, the general rule of practice in the admiralty court as to the costs of references, namely, that when more than a fourth is struck off a claim, each party pays his own costs, and when more than a third the claimant pays the other party's costs, is wrong, and the court must exercise its discretion according to the circumstances of each particular case. *The Empress Eugénie* (Lush. 140) overruled. *The Friedeberg*, 54 L. J., Adm. 75; 10 P. D. 112; 52 L. T. 837; 33 W. R. 687; 5 Asp. M. C. 426—C. A.

Claimant condemned in whole costs of the reference where a large part of the claim was disallowed, and no objection made to the registrar's report. *The J. J. Hathorn*, 4 Jur. (N.S.) 790.

Taxation—Interference with.]—The court will not ordinarily interfere with the registrar's discretion as to taxation, unless a mistake in principle has been made. *The Neera*, 5 P. D. 118; 42 L. T. 743; 4 Asp. M. C. 277.

Costs attending Claim for Freight disallowed.]—The shipowner claimed as damages for the collision freight which his ship might have earned under a charterparty entered into before the collision for a voyage to be performed after the collision:—Held, that he must pay the costs attending the claim for freight at the reference. *The South Sea*, Swabey, 141.

Masters' Wages.]—The rule obtaining in references in causes of collision, that if the registrar strikes off more than one-third of the plaintiff's claim, the plaintiff shall be condemned in the costs of the reference, does not apply to a reference in a cause of master's wages; but the court will decide equitably according to the circumstances of the particular case. *The Lemuella* Lush. 147; 30 L. J., Adm. 1.

Upon a report by the registrar in a cause of master's wages, the court will not determine the incidence of the costs of the reference by any fixed rule, but according to circumstances of the case. *The William*, Lush. 199.

On a reference of the accounts in a master's wages suit, more than half of the owner's claim of set-off and nearly two-thirds of the master's claim, were disallowed. Charges of immorality were made by the owners but not sustained. The master was allowed his costs of reference. *The Strathallan*, 6 L. T. 107.

Of Appeal from Registrar.]—See *The Black Prince*, infra.

c. Of Appeal.

Costs to follow Event—Special Circumstances.]—The costs of an admiralty action, both in the court of appeal and in the court below, follow the event in the absence of special circumstances. *The Batavier*, 59 L. J., Adm. 54; 15 P. D. 37; 62 L. T. 406; 38 W. R. 522; 6 Asp. M. C. 500—C. A. S. P., *The Swansea and The Condor*, 48 L. J., Adm. 33; 4 P. D. 115; 40 L. T. 442; 27 W. R. 748; 4 Asp. M. C. 115—C. A.

Where leave necessary.]—Costs not allowed when the court of appeal reversed the decision of the court below in an appeal for which permission was necessary. *The Swallow*, 36 L. T. 231; 3 Asp. M. C. 371—C. A.

Collision—Inevitable accident.]—In an action for damage by collision in which the defence was inevitable accident, the plaintiffs obtained judgment on the ground that negligence on the part of the defendants had been proved. On appeal to the court of appeal, the defence of inevitable accident was established, and the judgment reversed:—Held, that as the admiralty court is a division of the high court of justice, the general rule, in force in the other divisions—that, in the absence of special circumstances, costs follow the event—ought to be followed in that court, and that on the appeal being allowed, the defendants were entitled to the costs both of the appeal and in the court below. *The Monkseaton*, 58 L. J., Adm. 52; 14 P. D. 51; 60 L. T. 662; 37 W. R. 523; 6 Asp. M. C. 383—C. A.; and see *The Naples*, 55 L. J., Adm. 64; 11 P. D. 124; 55 L. T. 584; 35 W. R. 59; 6 Asp. M. C. 30.

—— **One or both Ships in fault.**]—When in a cause of collision the appellant was found in the court below solely to blame, and condemned in the whole damage, and the court of appeal found both parties to blame, and divided the damage, costs of appeal were given. *The Fyenoord*, Swabey, 374.

Where both parties appeal from a sentence, pronouncing both to blame, and the sentence is affirmed, no costs of the appeal are given. *The North American and The Tecla Carmen*, Swabey, 358; 12 Moore, P. C. 331.

Material mistakes in respect to certain facts in evidence occurred in the summing up of the judge. The committee, though it sustained the decree appealed from, under the circumstances affirmed the judgment without costs. *General Iron Screw Co.* v. *Moss*, 15 Moore, P. C. 122.

And see further as to costs in collision appeals, ante, col. 860.

Salvage.]—Though in appeals as to the amount of salvage the privy council generally did not give a successful appellant his costs of the appeal, such appeals under the Judicature Act form no exception to the general rule that a successful appellant is entitled to his costs. *The City of Berlin*, 47 L. J., Adm. 2; 2 P. D. 187; 37 L. T. 307; 25 W. R. 793; 3 Asp. M. C. 491—C. A. *And see further* as to costs in salvage appeals, ante, col. 677.

From Registrar.]—The costs of an appeal from the registrar, as a general rule, follow the result of the appeal. *The Black Prince*, Lush. 568.

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1. Stamping and Requirements.

a. Necessity of Stamp.

Under early Acts.]—Under 25 Geo. 3, c. 44, where several persons were interested in an insurance all their names had to be inserted in the policy. *Wilton* v. *Reatson*, 1 Park. Ins. (8th ed.) 16.

Stamped policy is alone binding. *Rogers* v. *M'Carthy*, 1 Park. Ins. (8th ed.) 39.

Admissibility in Evidence.]—By 35 Geo. 3, c. 63, s. 14, and 48 Geo. 3, c. 149, if several distinct interests were insured in the same policy, though for one entire sum, on goods "to be thereafter declared and valued"; and it appeared in fact that the several interests included fractional parts of 100*l.*, which interests were afterwards declared and indorsed on the policy, such policy could not be given in evidence, nor was available in law to any extent, unless stamped with a stamp of sufficient value to cover all such fractional parts; though sufficient to cover the entire sum insured. *Rapp* v. *Allnutt*, 15 East, 601.

Where a policy produced at the trial of an action has a sufficient stamp, evidence will be received that it had no such stamp when it was effected, in which case it is a mere nullity, though stamped afterwards by order of the commissioners. *Roderick* v. *Hovil*, 3 Camp. 103.

A. insured a ship in a mutual marine insurance association in 1863, and the policy, which was not stamped, was annually renewed up to the year ending March, 1868. In February, 1868, the ship, with A. on board, was lost at sea. The loss of the ship was reported to the association, and from entries in the minute-books the money due upon the policy was raised by order of the committee, but retained by the secretary until a personal representative to A. had been appointed.

The company was ordered to be wound up in January, 1870, and A.'s widow obtained letters of administration to him in December, 1871. Upon a claim by the widow under the winding-up for the amount secured by the policy:—Held, that there was a sufficient admission of liability in the books of the company to enable the widow to recover as a creditor for the amount secured by the policy, although, from the absence of a stamp, the policy itself, upon which the claim arose, could not be given in evidence. *Teignmouth and General Mutual Shipping Association, In re, Martin's claim*, 41 L. J., Ch. 679; L. R. 14 Eq. 148; 26 L. T. 684; 1 Asp. M. C. 325.

Question for Jury.]—On the trial of an action on a policy in which the existence of the policy was in issue, the plaintiffs, pursuant to notice to produce, called on the defendant to produce the original policy. He declined, and they thereupon, with a view of proving that it had been duly executed, proceeded to put in a document, purporting to be a copy of the policy which they had received from the defendant's broker. The defendant objected, and requested the judge to hear evidence to shew that no original policy was or ever had been in existence. The objection was overruled, and the alleged copy admitted. Later in the cause the defendant gave evidence tending to prove that in fact there had never been any duly stamped policy, or indeed any policy at all executed, and the judge left it to the jury to say whether there had or had not been executed a duly stamped policy by the defendant. The jury found in the affirmative:—Held, that the question was rightly left to the jury, inasmuch as if the judge had himself decided it, he would in fact have decided the main issue between the parties. *Stowe* v. *Querner*, 39 L. J., Ex. 60; L. R. 5 Ex. 155; 22 L. T. 29; 18 W. R. 466.

Letter referring to Rules not Stamped.]—B. & Co., by letter, authorised the managers of a mutual marine insurance association to insure a ship with the association, and undertook to abide by the rules and regulations thereof. By the rules, each insurer became liable to contribute to the losses of any other insurer in certain proportions. In pursuance of the authority given by B. & Co., a duly stamped policy was issued to them, which, however, contained no reference to the rules:—Held, that the letter, although not stamped, was admissible in evidence, and that B. & Co. were contributories. *Albert Average Association, In re, Blyth & Co.'s Case*, L. R. 13 Eq. 529; 20 W. R. 504.

Court will take Notice of, notwithstanding Parties' Admissions.]—In an action on an alleged contract of insurance, a special case was stated without pleadings, from which it appeared that no stamped policy had ever been executed; but it was stated that, for the purpose of the case, it was to be taken as if the defendants had executed a valid policy in the ordinary form. The case was ordered to be struck out on the ground that there was no legal contract, on which the judgment of the court could be delivered, and that the admission did not authorise the court to discuss the case. *Nixon* v. *Albion Marine Insurance Co.*, 36 L. J., Ex. 180; L. R. 2 Ex. 338; 16 L. T. 568; 15 W. R 964.

30 Vict. c. 23, ss. 1, 4.]—A time policy embracing several ships with separate sums insured on each is properly stamped at the aggregate amount insured. *Great Britain Steamship Premium Association* v. *Whyte*, 19 Ct. of Sess. Cas. (4th ser.) 109.

Ship Insured without Stamped Policy—Estoppel.]—Where a member of a mutual insurance company, afterwards converted into a limited company, has vessels on its books as insured, and pays calls, and otherwise acts as if he were a member of the company, he is, in any action brought against him by the limited company for calls on losses, estopped from denying his liability, and from setting up either any irregularity in the transfer from the one company to the other, or that the losses were paid without any stamped policies being entered into in contravention of 30 Vict. c. 23, s. 7. *Barrow-in-Furness Mutual Ship Insurance Co.* v. *Ashburner*, 54 L. J., Q. B. 377; 54 L. T. 58; 5 Asp. M. C. 527—C. A.

Policy issued by Mutual Company—Sealing—Validity—Stamp Act.]—Where a policy issued by a mutual insurance company is sealed with the company's seal and attested by the manager it is sufficiently signed within the meaning of the Stamp Act, 30 & 31 Vict. c. 23, s. 7. *Marine Mutual Insurance Co.* v. *Young*, 43 L. T. 441; 4 Asp. M. C. 357.

b. Upon Alteration.

Where Stamp Required.]—A stamped policy, on which an unstamped memorandum has been afterwards indorsed, is not admissible, unless the memorandum is also stamped. *Rex* v. *Gillson*, 2 Leach, C. C. 1007; R. & R. 138; 1 Taunt. 95.

Goods and specie to a certain amount having been insured by a policy on ship or ships which should sail on the voyage insured between the 1st October, 1799, and the 1st June, 1800, a memorandum written on the policy on the 11th June, extending the time of sailing to the 1st August, 1800, did not require a new stamp, being within the 35 Geo. 3, c. 63, s. 13, which provided that the act imposing the stamp shall not extend to prohibit the making any lawful alteration in the terms or conditions of any policy. *Kensington* v. *Inglis*, 8 East, 273; 9 R. R. 438.

A policy of insurance duly stamped was effected on a ship on a voyage at and from Liverpool to Quebec. The ship being detained beyond the intended time of sailing, the following memorandum was indorsed on the policy: "The 'Hebe' being unavoidably detained beyond the intended time of sailing to Quebec, the voyage is changed, and the vessel proceeds from Liverpool to St. John's, New Brunswick, at and from thence to London; and in consideration of one guinea per cent. additional, the underwriters agree to continue on the risk until the vessel shall be arrived back in London, or her port of discharge in the United Kingdom":—Held, that the change of destination of the ship, provided for by the memorandum, was an alteration in the terms and conditions of the policy, within 35 Geo. 3, c. 63, s. 13; and, therefore, the policy so altered by the memorandum did not require a new stamp. *Brockelbank* v. *Sugrue*, 1 B. & Ad. 81; 1 M. &

Rob. 102; 5 Car. & P. 21; 8 L. J. (o.s.) K. B. 371.

Where there was a policy on goods at and from S. to R., and the ship being driven into W. and detained, the assured wrote to their agents in L. "that the captain had been ordered to proceed to C., as they were not certain whether the enemy might be at R. or not, and that the passage to C. was nearly the same, but rather the shortest and safest, and they desired the agents to arrange the matter with the underwriters," which letter the agents receiving on 12th July, applied to the underwriters for their consent to alter the policy, by adding the words "S. or M. after R." which consent was obtained, and the ship and goods were afterwards lost in the voyage to C.:—Held, that this alteration did not require a new stamp, it being within 35 Geo. 3, c. 63, s. 13. *Ramstrom* v. *Bell*, 5 M. & S. 267.

A policy effected on ship and outfit on a voyage upon the southern whale fishery out and home, cannot be altered by consent after the ship sails, and the risk attaches to an insurance on "ship and goods" without a new stamp; outfit, the subject-matter of insurance, being essentially different in such a voyage from goods, and therefore not within the exception of the 35 Geo. 3, c. 63, s. 13, which enabled alterations to be made in the terms or conditions of a policy, without having a new stamp, so that the thing insured remained the property of the same persons. *Hill* v. *Patten*, 8 East, 373; 1 Camp. 72; 9 R. R. 469. And see *French* v. *Patton*, 9 East, 351; 1 Camp. 180; 9 R. R. 571; *Reed* v. *Deere*, 7 B. & C. 261; 2 Car. & P. 624; 31 R. R. 190.

A vessel having sailed and put back to the Downs, and then sailed again, laboured and strained much from being overloaded, and then put back a second time; and upon an application to the underwriters for liberty for the ship to go into port to discharge part of the cargo, it was only communicated to them that the ship was too deep in the water:—Held, that the memorandum giving such liberty did not require a new stamp. *Weir* v. *Aberdeen*, 2 B. & Ald. 320; 20 R. R. 450.

A policy was effected at four guineas per cent. on hemp, marked R., and valued, with certain returns of premium upon arrival at certain ports, and warranted to sail before the 20th of August, which was a summer risk and premium; by a memorandum indorsed, the underwriters for four guineas additional and the return of 5*s.* less for arrival, absolved the assured from the warranty of sailing before 20th August, so making it a winter risk; and withdrew the mark of the hemp:—Held, that these were not such alterations of the subject-matter insured, and of the terms of the policy, but that they might be made by 35 Geo. 3, c. 63, s. 13, without any new stamp. *Hubbard* v. *Jackson*, 4 Taunt. 169; 13 R. R. 574.

A broker, instructed to effect a policy on goods, effected it on the ship; the mistake was afterwards rectified by the underwriter subscribing a memorandum in the margin:—Held, that no new stamp was necessary. *Sawtell* v. *Loudon*, 5 Taunt. 359; 1 Marsh. 99.

A mistake made by an agent in declaring the interest in the margin of the policy to be on a ship by a wrong name, may be rectified by inserting the true name, without a fresh stamp. *Robinson* v. *Touray*, 1 M. & S. 217; 3 Camp. 160; 13 R. R. 781; *and see* 16 R. R. 284, n.

c. Slips and Informal Contracts.

Slips, Effect of.]—The unsigned underwriters' slips constitute only a provisional insurance, not binding in law on the underwriters; and the rights of the parties must be determined by the policies when executed. *Mildred* v. *Maspons*, 53 L. J., Q. B. 33; 8 App. Cas. 874; 32 W. R. 125; 5 Asp. M. C. 182—H. L. (E.) Affirming *S. C.* nom. *Hermano* v. *Mildred*.

—— **As Evidence.**]—Although by 30 Vict. c. 23, ss. 4 and 9, a slip in the ordinary printed form of an insurance office, not being stamped, is not available as a policy, it may be referred to for the purpose of shewing what was the intention of the parties at the time of the execution of a policy which is founded upon the slip. *Ionides* v. *Pacific Fire and Marine Insurance Co.*, 41 L. J., Q. B. 190; L. R. 7 Q. B. 517; 26 L. T. 738; 21 W. R. 22; 2 Asp. M. C. 454—Ex. Ch.

By 30 Vict. c. 23, s. 7, no contract or agreement for sea insurance shall be valid, unless expressed in a policy:—Held, that, notwithstanding that statute, the slip might be given in evidence, though not valid as a contract, as evidence of the intention of the parties. *Ib.*

A slip signed by underwriters is not admissible as evidence of a contract of insurance unless stamped. *Morrison* v. *Universal Marine Insurance Co.*, 25 L. T. 108; 1 Asp. M. C. 100. See *S. C.*, 27 L. T. 791; 1 Asp. M. C. 503—Ex. Ch.

—— **Custom as to.**]—A custom whereby an underwriter is held bound to issue a policy in accordance with the terms of the slip, notwithstanding that it was discovered after the signing of the slip that the subject-matter of the insurance was lost, is bad. *Ib.*

—— **No Contract to Execute Stamped Policy.**]—A Liverpool insurance company employed the firm of E. & Co. as its agents in London. The plaintiff instructed P. & Co. to insure for him steel rails, and P. & Co. prepared a slip, which was initialed by E. & Co. on behalf of the insurance company. According to the course of business observed by the insurance company, P. & Co. sent a copy of the slip to E. & Co., who the same night sent it to the company at Liverpool. P. & Co. paid to E. & Co. the premium due on the policy and the amount due for the stamp duty. The steel rails were afterwards totally lost by the perils intended to be insured against, and the company then refused to execute any stamped policy:—Held, that no action would lie; for that the initialing of the slip and forwarding the copy slip to the company were parts of one contract; and that no further contract could be implied to execute a stamped policy within a reasonable time after the copy slip was transmitted to the company, and as no stamped policy had been executed, 30 Vict. c. 23, ss. 7 and 9, prevented the plaintiff from maintaining an action. *Fisher* v. *Liverpool Marine Insurance Co.*, 43 L. J., Q. B. 114; L. R. 9 Q. B. 418; 30 L. T. 501; 22 W. R. 951; 2 Asp. M. C. 454—Ex. Ch.

The memorandum, or slip, which, by the custom of Lloyd's, is given by underwriters prior to the grant of a policy will not be enforced in equity as a contract to grant a policy. *Morocco*

Land and Trading Co. v. *Fry*, 11 Jur. (N.S.) 76; 11 L. T. 618; 13 W. R. 310.

Underwriters having executed to the defendants, iron merchants, a policy of marine insurance on a cargo which suffered loss, filed a bill in equity for a rectification of the policy, so as to make it conformable to that which they said was the real contract between the agents, in proof of which they produced in evidence the slip which was signed by their agent when presented at Lloyd's by a clerk of the defendants' insurance broker. They denied that they ever entered, or intended to enter, into any contract other than that expressed by the policy:—Held, that as the slip formed no contract, and there was no binding agreement between the parties until the policy was signed and the premium paid, the bill must be dismissed with costs. *Mackenzie* v. *Coulson*, L. R. 8 Eq. 368.

—— **On Contract to keep Insured.**]—A plaintiff having brought an action against a ship's company for the recovery of a debt, it was agreed between the parties that proceedings should be stayed and no judgment signed, upon the terms that the company should execute to the plaintiff a mortgage of the ship for the amount of his debt, and keep the same insured. On the day before the expiration of the then existing policy, slips of policies were signed by the underwriters, but the new policies themselves were not completed until three days after the expiration of the old ones:—Held, that this was a non-compliance on the part of the company of their undertaking to keep insured, and that the plaintiff was therefore entitled to sign judgment. *Parry* v. *Great Ship Co.*, 4 B. & S. 556; 33 L. J., Q. B. 41; 10 Jur. (N.S.) 294; 9 L. T. 379; 12 W. R. 78.

—— **On Winding up.**]—S. agreed by writing to become a member of an association, each member of which on effecting an insurance on his own ship became bound to contribute to the loss of any other member. S. agreed to become a member in respect of an insurance for 300*l.* on his own ship, but no stamped policy was ever executed. He contributed to the losses of other members, and his own ship having been injured he made a claim in respect of it, but before anything had been paid the association was ordered to be wound up:—Held, that under 35 Geo. 3, c. 63, no agreement for insurance of ships can be valid unless duly stamped according to that act, that therefore there was no evidence of a binding mutual contract for insurance having been entered into, and that S. was not a contributory. *London Marine Insurance Association, In re, Smith, Ex parte*, 38 L. J., Ch. 681; L. R. 4 Ch. 611; 21 L. T. 97; 17 W. R. 941.

"Open Cover"—Refusal of Policies in Terms of Cover — Specific Performance.] — An open cover, or proposal to insure before the goods to be insured are shipped, was given by the respondents to M. in order that he might give it to the charterer, who after shipment applied for policies to the amount mentioned in the cover and was refused:—Held, that such application constituted an acceptance of a subsisting proposal, and that there was a binding contract with the charterer to issue a policy in terms of the open cover. The asking for two policies did not prevent the acceptance being sufficient as there was a refusal to give any. *Bhugwandass* v. *Netherlands India Sea Insurance Co.*, 14 App. Cas. 83 —P. C.

Effect of Misnomer.]—The plaintiffs, by order of K., at Hamburg, opened with an insurance company a policy on hides by ship or ships to the extent of 5,000*l.* The slip was signed on the 23rd of September, 1869, but the policy had not then been made out; on the 3rd of February, 1870, one of the plaintiffs went to the company's office, taking with him the slip for the 5,000*l.* policy, and filed up two slips, one for 2,455*l.* on hides, per "Socrates," and another slip for 2,500*l.* on hides by another vessel; he stated to the clerk of the company that it would be more convenient to both parties to have two separate policies, instead of drawing up an open policy for 5,000*l.*, and then declaring it on 4,955*l.* The clerk acquiesced, and initialed the two slips, and afterwards the policies were executed by the company. There was a Norwegian ship, the "Socrates," and a French ship, the "Socrate," both described in the Veritas, the risk on the latter being greater than on the former. The hides insured by the policy were shipped on board the "Socrate" and lost. At the trial the jury found that the parties, on entering into the contract, both meant to insure the hides by the vessel on which they were actually shipped, whatever her name might be, though they supposed it to be the "Socrates," and that the company did not mean only to insure hides on board the "Socrates":—Held, that the company being bound on the 3rd of February to insure hides on board any ships selected by the plaintiffs, the misnomer was of no consequence, and the company were liable. *Ionides* v. *Pacific Fire and Marine Insurance Co.*, 41 L. J., Q. B. 190; L. R. 7 Q. B. 517; 26 L. T. 738; 21 W. R. 22; 1 Asp. M. C. 330—Ex. Ch.

Disclosure after Slip initialed.]—When underwriters have, by initialing a slip, made a contract of assurance, which, although invalid at law and in equity for want of statutory requisites, is, nevertheless, in practice, and according to the usage of those engaged in marine insurance, a complete and final contract binding upon them in honour and good faith, whatever events may subsequently happen, the assured need not communicate to the underwriters facts which afterwards come to his knowledge material to the risk insured against; and the non-disclosure of such facts will not vitiate the policy of insurance afterwards executed. And it makes no difference that, the insurance being negotiated by an agent of the assured, the slip was initialed subject to the ratification of the assured. *Cory* v. *Patton*, 43 L. J., Q. B. 181; L. R. 9 Q. B. 577; 30 L. T. 758; 23 W. R. 46; 2 Asp. M. C. 302.

See *S. C.*, on demurrer, 41 L. J., Q. B. 195, n.; L. R. 7 Q. B. 304; 26 L. T. 161; 20 W. R. 364; 1 Asp. M. C. 225.

An underwriter signed a slip effecting an insurance on the freight of a ship; at the time of his so signing the plaintiff knew of, but did not communicate to the defendant, a fact which the court held to be a material fact, which the plaintiff was bound to communicate. The defendant subsequently, at the time when he was fully acquainted with this fact, signed a policy in conformity with the terms of the slip, but also at the same time wrote a letter of protest to the plaintiff's brokers, declaring that he would resist

any claim made under the policy :—Held, that the policy was vitiated by the concealment, and the action was not maintainable. *Nicholson* v. *Power*, 20 L. T. 580.

—— **Estoppel by Conduct.**]—Where the assurer discovers the concealment of a material fact between the initialing of the slip and the issuing of the stamped policy, but issues the policy without protest, he is not estopped from disputing his liability, nor is the burden of proof thrown on him to shew that the assured was not misled into treating the contract as still subsisting. *Morrison* v. *Universal Marine Insurance Co.*, 42 L. J., Ex. 115 ; L. R. 8 Ex. 197 ; 21 W. R. 774 ; 1 Asp. M. C. 503—Ex. Ch.

d. Legality.

And see V. INTEREST OF ASSURED, 12. WAGERING POLICIES, post, col. 1137 ; 14. NEUTRAL OR HOSTILE PROPERTY, post, col. 1142.

Under Repealed Acts.]—A. & B. were secret partners in underwriting, each signing policies in his own name :—Held, that such policies were not void under 35 Geo. 3, c. 63, s. 11. *Brett* v. *Beckwith*, 26 L. J., Ch. 130 ; 3 Jur. (N.S.) 31 ; 5 W. R. 112.

A policy effected in the name of the broker of the assured not describing the broker as agent was not contrary to 28 Geo. 3, c. 56. *De Viguier* v. *Swanson*, 1 Bos. & P. (N.R.) 346, n. ; 4 R. R. 825, n.

Semble, a transfer by one underwriter to another at a higher premium his subscription to a policy is not a reassurance prohibited by 19 Geo. 2, c. 37, s. 4. *Delver* v. *Barnes*, 1 Taunt. 48 ; 9 R. R. 707.

A policy made by a company not subscribed by the individual members of the company is not void under 25 Geo. 3, c. 63. *Dowdall* v. *Allan*, 19 L. J., Q. B. 41. And see *Reid* v. *Allan* and cases infra, col. 1351.

A. and B. were in partnership carried on in A.'s name, to insure ships. A. paid all the losses. The partnership being illegal under 6 Geo. 1, c. 18, A. could not recover from B. his share of the losses. *Mitchell* v. *Cockburne*, 2 H. Bl. 380.

Advances on Ship—Full interest admitted—19 Geo. 2, c. 37, s. 1.]—See *Smith* v. *Reynolds*, post, col. 1132.

Names of Subscribers.]—A mutual marine insurance association issued policies signed by managers per procuration of the several members of the association :—Held, that this was not a specification of the names of the subscribers or underwriters within the meaning of the 30 Vict. c. 23, s. 7, and that on this ground the policies were void. *Arthur Average Association, In re, Cory, Ex parte, Hargrove, Ex parte*, 45 L. J., Ch. 346 ; 3 Ch. D. 522 ; 34 L. T. 388 ; 24 W. R. 514 ; 2 Asp. M. C. 570—C. A.

—— **Companies.**]—Since the 5 Geo. 4, c. 114, where a marine insurance is effected by an insurance company, it is not necessary that the name of each member of the company should be expressed in the policy. *Reid* v. *Allan*, 4 Ex. 326 ; 19 L. J., Ex. 39 ; 13 Jur. 1082. S. P., *Dowdall* v. *Clark*, 19 L. J., Q. B. 41 ; 14 Jur. 311 ; *Hallett* v. *Dowdall*, 18 Q. B. 2 ; 21 L. J., Q. B. 98 ; 16 Jur. 462.

Person Interested or Agent.]—If an agent residing abroad effected a policy without inserting his name as agent, such policy was void by 25 Geo. 3, c. 44 (repealed by 28 Geo. 3, c. 56). *Pray* v. *Eadie*, 2 Term Rep. 313 ; 1 R. R. 200.

And the name of the party interested must have been inserted in the policy, otherwise he could not recover upon it. *Cox* v. *Parry*, 1 Term Rep. 464.

If the name of the broker effecting a policy is inserted in a policy as agent, it is a sufficient compliance with 28 Geo. 3, c. 56. *Bell* v. *Gilson*, 1 Bos. & P. 345 ; 4 R. R. 823.

In a policy the persons interested were denominated "the trustees of Messrs. K. F. & Co.":—Held, that this might be considered their usual style and firm of dealing. *Hibbert* v. *Martin*, 1 Camp. 538.

A declaration stating that M. and another caused to be effected a policy containing that J. G. & Co. did make assurance, and averring the interest in F. W. S., with a promise by the defendant to the plaintiffs, in consideration of the premium paid by them, was held good after verdict ; for it must be intended that the plaintiffs insured under the names of J. G. & Co., and that they were proved to be within one or other of the descriptions of persons in 28 Geo. 3, c. 56, in whose names or usual style or firm of dealing insurance may be made. *Mellish* v. *Bell*, 15 East, 4 ; 13 R. R. 344.

A. having consigned a cargo to B., and drawn bills on him to the amount of it in favour of C., his general agent, sent these bills together with the bills of lading to C., desiring him to transmit them to B., "that B. may have an opportunity of insuring"; he also drew a bill for 300*l.* on C., which was accepted ; B. refused to take to the cargo or accept the bills drawn on him ; C. then effected a policy in his own name, and informed A., who approved of his conduct :—Held, that the policy was good within 28 Geo. 3, c. 56. *Wolf* v. *Horncastle*, 1 Bos. & P. 316 ; 4 R. R. 808.

Policy signed by Three for Themselves and Others—Validity—30 Vict. c. 23, s. 7.]—A policy signed by three persons "for ourselves and the other members of the I. Assurance Association," which was an unincorporated and mutual society, does not comply with 30 Vict. c. 23, s. 7. (Lord Justice Clerk and Lord Young, contra), *Inverkeithing Marine and Freight Assurance Association* v. *Mackenzie*, 9 Ct. of Sess. Cas. (4th ser.) 1043.

Commission.]—Insurance of captain's commission, &c. in the African trade is legal. *King* v. *Glover*, 2 Bos. & P. (N.R.) 206 ; 9 R. R. 638.

2. RE-INSURANCE.

Liability on.]—Formerly every re-insurance in this country, either by British subjects or by foreigners, whether on British or on foreign ships, was void, and an action to recover the premiums would not lie. *Andree* v. *Fletcher*, 2 Term Rep. 161 ; 3 Term Rep. 266 ; 1 R. R. 701. *But see* 30 & 31 Vict. c. 23, s. 3.

By a policy a vessel was insured from Bombay to Calcutta, and for thirty days after she had been moored at the latter place. She had arrived there

ten days before such policy was effected; and on receiving news of her arrival, her owners effected a second policy on her with the same insurers, by which she was insured at and from Calcutta to Bombay. The vessel was totally lost at Calcutta during the continuance of the risk under both policies, and the insurers having paid the owners as for a total loss upon the second policy sought to recover the full amount upon a policy of re-insurance which they had effected of the risk under the second policy, without deducting the money payable upon the first policy. The court was of opinion that the second policy was intended as a substitution for the first, and that the original insurers were liable only on the second policy, and were, therefore, entitled to recover the full amount on the policy of re-insurance. *Union Marine Insurance Co.* v. *Martin*, 35 L. J., C. P. 181.

Need not be Mentioned.]—An underwriter "on goods" may reinsure by the same description; and the policy need not be expressed to be a reinsurance. *Mackenzie* v. *Whitworth*, 45 L. J., Ex. 233; 1 Ex. D. 36; 33 L. T. 655; 24 W. R. 287; 2 Asp. M. C. 490—C. A.

An underwriter having subscribed a marine policy of insurance on certain goods, afterwards insured his risk by effecting with other underwriters a policy on the goods without stating that the latter transaction was a re-insurance. In an action by him upon the second policy, a common practice to state the fact of a re-insurance in the slip or policy was admitted; but the jury found the fact immaterial and negatived concealment: —Held, that he was not bound by law to disclose the fact of re-insurance unless inquiry were made of him with respect to it, and was, therefore, upon the findings of the jury, entitled to the verdict. *Ib.*

Declarations of Risk.]—In accordance with an agreement entered into between the plaintiffs, a marine insurance company, and the defendants, a fire insurance company, the defendants subscribed a policy whereby they undertook to reinsure the plaintiffs against loss or damage by fire to the extent of 50,000*l.* by the ships as might be declared at and from certain ports to destination, the policy to be subject to the same conditions (as far as they related to the fire risk only) as the original policy or policies, and would pay as might be paid thereon. The policy provided that the arrangement was to be in force for one year from the 1st of October, 1876, and to include only such vessels as were coal-laden; the policy to be supplemented by further policies on like terms should the amount thereof not prove sufficient for the year's transactions. The policy becoming exhausted by declaration of risk, the defendants, on the 9th of July, subscribed a second policy similar in terms to the former policy, and this second policy becoming likewise exhausted, a third policy was, on the 25th of October, subscribed by the defendants, similar in terms to the former policies. On the 7th of June the plaintiffs insured a coal-laden ship, the "Hampden," and there was a loss by fire of the cargo on the 18th of September, which would have been covered by the policy of insurance if the risk had been duly declared, but through the negligence of the plaintiff's manager the risk had not been declared. At the time the third policy was effected the plaintiffs knew of the loss, and on the 2nd of November they declared the "Hampden" and claimed for a loss. The plaintiffs having brought an action to recover the loss, it was:—Held, that the plaintiffs were entitled to recover, for that the defendants were insurers in respect of a marine risk, and as such subject to the usage of underwriters, stated in *Stephens* v. *Australian Insurance Co.* (L. R. 8 C. P. 18), by which in the case of open policies on ships to be declared, the policy attaches to the goods as soon as, and in the order in which, they are shipped, in which order the assured is bound to declare them, and in case of mistake as to the order of shipment, the assured is bound to rectify the declaration, which may, in the absence of fraud, be altered even after the loss is known. *Imperial Marine Insurance Co.* v. *Fire Insurance Corporation*, 48 L. J., C. P. 424; 4 C. P. D. 166; 40 L. T. 166; 27 W. R. 680; 4 Asp. M. C. 71.

"To pay as may be paid" on Original Policy —Indemnity — Condition precedent.]—The W. Company, having insured a ship, re-insured part of their risk with the E. Company, and duly paid the premiums. The re-insurance policy was not an exact copy of the original policy, but contained the following clause:—"Being a re-insurance applying to the lines of the Western Iusurance Company, Limited, policy No. , subject to the same terms and conditions as the original policy or policies, and to pay as may be paid thereon." The ship insured had suffered damage from the perils insured against, but the W. Company had not as yet paid any part of it. Both companies were in liquidation, and the liquidator of the W. Company made a claim in the winding-up of the E. Company for the amount secured by the policy of reinsurance:—Held, that payment by the W. Company on the original policy was not a condition precedent to their recovering against the E. Company. *Western Insurance Co., Ex parte, Eddystone Marine Insurance Co., In re*, 61 L. J., Ch. 362; [1892] 2 Ch. 423; 66 L. T. 370; 40 W. R. 441; 7 Asp. M. C. 167.

Appropriation.] — The plaintiffs were the London agents of an insurance company, who had also an agent at Calcutta. The company issued policies on cargoes proceeding from Calcutta to the United Kingdom, re-insuring the excess above 5,000*l.* on any one ship, through their agents, the plaintiffs, with the defendants, lost or not lost, in any one ship, as may be declared. From time to time the plaintiffs received advices from the agent at Calcutta, stating the names of the ships, and particulars of the excess of 5,000*l.* upon each, whereupon they declared the ships to the defendants, together with the amount of excess, indorsements of which were made on the back of the policy, which was thereby appropriated to the particular risk. By a letter of the 15th February, 1860, the Calcutta agent informed the plaintiffs of an excess insured by the company on the ship "R." On the 16th March both the plaintiffs and defendants had information, as the fact was, that the "R." had been destroyed by fire. On the 17th March the plaintiffs appropriated the whole of the amount remaining on the then current policy to other ships. On the 19th March the plaintiffs effected a fresh policy with the defendants, in continuation of the former one; and on the 21st the plaintiffs received the letter of the Calcutta agent of the 15th February; whereupon they immediately declared to the

defendants that the policy of the 19th would be appropriated to the excess of 5,000*l.* on board the "R." ; and on the 26th March made an indorsement thereof upon the policy, the defendants disputing their right to do so :—Held, that the fact of the loss of the "R." being known to both plaintiffs and defendants at the time of the issuing of the policy was immaterial, as it was not at that time known to either party that the company had undertaken any risk with respect to the ship ; and that the declaration and appropriation were sufficient. *Gledstanes* v. *Royal Exchange Insurance Corporation*, 5 B. & S. 797 ; 34 L. J., Q. B. 30 ; 11 Jur. (N.S.) 108 ; 11 L. T. 305 ; 13 W. R. 71.

Voyage ended when Policy effected.] — The defendant, who had insured a cargo by a certain vessel, lost or not lost, for a certain voyage, believing such vessel to be overdue, effected a policy of reinsurance with the plaintiff on the same cargo and risk. Before effecting the policy of reinsurance, the vessel and cargo had in fact arrived safely at the port of destination ; but this was not known to either the plaintiff or defendant at the time the policy was effected :—Held, that the policy had attached, and that therefore the plaintiff was entitled to the premium at which it had been effected. *Bradford* v. *Symondson*, 50 L. J., Q. B. 582 ; 7 Q. B. D. 456 ; 45 L. T. 364 ; 30 W. R. 27 ; 4 Asp. M. C. 455—C. A.

Construction of Clause "to Pay as may be Paid" — Liability of Reinsurer.]—A policy of reinsurance contained the following clause : "Being a reinsurance subject to the same clauses and conditions as the original policy, and to pay as may be paid thereon, but against the risk of total and (or) constructive loss, total loss only." The ship insured by the original policy stranded and was abandoned, and the underwriters paid a total loss. The reinsurers refused to admit any liability to pay under the policy of reinsurance, upon the ground that the ship had never been shewn to be a constructive total loss : —Held, that, upon the true construction of this clause, it did not bind the reinsurer to pay such sum as the insurer might choose to pay the assured, whether liable or not. *Chippendale* v. *Holt*, 65 L. J., Q. B. 104 ; 73 L. T. 472 ; 44 W. R. 128 ; 8 Asp. M. C. 78.

Reinsurance against Fire—Usage — Order of Attachment of Policies.]—See *Maritime Marine Insurance Co.* v. *Fire Reinsurance Co.*, infra, col. 1046.

3. Double Insurance.

Amount Recoverable.]—In a case of double insurance, the insured may recover the whole against any of the insurers, and leave him to recover satisfaction from the rest. *Newley* v. *Reed*, 1 W. Bl. 116. S. P., *Rogers* v. *Davis*, 1 Park. Ins. (8th ed.) 601.

In an action on a valued policy, it is no defence that the assured has received the amount of the valuation in the policy from the underwriters on another policy, if the subject-matter insured is proved to be of a value equal to the sum received and that sought to be recovered. *Bousfield* v. *Barnes*, 4 Camp. 228 ; 16 R. R. 780.

Where two policies for different sums were effected on goods on board any ship or ships on a particular voyage, and goods were put in different proportions on board two ships which sailed on the voyage, one of which was lost, but the other arrived in safety :—Held, that the insured might apply either policy to the ship which was lost. *Henchman* v. *Offley*, 2 H. Bl. 345, n. ; 3 Dougl. 135.

Bankruptcy of Assured—Second Insurance by Assignees—Payment.]—J. S. made a policy on a ship valued at 2,500*l.*, and became bankrupt. His assignees reinsured for 2,500*l.* ; and upon the loss of the ship the underwriters on the second policy paid J. S. 2,500*l.* for the loss :—Held, that J. S. could not sue on the first policy. *Morgan* v. *Stockdale*, 4 Ex. 615.

4. Grant and Issue of Policy.

Formalities.] — A policy purported to be signed, sealed and delivered by two of the directors of an insurance company in the presence of their secretary, and according to the powers vested in the directors by the deed of settlement of the company. This statement was taken, as against the company, to be conclusive that it was not only duly signed and sealed, but also duly delivered. *Xenos* v. *Wickham*, 36 L. J., C. P. 313 ; L. R. 2 H. L. 296 ; 16 L. T. 800 ; 16 W. R. 38.

A policy signed, sealed and delivered is complete and binding as against the party executing it, though, in fact, it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it. *Ib.*

It is not necessary that the assured should formally accept or take away a policy in order to make the delivery complete. *Ib.*

After the broker had prepared a slip, and the proposed insurer had accepted it, and had prepared a policy in accordance with it, a desire was expressed by him and assented to by the underwriter that the policy should be cancelled, on which a cancellation was in form effected :—Held, that this was not effectual as to the assured, who had not, in fact, given the broker any authority to cancel the policy. *Ib.*

Mistake — Cancellation.] — A broker was instructed to effect for a shipowner an insurance on a ship. The broker gave a slip to C. (the authorised representative of an insurance company), which was accepted, and a policy prepared accordingly. When the policy (with the amount debiting the broker with the premium) was sent to his office, duly signed, sealed and delivered, his clerk said there had been a mistake, that the policy ought not to have gone forward, and that there was no premium due. This was repeated by another clerk, who came to C.'s office for the purpose, and requested the cancellation of the policy. C. acted on these representations (which, however, had been made by the broker's clerks without any authority from the shipowner), and cancelled the policy, but charged the broker with the stamp duty paid, and gave the policy to him in order to enable him, if possible, to get a return of the stamp duty on it. The ship was lost, and the shipowner made his claim for the loss :—Held, that the circumstances were sufficient to shew an execution and a delivery of the policy, and that the unauthorised act of the broker afforded no answer to the claim. *Ib.*

At what Time Valid.]—A policy on a ship "lost or not lost," executed after the ship is known by all the parties to be lost, in pursuance of a previous agreement to insure, is valid. *Mead* v. *Davison*, 4 N. & M. 701; 3 A. & E. 303; 1 H. & W. 156; 4 L. J., K. B. 193.

5. ALTERATION AND CORRECTION.

Usage to Alter.]—A shipowner who was in the habit of receiving shipments of cotton to be carried on deck, sometimes at the request and risk of the shippers, sometimes for his own convenience, and under a clean bill of lading at his own risk—to protect himself as to jettison in the latter case, entered into open policies of insurance as to which the usage was that he was bound to declare all his risks in order of shipment, and rectify any mistake even after loss known. His agent, by negligence or by mistake, gave a clean bill of lading for a certain shipment and gave no notice to him, but such shipowner on discovering the omission altered his declaration by inserting this shipment though after loss known:—Held, that the shipowner had an insurable interest, as at law a written contract cannot be varied on the ground of negligence or mistake, and was entitled to alter the declarations both according to the usage, which could not be said to be unreasonable, and according to the doctrine to be deduced from decided cases, that by the usages of merchants and underwriters, recognised by the courts without formal proof, such declarations may be altered even after loss known, if the alterations are made innocently and without fraud. *Stephens* v. *Australasian Insurance Co.*, 42 L. J., C. P. 12; L. R. 8 C. P. 18; 27 L. T. 585; 21 W. R. 228; 1 Asp. M. C. 458.

Addition of Subject-matter.]—If a policy is executed in the printed form, without any specific subject of insurance being inserted in writing, and the subject-matter is afterwards added in writing, and the addition signed by some of the underwriters only, the assured cannot recover against those underwriters who do not so sign, on the contract as it stands altered by the insertion. *Langhorn* v. *Cologan*, 4 Taunt. 330; 13 R. R. 613.

A policy originally underwritten on "ship and outfit" was, after the ship sailed, declared by consent of all parties to be on ship and goods, by a memorandum written on a blank space in the body of the policy; but without any new stamps; and it having been before decided, that for want of the stamp the plaintiff could not recover as upon a policy on ship and goods, as declared by the memorandum, it was now held that he could not recover upon the policy in its original state as an insurance on "ship and outfit," by reason of the alteration apparent upon the face of the instrument itself, and which was made by parties interested. *French* v. *Patton* or *Patten*, 9 East, 351; 1 Camp. 72, 180, 180 b; 9 R. R. 571. And see *Hill* v. *Patten*, 8 East, 373; 1 Camp. 72; 9 R. R. 469.

As to Voyage.]—A policy was effected on goods from Batavia to London; after the execution of the policy, the time of sailing was enlarged from the 10th October to the 31st December by the assured, and acquiesced in by all the underwriters, except the defendant:—Held, that it was a material alteration, although the defendant had signed three memoranda subsequent thereto; yet, not having assented to it, the policy was void as to him; and that, consequently, the assured could not recover the amount of his subscription. *Fairlie* v. *Christie*, 1 Moore, 114; 7 Taunt. 412; Holt, 331; 18 R. R. 515.

The owner of a vessel bound from London to Berbice, which had deviated by taking in goods at Madeira, insured her, with notice to the underwriter of the circumstances, "at and from London to Berbice," and inserted the words "at sea" in another part of the policy:—Held, that the deviation was a good defence, as the policy was thereby vacated. *Redman* v. *London* or *Lowden*, 5 Taunt. 462; 1 Marsh. 136; 3 Camp. 503.

A policy "at and from A. and B." is not vitiated by inserting, without the consent of the underwriter, the words "both or either." *Clapham* v. *Cologan*, 3 Camp. 382.

On a policy on ship and goods "at and from Cuba to Liverpool, with liberty in that voyage to proceed and sail to and touch and stay at any ports and places whatscever; and with leave to discharge and take in at any ports or places she might call at, without prejudice to that insurance," the assured, after the subscription of the policy, inserted in the body of it the words, "with leave to call off Jamaica," which was acquiesced in by all the underwriters except the defendant, without increase of premium:—Held, that this was a material alteration, and avoided the policy as against the defendant. *Forshaw* v. *Chabert*, 6 Moore, 369; 3 Br. & B. 158; 23 R. R. 596.

A policy from Calmar to Portsmouth was altered with the consent of some of the underwriters, by inserting the words "or Weymouth" after Portsmouth:—Held, that the policy was void against an underwriter who was ignorant of the alteration when it was made, although afterwards, on being informed of it, he said he would not take advantage of it. *Campbell* v. *Christie*, 2 Stark. 64.

Policy differing from Slip.]—If a policy differs from the label, which is the memorandum of the agreement, it shall be made agreeable thereto; for the owner's agent, when he fetches the policy, is not bound to compare it with the label; and it is not a sufficient ground in equity to say that the insurance is in the name of a trustee, unless he denies the cestui que trust the use of his name in an action at law. *Motteaux* v. *London Assurance Co.*, 1 Atk. 545.

Alteration must be in Writing.]—A policy cannot be varied by agreement not in writing. *Kaines* v. *Knightley*, Skinner, 54.

Policy on Goods in Ship "M.," her real Name being "M. G."—Alteration.]—A policy was effected on goods in the "Mary" by mistake, the ship intended being the "Mary Galley." The "Mary Galley" was lost, and the insurers after the loss consented to alter the policy, and did so. In an action on the policy:—Held, that the insurers were liable; and that they were not entitled to an increase of premium on the ground that the "Mary" was the stouter ship. *Bates* v. *Grabham*, Holt, 469.

Alteration of Destination—Policy Avoided.]—A ship is insured for a voyage from Virginia to Rotterdam, with leave to call at a port in England. After the underwriters had signed

the policy the destination was altered to Hull, and a memorandum of the alteration was indorsed on the policy. Hull is not a port on the voyage from Virginia to Rotterdam :—Held, that the alteration avoided the policy as to all the underwriters who did not sign the memorandum. *Laird* v. *Robertson*, 4 Bro. P. C. 688.

Immaterial—Addition of "and Trade."]—A policy was effected on a ship from Liverpool to Africa, and during her stay there and from thence back to Liverpool, with liberty to proceed to and stay at any ports of discharge and loading in Africa, to sell, barter and exchange goods, and load, unload and reload goods at all or any of the ports she might call at and proceed to. After the execution of the policy, the assured inserted the words "sell, barter and exchange goods," as well as the words "and trade," after those of "during her stay," and to which several of the underwriters assented :—Held, that the alteration was unimportant, and therefore did not avoid the policy against an underwriter who had subscribed his initials to the words "sell, barter and exchange goods," but had not assented to the insertion of the words "and trade," although his initials were subscribed to them. *Sanderson* v. *M'Cullom*, 4 Moore, 5.

So, where a vessel was insured from Liverpool to Africa, and during her stay there and back, with liberty to sell, barter, exchange, load, unload and reload goods. After the execution of the policy, the assured inserted the words "and trade" in the risk without the consent of the defendant (an underwriter), although others had assented thereto :—Held, an immaterial alteration, as the ship had liberty to trade without the introduction of those words. *Sanderson* v. *Symons*, 4 Moore, 42; 1 Br. & B. 426; 21 R. R. 675.

Value of Share.]—A policy was effected on the plaintiff's share of goods, valued at 500*l.*, but upon its turning out that his interest was larger, the words were added in the margin of the policy on the plaintiff's goods, "say one-fifth valued at 100*l.*," to which the defendant's initials were subscribed; the declaration need not notice the original stipulation. *Robinson* v. *Tobin*, 1 Stark. 336.

Further Premium.]—A policy containing a warranty that the ship shall sail on or before a given day may be altered pending the risk, by a memorandum, whereby the underwriters, in consideration of a further premium, agree to cancel the warranty, and to make a return of premium if the ship sails with convoy. *Ridsdale* v. *Shedden*, 4 Camp. 107.

Necessity of Fresh Stamp.]—*See* ante, col. 1030.

Alteration of Adventure Passage Money not Freight.]—See *Denoon* v. *Home and Colonial Insurance Co.*, post, col. 1124.

Bill to Rectify Policy.]—Bill to rectify a policy of insurance dismissed; there not being evidence to vary the contract. *Henkle* v. *Royal Exchange Assurance Co.*, 1 Ves. sen. 317.

6. Construction.

Rule for Construing.]—Policies of insurance are to be construed by the same rules as other instruments, unless where, by the known usage of trade, or the like, certain words have acquired a peculiar sense, distinct from their ordinary and popular sense. See *Cazalet* v. *St. Barbe*, 1 Term Rep. 191; 1 R. R. 178.

Policies are to be construed according to the same rules as all other written contracts, namely, by ascertaining the intention of the parties, to be gathered, in the first instance, from the words of the instrument, but interpreted, if necessary, by the surrounding circumstances. *Carr* v. *Montefiore*, 5 B. & S. 408; 33 L. J., Q. B. 256; 10 Jur. (N.S.) 1069; 11 L. T. 157; 12 W. R. 870—Ex. Ch.

The words "perils of the seas" in a policy are terms of general import, upon which the court is to put a construction. *Crofts* v. *Marshall*, 7 Car. & P. 597.

A policy of insurance was effected on a ship on 22nd January, 1872, to 23rd January, 1873, both inclusive. These words were written in on a printed form, which also contained in print the words "at and from," and "for this present voyage," and other similar words which were commonly found in the form of a voyage policy, and which had not been erased :—Held, that this policy was really a time policy, and its character was not affected by the printed words left in. *Dudgeon* v. *Pembroke*, 46 L. J., Q. B. 409; 2 App. Cas. 284; 36 L. T. 382; 25 W. R. 499; 3 Asp. M. C. 393—H. L. (E.)

A policy of insurance is "to be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain ordinary and popular sense, unless they have generally in respect to the same subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other and peculiar sense." Per Lord Ellenborough. *Robertson* v. *French*, 4 East, 130, 135; 4 Esp. 246.

Written words in policies to have a greater weight in case of ambiguity than the printed words. *Ib.*

Construction of Condition.]—When a warranty or a condition in a policy of marine insurance is expressed in clear terms, evidence will not be admitted to shew that it is to be construed contrary to the apparent meaning of those terms, although the desired construction may be that which has ordinarily been put upon it by persons making use of that form of policy. *Provincial Insurance Co. of Canada* v. *Leduc*, 43 L. J., P. C. 49; L. R. 6 P. C. 224; 31 L. T. 141; 22 W. R. 929; 2 Asp. M. C. 338.

Usage at Lloyd's.]—Usage at Lloyd's is not binding upon assured unless he knows of it. *Gabay* v. *Lloyd*, 3 B. & C. 793; 5 D. & R. 641; 3 L. J. (O.S.) K. B. 116; 27 R. R. 486.

Usage cannot Contradict the Policy.]—Evidence is not admissible to shew that by usage the risk on goods expires twenty-four hours after the ship is moored in safety, when by the terms of the policy it does not expire until the goods are "discharged and safely landed." *Parkinson* v. *Collier*, 1 Park. Ins. (8th ed.) 47.

Usage of Trade—Non-communication.]—Insurance on fish from Newfoundland to Portugal. The ship on arrival in Newfoundland proceeded

to Sydney, N.B., and took in a cargo of coals, which she carried to Newfoundland, where she took in her fish, and was lost on her voyage to Portugal :—Held, that it being the usage of the trade to make such an intermediate voyage as that to Sydney, its non-communication to the underwriters was immaterial. *Ougier* v. *Jennings*, 1 Camp. 505 ; 10 R. R. 739, n.

—— **Usage as to Attachment of Policies.**]—See *Maritime Marine Insurance Co.* v. *Fire Reinsurance Co.*, infra.

Reinsurance.] —See *Chippendale* v. *Holt*, supra, col. 1039.

"Ice-bound"—"Open Water."]—By the rules of a mutual insurance association, "If a ship insured shall be and remain wrecked, stranded or sunk for a period of four months . . . and during such period it shall have been found impracticable to save the ship . . . the ship shall be considered to have been lost. . . . Provided that a ship which is so situated, and ice-bound, shall not be considered as coming within this rule or to have been lost unless and until there shall have been four months . . . of open water after the disaster" :—Held (Lopes, L.J., diss.), that the period of four months in the above rule would run, notwithstanding that floating ice prevented salvage operations, "ice-bound" meaning that ice is so round the ship that she could not move away out of it. Per Lopes, L.J. : So long as floating ice prevents salvage operations, there is not "open water" within the rule. *Sunderland Steamship Co.* v. *North of England Iron Steamship Insurance Assn.*, 14 R. 196—C. A.

"Premises."]—A fire insurance company, in making out a policy of insurance of a steamship, referring to conditions indorsed, so far as applicable, used one of their printed forms of conditions applicable to houses, the language being, "if more than twenty pounds of gunpowder be on the premises at the time of the loss, such loss will not be made good" :—Held, that the word "premises" equally applied to a ship, the word being in legal language often used to denote "the subject or thing previously expressed." *Beacon Life Assurance Co.* v. *Gibb*, 1 Moore, P. C. (N.S.) 73 ; 9 Jur. (N.S.) 185 ; 7 L. T. 574 ; 11 W. R. 194.

Held, also, that parol evidence was not admissible to prove that the word "premises" was not intended to include the steamer. *Ib.*

Held, also, that one of the conditions having specified a limited quantity of gunpowder to be carried on board, it was quite immaterial whether the fire was or was not occasioned by more than the specified quantity of gunpowder being on board. *Ib.*

"In the Month of October."]—Warranty to sail in the month of October explained by evidence of merchants to mean not after October 25th. *Chauraud* v. *Angerstein*, Peake, 61.

Parol Evidence.]—Parol evidence admitted to explain the meaning of "at and from" a port. See *Moxon* v. *Atkins*, 3 Camp. 200 ; 13 R. R. 789.

"No St. Lawrence"—Construction.]— See *Birrell* v. *Dryer*, post, col. 1162.

Valued Policy—Value not Filled in.]—See *Asfar* v. *Blundell*, post, col. 1142.

Reinsurance against Fire—Usage—Declaration of Risks—Order of Attachment.]—The plaintiffs, a marine insurance company, agreed with the defendants, a fire insurance company, that the defendants should reinsure them against loss by fire of coal-laden ships insured by the plaintiffs between certain ports, during the continuance of the agreement. Policies to cover risks upon such ships as might be declared by the plaintiffs were issued and subscribed by the defendants. A usage was admitted as between merchants and underwriters that in case of open policies upon ships to be declared the policies attached upon and in order of the declarations ; and that in case of mistake the declaration was rectified sometimes after the loss :—Held, that the usage applied as between the plaintiffs and defendants. *Maritime Marine Insurance Co.* v. *Fire Reinsurance Co.*, 40 L. T. 166 ; 4 Asp. M. C. 71.

East India Company's Policies.]—East India insurances include the chance of detention by the charterers in India and the risk of the country voyage there. The policy construed by reference to the East India Company's charterparty, which was well known. *Salvador* v. *Hopkins*, 3 Burr. 1707.

Action on policy of insurance on goods in ship chartered by East India Company. Defence that the loss was during a voyage not covered by the policy :—Held, that the custom of the East India Company as to ordering ships chartered by them on voyages such as that in question must be taken to have been in the knowledge of the insurers. *Grant* v. *Delacour*, 1 Taunt. 463, 467.

7. Ratification.

After Knowledge of Loss.]—A policy on freight, valued at a certain sum, was made by charterers on behalf of themselves and those interested, in the usual terms. It came to the knowledge of the shipowners, but not till after they had heard of the loss. They then claimed the benefit under it :—Held, that, there being satisfactory evidence of the policy having been made on the owners' account, it was open to them to ratify it, even after they had knowledge of the loss. *Williams* v. *North China Insurance Co.*, 1 C. P. D. 757 ; 35 L. T. 884 ; 3 Asp. M. C. 342—C. A.

8. Property in Policy.

Property of the Assured.]—The policy when effected is the property of the insured. *Harding* v. *Carter*, 1 Park Ins. (8th ed.) 5.

II. INSURANCE BY AGENTS, PART OWNERS, OR TRUSTEES.

Insurance by Agent—Lien on Policy Moneys.]—Merchants in London, upon the instruction of shipping agents at Havannah, after receiving the shipping documents of a cargo of tobacco consigned to them, effected policies on the cargo for the benefit of all whom it might concern. The Havannah agents shipped the tobacco in their own name, but were in fact acting as commission agents for the Havannah owners of the tobacco. The London merchants before insuring had notice that the Havannah agent had an unnamed principal. A total loss occurred, and the London merchants received the policy

moneys, after receiving notice that the moneys were claimed by the Havannah principals:—Held, that the latter were entitled to the moneys, and that the London merchants were not entitled to a lien upon the moneys for the balance of their general account with the Havannah agents; and that in an action by the Havannah principals against them for the moneys they could set off nothing but premiums, stamps and commission for insurance. *Mildred* v. *Maspons*, 53 L. J., Q. B. 33; 8 App. Cas. 874; 49 L. T. 685; 32 W. R. 125; 5 Asp. M. C. 182—H. L. (E.)

Authority to Insure—Ship's Husband.]—A ship's husband has no power to insure except by authority of all the owners. *French* v. *Foulton*, 5 Burr. 2727.

—— **Clerk of Consignee.**]—A clerk of a foreign consignee having effected a policy in England to cover the goods sent to his master, and the policy having been adopted by the latter:—Held, that the jury were justified in finding that the clerk had authority to insure. *Barlow* v. *Leckie*, 4 Moore, 8.

—— **Part Owners.**]—One of several part owners of a ship, without any express authority from the others, effected a joint insurance upon the entire ship, charging the premium and commission in the ship's accounts, which were open to the inspection of, and were actually inspected by, the other owners, and not objected to:—Held, that the jury was warranted in finding that the managing owner had a joint authority to effect an insurance for the whole; and that consequently all the owners were liable to the broker, notwithstanding the credit was in the first instance given to the managing owner alone—it appearing that the broker was ignorant of the names of the other owners. *Robinson* v. *Gleadow*, 2 Scott, 250; 2 Bing. (N.C.) 150; 1 Hodges, 245.

Although one part owner of a ship has no implied authority, as such, to order assurances to be effected on account of the other part owners, yet, if they are in partnership together, an order to insure the ship given by one will render all liable. *Hooper* v. *Lusby*, 4 Camp. 66.

One part owner cannot, by ordering an insurance of the ship without authority from another, charge the other with any part of the premium, unless the other afterwards assents to the insurance. *Bell* v. *Humphries*, 2 Stark. 354.

Where part owners of a vessel authorise co-owners to insure the whole vessel, and afterwards assign their interest in the freight, and the assignees do not give express notice of the assignment, the co-owners are entitled to insure the vessel, and deduct the costs of insurance from the freight. *Lindsay* v. *Gibbs*, 3 De G. & J. 690; 28 L. J., Ch. 692; 5 Jur. (N.S.) 376; 7 W. R. 320.

An action is maintainable by an assured part owner of a vessel against an insurance broker, who has received from the underwriters the full amount of the sums subscribed on a total loss, although there are several other persons interested as part owners, who have given the defendants notice of their interest, where the plaintiff insured on the whole ship generally, through the intervention of his captain, who gave the order for effecting the insurance. *Roberts* v. *Ogilby*, 9 Price, 269; 23 R. R. 671.

When an insurance is effected by a part owner of a ship generally, in his own name, but to an amount exceeding the value of his share, and it is understood that such insurance is intended to cover the interest of other persons, the other part owners are, upon a loss, entitled to their proportion of the insurance. *Brack* v. *Douglas*, 4 Myl. & Cr. 320.

Part Owners, Liability for.]—One part owner cannot by ordering an insurance without authority from another, charge the other with any part of the premium, unless the other afterwards assent to the insurance. *Ogle* v. *Wrangham*, Abbott on Shipping (13th Ed.) 96.

Insurance as Trustee—Receipt of Policy Moneys.]—A person shall not be allowed to detain to himself money due upon a policy of assurance wherein his name was only made use of as a trustee, under pretence that the cestui que trust was indebted to him. *Fell* v. *Lutwidge*, Barnard. Ch. 319.

III. DURATION OF RISK.

1. *On Goods.*
   - *a.* What Goods, 1048.
   - *b.* On Loading or Landing Cargo, 1050.
   - *c.* Mode of Loading and Landing, 1054.
   - *d.* What Port, 1055.
2. *On Ship.*
   - *a.* Extent of Liability, 1058.
   - *b.* Termination on Mooring, 1064.
   - *c.* Time Policy, 1067.
3. *On Freight*, 1068.

1. On Goods.

a. What Goods.

Transhipping.]—Where the owners of goods insured shifted them from one ship to another:—Held, that they might still recover for an average loss arising from the capture of the other ship. *Plantamour* v. *Staples*, 1 Term Rep. 611, n.; 3 Dougl. 1.

By a policy, assurance was made "including risk of craft to and from the ship," on linseed-oil cakes, "free of particular average unless general, or the ship was stranded." The cakes were put on board a lighter at their destination, and the lighter stranded and sank, whereby a particular average loss was sustained:—Held, that the underwriters were not liable. *Hofman* v. *Marshall*, 2 Bing. (N.C.) 383; 2 Scott, 559; 1 Hodges, 330; 5 L. J., C. P. 70.

Several Vessels.]—Carriers on a canal effected an insurance for twelve months, upon goods on board of thirty boats, named, between London, Birmingham, &c., backwards and forwards, with leave to take in and discharge goods at all places on the line of navigation. The insurance was agreed to be 12,000*l.* on goods, as interest might appear thereafter; the claim on the policy warranted not to exceed 100*l.* per cent., and 3,000*l.* only were to be conveyed by the policy in any one boat on any one trip:—Held, that the policy was not exhausted when once goods to the value of 12,000*l.* had been carried by all the boats, or by each of them, but that it continued, throughout the year, to protect all the goods afloat at any one time, up to the amount insured. *Crowley* v. *Cohen*, 3 B. & Ad. 478; 1 L. J., K. B. 158.

Held, also, that, upon the loss of goods on board one of the boats, the assured was entitled

to recover that proportion of such loss which 12,000*l.* bore to the whole value of the amount carried during the year. *Ib.*

Where two policies for different sums were effected on goods on board any ship or ships on a particular voyage, and the goods were put in different proportions on board two ships which sailed on the voyage, one of which was lost, but the other arrived in safety:—Held, that the insured might apply either policy to the ship which was lost. *Henchman* v. *Offley*, 2 H. Bl. 345, n.; 3 Dougl. 139; 3 R. R. 408, 413.

Sale at Sea.]—A ship being chartered with grain from Galatz to Emden, for orders to discharge in a port of the United Kingdom, the owners effected an insurance on the cargo from Galatz to Emden, and thence to a port of discharge in the United Kingdom, with leave to call for orders, and to naturalise the cargo, to return 20*s.* per cent. if risk should end at the port of naturalisation. The cargo was sold afloat, while on the voyage from Galatz to Emden, by bought-and-sold notes, for 60*s.* per quarter, including freight and insurance to Emden. The bill of lading (which was in conformity with the charterparty) and the policy of assurance were delivered to the purchaser:—Held, that the purchaser was only entitled to the assurance to Emden, and consequently that he could not recover from the underwriter for a loss between Emden and the port of discharge in the United Kingdom. *Ionides* v. *Harford*, 29 L. J., Ex. 36.

On Separate Packages.]—By a marine policy of insurance the insurance was described to be "on 1,711 packages teas, valued at one sum, on a voyage from New York to London," by a ship "warranted by the assured free from damage from dampness, change of flavour, or being spotted, or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils." In case of partial loss by sea damage to certain goods, not including tea, "the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise, as far as practicable." The ship met with very bad weather during the voyage, and 449 of the 1,711 packages of the tea were seriously damaged by actual contact of sea water. The rest of the packages arrived soundly and in good condition, except by the injury to their reputation from having formed part of a shipment of which 449 packages had been damaged by sea water, and which was the cause, as was usual in such cases, of these packages, though sound and uninjured, not realising so high prices as they would have done if the 449 packages had not been damaged by sea water:—Held, that the packages insured by the policy were divisible, and that the assured was entitled to recover only in respect of the 449 packages which were actually damaged. *Cater* v. *Great Western Insurance Co. of New York*, 42 L. J., C. P. 266; L. R. 8 C. P. 552; 29 L. T. 136; 21 W. R. 850; 2 Asp. M. C. 90.

Goods Valued as at Time of Arrival.]—Held, also, that the loss in value of the goods depended on their value at the time of their arrival at the port of destination, and not at the time of sale, and the underwriters were therefore not liable for a fall in the market price between such arrival and the time of sale. *Ib.*

Open Policy—Declaration of Goods by Insured.]—Where an open policy was granted on goods shipped from Melbourne to London per one set of specified steamers to Sydney and thence to London per another set, covering risk while in a specified factory at Sydney, "declarations to be made within forty-eight hours after departure of steamer from Sydney":—Held, that according to the true construction of this contract two declarations must be made by the insured, one as incident to every contract of an open policy, for the purpose of identifying the shipments at Melbourne to which the policy was to attach and necessary by law to make the policy operative; the other, under the express terms of the above contract, giving particulars relating to such goods as had been already brought within the policy, by a previous declaration apt for that purpose, and had since been actually shipped for London. *Davies* v. *National Marine Insurance Co.*, 60 L. J., P. C. 73; [1891] A. C. 485; 65 L. T. 560.

Insurance of Goods—Marks.]—Declaration in a policy on ship and goods at and from London to Emden "beginning the adventure on the said goods, &c., from the loading thereof on board the said ship." In the policy was a memorandum whereby the insurance was declared to be on fifteen hogsheads of tobacco marked, "B. S. No. 51 & 65." Special demurrer, first, because the goods were not averred to have been put on board at London; secondly, because the goods were not alleged to have been marked or numbered as in the memorandum, but thus: "15 hogsheads, the goods, &c., in the policy mentioned"; thirdly, because the plaintiff was stated to have been interested until and at the time of the loss, without shewing that he was interested at the time of the policy being made; fourthly, because no venue was laid to the alleged loss on the high seas. Semble, that the declaration was bad. *De Symonds* v. *Shedden*, 2 Bos. & P. (N.R.) 153.

Goods Stowed on Deck.]—Goods stowed on deck are not within a general policy on goods. *Backhouse* v. *Ripley*, 1 Park. (8th ed.) 24. S. P., *Ross* v. *Thwaites*, *Ib.*

b. On Loading or Landing Cargo.

"From the Loading"—Reference to Original Policy.]—A policy of insurance was underwritten for 1,000*l.*, which was declared to be a re-assurance, subject to all clauses and conditions of the original policy, on the ship "Daybreak," at and from any port or ports in any order on the West Coast of Africa to the vessel's port or ports of call and discharge in the United Kingdom, the insurance to commence "from the loading of the goods at as above." By the original policy the insurance was for 1,000*l.* upon the cargo of "Daybreak," at and from Liverpool to any ports in any order, backwards and forwards and forwards and backwards on the coast of Africa, and thence back to a port of discharge in the United Kingdom, with leave to increase the valuation of the cargo on the homeward voyage; "outward cargo to be considered homeward interest twenty-four hours after her arrival at her first port of discharge." Goods were shipped at Liverpool, and the vessel,

with the same goods on board, departed from a port on the West Coast of Africa, and more than twenty-four hours after she had arrived at her first port of discharge, the goods were lost by perils insured against in the original policy:—Held, that the words "the insurance to commence from the loading of the goods as above" were qualified by the words in the original policy, by which outward cargo was to be considered homeward interest twenty-four hours after the vessel's arrival at her first port of discharge, and that the risk had consequently attached and the underwriters were liable. *Joyce* v. *Realm Marine Insurance Co.*, 41 L. J., Q. B. 356; L. R. 7 Q. B. 580; 27 L. T. 144; 1 Asp. M. C. 194.

—— **Loss of Lighters alongside.**]—The plaintiffs, shipowners, by a policy of insurance underwritten by the defendants, caused "themselves to be insured, lost or not lost, at and from Liban to Bordeaux, upon freight (valued at interest), of and in the vessel 'Hawthorn,' beginning the adventure upon the said goods or freight from the loading thereof, on board the said ship at Liban, and to continue and endure during the said vessel's abode there, and until the said vessel shall have arrived at Bordeaux, and the said goods shall be safely delivered from the said ship." The plaintiffs' vessel commenced loading at Liban a cargo of oats for Bordeaux, and a portion of the cargo was in lighters alongside, and was about to be transferred to the vessel, when, by reason of the perils of the sea, the lighters and portions of cargo were wholly lost, and the plaintiffs were prevented from earning the freight insured:—Held, upon demurrer, that the plaintiffs could not recover. *Hopper* v. *Wear Marine Insurance Co.*, 46 L. T. 107; 4 Asp. M. C. 482.

—— **Time of.**]—Where, by a policy, a ship and goods were insured "at and from all and every port, &c., on the coast of Brazil, and after the 17th of September to the Cape of Good Hope, beginning the adventure upon the goods from the loading aboard the same ship at all and every port, &c., on the coast of Brazil, and from the 17th of September, 1800, and upon the ship in the same manner," with liberty to sail to, &c., any places backwards or forwards under the Portuguese government, &c., at a premium of four guineas per cent., to return 3*l.* 10*s.* should the ship have arrived or the risk have otherwise ceased on or before the 17th September:—Held, that the policy only attached on the homeward-bound cargo laden on board at the coast of Brazil, and did not cover a cargo originally taken in at the Cape of Good Hope, and which continued on board after the 17th of September, while the ship was on the coast of Brazil, and after she left it on her return to the Cape. Neither did the policy cover the ship itself, which was insured in the same manner as the goods. *Robertson* v. *French*, 4 East, 130; 4 Esp. 246; 7 R. R. 535.

Commencement of Risk—Distinction between Insured Voyage and Risks Insured—Deviation Clause.]—In construing an open policy of marine insurance in order to ascertain what risks are covered by the policy, it must first be ascertained what the voyage insured is. If the goods lost never were upon the insured voyage, then the policy never attached; and the fact that the policy contains a deviation clause is immaterial. *Simon* v. *Sedgwick*, 62 L. J., Q. B. 163; [1893] 1 Q. B. 303; 4 R. 128; 67 L. T. 785; 41 W. R. 163; 7 Asp. M. C. 245—C. A.

Consignors, at Bradford, of the goods in question, effected, through their agents at Liverpool, a marine policy of insurance from the Mersey to any port in Portugal or Spain "this side Gibraltar, $\frac{\text{and}}{\text{or,}}$ at and from thence to any place in the interior, including all risks by any conveyance whatsoever from the time of leaving the warehouse in the United Kingdom until on board, . . . and all risks of every kind until safely delivered at the warehouse of the consignees." The policy contained the following marginal clause:—"Deviation $\frac{\text{and}}{\text{or}}$ change of voyage . . . not included in the policy, to be held covered at a premium to be arranged." The consignees were merchants at Madrid, and the consignors intended that the goods should be shipped at Liverpool for Seville, and carried thence by land to Madrid. By the blunder of the consignors' agent the goods were in fact declared and shipped at Liverpool on board a vessel bound only for Carril and Huelva, on the west coast of Spain, and for Carthagena and other ports on the east coast of Spain. The bills of lading of the goods in question were made out for Carthagena. The consignors only discovered the mistake after the vessel had sailed. The vessel was lost between Liverpool and Carril, a part of the voyage common to vessels bound either for the west or the east coast of Spain:—Held, that the goods in question never were upon the insured voyage; that, consequently, the policy never attached; and that the underwriters were not liable to pay the consignors the amount of the goods in question. *Ib.*

—— **Loading.**]—A policy was effected on guano on board the "D. H." "at and from port or ports in the river Plate to the United Kingdom, &c. . . . beginning the adventure from the loading thereof aboard the said ship as above." The guano had been loaded at Patagonia before the ship went to the Plate. When she arrived in the Plate part of the guano was unloaded to enable a leak to be stopped. This guano was reshipped, and the ship sailed from the Plate for England. Before the policy was effected the underwriter was informed that the guano had been loaded in Patagonia and taken to the Plate, and that the ship had sailed from the Plate for England. A loss occurred:—Held, that the policy attached, and that the plaintiff could recover upon it. *Nonnen* v. *Kettlewell* (16 East, 176) followed. *Carr* v. *Montefiore*, 5 B. & S. 408; 33 L. J., Q. B. 256; 10 Jur. (N.S.) 1069; 11 L. T. 157; 12 W. R. 870—Ex. Ch.

—— **Shipment of Portion.**]—Where a contract of insurance related to wheat cargo then on board or to be shipped in the "D. of S.":—Held, that the risk commenced as soon as any portion thereof was on board. *Colonial Insurance Co. of New Zealand* v. *Adelaide Marine Insurance Co.*, 56 L. J., P. C. 19; 12 App. Cas. 128; 56 L. T. 173; 35 W. R. 636; 6 Asp. M. C. 94—P. C.

—— **Before Loading.**]—Action upon a policy, at and from New York to Quebec, during the ship's stay there, and thence to Liverpool, on profit on cargo, beginning the adventure upon the goods from the loading aboard the ship. The ship was at the time of effecting the policy on the voyage from New York to Quebec, where the plaintiff had provided a cargo ready to be

loaded, and was lost before she reached that port. The declaration set out a correspondence between the plaintiff and his brokers, which shewed that the plaintiff intended to insure the loss of his profit by the ship being lost before she reached Quebec, and alleged that the correspondence and the nature of the intended risk were explained to the defendant before he subscribed the policy, and that the rate of premium was higher than would have been charged for a similar risk commencing at Quebec, or for a risk on goods only for the said voyage:—Held, that as no goods ever were loaded aboard her by the insured, the adventure never began, and therefore the underwriters were not liable. *Halhead* v. *Young*, 6 El. & Bl. 312; 25 L. J., Q. B. 290; 2 Jur. (N.S.) 970; 4 W. R. 530.

—— **Fire after Landing.**]—A time policy was made on the "Grand Bonny," "on 15,000*l.* on cargo, valued at 15,000*l.*, with liberty to increase the value on the homeward voyage." The body of the policy was in the ordinary printed form, expressing the risk on the goods to be from the loading on board the ship, including risk of craft, and to endure until discharged and safely landed. On the margin was a memorandum, "with liberty to load, reload, exchange, sell, or barter, all or either, goods or property, on the coast of Africa and African islands, and with any vessels, boats, factories, canoes, and to transfer interest from the vessel to any other vessel, or from any other vessels to this vessel, in port and at sea, and in any ports or places she may call at or proceed to, without being deemed a deviation." The "Grand Bonny" sailed to Africa with a cargo, part of which was landed in a factory for the purpose of barter, and was lying at anchor loading from the factory native produce, when the factory with its contents was destroyed by fire:—Held, that the policy embraced only maritime risks, and did not protect either the goods which had been part of the cargo of the "Grand Bonny," but had been landed in the factory, nor the produce intended to be her cargo, but still on shore, whether that produce had been obtained by barter of the cargo or otherwise. *Harrison* v. *Ellis*, 7 El. & Bl. 465; 26 L. J., Q. B. 239; 3 Jur. (N.S.) 908; 5 W. R. 494.

—— **Valued Policy on Freight—Breakdown of Machinery before Cargo Loaded.**]—In an action to recover 2,000*l.* under a valued policy on freight the question was whether a risk against loss of freight through a breakdown of machinery had attached. The words printed in the policy were "The assurance shall commence upon freight and goods or merchandise on board (the vessel) from the loading of the said goods or merchandise at ." The words "Monte Video" in writing completed the sentence. The vessel arrived at Monte Video and discharged her outward cargo. A refrigerating engine was then started to reduce the temperature below 288 F. so that a cargo of meat could be shipped. The engine broke down, and the adventure was abandoned:—Held, that the words defining the commencement of the risk with regard to the loading of the goods being absolutely inapplicable under the circumstances must be rejected, and that the policy attached although no meat was ever loaded. *Hydarnes SS. Co.* v. *Indemnity Mutual Marine Assurance Co.*, 64 L. J., Q. B. 353; [1895] 1 Q. B. 500; 14 R. 216; 72 L. T. 103; 7 Asp. M. C. 553—C. A.

Loss of Profits on Cargo bought—Ship Disabled at Port of Loading—Contract Inoperative.]—See *McSwiney* v. *Royal Exchange Assurance Corporation*, post, col. 1079.

c. Mode of Loading and Landing.

By Lighters.]—Insurance on goods from A. to B., "until they should be there discharged and safely landed." On their arrival at B., the merchant to whom the goods belonged employed and paid a public lighter to land them, and the goods being damaged in the lighter, without negligence, the underwriters were held liable for the loss. *Hurry* v. *Royal Exchange Assurance Co.*, 2 Bos. & P. (N.R.) 430; 3 Esp. 289; 5 R. R. 639; 6 R. R. 804.

Goods put into a public lighter for the purpose of being landed, are protected by usage under a general policy; but if the merchant sends his own lighter, the underwriter is discharged. *Rucker* v. *London Assurance Co.*, 2 Bos. & P. (N.R.) 432, n.; 3 Esp. 290; 5 R. R. 639, n.

Action on a policy on goods, "until the cargo should be discharged and safely landed." On the arrival of the ship, the goods insured were put on board a lighter hired in the usual way, and brought to the plaintiff's wharf in the evening; but not landed on account of the rough weather; the plaintiff then undertook to see to the landing himself, but in the night the lighter was by an unavoidable accident sunk and the goods lost:—Held, that the underwriters were discharged. *Strong* v. *Natally*, 1 Bos. & P. (N.R.) 16; 8 R. R. 741.

By a policy, assurance was made "including risk of craft to and from the ship," on linseed oil cakes, "free of particular average unless general, or the ship was stranded." The cakes were put on board a lighter at their destination, and the lighter stranded and sunk, whereby a particular average loss was sustained:—Held, that the underwriters were not liable. *Hofman* v. *Marshall*, 2 Bing. (N.C.) 383; 2 Scott, 559; 1 Hodges, 330; 5 L. J., C. P. 70. See also *Hopper* v. *Wear Marine Insurance Co.*, 46 L. T. 107; 4 Asp. M. C. 482, ante, col. 1051.

Lost in Government Warehouses.]—Upon a common policy on goods the underwriters are discharged if the goods are landed at the port of destination by the officers of government there, and are lodged in the government warehouses, if this is the usual mode in which goods are landed at that port, although the goods insured are afterwards confiscated by the government, and are never in the possession of the consignees. *Brown* v. *Carstairs*, 3 Camp. 161.

Removal and Reloading.]—A ship, having landed a cargo of guano at Patagonia, sailed for England, but being sea-damaged, put into Monte Video, in the river Plate. She there underwent repairs, a portion of her cargo having been removed for the purpose; and after refitting and reloading, she was sold, together with the cargo, to D. & Co., who caused her to be insured "at and from port or ports in the river Plate to the United Kingdom, beginning the adventure upon the goods and merchandises from the loading thereof aboard the ship at as above":—Held, that the removal and reloading of a portion of the cargo at Monte Video amounted to a constructive loading at that port, so as to satisfy the

terms of the policy, and that the underwriters were therefore liable. *Carr* v. *Montefiore*, 5 B. & S. 408; 33 L. J., Q. B. 256; 10 Jur. (N.S.) 1069; 11 L. T. 157; 12 W. R. 870—Ex. Ch.

Loss in Lighter.]—Goods lost after the owner has taken them from the ship into a lighter are no charge to the insurer. *Sparrow* v. *Caruthers*, 2 Str. 1235.

Risk of Craft till Goods landed—Transhipment from Lighters into export Vessel.]—A policy of insurance on goods which includes "all risk of craft until the goods are discharged and safely landed" does not cover the risk to the goods while waiting on lighters at the port of delivery for transhipment into an export vessel. *Houlder* v. *Merchants Marine Insurance Co.*, 55 L. J., Q. B. 420; 17 Q. B. D. 354; 55 L. T. 244; 34 W. R. 673; 6 Asp. M. C. 12—C. A.

d. What Port.

What is a Port.]—Policy on ship for four months, at and from a place to any port or ports whatsoever:—Held, that an open roadstead (being the usual place of loading and unloading) was a port within the meaning of this policy. *Cockey* v. *Atkinson*, 2 B. & Ald. 460; 21 R. R. 357.

Extent of Port.]—A policy "at and from Lyme to London" does not protect a cargo laden at Bridport within the port of Lyme, and eight miles nearer to London. *Constable* v. *Noble*, 2 Taunt. 403; 11 R. R. 617.

Port of Loading.]—If a policy is effected on goods on a voyage defined from A. to B., the risk to commence "at and from the loading thereof on board," not saying where, it must be intended a loading at the place from which the voyage commenced. *Spitta* v. *Woodman*, 2 Taunt. 416; 11 R. R. 628.

A policy on goods at and from G. to the ship's port of discharge, beginning the adventure on the goods from the loading aboard the ship, does not cover goods loaded at an anterior port, though they were in a loaded state and in good safety at G., just before effecting the insurance. *Mellish* v. *Allnutt*, 2 M. & S. 106; 14 R. R. 599.

An assured was entitled to recover a loss of goods insured at and from Landscrona to Wolgast, though they were shipped at Gottenburg before the ship arrived at Landscrona, and though the policy was declared to be at and from the loading of the goods on board the ship; it appearing that the underwriter was informed at the time when the goods were loaded on board at Gottenburg, and that part of them was landed and reloaded at Landscrona, so as to enable the custom-house officers there to ascertain the quality of the whole, and to adjust the duties, and the policy being free of average. *Nonnen* v. *Reid*, 16 East, 176. And see *Carr* v. *Montefiore*, supra.

Policy on goods at and from G. to any port in the Baltic, beginning the adventure from the loading on board the ship, and the policy was declared to be in continuation of a former policy; which was a policy from V. to her port of discharge in the United Kingdom, or any ports in the Baltic, with liberty to take in and discharge goods wheresoever, to return 12 per cent. if the voyage ended at G.:—Held, that the assured was entitled to recover, although the goods were not loaded on board at G. but at V., and although the defendant was not an underwriter on the former policy. *Bell* v. *Hobson*, 16 East, 240; 3 Camp. 272; 14 R. R. 337. And see *Harrower* v. *Hutchinson*, post, col. 1198.

Partial Discharge.]—If, on an insurance of goods only to a particular port, the ship touches at one port, and, after discharging part of her cargo proceeds with the residue to another, the insurance remains in force until her arrival at the latter port. *Leigh* v. *Mather*, 1 Esp. 411; 5 R. R. 740.

Secus, if the insurance is on ship and goods. *Ib.*

Goods on Board before Arrival at Port of Loading.]—A policy at and from G. on goods, beginning the adventure from the loading on board the ship, will not protect goods laden on board before the ship's arrival at G. *Langhorn* v. *Hardy*, 4 Taunt. 628; 13 R. R. 708.

Ship and goods insured at and from the coast of Brazil, and after September 17th to the Cape of Good Hope, beginning the adventure from the loading of the goods on the coast of Brazil, and from September 17th; with liberty to sail backwards and forwards to Portuguese ports; at four guineas per cent., to return 3*l.* 10*s.* should the ship have arrived or the risk determined on or before September 17th:—Held, that the policy did not cover cargo taken in at the Cape, and on board on September 17th, when the ship was on the Brazil coast; nor did it cover the ship. *Robertson* v. *French*, 4 East, 130; 4 Esp. 246; 17 R. R. 535.

Goods insured at and from L. to W. They were shipped to the knowledge of the underwriter at G. before the ship arrived at L. *Nonnen* v. *Reid*, 16 East, 176.

Previous Loading.]—Where a policy was on goods at and from Pernambuco to Maranham, and from thence to Liverpool, beginning the adventure on the goods from the loading thereof on board the ship wheresoever:—Held, that it would cover goods previously loaded at Liverpool, and which arrived at P., but were not unloaded there, and afterwards sustained a partial loss by wreck in the voyage from P. to M. *Gladstone* v. *Clay*, 1 M. & S. 418; 14 R. R. 479.

Under a policy upon a ship and cargo "at and from the coast of A. to her port and ports of discharge in the United Kingdom, beginning the adventure upon the goods and merchandise from the loading aboard the ship, twenty-four hours after her arrival on the coast":—Held, that no part of the outward cargo was covered by the policy, it not appearing on the face of the policy that the goods on board previously to the arrival on the coast of A. were intended to be insured. *Rickman* v. *Carstairs*, 2 N. & M. 562; 5 B. & Ad. 651; 3 L. J., K. B. 28.

Held, also, that a memorandum, valuing the cargo at a certain sum, did not operate to make the policy extend to cover a loss of portions of the outward cargo, which continued on board after the vessel had arrived on the coast. *Ib.*

"At and from" a Foreign Port.]—A policy upon a homeward voyage from India, upon goods at and from a foreign port of loading, until the ship's arrival in London, beginning the adventure upon the goods from the loading at the foreign port of loading, and so to continue upon the goods until the same should be discharged, attaches only on the particular cargo taken at the first port of loading. *Grant* v. *Paxton*, 1 Taunt. 463; 10 R. R. 583.

Where a vessel is insured "at and from" a foreign port at which she is expected to arrive, the risk attaches when she first arrives at the port in such a seaworthy condition as to be enabled to lie there in safety. *Haughton* v. *Empire Marine Insurance Co.*, 4 H. & C. 41; 35 L. J., Ex. 117; L. R. 1 Ex. 206; 12 Jur. (N.S.) 376; 15 L. T. 80; 14 W. R. 645.

A ship was insured on a valued policy, lost or not lost, at and from Havana to Greenock. Upon arriving inside the harbour of Havana she proceeded up the harbour in charge of a pilot. When past the mass of the shipping lying off the city of Havana, and past the point where she was ultimately discharged, she began to stir up the mud, whereupon the pilot ordered her to be anchored. She sustained damage from settling down on the anchor of another ship:—Held, that the word "at" was to be construed in its ordinary and geographical sense, and that it was equivalent to "at her first arrival at"; and therefore the policy attached immediately on the ship entering the natural boundaries of the harbour of Havana. *Ib.*

A policy, at and from a foreign port, attaches when the ship has arrived there in good physical safety, although, from physical causes, she may be in great danger of condemnation. *Bell* v. *Bell*, 2 Camp. 475; 11 R. R. 769.

On a policy at and from Pernambuco, or any other port or ports in the Brazils, to London, "beginning the adventure from the loading the goods on board the ship on the termination of her cruise, and preparing for her voyage to London." The ship, on the termination of her cruise, touched at Pernambuco, but failing to procure a cargo there, she proceeded to St. Salvador, and was lost on her voyage thither:—Held, that the policy attached at Pernambuco. *Lambert* v. *Liddard*, 1 Marsh. 149; 5 Taunt. 480; 15 R. R. 557.

Last Port of Discharge.]—Last port of discharge held to mean not the original port of destination, but the port where the ship in fact discharged. *Moffat* v. *Ward*, 4 Dougl. 31.

Cargo taken in Outside Bar.]—Insurance at and from Oporto. A ship according to usage took in part of her cargo inside and part outside the river bar, and whilst loading outside was caught by bad weather and lost:—Held, that the indemniters were liable, being bound to know the usage. *Kingston* v. *Knibbs*, 1 Camp. 508; 10 R. R. 742.

Ship never going to Island named—Usual Mode of Loading.]—Policy on goods "at and from the ship's loading port or ports in Amelia Island to London." The ship never touched at Amelia Island, but went further up the St. Mary's river to Tiger Island, where she took in her cargo:—Held, that the policy attached, this being the usual mode of loading in the trade. *Moxon* v. *Atkins*, 3 Camp. 200; 13 R. R. 789.

"At and from Port."]—Where the plaintiffs proposed to insure a wheat cargo "at and from" port, and the defendants, "in accordance with your written request," granted an insurance "from" port:—Held, that there was a complete contract to insure "at and from" port. *Colonial Insurance Co. of New Zealand* v. *Adelaide Marine Insurance Co.*, 56 L. J., P. C. 19; 12 App. Cas. 128; 56 L. T. 173; 35 W. R. 636; 6 Asp. M. C. 94.

Goods in Store Ship—Transhipment.]—Insurance on goods from Malaga to Gibraltar, and from thence to England and Holland, or either; with liberty to tranship the goods at Gibraltar into a British ship or British ships for England or Holland. There being no British ship at Gibraltar, the goods were, according to custom, put on board a store ship, and there lost:—Held, that the underwriters were liable. *Tierney* v. *Etherington*, cited 1 Burr. 348.

Delay at Intermediate Port.] — Goods and freight were insured at and from L. to M. V. and B. A., if open, or the ship's final port of discharge in the river P., with liberty to wait two months at M. V., if needful, at a premium of five guineas per cent., to return 2*l.* per cent. for risk ending at M. V. on arrival. The vessel arrived on the 2nd of August at M.V., which was then blockaded by an enemy's fleet, to prevent vessels passing to B. A. The blockade did not cease till the 4th of October. The vessel afterwards sailed for B. A., and was lost:—Held, that the risk was at an end as soon as the vessel had stayed two months at M. V., and the underwriters were therefore discharged. *Doyle* v. *Powell*, 4 B. & Ad. 267; 1 N. & M. 678.

2. On Ship.

a. Extent of Liability.

Preparing for Voyage — Undue Delay.] — Whilst a ship is preparing for the voyage upon which she is insured, the insurer is liable; but if the voyage is laid aside, and the ship lies by for five, six, or seven years, with the owner's privity, the insurer is not liable. *Chitty* v. *Selwyn*, 2 Atk. 359.

Description of Voyage.]—If parties describe in the usual terms the voyage they insure, both knowing that the adventure has deviated from that description, they are nevertheless bound by the description they have chosen, and the previous deviation is fatal. *Redman* v. *Loudon* or *Lowden*, 5 Taunt. 462; 1 Marsh. 136; 3 Camp. 503.

Time or Voyage Policy.]—A ship insured "at and from the port of Pomaron to Newcastle-on-Tyne, and for fifteen days whilst there after arrival," arrived safely at Newcastle on the 4th of December, and on the 13th completed the discharge of her inward cargo within the port of Newcastle. Having been chartered to load in the River Tyne a cargo of coals for delivery at Gibraltar, and having received on board two keels of the same as a stiffening, the ship was moved on the 15th of December to a loading place on the Tyne, within the port of Newcastle, there to complete her loading. Whilst moored there, she was, on the 16th, injured in a storm. The stamp on the policy was sufficient to cover both a voyage and a time policy. The policy did not contain the usual twenty-four hours' clause:—Held, that the policy must be construed as a voyage policy with a time policy engrafted upon it, and that, although the voyage was terminated and the inward cargo discharged, the underwriters were liable. *Gamble* v. *Ocean Marine Insurance Co. of Bombay*, 45 L. J., Ex. 366; 1 Ex. D. 141; 34 L. T. 189; 24 W. R. 384; 3 Asp. M. C. 180—C. A.

In such a policy the provision as to the further period after arrival is not a mere expansion of the period covered by the voyage policy so as to

require that the ship up to the time of the loss should not be engaged in a matter unconnected with purposes of the voyage insured. That provision, though appended to a voyage policy, is to be administered upon the principles applicable to a time policy. *Ib.*

To a Port.]—The risk on a vessel under a policy to a place generally, without any provision as to her safety there, continues until she is anchored at her port of destination, in the usual place for discharge of her cargo. *Stone* v. *Ocean Marine Insurance Co. of Gothenburg*, 45 L. J., Ex. 361 ; 1 Ex. D. 81 ; 34 L. T. 490 ; 24 W. R. 55 ; 3 Asp. M. C. 152.

By a memorandum indorsed on a policy made by way of reinsurance on a vessel from Liverpool to Baltimore and United Kingdom, the vessel, in consideration of an additional premium, was to be at liberty to go to Antwerp. On leaving Baltimore, she went direct to Antwerp, where she arrived the day before the memorandum was made. Two days after, while in the outer dock, on her way into the inner dock, the usual place of discharge, she was ordered to Leith, on her way to which place she was lost. In an action on the policy or for a return of the additional premium :—Held, that the memorandum did not give liberty to touch or call at Antwerp, and so did not permit the vessel to go to Antwerp, and thence to England ; and that, as the vessel had not, when the memorandum was made, reached the usual place of discharge, the voyage was not then at an end, and the additional premium could not be recovered back. *Ib.*

"At and from a Port."]—In a voyage policy of insurance "at and from" a port, it is an implied understanding that the ship shall be at the port within such a time that the risk shall not be materially varied ; and if there is delay beyond such time, the policy does not attach. *De Wolf* v. *Archangel Maritime Bank and Insurance Co.*, 43 L. J., Q. B. 147 ; L. R. 9 Q. B. 451 ; 39 L. T. 605 ; 22 W. R. 801 ; 2 Asp. M. C. 273.

Where the words of a policy are "at and from England to Bengal," the first arrival of the ship at Bengal is implied, and shall be so understood ; but if a ship is decayed, and goes to the nearest port for repair, it is the same as if she was repaired at the place from whence she came. *Motteux* v. *London Assurance Co.*, 1 Atk. 545.

In a homeward policy the words "at and from" a named port, are to be construed in their natural geographical sense without reference to the expiration of an outward policy "to" the same place ; therefore the policy attaches as soon as the vessel arrives within the port.

A vessel insured "at and from" Havana was injured by striking an anchor whilst proceeding up the harbour to her place of discharge :—Held, that the policy attached. *Haughton* v. *Empire Marine Insurance Co.*, 4 H. & C. 41 ; 35 L. J., Ex. 117 ; L. R. 1 Ex. 206 ; 12 Jur. (N.S.) 376 ; 15 L. T. 80 ; 14 W. R. 645.

What Ports.]—In an action on a policy on a voyage, "to any port in the Baltic," evidence was admitted to prove that the Gulf of Finland is considered in mercantile contracts as within the Baltic, although the two seas are treated as separate and distinct by geographers. *Uhde* v. *Warlters*, 3 Camp. 16 ; 13 R. R. 737.

A policy at and from Martinique and all and every West India Island, warrants a course from Martinique to islands not in the homeward voyage. *Bragg* v. *Anderson*, 4 Taunt. 229 ; 13 R. R. 584.

In an action on a policy on a voyage "at or from the port or ports of discharge and loading in India and the East India Islands," evidence was admitted to show that the Mauritius was considered in mercantile contracts as an East India Island, although treated by geographers as an African island. *Robertson* v. *Money*, Ry. & M. 75 ; 27 R. R. 732.

But the court afterwards decided that the Mauritius was not in the East Indies, nor was it an Indian Island. *Robertson* v. *Clarke*, 1 Bing. 445 ; 8 Moore, 622 ; 2 L. J. (O.S.) C. P. 71 ; 25 R. R. 676.

Under an insurance from the port of loading a loading at one single place only is authorised. *Brown* v. *Tayleur*, 5 N. & M. 472 ; 1 Hurls. & Walms. 578 ; 4 A. & E. 241 ; 5 L. J., K. B. 57.

Under a policy at and from an island, a ship is protected in moving from port to port in the same island. *Cruickshank* v. *Janson*, 2 Taunt. 301 ; 11 R. R. 584.

If a policy describes a voyage at and from a place which is the head of a port, it will not cover a voyage at and from a distant place which is a member of the same port. *Payne* v. *Hutchinson*, 2 Taunt, 405, n. ; 11 R. R. 620.

Voyage Specified — Further Voyage not Covered.]—A policy covering a specific voyage cannot be extended by implication to cover a further voyage, although circumstances (of war) make the further voyage necessary. *Parkin* v. *Tunno*, 2 Camp. 59 ; 11 East, 22 ; 10 R. R. 422.

Intermediate Voyage.]—Policy on ship at and from Newfoundland to Portugal, upon goods, begining the adventure from the loading thereof. Before loading the fish she made an intermediate short voyage with coals, according to the usage of the Newfoundland trade :—Held, that the usage could be proved and that the policy attached. *Ougier* v. *Jennings*, 1 Camp. 505 ; 10 R. R. 739.

—— **East India Company's Ship.**]—A policy in common form upon goods to the East Indies, ceases when the ship has delivered the company's outward cargo in the East Indies, and will not protect the goods to a market in an intermediate voyage made by the ship before her return to Europe. *Richardson* v. *London Assurance Co.*, 4 Camp. 94.

From L. to R.—Ship never reaching R.]—A ship insured from L. to R., on approaching R. ascertained that an embargo was laid upon all ships of her nation. She thereupon sailed home to L. and was lost :—Held, the assurers not liable. *Blackenhagen* v. *London Assurance Co.*, 1 Camp. 454 ; 10 R. R. 729.

Until Ship Discharged.]—Policy to run until the ship shall have ended and be discharged of her voyage :—Held, arrival at port of discharge is not a discharge until she be unloaded. *Anon.*, Skinner, 243.

"Last Port of Discharge."] — A ship was insured from London to any port or ports in the River Plate, until her arrival at her last port of discharge in that river; and the master, intending to discharge her cargo at Buenos Ayres, passed

Maldonado, but hearing that Buenos Ayres was then in the hands of the enemy, he went to Monte Video, with intent to make a complete discharge there, if the market was favourable; but after discharging a part, and not finding the market there so favourable as he expected, he had not abandoned his original intention of going to Buenos Ayres, if it should afterwards be practicable; but while he was still discharging part of his cargo at Monte Video, a loss happened by a peril of the sea:—Held, that as Buenos Ayres, to which other port only in the Plate he had contemplated to go, was at the time of his arrival in the Plate (and in fact continued up to the time of the loss) in the hands of the enemy, so that he could not legally go there, Monte Video must be taken to be the ship's last port of discharge, and that on her arrival there the policy was discharged. *Brown* v. *Vigne*, 12 East, 283; 11 R. R. 375.

Upon an insurance from England to Barbadoes and all or any of the West India colonies, to continue until the ship shall be arrived at her final port of discharge, the risk terminates on the discharge of the outward cargo at any of the colonies. *Moore* v. *Taylor*, 3 N. & M. 406; 1 A. & E. 25; 3 L. J., K. B. 132.

"Whilst in Port"—Fairway of Navigable Channel.]—A ship insured for a voyage to any port of discharge in the United Kingdom, "and whilst in port during thirty days after arrival," arrived at Greenock, discharged her cargo, and was placed in a dock for repairs. Within thirty days after her arrival she left the dock in ballast for the port of Glasgow, in tow of a steam-tug, to proceed on a new voyage, and had reached the fairway of the channel of the Clyde, her stern being about 500 feet distant from the harbour works when she was capsized by a sudden gust of wind, and sustained damage:—Held, that the ship at the time of the accident was not "in port" within the meaning of the policy, and that the underwriters were not liable. "*Garston*" *Sailing Ship Co.* v. *Hickie* (15 Q. B. D. 580) discussed. *Hunter* v. *Northern Marine Insurance Co.*, 13 App. Cas. 717—H. L. (Sc.)

What Ship.]—Plaintiff insured, interest or no interest, on any ship he should come in from Virginia to London, beginning the adventure on his embarking; the money to be paid though his person should escape or the ship be retaken. He embarked on the "S." but she springing a leak he went on board the "F." and arrived at London. The "S." was captured after he left her:—Held, the underwriter was liable. *Dick* v. *Barrell*, 2 Str. 1248.

Time of Sailing.]—On an assurance of a vessel at and from New York to Quebec, during her stay there, thence to the United Kingdom, the ship being warranted to sail from Quebec on or before the first of November, 1853:—Held, that the assurer was liable for a loss occurring on her voyage to Quebec after the 1st of November, 1853. *Baines* v. *Holland*, 10 Ex. 802; 3 C. L. R. 593; 24 L. J., Ex. 204.

Loss after Expiration of Time—Damage within.]—Where a ship, insured for 1,000*l.* under a time policy ending on the 23rd September, whilst attempting on the 16th September, to enter the harbour of Santa Cruz, took the ground and remained fast, on a rocky bottom, till the tide flowed, and was then got off and brought into harbour, where she remained with her crew on board, but kept afloat by pumping till the middle of October, when she was beached, and it was found that, by the accident of the 16th September, she had been so damaged that the necessary repairs could not be made at Santa Cruz, and that to take her to the nearest port, at Monte Video, was more than a prudent owner could be expected to do, and where the master, in consequence, sold her at Santa Cruz, for the benefit of all concerned, for 72*l.* 10*s.*:—Held, first, that there was no actual total loss within the time stipulated by the policy. *Knight* v. *Faith*, 15 Q. B. 649; 19 L. J., Q. B. 509; 14 Jur. 1114.

Held, secondly, that it was sufficiently proved that there was actually a partial loss within the time, although neither the nature nor the extent of that loss was ascertained by examination until after the expiration of the time. *Ib.*

Held, also, that although the ship was to be considered as totally lost after the expiration of the risk, in consequence of the injury of the 16th September, yet, since the insurers were not liable for the total loss they were not thereby exempted from their liability to pay the partial loss, arising from the same injury, which was suffered during the risk, and continued prejudicial to the assured even to the time of action brought. *Ib.*

"Coasting Trade."]—A ship whilst on a voyage from Sunderland to Bordeaux, lost off the coast of Norfolk, is not employed in the "coasting trade" at the time of loss, so as to escape the stipulated deduction from the insurance in respect of the extra risk incurred by a voyage "crossing the North Sea or the Bay of Biscay, or to any port south of Brest." *Harvey* v. *Beckworth*, 2 H. & M. 429; 4 N. R. 255; 10 Jur. (N.S.) 577; 10 L. T. 632; 12 W. R. 896—C. A.

Continuing Policy.]—A policy was made on a vessel for a year by an insurance association, by the rules of which the insurance was to be from year to year, unless notice to the contrary was given, and the managers, unless they received ten days' notice to the contrary, were to renew the policy on its expiration:—Held, that according to the term of such rules, and 30 & 31 Vict. c. 23, s. 8 (which makes null a policy exceeding twelve months) the policy was not a continuing one, but expired at the end of the year. *Lishman* v. *Northern Maritime Insurance Co.*, 44 L. J., C. P. 185; L. R. 10 C. P. 179; 32 L. T. 170; 23 W. R. 733—Ex. Ch.

Freight was insured by a club policy from the 24th of January, 1852, to the 1st of March, 1852, subject to the rules of the association, one of which was as follows:—"That the committee, unless they receive ten days' notice to the contrary, shall renew each policy on its expiration, except in cases where it may be deemed expedient not to renew, when the committee shall cause similar notice to be given to the parties." No notice having been given:—Held, that this was a continuing policy, and not merely a policy to come till the 1st of March. *Michael* v. *Gillespy*, 2 C. B. (N.S.) 627; 26 L. J., C. P. 306; 3 Jur. (N.S.) 1219.

Time of Execution of Policy.]—Where, by the rules of an insurance association, insurances were to commence on the day on which the ship was accepted by the committee, and to continue in force for twelve months, a ship accepted in

February, and lost in June, was well insured by a policy executed 3rd October. *Mead* v. *Davison*, 4 N. & M. 701; 3 A. & E. 303; 1 H. & W. 156; 4 L. J., K. B. 193.

On and off Risk—Consideration.]—A declaration on a policy stated that the policy was made by the plaintiff and the defendants, whereby the latter insured the former's vessel for twelve months (setting out the terms of the policy containing certain warranties). The declaration stated that at the time of the making of the policy the defendants were used and accustomed to allow to all persons insuring ships with them for the period of twelve calendar months to take their vessels off risk for any one or more entire month or months for which such vessels were insured, and upon giving notice to the insured to consider such vessels as off risk, and not subject to any of the terms of such policies until such vessels were again taken upon risk and notice given to the defendants, and to make a return to the persons so insured of part of the premium during each of such entire month or months. The declaration averred that the plaintiff had notice of the custom, that the vessel was taken off risk for a month and that the plaintiff had claimed 3*l.* 12*s.* as a return of the premium, and that it was agreed between the plaintiff and defendants that the sum should be accepted in discharge of the claim, and that the vessel should be considered as again on risk for the residue of the twelve months, and that the policy should continue in full force for the unexpired residue of such period. The declaration contained an averment that the vessel was again on risk, and that during the residue of such period she was wholly lost. There were averments of compliance with the warranties by the plaintiff during the continuance of the policy, and after the vessel was again on risk:—Held, that the declaration was bad in substance for not alleging a compliance with the warranties during the whole period the vessel was on risk, for that either the vessel was on risk again under the original contract or upon a new agreement, in which latter case the agreement was void for want of a sufficient consideration. *Hutchinson* v. *Read*, 4 Ex. 761; 19 L. J., Ex. 222.

"Port or ports"—Risk Covered—Ports of Loading and of Discharge.]—In a policy of marine reinsurance the voyage covered by the policy was described as "at and from Newcastle (N.S.W.) to any port or ports, place or places, in any order, on West Coast of South America, and for thirty days after arrival in final port, however employed":—Held, that the policy covered risks at both ports of loading and ports of discharge on the West Coast of South America, and was not limited to risks at the port of final discharge of the cargo from Newcastle, and thirty days after. *Crocker* v. *Sturge*, 66 L. J., Q. B. 142; [1897] 1 Q. B. 330; 75 L. T. 549; 45 W. R. 271; 8 Asp. M. C. 208.

"In Port," Meaning of.]—In a policy for a voyage and "while in port thirty days after arrival":—Held, that "in port" as applied to Greenock did not include the fairway of the navigable channel of the Clyde off the harbour works. *The Afton (Owners)* v. *Northern Marine Insurance Company*, 14 Ct. of Sess. Cas. (4th ser.) 544.

Fire in Dock—"Intended to Navigate."]—A policy against loss by fire described a steamboat as "now lying in Tait's Dock, Montreal, and intended to navigate the St. Lawrence and lakes from Hamilton to Quebec principally as a freight-boat, and to be laid up in winter in a place approved by the insurers, who will not be liable for explosion either by steam or gunpowder." The steam-boat never left Tait's Dock, and was burnt there:—Held, that the words in the policy implied no agreement to navigate the steamboat as described in the policy, and that consequently the insurers were liable, though the steamboat never left the dock. *Grant* v. *Ætna Insurance Co.*, 15 Moore, P. C. 516; 8 Jur. (N.S.) 705; 6 L. T. 735; 10 W. R. 772.

Three Months' Cruise—Mutiny.]—Insurance on a cruise for three months, the sailors mutinied and brought the ship into port: the insurance is not due. *Pole* or *Poole* v. *Fitzgerald*, Ambl. 145; Willes, 641; 4 Bro. P. C. 439.

Insurance of Pumps—"While at Wreck."]—A policy of insurance stated the risk to be on four pumps "at and from Ardrossan to the 'Alexandra' steamer ashore in the neighbourhood of Drogheda, and while there engaged at the wreck and until again returned to Ardrossan by the 'Sea Mew' salvage steamer, beginning the risk from the loading on board the said ship and [or] wreck, including all risk of craft and for boats to and from the vessel and while at the wreck":—Held, that the words of the policy did not include the risks while the pumps were on board the wreck on a voyage to Belfast, a port of safety. *Wingate* v. *Foster*, 47 L. J., Q. B. 525; 3 Q. B. D. 582; 38 L. T. 737; 26 W. R. 650; 3 Asp. M. C. 598—C. A.

—— **Pumps engaged "at the Wreck."**]—A policy of insurance was effected on salvage pumps insured "from the 30th of December, 1882, to the 12th of January, 1883, . . . whilst engaged in salvage operations at the wreck of the 'C.,'" "including all risk whilst being conveyed from B. to $\frac{\text{and}}{\text{or}}$ on board the wreck." It was shewn that the "C." was floated by means of the pumps which were brought from B., and placed on board her, and that she was kept afloat by the pumps, and that she partly steamed and partly was towed by another vessel for a distance of nearly forty miles, until she had almost reached B., the nearest port of safety, when she sank in deep water, with the salvage pumps on board, on the 4th of January, 1883:—Held, that the loss was not covered by the policy. *Difiori* v. *Adams*, 53 L. J., Q. B. 437; 1 Cab. & E. 228.

Quarantine—Loss during.]—Ship insured from Leghorn to London, and till there moored twenty-four hours in safety. She arrived on the 8th July at Fresh Wharf, but the same day was ordered back to the Hope to perform quarantine. On the 12th her master applied to be excused, her seamen having deserted on the 9th; on the 30th she was finally ordered back to the Hope, and whilst there was burnt:—Held, that the insurers were liable. *Waples* v. *Eames*, 2 Str. 1243.

b. Termination on Mooring.

Lying in Dock for Repairs.]—A time policy against fire was effected on a steamship. The policy described it as then "lying in the Victoria

Docks," but gave it liberty "to go into dry dock, and light the boiler fires once or twice during the currency of this policy." The only dry dock into which the ship could go was Lungley's Dock, at some distance up the river. To go there it was necessary to remove the paddle-wheels; they were removed in the Victoria Docks, and the ship was then towed up to Lungley's Dock. The necessary repairs there having been completed, the ship was brought out and moored in the river, preparatory to replacing the paddle-wheels. This operation could have been perfectly performed in the Victoria Docks, but it was found that in such case it was customary, as the more economical course, to replace the paddle-wheels while the ship lay in the river. Before the wheels had been replaced the ship was burnt:—Held, that the policy covered the ship while in the Victoria Docks, and while passing from them to the dry docks, and while directly returning from the dry docks to the Victoria Docks; but did not cover the vessel while moored in the river for a collateral purpose. *Pearson* v. *Commercial Union Assurance Co.*, 45 L. J., C. P. 761; 1 App. Cas. 498; 35 L. T. 445; 24 W. R. 951—H. L. (E.) See also *Gamble* v. *Ocean Marine Insurance Co.*, 1 Ex. D. 141; and *Stone* v. *Ocean Marine Insurance Co. of Gothenburg*, 1 Ex. D. 81, ante, col. 1059.

Twenty-four Hours in Safety.]—By a Lloyds' policy on ship, the risk was described in writing to be "at and from London to Calcutta, and for thirty days after arrival," and then followed the usual printed words, "upon the ship, &c., until she hath moored at anchor twenty-four hours in good safety."—After having sustained damage at sea to such an extent as to require constant pumping to keep her afloat, the vessel arrived at Calcutta, and was safely moored there on the 28th of October, 1866. Her cargo was unloaded in safety by the 8th of November. It was necessary to continue the pumping during the discharge of the cargo until she was much lightened. On the 12th she was taken from her moorings to a dry dock for survey and repair, and was there destroyed by an accidental fire on the 5th of December:—Held, that as the vessel remained at her moorings more than twenty-four hours as a ship, though damaged, and not as a mere wreck, she had been moored "twenty-four hours in good safety," and as her destruction did not take place until after thirty days from that time, that the risk had terminated at the time of the loss. *Lidgett* v. *Secretan*, 39 L. J., C. P. 196; L. R. 5 C. P. 190; 22 L. T. 272; 18 W. R. 692. *S. C.*, on another point, infra, col. 1141.

The outward risk upon a ship ceases after she has been moored at anchor twenty-four hours in the first port of an island to which she is destined; but an outward policy upon goods continues until they are landed. *Barras* v. *London Assurance Co.*, 1 Esp. 411.

An insurance on a ship to Jamaica is determined by the ship's mooring twenty-four hours in any port there, and does not continue till she comes to the last port of delivery. *Camden* v. *Cowley*, 1 W. Bl. 417.

A ship being insured for a voyage, the underwriter is not liable for any loss arising from seizure, after she has been twenty-four hours in port; though such seizure was in consequence of an act of smuggling committed by the master during the voyage. *Lockyer* v. *Offley*, 1 Term Rep. 252; 1 R. R. 194.

When, immediately upon the arrival of a ship at Riga, her papers were taken, and her hatches sealed down by the officers of government, and so kept till her papers were sent to St. Petersburg to be examined; and on such examination immediate orders were issued for the seizure of the ship and cargo, which were afterwards condemned for carrying simulated papers:—Held, that this was not a mooring twenty-four hours in safety after her arrival, within those words in the policy. *Horneyer* v. *Lushington*, 15 East, 46; 3 Camp. 85; 13 R. R. 759.

Policy at and from the island of St. Michael's. The ship arrived there in a very disabled state, and after lying at anchor twenty-four hours in great danger from a storm, was blown out to sea and wrecked:—Held, that the policy on the homeward voyage never attached. *Parmeter* v. *Cousins*, 2 Camp. 235; 11 R. R. 702.

—— **Inability to enter Dock.**]—A vessel insured from Sierra Leone to London, and upon which the insurance was to endure until she had been moored in good safety twenty-four hours, arrived in the evening of the 18th February, and the captain, having orders to take her into the King's Dock at Deptford, moored her near the dock gates. On the following morning he was informed at the dock that no order for his admittance had been received; but that, if it had, the vessel could not be then admitted, on account of the quantity of ice in the river. The order was sent by the navy board on the 21st, but on account of the ice the ship could not be moored until the 27th, and then, in warping her towards the docks, a rope broke, she grounded, and was totally lost. The jury found that the vessel remained at her moorings from the 18th to 27th of February, on account of the ice, and not for want of an order to enter the dock:—Held, that upon this finding, the plaintiff was entitled to recover, as the place where the ship was moored not being that of her ultimate destination, the policy did not expire when she had been there in safety twenty-four hours; and as the vessel remained at those moorings on account of the ice, and not waiting for the order, the underwriters were not discharged by the delay. *Samuel* v. *Royal Exchange Assurance Co.*, 8 B. & C. 119; 6 L. J. (o.s.) K. B. 315.

Arrival at Port — Question for Jury.] — Declaration on a policy of insurance on the barque "S." "from Swan river to Mauritius and for thirty days after arrival," averring a total loss; plea that the ship was unnecessarily delayed and abandoned, and deviated from her voyage. It was proved that ships bound for Mauritius loaded, usually go into the harbour of Port Louis. If in ballast or seeking, they usually anchor at the bell-buoy at sea, a few miles from the harbour. The "S." sailed in ballast from the Swan river to Mauritius, and on her arrival there anchored near the bell-buoy for fourteen days, awaiting the arrival of money to pay a bottomry bond, and at end of that period was wrecked:—Held, that it was a question of fact for the jury, whether she had arrived at Mauritius. *Lindsay* v. *Janson*, 4 H. & N. 699; 28 L. J., Ex. 315.

Policy ceases on Arrival of Ship in Absence of Provision to contrary.]—In the absence of any period being mentioned in the policy during which the ship is to be at the risk of under-

writers after her arrival, the policy determines on the ship being moored at her port of arrival. *Anon.*, Skinner, 243.

Until Moored.]—Policy on a vessel at and from Liverpool to Quebec, during her stay there, and from thence back to her discharging port, in the United Kingdom, and until she has moored at anchor twenty-four hours in good safety. The vessel was chartered to take on board a cargo at Quebec, and proceed therewith to Wallasey Pool, in the river Mersey, or as near thereto as she could safely get, and there discharge her cargo. She arrived from Quebec in the Mersey, on the 4th of September, and was towed up the next morning, and came abreast of Wallasey Pool, where, being unable to enter the pool by reason of her great draught of water, the captain anchored, and reported the vessel at Liverpool. He engaged lumpers to discharge the cargo, at a fixed rate of payment, and discharged the crew. The deck cargo, and also a considerable portion of the other cargo having been discharged, on the 14th of September the vessel fell over and sustained injury. The captain had always intended to take the vessel into Wallasey Pool, with as much of the cargo as she could safely carry:—Held, that the vessel had arrived at her port of discharge, was in the course of discharging her cargo, and had moored twenty-four hours in safety, and that the underwriters were not liable. *Whitwell* v. *Harrison*, 2 Ex. 127; 18 L. J., Ex. 465.

—— **Printed and Written Conditions Dissimilar.**]—By a policy effected by B. & Co. on a ship, they caused themselves "to be insured, lost or not lost, at and from L. to any port or ports, in any order, backwards and forwards, and during thirty days' stay in her last port of discharge." In another part of the policy there was the usual clause, whereby she was insured "until she has moored at anchor twenty-four hours in good safety." The clause as to the thirty days was in writing; that as to the twenty-four hours in print. The ship arrived at her last port of discharge at 7 p.m., on the 25th May, 1863, where she remained until 3.45 a.m. on the 24th June, 1863, when she was driven on shore and wrecked:—Held, that the thirty days had not expired, and that the loss was covered by the policy. *Mercantile Marine Insurance Co.* v. *Titherington*, 5 B. & S. 765; 34 L. J., Q. B. 11; 11 Jur. (N.S.) 62; 11 L. T. 340; 13 W. R. 141.

Moving in Harbour.]—Under a policy on a ship for a given time, while securely moored in a certain harbour, she is warranted in changing her moorings within the same harbour. *Anon.* v. *Westmore*, 6 Esp. 109.

c. Time Policy.

Time Policy—Chartered Freight.]—The plaintiffs were the owners of a vessel which they chartered on certain terms as regards payment of freight for six months from the 21st of March, 1881, with the option to the charterer of extending the time for a period of three or six months. A clause in the charterparty provided that, in the event of loss of time by collision, whereby the vessel was rendered incapable of proceeding for more than forty-eight hours, payment of hire was to cease until such time as she was again in an efficient state to resume her voyage. On the 4th of April, 1881, the plaintiffs insured against loss of freight with the defendant "at and from and for and during the space of six calendar months from the 15th of April to the 14th of October, 1881," the defendant to pay only loss of hire which might arise under the clause in the charterparty "for accidents occurring between the 15th of April and the 15th of October." On the 27th of June, 1881, the vessel, while on a voyage, struck something soft with her bottom, but was able to proceed on her voyage, and it was not until the 18th of November, when she arrived at Liverpool, that it was discovered that she required considerable repairs, owing to damage admittedly caused by the accident in June. The charterers, who had exercised their option of continuing the charter until the 21st of December, thereupon gave notice to the plaintiffs discontinuing the hire until the vessel was in a fit state to resume employment, which she never was until the end of December:—Held, that as the policy was a time policy, the loss insured against must happen during the period covered by the policy; and that the defendant's liability being confined to loss of chartered freight between the 15th of April and the 15th of October, could not be extended so as to include loss of hire which only occurred after the expiration of that time. *Hough* v. *Head*, 55 L. J., Q. B. 43; 53 L. T. 809; 34 W. R. 160; 5 Asp. M. C. 505—C. A.

Loss after Expiration of Policy—Death-wound received before.]—Where a ship received the injury which ultimately caused her loss during the period for which she was insured, and was kept afloat by pumping for some days and until after the expiration of that period, when she sank, it was held that the underwriter was not liable. *Meretony* v. *Dunlope*, cited, 1 Term Rep. 260; 1 R. R. 194.

d. On Freight.

When it Attaches.]—The risk on freight does not attach until goods are either actually shipped on board, or until there is an actual contract for shipping them. *Flint* v. *Flemyng*, 1 B. & Ad. 45; 8 L. J. (o.s.) K. B. 350.

Where there is a valued policy on freight, and the ship is lost while taking in her cargo, the assured can only recover for the freight of the goods actually on board, unless a full cargo is then provided for her, or there is a contract either written or parol to supply one. *Patrick* v. *Eames*, 3 Camp. 441.

Printed and Written Clauses in Policy—Refrigerating Machinery.]—A policy of insurance upon freight of a cargo of frozen meat in a ship fitted with refrigerating machinery, provided (in writing), that the assurors should be liable "for any loss occasioned by breaking down of machinery until final sailing of vessel." The voyage was stated to be at and from "Monte Video to any ports in any order backwards and forwards in the river Plate, and thence to any port of the United Kingdom," these words being also in writing. The insurance was to commence "upon the freight and goods or merchandise on board thereof from the loading of the said goods or merchandise on board the said ship or vessel at Monte Video." This last clause was in print, except "Monte Video," which was written. The

assured had contracted with the charterers that they would not receive meat on board until the temperature had been reduced to a specified degree by the refrigerating machinery. The charterers had contracted to pay freight on the arrival of the ship at the port of discharge on all meat which had been shipped. It was known to all parties that no meat ever was or could be shipped at Monte Video. The ship having discharged her outward cargo at Monte Video, proceeded to Buenos Ayres, both of them ports in the river Plate. After her refrigerating machinery, which was set at work at Monte Video, had been at work for two weeks, it broke down in such a way as to be useless before the requisite coldness had been attained. No meat was ever received on board, and notice of abandonment was given to the assurors. In an action on the policy by the assured to recover the amount of freight insured:—Held, that the liability under the policy for loss of freight occasioned by the breaking down of machinery attached at Monte Video, and was not only to attach upon the loading of the meat on board; the printed words, "from the loading of the said goods on board the said ship," being capable of being read as applying only to an insurance upon goods, and not to an insurance upon freight, and that being, under the circumstances, the proper construction. *Hydarnes Steamship Co.* v. *Indemnity Mutual Marine Insurance Co.*, 64 L. J., Q. B. 353; [1895] 1 Q. B. 500; 14 R. 216; 72 L. T. 103; 7 Asp. M. C. 553—C. A.

Engagement of Goods—Loading Port.]—A policy on freight "at and from" Valparaiso does not attach if the ship be lost before arrival at Valparaiso, notwithstanding that a subsequent clause provides that the policy is "to cover freight from the time of the engagement of the goods," and that the goods were engaged before the ship was lost. *The Copernicus*, 65 L. J., Adm. 108; [1896] P. 237; 74 L. T. 757; 8 Asp. M. C. 166—C. A.

"From the Loading."]—The plaintiffs, shipowners, by a policy of insurance underwritten by the defendants, caused "themselves to be insured, lost or not lost, at and from Libau to Bordeaux, upon freight (valued at interest), of and in the vessel 'Hawthorn,' beginning the adventure upon the said goods or freight from the loading thereof, on board the said ship at Libau, and to continue and endure during the said vessel's abode there, and until the said vessel shall have arrived at Bordeaux, and the said goods shall be safely delivered from the said ship." The plaintiff's said vessel commenced loading at Libau a cargo of oats for Bordeaux, and a portion of the cargo was in lighters alongside, and was about to be transferred to the said vessel, when, by reason of the perils of the sea, the said lighters and portion of cargo were wholly lost, and the plaintiffs were prevented from earning the freight insured:—Held, upon demurrer, that the plaintiffs could not recover. *Hopper* v. *Wear Marine Insurance Co.*, 46 L. T. 107; 4 Asp. M. C. 482.

A ship was chartered to carry a cargo from Liverpool to Lagos, on the west coast of Africa, there discharge, and reload another cargo for the United Kingdom, in consideration of a lump sum by way of freight, payable half before sailing from Liverpool, half on delivery of the homeward cargo. The shipowner effected an insurance on freight "at and from Lagos," and the policy contained a clause whereby the insurance company agreed that the insurance "shall commence upon freight and goods or merchandise aforesaid from the loading of the goods or merchandise on board the said ship or vessel at as above." The ship was lost before she had shipped any of her homeward cargo:—Held, that this clause precluded the assured from recovering against the underwriters, although the freight was chartered freight. *Beckett* v. *West of England Marine Insurance Co.*, 25 L. T. 739; 1 Asp. M. C. 185.

Where the owner of a vessel entered into a contract with the East India Company at Madras, through the medium of a correspondence with their agents, for freight and the passage of invalids; and the ship had been surveyed by their officer and represented to be fit for the purpose, after certain alterations had been made, and goods had been shipped, water taken in for the invalids, and the projected alterations commenced, but the completion was prevented by the perils of the sea:—Held, that there was an inception of the risk; and that the plaintiff was entitled to recover for passage-money as well as freight. *Truscott* v. *Christie*, 5 Moore, 33; 2 Br. & B. 320.

The assured assigned a policy on chartered freight of the vessel "Napier," on a voyage to Baker's Island, and from Baker's Island to a port of destination in the United Kingdom. They then caused themselves to be reinsured, "lost or not lost, upon freight payable in respect to this present voyage to be performed by the vessel 'Napier' from Baker's Island to a port of discharge in the United Kingdom; the insurance on the freight beginning from the loading of the vessel." The "Napier" arrived at Baker's Island, and was wrecked after taking in about two-thirds of her homeward cargo:—Held, that the assured were not entitled to recover as for a total or partial loss of the freight—by Blackburn, J., on the ground that it was not intended that the risk should commence until the vessel sailed on her voyage from Baker's Island, and that the words "beginning from the loading of the vessel" did not extend the liability of the underwriters, but only added the further statement that they would not be liable for freight until the goods were actually loaded—by Mellor, J., and Lush, J., on the ground that these words did create a liability before the voyage commenced, but that the word "loading" must be taken to mean "complete loading," so that as the cargo was never fully loaded, the policy did not attach, and nothing could be recovered. *Jones* v. *Neptune Marine Insurance Co.*, 41 L. J., Q. B. 370; L. R. 7 Q. B. 702; 27 L. T. 308; 1 Asp. M. C. 416.

Loss after loading Part.]—Policy upon the freight of the ship "Stranger" at and from London to Jamaica, with liberty to touch at Madeira, and discharge and take goods on board there; the plaintiffs had agreed by charterparty that the ship should take in goods at London, and proceed to Madeira, and there deliver such parts of the goods shipped at London as their agent should direct, and receive on board wine, and proceed to Jamaica, and there deliver; and the freighter agreed to pay 135*l.* in full for freight, during the whole voyage from London to Madeira, and from thence to Jamaica, such freight to be paid in Madeira, on delivery of the goods shipped at London for that place, by Madeira wine at 40*l.* per pipe, to be carried in the said

ship to Jamaica free of freight. The ship arrived at Madeira, and delivered all her London cargo, except thirty-three casks of coals, which the captain kept on board to stiffen the ship; having received part of his cargo for Jamaica, but not the wine to be paid for freight, a gale of wind arising, the captain was obliged to cut his cables and run out to sea, where he was captured:—Held, that the plaintiff was entitled to recover for a total loss. *Atty* v. *Lindo*, 1 Bos. & P. (N.R.) 236; 8 R. R. 788.

Loss Before Loading.]—Policy at and from Sheerness in ballast, to Charente, and back to a port in the British Channel and London, from the date thereof, till the ship should be arrived at Charente, and back at a port in the Channel and London; on freight valued at the sum insured, to be deemed interest on the outward voyage. The ship was freighted for the voyage in question by a charterparty, whereby she was to proceed to Charente in ballast, and there the freighter was to provide her with a full cargo of brandy; on the arrival of the ship at Charente she was put under an embargo, and, after being kept for six months, she was seized and condemned by the French government:—Held, that the freight was protected by the policy while the ship lay at Charente, before any goods were put on board, and that the underwriters were liable for a loss so happening. *Mackenzie* v. *Shedden*, 2 Camp. 431; 11 R. R. 759.

Policy on freight valued at 500*l.* on a voyage at and from Demerara, Berbice, and the Windward and Leeward Islands to London: the ship being at Demerara, an agreement was entered into by the master with a house there for a freight from Berbice to London, the cargo to be put on board at Berbice, and the ship to take a cargo of bricks and planks there. While proceeding from Demerara to Berbice, with the bricks and planks on board, she met with an accident, and in consequence never earned her freight:—Held, that it was not a loss within the policy. *Sellar* v. *M'Vicar*, 1 Bos. & P. (N.R.) 23; 8 R. R. 744.

"At and from" Ports.]—A vessel when about to proceed on a voyage with cargo from Calcutta to Mauritius was chartered "to proceed with all convenient speed on her present voyage to Mauritius, and, having discharged her cargo there," to "sail and proceed to Akyab, &c., and book, from the charterers, a cargo of rice for a port in the United Kingdom." Subsequently the owner insured the freight to be earned under the charterparty by an insurance "at and from Mauritius to rice ports, and at and thence to a port of discharge in the United Kingdom, on chartered freight, valued at 1,150*l.*" The vessel was afterwards lost at Mauritius, by a peril insured against, before she had discharged the whole of her cargo there:—Held, that the risk on the policy attached upon the arrival of the vessel at Mauritius, and that the assured was therefore entitled to recover. *Foley* v. *United Fire and Marine Insurance Co.*, 39 L. J., C. P. 206; L. R. 5 C. P. 155; 22 L. T. 108; 18 W. R. 437.—Ex. Ch.

A homeward policy on freight, at and from Algoa Bay, attaches when the ship is at Algoa Bay in a condition to begin to take in her homeward cargo. *Williamson* v. *Innes*, 8 Bing. 81; 1 M. & Rob. 88.

Where a ship was chartered on a voyage from London to Dominica, and back to London, at a certain rate of freight upon the outward cargo; and, after delivering her outward cargo at D., the charterers were to provide her a full cargo homewards, at the current freight, from D. to L.:—Held, that an insurance by the owner of the ship on the freight at and from D. to L. attached whilst the ship lay at D. delivering her outward cargo, and before any part of the homeward cargo was shipped, during which time she was captured by an enemy, the contract of affreightment by the charterparty being entire, and the risk on the policy having commenced. *Horncastle* v. *Stuart*, 7 East, 400; 8 R. R. 649.

Where a ship was chartered from L. to T., there to take on board a certain number of pipes of wine, and proceed to B., for which the owner was to receive freight at the rate of so much per pipe; a policy on such freight attached from the sailing of the ship from L. *Thompson* v. *Taylor*, 6 Term Rep. 478; 3 R. R. 233.

What Voyages.]—The stipulation in a charterparty may be varied by subsequent instructions which may amount to a new contract pro tanto; and an insurance of the freight upon the new voyage, though different from that described in the charterparty, may be good. *Hall* v. *Brown*, 2 Dow, 367.

Intermediate Cargoes.]—A policy on freight, at and from the ship's port of loading at J., to her port of discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading as aforesaid, with leave to discharge, exchange and take on board goods at any port she may call at, without being deemed a deviation, covers the freight of goods loaded at an intermediate port; and, therefore, where the ship having sailed with a cargo loaded at J., was during the voyage cast on shore at an intermediate port, and lost a part of her cargo, and took on board other goods at that port to complete her cargo, and arrived at her port of discharge, and earned freight:—Held, that the assured, who had abandoned to the underwriter upon intelligence of the loss, and had adjusted with him as for a total loss, was liable to the underwriter for the freight of that part of the cargo loaded at the intermediate port, after deducting the expenses attendant upon procuring the freight. *Barclay* v. *Stirling*, 5 M. & S. 6; 17 R. R. 245.

Outward or Return.]—A policy at and from Riga to the United Kingdom, on ship and freight, was declared to be in continuation of two other policies, which were on ship and freight, on a voyage from the United Kingdom to the ship's port of discharge in the Baltic during her stay there, and from thence back to her port of discharge in the United Kingdom; the ship was seized and condemned at Riga before she had discharged her outward cargo:—Held, that the first policy could not be applied to the outward freight. *Bell* v. *Bell*, 2 Camp. 475; 11 R. R. 769.

Retardation of Adventure.]—Policy on freight valued, at and from R. and any ports in the Baltic to any ports in the United Kingdom, and the ship was chartered to sail with a cargo from L. to some port in the Baltic, not beyond R. and from thence to R., there to take in a homeward cargo, and sailed from L. and arrived at R., where she was detained five weeks, and prevented

from loading by the government, and the freighter never loaded her; and a few days after the detention ceased the frost set in, which detained her till the spring, when she procured a freight from other persons, and returned with it to L., but the expenses of her detention exceeded such freight:—Held, that the policy attached at the time of the detention, but that freight having been afterwards earned, the underwriter was not liable. *Everth* v. *Smith*, 2 M. & S. 278; 15 R. R. 246.

Sending Home Portion of Cargo.]—An insurance on the freight of a ship destined for a fishing adventure in the South Sea, is not determined by the arrival of part of the cargo in another ship. *Phillips* v. *Champion*, 1 Marsh. 402; 6 Taunt. 3.

See also Cases under V. INTEREST OF ASSURED, 1. FREIGHT, post, cols. 1110, seq.

Freight Earned.]—Upon a policy for freight the insurers cannot be held responsible where the freight has been actually earned. *Scottish Marine Insurance Co.* v. *Turner*, 1 Macq. H. L. 334; 17 Jur. 631.

Ship never arrived at Port of Loading—Cancellation of Charterparty.]—See *Jamieson* v. *Newcastle Steamship Freight Assurance Assn.*, post, col. 1117.

IV. NATURE OF RISK.

1. *Perils of the Sea.*
   a. Injury consequential on, 1072.
   b. Collision, 1082.
   c. Whilst under Repair, 1085.
   d. Ship Missing, 1086.
   e. Other Cases, 1087.
   f. Evidence of Loss, 1087.
2. *Restraint and Detention*, 1089.
3. *Stranding.*
   a. Operation of Memorandum, 1092.
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4. *Barratry.*
   a. What is, 1097.
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   c. Effect and Proof of, 1100.
5. *Jettison*, 1101.
6. *Fire*, 1102.
7. *Capture and Seizure.*
   a. What Amounts to, 1104.
   b. Proof of, 1108.
8. *Other Risks*, 1109.

1. PERILS OF THE SEA.

a. Injury consequential on.

Negligence of Crew.]—Underwriters are liable for a loss arising immediately out of the perils of the sea, such as the winds and waves, although remotely from the mismanagement and negligence of the master and mariners. *Walker* v. *Maitland*, 5 B. & Ald. 171; 24 R. R. 320. S. P., *Bishop* v. *Pentland*, 7 B. & C. 214; 1 M. & Ry. 49; 6 L. J. (O.S.) K. B. 6; 31 R. R. 177.

—— **Throwing away Ballast.**]—To a declaration on a time policy for six months, stating a loss by perils of the sea, the defendant pleaded, that, although the vessel was lost by perils of the sea, yet such loss was occasioned by the wrongful, negligent, and improper conduct (the same not being barratrous) of the master and mariners of the ship, by wilfully, wrongfully, negligently and improperly (but not barratrously) throwing overboard so much of the ballast that the vessel became unseaworthy, and was lost by perils of the sea, which otherwise she would have encountered and overcome:—Held, that the plea was bad, and that the underwriter was liable for the consequence of the wilful but not barratrous act of the master and crew, in rendering the vessel unseaworthy before the end of the voyage, by throwing overboard a part of the ballast. *Sadler* v. *Dixon*, 8 M. & W. 895; 11 L. J., Ex. 435—Ex. Ch.

To Animals.]—Policy on horses "warranted free from mortality." Special verdict, finding, that on the voyage, in consequence of a storm, the horses broke down the partitions between them, and by kicking, bruised each other so much, that they died: that a particular usage with respect to policies on live stock prevailed at Lloyd's coffee-house in London, and was adopted both by the underwriters subscribing, and the merchants effecting policies there, and that this policy was effected there:—Held, first, that this was a loss by perils of the sea for which assured might recover notwithstanding the warranty; and secondly, that, as it did not appear that the assured knew of the usage prevailing at Lloyd's, or was in the habit of effecting policies there, such usage did not bind him. *Gabay* v. *Lloyd*, 5 D. & R. 641: 3 B. & C. 793; 3 L. J. (O.S.) K. B. 116; 27 R. R. 486.

Where a policy was effected on mules and other living animals, warranted "free from mortality and jettison"; and in the course of the voyage some of them were killed, in consequence of the agitation of the ship in a storm; and others died before the termination of the voyage insured, in consequence of the injuries they had received:—Held, that this was a loss by a peril of the sea, for which the underwriters were liable. *Lawrence* v. *Aberdein*, 5 B. & Ald. 107; 24 R. R. 299.

To Goods.]—A vessel laden with hides and tobacco, in the course of her voyage shipped large quantities of sea water. On the termination of the voyage it was discovered that the sea water had rendered the hides putrid, and that the putrefaction of the hides had imparted an ill flavour to the tobacco, and had thereby injured it:—Held, that the damage thus occasioned to the tobacco was a loss by the perils of the sea. *Montoya* v. *London Assurance Co.*, 6 Ex. 451; 20 L. J., Ex. 254.

—— **Negligent Loading.**]—Where a ship, insured against the perils of the sea, was injured by the negligent loading of her cargo by the natives on the coast of Africa, and, in consequence, shortly afterwards became leaky, and, being pronounced unseaworthy, was run ashore, in order to prevent her from sinking and to save the cargo:—Held, that the insurers were liable for a constructive total loss, the immediate cause of the loss being the perils of the sea, although the cause of the unseaworthiness was the negligence in the loading. *Redman* v. *Wilson*, 14 M. & W. 476; 14 L. J., Ex. 333; 9 Jur. 714.

A. effected a policy against "perils of the seas and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the goods," in the ordinary form, upon goods for a voyage by a steamer from K. to Y. While the steamer was loading in the harbour at K. her draught was increased by the weight of

the cargo, until the discharge-pipe was brought below the surface of the water, which then flowed down the pipe under the valve and, some cocks or valves in the machinery having been negligently left open, flowed into the hold and injured A.'s goods:—Held, that the injury was caused by one of the perils insured against. *Davidson* v. *Burnand*, 38 L. J., C. P. 73; L. R. 4 C. P. 117; 19 L. T. 782; 17 W. R. 121.

Held, also, that the burden of proving that the vessel was unseaworthy was on the defendant. *Ib.*

—— **Through Delay.**]—Meat shipped at Hamburg for London was delayed on the voyage by tempestuous weather, and solely by reason of such delay became putrid, and was necessarily thrown overboard at sea:—Held not a loss by perils of the sea, or within the words "all other perils, losses and misfortunes," in the policy. *Taylor* v. *Dunbar*, 38 L. J., C. P. 178; L. R. 4 C. P. 206; 17 W. R. 382.

"Perils of the Seas and all other Perils," &c.—Donkey-engine, Injury to.]—A steamer was insured by a time policy in the ordinary form on the ship and her machinery, including the donkey-engine. For the purposes of navigation the donkey-engine was being used in pumping water into the main boilers, when owing to a valve being closed which ought to have been kept open water was forced into and split open the air-chamber of the donkey-pump. The closing of the valve was either accidental or due to the negligence of an engineer and was not due to ordinary wear and tear:—Held, that whether the injury occurred through negligence or accidentally without negligence, it was not covered by the policy, such a loss not falling under the words "perils of the seas," &c., nor under the general words "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the subject-matter of insurance." *West India and Panama Telegraph Co.* v. *Home and Colonial Marine Insurance Co.* (6 Q. B. D. 51; 50 L. J., Q. B. 41), disapproved. *Thames and Mersey Marine Insurance Co.* v. *Hamilton*, 56 L. J., Q. B. 626; 12 App. Cas. 484; 57 L. T. 695; 36 W. R. 337; 6 Asp. M. C. 200—H. L. (E.)

"Improper Navigation of Ship"—Negligence—Damage to Cargo—Insufficiently-closed Port.]—By the articles of a mutual assurance association the members agreed to indemnify each other against losses, damages, and expenses arising from or occasioned by any loss or damage of or to any goods or merchandise caused by improper navigation of the ship carrying the goods," for which any such member might be liable. A cargo of wheat was shipped on board a vessel belonging to the plaintiffs, who were members of the association. During the loading of the cargo an opening or port in the side of the vessel was by the negligence of persons employed by the plaintiffs insufficiently secured, so that during the voyage the water leaked in and damaged the wheat in the lower hold, and the plaintiffs became liable to pay and paid compensation to the owners of the cargo. The leak did not hinder or impede the navigation of the vessel in the course of her voyage:—Held, that this was a damage arising from "improper navigation of the ship," within the articles of association, for which the plaintiffs were entitled to recover. *Carmichael* v. *Liverpool Sailing Ship Owners' Assn.*, 56 L. J., Q. B. 428; 19 Q. B. D. 242; 57 L. T. 550; 35 W. R. 793; 6 Asp. M. C. 184—C. A.

"Improper Navigation."]—An association of steamship owners agreed by deed to indemnify each other in respect of ships entered by them in the association against "loss or damage which by reason of the improper navigation of any such steamship as aforesaid may be caused to any goods, &c. on board such steamship." The steamship "Severn" was duly entered, and whilst on a voyage from Memel to Hull with a cargo of linseed and flax, having encountered heavy weather and being short of coals, she put back to Fredericksharen to coal and to trim her cargo, which had shifted. Going into the harbour she took the ground, but was got off within an hour. The pumps were put on to see whether she had made any water, and for this purpose the bilge-cock was opened, but through the negligence of the crew this cock was not closed when the attempt to pump ceased. Whilst the "Severn" was moored at Fredericksharen quay orders were given to put on the donkey-engine pumps to fill the boilers, and for this purpose the sea-cock was opened. The sea-cock communicated with the box or tank in which was the bilge-cock, and when the boilers were filled the sea-cock being through a like negligence left open the water entered in large quantities by means of the open bilge-cock into the hold of the vessel and damaged the linseed:—Held, that this was a damaging arising from "improper navigation" within the meaning of the deed. *Good* v. *London Steamship Owners' Mutual Protecting Association*, L. R. 6 C. P. 563; 20 W. R. 33.

"Improper Navigation"—"Improper Stowage."]—By the rules of the defendants, a shipowners' mutual insurance association, the plaintiffs were entitled to protection in respect of "damage to goods on board when caused by the improper navigation" of their ship, but were not entitled to claim in respect of "damage caused by improper stowage." A cargo of wheat while in the hold of the plaintiffs' ship was damaged owing to a taint communicated to the wheat though the ceiling and limber boards of the vessel having been saturated with a composition which had leaked from the previous cargo. The ceiling and limber boards had not been properly cleaned before the wheat was stowed:—Held, that the damage was not caused by "improper navigation." Quære, whether it was caused by "improper stowage." *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Assn.* (supra) distinguished. *Canada Shipping Co.* v. *British Shipowners' Mutual Protection Assn.*, 58 L. J., Q. B. 462; 23 Q. B. D. 342; 61 L. T. 312; 38 W. R. 87; 6 Asp. M. C. 422—C. A.

Master part Owner—Loss through Master's Negligence.]—When a loss by perils of the sea occurs to an insured ship through the negligent navigation of the assured himself, the underwriters will be liable for such loss unless the assured's negligence was knowing and wilful. *Trinder, Anderson & Co.* v. *North Queensland Insurance Co.*, 66 L. J., Q. B. 802; 77 L. T. 80. Affirmed, 67 L. J., Q. B. 666—C. A.

Leakage.]—In an action on a policy for a constructive total loss arising from a leak:—Held, that it was for the jury whether the leak

arose from the ship being unseaworthy before the voyage, either from any injury arising before the insurance, or from ordinary wear and tear or whether it arose from the perils of the seas, in the course of the voyage insured, and whether the ship was abandoned in the exercise of an honest and reasonable discretion. *Jardine* v. *Leathley*, 3 F. & F. 80.

In a case where it is suggested on the one side, that the loss of a quantity of liquid was occasioned by the perils of the sea, and on the other side, that it was leakage, for which the underwriters were not answerable, witnesses cannot be called and asked "Whether, where the cargo has not been shifted, nor the casks damaged, the running out of the liquid is in practice considered as leakage, or as a loss by the perils of the sea." But this question may be put to persons skilled in navigation—"Suppose the casks have not been shifted nor damaged, but the liquid escapes, to what do you attribute it?" *Crofts* v. *Marshall*, 7 Car. & P. 597.

Piratical Act of Emigrants.]—To a declaration on a policy on advances for the transport of Chinese emigrants from China to Peru, for their outfit and provisions, to be paid on arrival of the emigrants at the port of destination, the perils insured against being pirates, rovers, thieves, barratry of the master and mariners, and all other perils, losses, and misfortunes, and alleging a total loss by the emigrants piratically and feloniously murdering the captain and part of the crew, and feloniously stealing and carrying away the ship, the defendant pleaded, first, that as soon as the emigrants obtained possession of the vessel, they steered to the nearest land for the purpose of being landed, and refused to and would not proceed upon the voyage, and the vessel was then fit and able to proceed safely on the voyage, and the remainder of the crew would have navigated her there, and was ready and willing to convey the emigrants there if they would have gone, but that they would not, and that by reason of such refusal, and for no other cause whatsoever, the transport was never completed; and, secondly, as to taking and carrying away the vessel, that the emigrants were unwilling to be carried on the voyage, and that they committed the murder and took possession of the vessel for the purpose of being landed, and of escaping from being carried on the voyage, and for no other purpose, which is the piratical carrying away of the vessel:—Held, that the murder of the captain and part of the crew, and the seizure of the vessel by the emigrants, was, if not a piratical act, one ejusdem generis, and therefore within the perils insured against, and that as the loss was complete at that moment, and never reduced, the unwillingness of the emigrants to proceed was not the cause of the loss, but was wholly immaterial, and consequently that the pleas were bad. *Palmer* v. *Naylor*, 10 Ex. 382; 2 C. L. R. 1202; 23 L. J., Ex. 323; 18 Jur. 961; 2 W. R. 621—Ex. Ch.

Perils of Sea incurred by Capture.]—A merchant ship was, by mistake, seized at sea and taken in tow by a British man-of-war; she was thereby exposed to bad weather, which injured goods on board her:—Held, that this is a loss by perils of the sea. Semble, it is also a loss by capture and detention. *Hagedorn* v. *Whitmore*, 1 Stark. 157.

Rats.]—A loss arising from rats eating holes in the ship's bottom is not within the perils insured against by the common form of policy. *Hunter* v. *Potts*. 4 Camp. 203; 16 R. R. 776. And see *Laveroni* v. *Drury*, *Kay* v. *Wheeler*, *Pandorf* v. *Hamilton*, ante, col. 275.

Unseaworthiness—Question for Jury.]—Action on a time policy alleging a loss by perils of the sea. Plea, that the plaintiff knowingly, wilfully, wrongfully, and improperly sent the ship to sea in an unseaworthy state, and wrongfully and improperly caused and permitted her to remain on the high seas, near to the seashore, for a great length of time, in the state and condition aforesaid, during which time the ship, by reason of the premises, was wrecked and lost. At the trial it appeared that the ship, having been loaded, was, by authority of the plaintiff, towed out of Sunderland Harbour, and over the bar, for the purpose of taking advantage of a spring tide. Some of her shrouds, which had been cast off for the purpose of loading her, were not replaced, and her rigging was incomplete. In consequence, the plaintiff, who was on board, ordered her to be brought up in the open roadstead, and lumpers were sent out to complete her equipment. After her equipment was completed, but before she had left the roadstead, a sudden storm came on, and owing to a defect, the cable broke, and she went on shore and was lost:—Held, that the insurers were liable for the loss, unless it was immediately occasioned by the wrongful act or default of the insured. *Thompson* v. *Hopper*, 6 El. Bl. & El. 1033; 27 L. J., Q. B. 441; 6 W. R. 857—Ex. Ch. See *Dudgeon* v. *Pembroke*, post, col. 1088.

Salvage Expenses.]—Where a steamship leaves port with an insufficient supply of bunker coal for her whole voyage, and lies helpless at sea till towed to her destination by a passing tug, her salvage expenses cannot be recovered from her underwriters as an average loss under a time policy. *Ballantyne* v. *Mackinnon*, 65 L. J., Q. B. 616; [1896] 2 Q. B. 455; 75 L. T. 95; 45 W. R. 70; 8 Asp. M. C. 173—C. A.

Injury to Electric Cable.]—Where an attempt to lay an electric cable resulted in failure owing to the imperfect insulation of the copper wire along which the electrical fluid passed, arising from defect in the outer covering by which it was protected from external contact; which defect was occasioned by accident prior to the shipment of the cable, and the commencement of the risk, aggravated by the action of the sea, and arose from the chemical action of the sea water on the interior of the cable, and not from any mischief done by the mechanical action of the sea:—Held, that this was not an injury caused by perils of the sea. *Paterson* v. *Harris*, 1 B. & S. 336: 30 L. J., Q. B. 354; 7 Jur. (N.S.) 1276; 9 W. R. 743.

Loss by Weather—Time Policy.]—See *Kenneth* v. *Moore*, post, col. 1155.

Shaft broken—Voyage abandoned—Charterparty cancelled.]—See *Bensaude* v. *Thames and Mersey Marine Insurance Co.*, post, col. 1118.

Charterparty thrown up.]—A shipowner, in November, 1871, entered into a charterparty, by which the ship was to proceed with all possible dispatch (dangers and accidents of navigation

excepted) from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. He effected an insurance on the chartered freight for the voyage. The ship sailed from Liverpool on the 2nd of January, 1872, and on the 3rd got aground in Carnarvon Bay. She was got off by the 18th of February and repaired, the time necessary for the completion of such repairs extending to the end of August. In the meantime on the 15th of February, the charterers had thrown up the charter and chartered another ship to carry the rails (which were wanted for the construction of a railway) to San Francisco. In an action by the shipowner on the policy of insurance on the chartered freight, the jury found that the time necessary for getting the ship off and repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and the charterers:—Held, that the charterers were, by reason of the delay, not bound to load the ship, and that there was therefore a loss of the chartered freight by perils of the sea. *Jackson* v. *Union Marine Insurance Co.*, 44 L. J., C. P. 27; L. R. 10 C. P. 125; 31 L. T. 789; 23 W. R. 169; 2 Asp. M. C. 435—Ex. Ch.

Ship disabled—Contract inoperative—Loss of Profits on Cargo bought.]—Plaintiff in London contracted to buy of D. 6,000 bags of rice to arrive by the ship "E." from Madras before the end of May, and he contracted to sell the same rice to another at an advanced price. He then insured "at and from Madras to London on profit on rice" loaden and not loaden, and on the ship "E.," beginning the adventure upon goods immediately after the loading thereof on board at Madras. The ordinary perils were insured against. When 1,200 bags of rice had been put on board the ship was disabled by perils of the sea; she could not perform the voyage; the 1,200 bags were spoiled; and the plaintiff's contracts were inoperative. The plaintiff sued upon the policy for a total loss of 4,800 bags, the 1,200 having been settled for:—Held, that the interest in profits was insurable; but, that except as to the 1,200 on board, the present policy did not cover it; also, that the rice ashore, assuming it to be covered by the policy, was not lost by peril of the sea. *McSwiney* v. *Royal Exchange Assurance Corporation*, 14 Q. B. 634; 18 L. J., Q. B. 193.

Cessation of Hire — Damage occasioned by Perils insured against—Causa proxima.]—By a charterparty it was provided that the vessel should be hired by the charterer at a stipulated sum per month, and that, in the event of loss of time from want of repairs, preventing the working of the vessel for more than twenty-four hours, the payment of hire should cease from the hour when detention began until the ship should be again in an efficient state to resume her service. The shipowners insured the chartered freight against fire. During the continuance of the policy the vessel was damaged by fire to such an extent as necessitated her being repaired. The hire of the vessel "ceased," and a loss of chartered freight thereby accrued to the shipowner:—Held, that there had been a loss of chartered freight by the immediate action of the perils assured against, and that the underwriters were liable to the shipowners therefor. *The Alps*, 62 L. J., Adm. 59; [1893] P. 109; 1 R. 587; 68 L. T. 624; 41 W. R. 527; 7 Asp. M. C. 337.

Loss of Freight—Proximate Cause—Concealment of Material Fact.]—A charterparty contained a clause for cesser of payment of freight in the event of the ship being delayed in consequence of the breakdown of machinery for more than twenty-four hours. The shipowners insured the freight for three months, the slip containing the words "freight chartered and [or] as if chartered, on board, or not on board, one third diminishing each month." The existence of the cesser clause was not expressly communicated to the underwriter. In consequence of a breakdown of machinery caused by a peril of the sea covered by the policy the ship was delayed, and payment of freight ceased. The owners having brought an action on the policy:—Held, that, as the cesser clause had been put into operation through the immediate action of a peril insured against, such peril was a sufficiently proximate cause of the loss to found an action on the policy. *The Alps* (supra) followed. *The Bedouin*, 63 L. J., Adm. 30; [1894] P. 1; 6 R. 693; 69 L. T. 782; 42 W. R. 292; 7 Asp. M. C. 391—C. A.

Held, also, that the underwriter could not rely on the non-disclosure of the existence of the cesser clause as a concealment of a material fact, for the words of the slip shewed that the freight proposed to be insured was freight under a time charter, and consequently gave the underwriter notice that the charter probably contained the cesser clause. *Ib.*

Option to Charterers to discharge Ship—Condition precedent.]—A ship was chartered for time on monthly hire; the charterers agreeing to pay the freight during employment and efficient performance of the service, and the owner covenanting that the ship should be seaworthy during the continuance of the charter; provided that if at any time it should appear to the charterers that the ship became inefficient it should be lawful for them to put her out of pay, or to make such abatement by way of mulct out of the hire or freight as they should adjudge fit. The owner effected a time policy of insurance "on freight outstanding." During the time the ship became inefficient through perils of the seas, and the charterers refused to pay freight after that date. The owner having brought an action on the policy:—Held, that on the true construction of the charterparty the efficiency of the ship was not a condition precedent to the earning of the freight; that the pecuniary loss was caused by the charterers availing themselves of the abatement clause, and not by the perils of the sea; and that the underwriters were not liable. *Inman Steamship Co.* v. *Bischoff*, 52 L. J., Q. B. 169; 7 App. Cas. 670; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6—H. L. (E.)

The plaintiffs, on the 29th of July, 1875, chartered their ship "G." for a voyage from New York to Odessa. The freight was agreed "during the voyage aforesaid" at 5,500*l.* in cash at Hull, England, on the discharge of the cargo in Odessa, "if the vessel has not arrived at the port of New York on or before the 1st of September, 1875, charterers have option of cancelling this charterparty." The plaintiffs, on the 7th of August, 1875, effected an insurance with the defendant "at and from London to New York, while there, and thence to Odessa viâ Constantinople," on their chartered freight, including, besides the ordinary ones, all risks "incident to steam navigation." The clause in the charterparty giving the option to cancel was not mentioned to the

defendant. The ship started from England on the 7th of August, but owing to the failure of her machinery in the British Channel was obliged to put back for repairs, which occupied so much time that she did not reach New York until after the 1st of September, whereupon the charterers cancelled the charter and the freight was lost:—Held, that the interest in the chartered freight had commenced at the time when the charter was cancelled, but that the defendant was not liable, for the freight was not lost by any of the perils insured against, but by the exercise of the option to cancel in the charterparty; and further that the withholding from the defendant information as to the power to cancel vitiated the policy. *Mercantile Steamship Co.* v. *Tyser*, 7 Q. B. D. 73; 29 W. R. 790; 5 Asp. M. C. 6, n.

Vessel Hogged.]—A vessel was chartered for a voyage, and the cargo was insured against total loss. In the course of the voyage the vessel went aground, became hogged, and sustained other injuries, and surveyors recommended her to be stripped with despatch, and steps taken to save the cargo, but no attempt was made to do so; and after several days the master fearing bad weather, sold the vessel and cargo for the benefit of all concerned. The vessel remained for some days in the same state, and the weather proving fine, the purchasers saved a large part of the cargo:—Held, that the charterers were not entitled to treat the cargo as having been totally lost. *Currie* v. *Bombay Native Insurance Co.*, 6 Moore, P. C. (N.S.) 302; 39 L. J., P. C. 1; L. R. 3 P. C. 72; 22 L. T. 317; 18 W. R. 296.

A vessel was, in the ordinary course of navigation, moored in harbour, and at each successive low tide took the ground. She became hogged or strained in consequence:—Held, that there was no casus fortuitus, and that therefore the insurers were not liable for the loss as a loss from the perils of the sea. *Magnus* v. *Buttermere*, 11 C. B. 876; 21 L. J., C. P. 119; 16 Jur. 480.

Injury to Hull.]—In the absence of any custom, underwriters are liable for injury to a ship's bottom, caused not by the ordinary action of the winds and waves, but by their violent action in a storm. *Harrison* v. *Universal Marine Insurance Co.*, 3 F. & F. 190.

Where a ship's bottom has, during the voyage insured, been taken by the worm, in consequence of which she is incapable of proceeding on her voyage, and is condemned, that is not a loss by perils of the sea within the meaning of the policy. *Rohl* v. *Parr*, 1 Esp. 445; 5 R. R. 741.

Explosion of Boiler.]—Plaintiff's steamer was insured by a time policy against "adventures and perils . . . of the seas . . . fire, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the aforesaid subject-matter of the insurance or any part thereof." The steamer was damaged while at sea by the bursting of the boiler, which took place in consequence of the plates being worn too thin to resist the pressure of the steam. This condition of the plates was due to the negligence of those who had charge of the boiler in omitting to clean and inspect it at proper intervals. In an action against the underwriters:—Held, that the damage caused by the bursting of the boiler was covered by the policy, and plaintiffs were entitled to recover. *West India and Panama Telegraph Co.* v. *Home and Colonial Marine Insurance Co.*, 50 L. J., Q. B. 41; 6 Q. B. D. 51; 43 L. T. 420; 29 W. R. 92; 4 Asp. M. C. 341—C. A.

Barratry of Master or Crew.]—Semble, that if a declaration of a policy of insurance lay the loss by perils of the seas, the plaintiff may recover upon proof that the ship was wrecked, although this may have been occasioned by the barratry of the master or mariners. *Heyman* v. *Parish*, 2 Camp. 148; 11 R. R. 688. And see *Small* v. *United Kingdom Marine and Mutual Insurance Association*, post, col. 1136.

Fruit Rotted by Sea Water — Destroyed by Order of Port Authority.]—Policy on fruit from Cadiz to London with usual memorandum. During the voyage the fruit was damaged by sea water, rotted and stank, and on the ship's arrival at a port to which she was driven, by order of the port authority not allowed to be landed. The ship being too much damaged to proceed, was sold, and the cargo necessarily thrown overboard:—Held, that the assured could recover for a total loss. *Dyson* v. *Rowcroft*, 3 Bos. & P. 474; 7 R. R. 809.

Ship Stranded—Seizure by Enemy—Loss by Peril of Sea.] — Goods insured in a ship warranted free from capture and seizure. The ship was stranded, disabled and lost. Whilst ashore on the shoal she was seized by the enemy and the goods confiscated by him:—Held, a loss of the goods by peril of the sea. *Hahn* v. *Corbett*, 2 Bing. 205; 9 Moore, 390; 3 L. J. (O.S.) C. P. 253; 27 R. R. 590.

b. Collision—Running down Clause.

By Gross Negligence.]—A loss occasioned by another ship running down the ship insured through gross negligence, is a loss by perils of the sea. *Smith* v. *Scott*, 4 Taunt. 126; 13 R. R. 568.

Accidental.]—Where there is an exception in a charterparty of perils of the sea, a loss from the ship's running foul of another by misfortune is within the exception, and is a loss by perils of the sea. *Buller* v. *Fisher*, 3 Esp. 67; Peake's, Add. Cas. 183; 4 R. R. 902.

Collision Clause—Legality.]—Whether insurance against damages that a shipowner may be liable to pay in consequence of his ship running down another be illegal, quære. *Anon.*, 5 Taunt. 292. *But see* 25 & 26 Vict. c. 63, s. 54, 55.

Construction—Collision with Breakwater.]—Where a vessel was insured "against risk of loss or damage through collision with any other ship or vessel, or ice, or sunken or floating wreck, or any other floating substance, or harbours or wharves, or piers or stages, or similar structures," and was lost by being driven by the wind against the sloping bank or "toe" of a breakwater, such loss was caused by "collision," and not by "stranding," and was therefore within the words of and covered by the insurance policy. *Union Marine Insurance Co.* v. *Borwick*, 64 L. J., Q. B. 679; [1895] 2 Q. B. 279; 15 R. 546; 73 L. T. 156; 8 Asp. M. C. 71.

—— **"Sunken Wreck."**]—Part of the frame of a ship sunk beneath the surface of the sea, and partially embedded in the ground, and also a

quantity of iron ore that had formed part of the cargo of a ship, are "sunken wreck" within the meaning of the collision clause in a policy of marine reinsurance. *The Munroe*, [1893] P. 248; 1 R. 642; 70 L. T. 246; 7 Asp. M. C. 407.

—— **"Damage received in Collision."**]—An injury to a ship may fairly be said to cause its loss if, before that injury is or can with reasonable diligence be repaired, the ship is lost by reason of the existence of that injury; i.e. under circumstances which, but for that injury, would not have affected her safety. Accordingly, if a policy is effected covering such an injury, it will in the supposed circumstances extend to the loss of the ship. *Reischer* v. *Borwick*, 63 L. J., Q. B. 753; [1894] 2 Q. B. 548; 9 R. 558; 71 L. T. 238; 7 Asp. M. C. 493—C. A.

—— **"Damage Consequent on Collision"—Repairs—Damage to Cargo by Delay and Handling.**]—Goods were insured by a marine policy against (among other things) damage consequent on collision. The ship in which they were shipped came into collision with another ship, and was thereby damaged so as to render it necessary for for her to go into a port for repairs. For the purpose of such repairs it was necessary to discharge a portion of the goods insured. When the repairs were completed such goods were re-shipped, and the ship proceeded to her destination. On arrival it was found that the goods, being of a perishable nature, had been damaged by the handling necessary for their discharge and re-shipment and by the delay. In an action by the insured upon the policy to recover the amount of the damage to the goods:—Held, that the collision was not the proximate cause of the loss, and therefore the plaintiffs could not recover. *Pink* v. *Fleming*, 59 L. J., Q. B. 559; 25 Q. B. D. 396; 63 L. T. 413; 6 Asp. M. C. 554—C. A.

Costs and Damages Payable to other Ship.]—A policy of 4,000*l.* for twelve months on the ship "Rouen" and her freight contained the following clause: "And we, the assurers, do covenant and agree that in case the vessel shall, by accident or negligence of the master or crew, run down or damage any other ship or vessel, and the assured shall thereby become liable to pay, and shall pay as damages any sum or sums not exceeding the value of the vessel and her freight, by or in pursuance of any judgment of any court of law or equity given in any suit or action defended with our previous consent in writing, or by or in pursuance of any award made upon reference entered into by the assured, with our previous consent in writing, we, the assurers, shall and will bear and pay such proportions of three-fourth parts of the sum so paid as aforesaid, as the sum of 4,000*l.* hereby assured bears to the value of the vessel and her freight." The ship having run down another ship, whereby some of her crew were drowned, and the owners of the "Rouen" having been condemned by the Court of admiralty to pay damages to the personal representatives of the deceased for the loss of those lives:—Held, that the clause did not apply. *Taylor* v. *Dewar*, 5 B. & S. 58; 33 L. J., Q. B. 141; 10 Jur. (N.S.) 361; 10 L. T. 267; 12 W. R. 579.

A Lloyds' policy on the owner's vessel was expressed to be made "subject to the running-down clause, as per slip attached." By that clause the assurers agreed that if the assured became liable to pay and paid as damages for running down any other ship any sum not exceeding the value of the vessel insured, they would repay to the owner a certain proportion of such sum. The vessel insured having run down another, and the owner assured having successfully defended an action brought against him in respect of the injury:—Held, that he was not entitled to recover any portion of the costs of the defence, either under the suing and labouring clause or the running down clause. *Xenos* v. *Fox*, 38 L. J., C. P. 351; L. R. 4 C. P. 665; 17 W. R. 893—Ex. Ch.

Both Ships to Blame.]—Where there is a collision between two vessels, by which one of them is more damaged than the other, and, both being to blame, they have to share the damage equally, there is not a cross liability on the part of each vessel to pay half of the damage sustained by the other, but one liability only, viz. the liability of the vessel less damaged to pay to the vessel more damaged one half of the amount by which the damage to the one exceeds the damage to the other. Therefore the owner of the more damaged vessel in such a case is not entitled to recover upon an insurance effected by him against liability for damage to another vessel by collision with his vessel. *London Steamship Owners Insurance Co.* v. *Grampian Steamship Co.* 59 L. J., Q. B. 549; 24 Q. B. D. 663; 62 L. T. 784; 38 W. R. 651; 6 Asp. M. C. 506—C. A.

Damages for Loss of Life.]—The collision clause held to include damages payable by the assured in respect of life lost in the collision. *The Excelsior Co.* v. *Smith*, 2 L. T. 90 (Scotch).

Collision clause in Lloyds' policy held to cover damages recovered against the owners of the ship insured by relatives of persons on board the other ship killed in the collision. *Coey* v. *Smith*, 22 Ct. of Sess. Cas. (4th ser.) 955.

Tug and Tow—Indemnity to Tow-Owner.]—Contract by tug-owner to insure against damage done to or by other ships by or to tug or tow. See *The Lord of the Isles*, ante, col. 681.

Exemption of Underwriters from Liability for the Removal of Sunken Ship.]—A collision clause in a policy of insurance upon ship stipulated that "if the ship insured shall come into collision with any other ship, and the insured shall, in consequence thereof, become liable to pay, and shall pay, by way of damages . . . any sum not exceeding the value of the ship insured," the underwriters "will severally pay the assured such proportion of three-fourths of such sum so paid as" each underwriter's subscription "bears to the value of the ship insured; . . . provided that this clause shall in no case extend to any sum which the assured may become liable to pay for removal of obstructions, under statutory powers, . . . consequent on such collision":—Held, that the underwriters were exempted from liability for any sum which the assured was liable to pay, whether by way of damages or otherwise, for the removal of obstructions consequent on collision, and that the exemption of the underwriters was not restricted to any sum which the assured was liable to pay otherwise than by way of damages for the removal of obstructions consequent on collision. *Taylor* v. *Dewar* (supra), discussed. *The North Britain, Roberts* v. *Ocean Marine Insurance Co.*, 63 L. J., Adm. 33; [1894] P. 77;

6 R. 673; 70 L. T. 210; 42 W. R. 243; 7 Asp. M. C. 413—C. A.

Vessels in Tow—Collision with Tug.]—By a policy of marine insurance the underwriters insured the ship "Niobe" from the Clyde (in tow) to Cardiff $\frac{\text{and}}{\text{or}}$ Penarth while there and thence to Singapore, and while in port for thirty days after arrival; and agreed "if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, any sum or sums of money," &c. to pay the assured a certain proportion of the sum so paid. While the "Niobe" was being towed to Cardiff, her tug came in collision with and sank another vessel, whose owners recovered damages both from the "Niobe" and the tug. In an action by the owners of the "Niobe" upon the policy against one of the underwriters for payment of his proportion of the sum paid by such owners on account of the collision, the underwriter pleaded that under the policy he was only liable for damage arising from collision with the "Niobe":—Held (Lord Bramwell dis.), that the collision of the tug with the damaged vessel must be taken to have been a collision of the "Niobe" with another vessel within the meaning of the policy, and that the underwriters were liable. *McCowan* v. *Baine*, [1891] App. Cas. 401; 65 L. T. 502; 7 Asp. M. C. 89—H. L. (Sc.)

c. Whilst under Repair.

On Beach.]—If a ship hove down on a beach within the tideway, to repair, is thereby bilged and damaged, it is not a loss occasioned by the perils of the sea. *Thompson* v. *Whitmore*, 3 Taunt. 227; 12 R. R. 642. Cf. *Rowcroft* v. *Dunsmore*, cited, 3 Taunt. 228; 12 R. R. 643.

In Harbour.]—A transport in government service was insured for twelve months, during which she was ordered into a dry harbour, the bed of which was hard and uneven, and, on the tide having left her, she received damage by taking the ground:—Held, that this was a loss by a peril of the sea. *Fletcher* v. *Inglis*, 2 B. & Ald. 315; 20 R. R. 448.

On a policy on a ship, for twelve months, at sea and in port the declaration averred a loss as follows:—That the ship having arrived at the harbour of St. John in the province of New Brunswick, and discharged her cargo there, it became necessary to place her, and she was accordingly placed, in a graving dock, there to be repaired, and near to a certain wharf in the graving dock; and that, whilst there, she was by the violence of the wind and weather, blown over on her side, whereby she struck the ground with great violence, and was bilged and greatly damaged:—Held, that this was a loss within the words "all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the ship," for which the underwriters were liable. *Phillips* v. *Barber*, 5 B. & Ald. 161; 24 R. R. 317.

In moving a ship from one part of a harbour to another, it became necessary to send two of the crew on shore to make fast a new line and cast off the rope by which the ship was made fast; those two men being immediately impressed and carried away, and not being allowed by the press-gang to cast off the rope, the ship in consequence went ashore and was lost:—Held, a loss by perils of the sea within the policy. *Hodgson* v. *Malcolm*, 2 Bos. & P. (N.R.) 336; 9 R. R. 656.

A time policy against fire was effected on a steamship. The policy described it as then "lying in the Victoria Docks," but gave it "liberty to go into dry dock, and light the boiler fires once or twice during the currency of this policy." The only dry dock into which the ship could go was Lungley's Dock, at some distance up the river. To go there it was necessary to remove the paddle wheels; they were removed in the Victoria Docks, and the ship was then towed up to Lungley's Dock. The necessary repairs there having been completed, the ship was brought out and moored in the river, preparatory to replacing the paddle-wheels. This operation could have been perfectly performed in the Victoria Docks, but it was found that in such case it was customary, as the more economical course, to replace the paddle-wheels while the ship lay in the river. Before the wheels had been replaced the ship was burnt:—Held, that the policy covered the ship while in the Victoria Docks, and while passing from them to the dry dock, and while directly returning from the dry dock to the Victoria Docks, but did not cover the vessel while moored in the river for a collateral purpose. *Pearson* v. *Commercial Union Assurance Co.*, 45 L. J., C. P. 761; 1 App. Cas. 498; 35 L. T. 455; 24 W. R. 951; 3 Asp. M. C. 275—H. L. (E.)

d. Ship Missing.

Presumption.]—There is no fixed rule of law with regard to the time after which a missing ship will be reputed to be lost. It is in all cases a question of presumption, to be governed by the circumstances of the particular case. *Houstman* v. *Thornton*, Holt, 242; 17 R. R. 632. And see *Marshall* v. *Parker*, 2 Camp. 70; 11 R. R. 665.

Where a loss by the perils of the sea is to be inferred from the ship not being heard of after her sailing, the assured must prove that, when she left the port of outfit, she was bound upon the voyage insured. *Cohen* v. *Hinckley*, 2 Camp. 51; 1 Taunt. 249; 11 R. R. 660. S. P., *Koster* v. *Innes*, Ry. & M. 333; 27 R. R. 755.

In the absence of any express stipulation in the policy, a vessel which is not heard of for a reasonable time is presumed to have perished by a peril of the sea. What is such a reasonable time as to give rise to this presumption depends not upon any fixed rule of law, but upon the circumstances of any particular case. *Green* v. *Brown*, 2 Str. 1199.

Where, in an action on a policy of goods by a certain ship, it was proved that she sailed on the voyage insured with the goods on board, and never arrived at her port of destination; and that, a few days after her departure, a report was heard at the place whence she sailed, that the ship had foundered at sea, but that the crew were saved:—Held, that this was a sufficient primâ facie evidence of a loss by perils of the sea; and that the assured was not bound to call any of the crew, or to shew that he was unable to procure their attendance. *Koster* v. *Reed*, 6 B. & C. 19; 9 D. & R. 2; 30 R. R. 239.

In an action on a policy from an English to a foreign port, to found a presumption that a

ship was lost on the voyage, it is not enough to prove that she was not heard of in this country after she sailed, without calling witnesses from her port of destination, to shew that she never arrived there. *Twemlow* v. *Oswin*, 2 Camp. 85; 11 R. R. 670.

Rights of Underwriters.]—If a ship, for which the underwriters (when a demand is made upon the policy) have paid as for a lost ship, should chance to turn up, she is to be considered as abandoned, and will belong to the underwriters. *Houstman* v. *Thornton*, Holt, 242; 17 R. R. 632.

e. Other Cases.

Plunder.]—Where a vessel is wrecked, part of the goods is lost, and part is got on shore, but (whilst on shore) is destroyed and plundered by the inhabitants of the coast, so that no portion of them comes again into the possession of the assured:—Held, that is a loss by the perils of the sea, and no abandonment was necessary. *Bondrett* v. *Hentigg*, Holt, 149; 17 R. R. 625.

Accidental Shot.]—A ship and goods were sunk at sea by another ship firing upon her, in consequence of mistaking her for an enemy:—Held, a loss within the general words of the policy, "all other perils, losses," &c. *Cullen* v. *Butler*, 5 M. & S. 461; 4 Camp. 289; 17 R. R. 400.

Death of Slaves—Failure of Provisions.]—A policy on slaves against perils of the sea does not cover a loss by deaths caused by failure of provisions in consequence of delay caused by bad weather. *Tatham* v. *Hodgson*, 6 Term Rep. 656.

Goods sold to Pay for Repairs — Causa proxima.]—The assurer is not liable for loss on goods sold by the master to defray expense of repairs made necessary by bad weather to which the ship and goods had been exposed; the bad weather not being the proximate cause of the loss. *Sarquy* v. *Hobson*, 4 Bing. 131; 3 D. & R. 192; 2 B. & C. 7; 12 Moore, 174; 26 R. R. 251; 1 Y. & J. 347; 1 L. J. (O.S.) K. B. 222; 30 R. R. 794—Ex. Ch.

f. Evidence of Loss.

Absence of Evidence how Loss arose.]—A ship, whose cargo was insured by a policy, began suddenly to leak, and sank at her anchors in port during fine weather. In an action on the policy evidence was given on the part of the assured tending to shew that the ship was seaworthy, viz. that she had not long before been put in good repair; that surveys had been made of her just previously, and that she had behaved well on previous voyages, and on her voyage to the port where she was lost. No evidence was given of any actual facts shewing the cause of her loss, although possible explanations of it, by way of conjecture, were suggested by the witnesses:—Held, that there was evidence of a loss by the perils insured against. *Anderson* v. *Morice*, 46 L. J., Q. B. 11; 1 App. Cas. 713; 35 L. T. 506; 25 W. R. 14; 3 Asp. M. C. 290—H. L. (E.)

A time policy was effected on an iron steamer, the "Frances," of 705 tons burden, then lying in the yard of its owner, a shipwright. It had been put under repair, and it was stated that there had not been any stint placed upon the repairs, and that the marine engineer who superintended the repairs, and the workmen who executed them, believed them to be completely satisfactory. It was expressly found that if the ship was unseaworthy the assured was ignorant of the fact. The ship went with nothing but a deck cargo of iron machinery from London to Gothenburg, made more water on the voyage than could have been expected from the state of the weather, ceased to do so on getting into harbour, was examined, and its condition on the voyage could not be accounted for; and in a few days afterwards took on board a cargo of oats and 380 tons of iron, and a deck loading of timber, started from Gothenburg, encountered in the open sea very bad weather, which put out the fires, ran for the port of Hull, could not make the port, ran ashore, and after some time was broken up and became a total wreck:—Held, that these facts shewed a loss by perils insured against, the perils of the sea, and that the assured was entitled to recover as for a total loss. *Dudgeon* v. *Pembroke*, 46 L. J., Ex. 409; 2 App. Cas. 284; 36 L. T. 382; 25 W. R. 499; 3 Asp. M. C. 393—H. L. (E.)

—— **Constructive Total Loss—Sale by Master—Necessity.**]—A vessel struck upon a rock outside a harbour, and it was necessary to lighten her in order to get her off at the next high tide, and for that purpose her master entered into a contract with one G., who was the only person at the place who had a sufficient number of men to render effectual assistance, to find the labour required for that purpose. G. supplied only a small number of men, who worked very languidly in discharging the cargo for two or three hours, and at the end of that time G. persuaded the master to cancel this contract, and to call a survey of the vessel and sell her. G. and some men he brought accordingly made a survey and by it found the mainmast raised one inch, the main combings parted, the deck plank opening, and the vessel unseaworthy, and advised that the ship and cargo should be sold for the benefit of all concerned. The master then sold her to G. for a very small sum of money. When the vessel struck on the rock there was a strong breeze blowing, but it afterwards got calmer, and at the time of the sale the weather was good, and the vessel lying on her bilge, with no more danger than she had been in from the time she struck, but there was evidence that if the wind veered round to the south or west the sea would have heaved in, and the vessel would have broken up in a short time. As a fact, directly after the sale G. brought a number of hands to discharge the cargo, and so got the vessel off and floated her at the next high tide, and he afterwards repaired and made her seaworthy at a trifling expense. In an action against the underwriter on a policy of insurance on the vessel for constructive total loss, the judge ruled on the above facts appearing at the end of the plaintiff's case, that there was no evidence upon which the jury could reasonably find the urgent necessity for the sale of the vessel at the time she was sold, and he accordingly withdrew the case from the jury, and directed the verdict to be entered for the defendant:—Held, by Lord Coleridge, C. J., that such ruling was right. *Hall* v. *Jupe*, 49 L. J., C. P. 721; 43 L. T. 411; 4 Asp. M. C. 328.

Held, by Grove, J., that it was wrong, and that the case should not have been withdrawn from the jury. *Ib.*

Captain's Protest.]—The plaintiff's agent shewed to the defendant, an underwriter, the captain's protest, containing an account of the loss of the ship insured, demanding payment:—Held, that this did not entitle the defendant to read the protest in evidence in an action on the policy. *Senat* v. *Porter*, 7 Term Rep. 158; 4 R. R. 403.

As to Presumption arising when Ship Missing.]—*See ante*, col. 1086.

What is sufficient Evidence.]—On the 7th August, 1866, the agents of the owners of a ship, lying at Bombay, chartered her at Liverpool for a voyage from Howland's Island to a port in the United Kingdom for a cargo of guano, freight to be paid at port of discharge, the ship to be at Howland's Island on or before the 1st June, 1867, or the charterer to have the option of declaring the charter void. On the 7th September, 1866, an agent, on behalf of the owners of the vessel, effected an insurance with an underwriter at and from Bombay to Howland's Island while there, and thence to any port, &c., in the United Kingdom on freight chartered, or otherwise, valued at 3,600*l.* in the ship. It was lawful for the ship to sail to and touch and stay at any ports whatsoever without prejudice to the insurance, which was against the usual perils. On the 4th September she sailed in ballast under the charter from Bombay for Howland's Island. She got out of her course, and on the 25th December ran ashore on the coast of New Zealand. The owners declined to furnish the funds necessary for repairing her, and the captain was unable to borrow money on a bottomry bond except on condition that he would charter the ship to the lender for a cargo of timber from New Zealand to England. Ultimately she was abandoned to the holder of the bottomry bond; the repairs were completed, and a cargo of timber brought to England for the holder of the bottomry bond:—Held, that it was a question for the jury whether there was a total loss by the perils of the sea. But there was abundant evidence in the affirmative. *Barber* v. *Fleming*, 10 B. & S. 879; 39 L. J., Q. B. 25; L. R. 5 Q. B. 59; 18 W. R. 254.

Ship sinking from Unascertained Cause.]—Voyage policy on ship from M. to C., whilst at C., and thence to A. The ship arrived and loaded coals at Cardiff, sailed, anchored in Cardiff roads the same day, and during the night, in fine weather, filled and went down, probably from one of the coal ports having been left open. The jury having found that she was unseaworthy when she sailed, and that she was not lost from perils of the sea (which were explained by the judge to mean violent action of the elements from without):—Held, that the judge's direction was right, and a new trial refused. *Merchants' Trading Co.* v. *Universal Marine Co.*, cited in *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. 581, 596; 2 Asp. M. C. 431, n.

Presumption of Unseaworthiness—Ship sinking.]—If a ship becomes leaky and unable to proceed soon after the commencement of the risk, without any visible cause, the presumption is that she was not seaworthy when she sailed. *Munro* v. *Vandam*, 1 Park. Ins. (8th ed.) 469.

2. Restraint and Detention.

Land Transit.]—In a policy of insurance on goods the voyage was thus described: "At and from Japan and [or] Shanghai to Marseilles and [or] Leghorn and [or] London, viâ Marseilles and [or] Southampton, including all risks of craft to and from the steamers." The risks insured against were of the seas, fire, and thieves, arrests, restraints, and detainments of all kings, princes, and people. In the margin of the policy was the following memorandum:—It is hereby agreed that the silks insured by this policy shall be shipped by Peninsular and Oriental Company Messageries Impériales steamers, and [or] the steamers of the Mercantile Trading Company of Liverpool only." The goods insured were shipped from Shanghai for London by the Messageries Impériales; the practice of that company was to send such goods overland through France by the Lyons Railway, from Marseilles to Paris, and thence by the Northern Railway to Boulogne, and thence to London; and this course of business was well known among underwriters. The goods arrived in Paris on their way on the 13th of September, 1870. At this time the German armies were advancing on Paris, and had seized parts of the Northern Railway, so that the goods could not be forwarded to Boulogne, and by the 19th of September they completely surrounded and besieged Paris, preventing communication between it and all other places, by reason of which it was impossible to remove the goods from Paris. This state of things continued till after the 7th of October, on which day the assured gave notice of abandonment:—Held, that the policy covered the overland transit from Marseilles to Boulogne, and that there was a constructive total loss by restraint or detainment of princes within the meaning of the policy. *Rodoconachi* v. *Elliott*, 43 L. J., C. P. 255; L. R. 9 C. P. 518; 31 L. T. 239; 2 Asp. M. C. 399—Ex. Ch.

Total or Partial Loss.]—A cargo on board a ship bound from Liverpool to Matamoras was insured against the usual perils, including "takings at sea, arrests, restraints, and detainments of all kings, princes, and people." The ship sailed, and had nearly reached her destination, when she was captured by a United States cruiser and taken into New Orleans, where a suit was instituted in the prize court for her condemnation. The insurers contested the suit, electing to treat the loss as a partial one. They obtained the judgment of the court, whereupon the captors appealed. The insured gave a formal notice of abandonment, which the insurers refused to accept. Upon the application of the captors, the ship and cargo were ordered to be sold, unless bail were given by the insured. Upon receiving intelligence that this order had been made, they applied to the insurers for assistance in giving bail to prevent the sale. The insurers refused, and in the end the ship and cargo were sold by the order of the prize court. The insured brought an action to recover from the insurers as for a total loss:—Held, that they were entitled to recover the whole amount, inasmuch as the decree of the prize court, and the sale of the goods under it, was a deprivation of the ownership of the goods, and amounted to a total loss. *Stringer* v. *English and Scottish Marine Insurance Co.*, 10 B. & S. 770; 39 L. J., Q. B. 214; L. R. 5 Q. B. 599; 22 L. T. 802; 18 W. R. 1201; —Ex. Ch.

Nature of Seizure.]—The clause in a policy on a ship and goods which insures against losses

occasioned by "arrests, restraints and detainments of all kings, princes and people, of what nation, condition, or quality soever," applies to a seizure of the ship in consequence of an embargo laid on her by the sovereign of the country of the assured, for the purpose of carrying on a war with another power. *Aubert* v. *Gray*, 3 B. & S. 163, 169; 32 L. J., Q. B. 50; 9 Jur. (N.S.) 714; 7 L. T. 469; 11 W. R. 27—Ex. Ch.

There is a distinction in this respect between an embargo, in a time when there is peace between the countries of the insurer and the assured, laid on for a purpose wholly unconnected with hostility either existing or expected, and an embargo connected with such hostility. *Ib.*

A policy on a ship and stores, "at and from a port" in a foreign country, in the common form against arrests of princes, people, &c., extends to an embargo laid on by the government of that country in the loading port. *Rotch* v. *Edie*, 6 Term Rep. 413; 3 R. R. 222.

And if the embargo continues, the assured may abandon and recover as for a total loss. *Ib.*

If an armed force boards a ship and takes part of the cargo, the underwriters are not liable on a count stating the loss to be by a seizure by people to the plaintiffs unknown; for people, in the policy, means the governing power of the country. *Nesbitt* v. *Lushington*, 4 Term Rep. 783; 2 R. R. 519.

In an action on a policy of insurance upon a ship, in which the subject-matter was warranted "free from capture and seizure, and the consequences of any attempt thereat," it was proved that during the continuance of the risk some natives took forcible possession of the ship in the Brass River, plundered the cargo, and damaged her, so that she became a constructive total loss, and that their intention in so taking possession was only to plunder the cargo, and not to keep the ship:—Held, that the acts of the natives constituted a "seizure" within the meaning of the warranty, and therefore, that the underwriters were not liable. *Johnston* v. *Hogg*, 52 L. J., Q. B. 343; 10 Q. B. D. 432; 48 L. T. 435; 31 W. R. 768; 5 Asp. M. C. 51.

—— **Permission to Leave.**]—A policy was effected on a ship from London to her lading port in Virginia and back. On her arrival at that port in January, 1808, an embargo was laid on all shipping in American ports by an act of Congress, which contained a proviso that all foreign ships, either in ballast or with goods on board, might depart when notified of that act. The captain covenanted by charterparty to take in a cargo of timber at that port, and return therewith to London. It was proved that the embargo was taken off in March, 1809, and that the ship did not sail until the August following, and that she was lost on her way home:—Held, that the captain was justified in remaining in port, and that he was not bound to return with the cargo or sail in ballast; and that, consequently, the underwriters on the ship were liable at the time of the loss. *Schroeder* v. *Thompson*, 1 Moore, 163; 7 Taunt. 462; 18 R. R. 540.

Delay through Mistake.]—If, by some mistake of a ship's manifest, a suit is commenced in a foreign port against the captain for a supposed surreptitious landing of a part of his cargo, by which he is delayed in prosecuting his voyage, there being no suit against the ship, this is not a loss for which the underwriters on the ship are liable. *Bradford* v. *Levy*, 2 Car. & P. 137; Ry. & M. 331; 31 R. R. 657.

Restoration.]—Goods detained by a foreign power being afterwards restored, as between the assurer and assured, the yielding up quasi in integro is to be considered as a restoration, notwithstanding some spoliation during the detention. *Jordaine* v. *Cornwall*, 1 Stark. 6.

Evidence.]—The plaintiff declared on a policy from Jutland to Leith, and averred a loss by seizure. The captain stated that the ship was pursuing her course for Leith when she was captured by a Swedish frigate, five German miles off the coast of Norway; the defendant produced a Swedish sentence of condemnation for breaking the blockade of Norway:—Held, first, that this was conclusive evidence that the blockade had been violated; but secondly, that it was not sufficient evidence to fix the captain with barratry. *Everth* v. *Hannam*, 2 Marsh. 72; 6 Taunt. 375.

To support an averment in a declaration on a policy on goods, "that the ship, with the goods on board, when at A., was arrested by the persons exercising the powers of government there, and the goods were then and there, by the said persons seized, detained and confiscated," it is enough to shew that the goods were forcibly taken from on board the ship by the officers of government, and never delivered to the consignees, without putting in any sentence of condemnation. *Carruthers* v. *Gray*, 3 Camp. 142; 15 East, 35.

Detention by British Government.]—Where the assured is a British subject, he may recover against a British underwriter for a loss by detention of the British government. *Page* v. *Thompson*, 1 Park. Ins. (8th ed.) 175.

Sentence of Foreign Admiralty—Ship released on Appeal—Detention.]—If a ship warranted neutral be condemned as prize by a French admiralty court, and the sentence is afterwards reversed by a court of appeal, but on the appeal no damages or costs are given, because the muster-roll does not give the place of nationality of the crew according to the ordinance of France, and it is proved that the ship was otherwise properly documented as neutral, the assured may recover on the policy for the detention, notwithstanding the refusal of the court of appeal, to give damages and costs. *Siffken* v. *Lee*, 2 Bos. & P. (N.R.) 484; 9 R. R. 676. *And see* post, XI. ABANDONMENT, 5, EMBARGO AND CONFISCATION.

3. STRANDING.

a. Operation of Memorandum.

Stranding not cause of Loss.]—If an insurance is effected on fruit, and the policy contains the usual memorandum "corn, fruit, &c., warranted free from average, unless general, or the ship be stranded," and the ship is in fact stranded in the course of the voyage, the underwriters are liable for an average loss arising from the perils of the seas, though no part of the loss arises from the act of stranding. *Burnett* v. *Kensington*, 7 Term Rep. 210; 1 Esp. 416; Peake's Add. Cas. 71; 4 R. R. 424.

Effect of Stranding.]—The ship having been stranded the assured recovered an average loss of

80 per cent. being the whole loss. The words, "if the ship be stranded," are a condition upon the happening of which the assured is let in to prove his entire loss. *Cantillon* v. *London Assurance Co.*, cited, 3 Burr. 1553.

Fraudulent Stranding.]—Insurance on fish with the usual memorandum. The ship having been fraudulently run ashore by her crew:—Held, that the underwriters were not liable. *Browning* v. *Elmslie*, cited, 7 Term Rep. 216; 4 Term Rep. 783.

Per Lord Kenyon, C.J.: If the stranding was not fraudulent the underwriters were liable for all damage to the fish whether caused by stranding or not. *Ib.*

b. What is.

Definition.]—Stranding is where a ship, by an accident and out of the ordinary course of her voyage, gets upon the strand, and receives injury in consequence. *Bishop* v. *Pentland*, 7 B. & C. 219; 1 M. & Ry. 49; 6 L. J. (O.S.) K. B. 6; 31 R. R. 177.

Act of Mob.]—Where, after a seizure, the vessel stranded, and part of the cargo (consisting of corn) was taken by the mob at their own price, the loss could not be recovered as for general average; but, for such part as in consequence of the stranding was damaged and thrown overboard, the insured might recover on a count stating the loss to be by stranding. *Nesbitt* v. *Lushington*, 4 Term Rep. 783; 2 R. R. 519.

Confiscation.]—Where a vessel was stranded and afterwards confiscated for breach of an embargo:—Held, that as the vessel was warranted free from confiscation, the insured could not recover. *Livie* v. *Jansen*, 10 East, 648; 11 R. R. 513.

Time of.]—Hides were shipped on board a vessel at Valparaiso for Bordeaux. The ship sailed from Valparaiso on the 13th May, and on the 7th July put into Rio de Janeiro, in consequence of damage by stress of weather. It being found that the hides were so much damaged that it would be impossible to carry them in specie to the termination of the voyage, they being in such a state that they must either have been annihilated by putrefaction, or thrown overboard, they were sold at Rio de Janeiro for one-fourth of their value. On the 23rd July, the ship set sail from Rio on her voyage to Bordeaux, and was stranded on the 29th of September at the entrance of the Garonne. In an action on the policy, containing a memorandum declaring "cocoa and hides free of particular average unless the ship was stranded":—Held, that this was not a stranding of the ship within the meaning of the memorandum. *Roux* v. *Salvador*, 1 Bing (N.C.) 526; 1 Scott, 491; 4 L. J., C. P. 156; overruled, but not on this point, 4 Scott, 1; 3 Bing. (N.C.) 266; 2 Hodges, 209; 7 L. J., Ex. 328—Ex. Ch.

Salvage.]—A cargo of salt, of the value with prepaid freight of about 1,900*l.*, was insured from Liverpool to Calcutta, the policy containing the memorandum warranting "corn, fish, salt, &c., free from average unless general or the ship be stranded." Having encountered bad weather, lost both her anchors, and had her masts cut away, the ship was taken in tow by salvors and placed on a bank out of the ordinary course of the voyage, where she lay on her port side for several tides, and sustained considerable further injury. The salt was landed in a damaged state, and the ship repaired, though at an expense which exceeded her value when repaired. About one-fifth of the salt might have been made saleable, but would have realised no profit. Suits were instituted by the salvors in the admiralty court, and the salt sold under a decree, the entire proceeds being absorbed by the costs:—Held, that there was a partial loss of the salt, but not a total loss, the seizure and sale under the decree of the admiralty court not being a natural or necessary consequence of a peril insured against; and that there was a stranding within the meaning of the memorandum. *De Mattos* v. *Saunders*, L. R. 7 C. P. 570; 27 L. T. 120; 20 W. R. 801; 1 Asp. M. C. 377.

Negligence of Crew.]—Underwriters are liable for a stranding occasioned remotely by the negligence of the crew. *Bishop* v. *Pentland*, supra.

A vessel, moored in the usual way in a tidal harbour, was obliged also to be lashed to the side by a rope, which broke, and the vessel fell over on her side:—Held, to be a stranding, and that the underwriters were answerable, though it was remotely caused by the negligence of the crew. *Ib.*

Where no Pilot.]—A ship insured at and from London to Sierra Leone, arrived off the river Sierra Leone, where there was a regular establishment of pilots, about three o'clock in the evening. The captain hoisted a signal for a pilot, but no pilot came on board; about ten o'clock at night he attempted to enter the river without one, and in so doing the ship took the ground and was lost. The judge left it to the jury whether the captain, in entering without a pilot, did what a prudent man ought to have done under the circumstances. The jury was of that opinion, and found for the plaintiff. On motion for a new trial, on the ground that the verdict was against evidence:—Held, that the underwriters were liable, and would have been so although the captain had been wrong in attempting to enter the port without a pilot, he being a person of competent skill, having used reasonable diligence to obtain a pilot, and having exercised his discretion bonâ fide under the circumstances. *Phillips* v. *Headlam*, 2 B. & Ad. 380; 9 L. J. (O.S.) K. B. 238.

Order of Pilot—Mooring.]—A ship being under conduct of a pilot in her course up the river to Liverpool, was, against the advice of the master, fastened at the pier of the dock basin by a rope to the shore, and left there, and she took the ground, and when the tide left her fell over on her side and bilged; in consequence of which, when the tide rose, she filled with water, and the goods were wetted and damaged:—Held, that this was a stranding to entitle the assured to recover for an average loss upon the goods. *Carruthers* v. *Sydebotham*, 4 M. & S. 77; 16 R. R. 392.

Canal.]—During the course of a voyage on an inland canal, it became necessary, in order to repair the canal, to draw off the water, and the ship, in consequence, having been placed in the most secure situation that could be found, when the water was drawn off, took the ground by accident on some piles which were not previously known to be there:—Held, that this was a stranding, the accident not having happened in

the ordinary course of the voyage. *Rayner* v. *Godmond*, 5 B. & Ald. 225; 24 R. R. 335.

Harbour—Condition of.]—A policy of marine insurance on cargo contained the usual warranty against average unless the ship were stranded. The place of discharge was in a tidal harbour, where vessels of the size of the ship in question can only get to the quay to unload during high spring tides. A ship arriving in the port is brought towards the quay as soon as in the pilot's judgment there will be water enough to float her there, and, if in the course of getting her to the quay the depth of water proves insufficient, she takes the ground to wait until the next tide admits of her being floated further. The ship in question was in the course of being brought to the quay, but it was found that she could not get within twenty feet of it, and consequently she was left where she was to await a higher tide. As the tide receded and she settled down. instead of resting on an even keel she pitched by the head into a hole, and remained in such a position as to cause her timbers to be strained, by reason whereof she made water and damage resulted to the cargo. It afterwards appeared that there was an elevation in the bottom of the harbour, a small bank having been formed parallel with the quay, and a hole beside it into which the vessel had pitched. This state of things had been caused by the paddles of steamers leaving the harbour at low tide, and its existence had not been found out previously to the accident:—Held, that the taking of the ground by the vessel was under circumstances of such an accidental and unforeseen character as not to be in the ordinary course of navigation and to amount to a "stranding." *Letchford* v. *Oldham*, 49 L. J., Q. B. 458; 5 Q. B. D. 538; 28 W. R. 789—C. A.

Upon the ebbing of the tide, a vessel took the ground in a tidal harbour, in the place where it was intended that she should; but in so doing, struck against some hard substance, by which two holes were made in her bottom, and the cargo damaged:—Held, not a stranding for which the underwriters were liable upon an insurance upon corn warranted free from average, unless general, or the ship to be stranded. *Kingsford* v. *Marshal*, 8 Bing. 458; 1 M. & Scott, 657; 1 L. J., C. P. 135.

A ship having on board goods which were insured on a voyage from London to Hull, but "warranted free from average, unless general, or the ship should be stranded," arrived in Hull harbour, which is a tidal harbour, and proceeded to discharge her cargo at a quay inside of it; this could be done at high water only, and could not be completed in one tide. At the first low tide the vessel grounded on the mud; on a subsequent ebb, the rope by which her head was moored to the opposite side of the harbour, stretched, and the wind blowing from the east at the same time, she did not ground on the mud, which it was intended she should do, but her forepart got on a bank of stones, rubbish and sand, near to the quay, and the vessel having strained, some damage was sustained by the cargo, but no lasting injury by the vessel:—Held, by Lord Tenterden, C.J., Littledale and Taunton, JJ., Parke, J., dissentiente, that this was a stranding within the meaning of that word in the policy. *Wells* v. *Hopwood*, 3 B. & Ad. 20.

Policy on goods, with a warranty against average, unless general, or the ship be stranded. On the voyage the ship was driven by stress of weather into a harbour at the mouth of which she struck upon an anchor, and was in danger of sinking; to prevent which she was warped higher up in the harbour, where she took the ground, and remained fast half an hour:—Held, that the ship was stranded. *Barrow* v. *Bell*, 4 L. J. (o.s.) K. B. 47; 7 D. & R. 244; 4 B. & C. 736; 28 R. R. 468.

—— **Driven into, by Stress of Weather.**]—If a ship takes the ground at the ordinary time, in the ordinary place, in the ordinary manner, and from the ordinary causes, that is, so in all respects as it must have been contemplated she would in the course of an ordinary voyage, such a taking the ground is not a stranding; but if she takes the ground at an unusual time, or in an unusual place, or in an unusual manner, or from accidental and unusual though natural causes, she is to be considered as stranded. *Corcoran* v. *Gurney*, 1 El. & Bl. 456; 22 L. J., Q. B. 113; 17 Jur. 1152; 1 W. R. 129.

Where a ship was driven by stress of weather into a tidal harbour, where by reason of its being low water, she took the ground:—Held, that she was stranded. *Ib.*

—— **Moored in.**]—A vessel with a cargo on board took the ground on two successive days in going up Cork harbour, under the direction of a pilot, and being afterwards moored in the usual course, was thrown on her broadside by the receding of the tide, and received a considerable injury:—Held, that this was not a stranding. *Hearne* v. *Edmunds*, 1 Br. & B. 388; 4 Moore, 15; 21 R. R. 660.

Damage resulting from a ship's taking the ground on the falling of the tide, in a tidal harbour, in a spot where she is properly placed for the purpose of unloading, is not a stranding within the ordinary term of a policy. *Magnus* v. *Buttermer*, 11 C. B. 876; 21 L. J., C. P. 119; 16 Jur. 480.

On Rock.]—A vessel strikes upon a rock and remains fixed there for the space of fifteen or twenty minutes, in consequence of which she sustains a material injury. This constitutes a stranding. *Baker* v. *Towry*, 1 Stark. 436; 18 R. R. 803.

But the striking of a ship on a rock, where she remained a minute and a half, and was laid on her beam ends, was held not to constitute a stranding. *M'Dougle* v. *Royal Exchange Assurance Co.*, 4 M. & S. 503; 4 Camp. 283; 16 R. R. 532.

Where there is a warranty in a policy against average, "unless general, or the ship be stranded"; if, during the voyage, the ship is forced ashore by the wind, or driven on a bank, and remains fast for any time, this is a sufficient stranding to do away with the effect of the warranty, although the ship is not proved to have thereby received any material damage. *Harman* v. *Vaux*, 3 Camp. 429; 14 R. R. 773.

A ship which had struck upon a sunken rock, and received damage, was run on shore by direction of the pilot, when she was repaired, and afterwards proceeded to her ports of delivery:—Held, not to be a stranding. *Burnett* v. *Kensington*, 7 Term Rep. 20; 1 Esp. 416; Peake's Add. Cas. 71; 4 R. R. 424.

Improper Mooring.]—Where a ship, being under the conduct of a pilot, in her course up the river to Liverpool, was, against the advice of

the master, fastened at the pier of the dock basin, by a rope to the shore, and left there, and she took to the ground, and when the tide left her, fell over on her side and bilged, in consequence of which, when the tide rose she filled with water, and the goods were wetted and damaged :—Held, that this was a stranding, to entitle the assured to recover for an average loss upon the goods. *Carruthers* v. *Sydebotham*, 4 M. & S. 77 ; 16 R. R. 392.

The assured is not prevented from recovering against the underwriter because the ship was in charge of a compulsory pilot. *Ib.*

Grounding on Piles.]—A ship grounding on piles in the Wisbeach river, put there to keep up the banks and sitting on them until they were cut away :—Held, to be stranded within the meaning of the memorandum. *Dobson* v. *Bolton*, 1 Park. Ins. (8th ed.) 239.

4. Barratry.

a. What is.

Position of Owner.]—Barratry can only be committed against the owner of the ship, and without his consent. *Nutt* v. *Bourdieu*, 1 Term Rep. 323 ; 1 R. R. 211.

In an action by an assured against the underwriters for a loss by the barratry of the master, proof that the person who was described in the policy as master, and who was treated with and acted as such, carried the ship out of her course for fraudulent purposes of his own, primâ facie is sufficient to entitle the assured to recover, without shewing negatively that he was not the owner, or that any other person was. *Ross* v. *Hunter*, 4 Term Rep. 33 ; 2 R. R. 319.

Barratry is any fraudulent or criminal conduct against the owners of ships or goods by the master or mariners in breach of the trust reposed in them, and to the injury of the owners ; although it may not be done with intent to injure them, or to benefit, at their expense, the master or mariners. *Vallejo* v. *Wheeler*, Cowp. 143 ; Lofft, 631.

Deviation.]—A deviation of a vessel from the voyage insured, through the ignorance of the captain, or from any other motive not fraudulent, though it avoids the policy, does not constitute an act of barratry. *Phyn* v. *Royal Exchange Assurance Co.*, 7 Term Rep. 505 ; 4 R. R. 508. But see *Browning* v. *Elmslie*, supra, col. 1093.

Scuttling Ship.]—Scuttling a ship with the knowledge of the shipowner, but without the knowledge of the freighter, is barratry, in respect of which the freighter may recover against the underwriters. *Ionides* v. *Pender*, 27 L. T. 244.

Kidnapping.]—The Kidnapping Act, 1872 (35 & 36 Vict. c. 19), having prohibited the carrying of Polynesian native labourers in ships without a licence, under penalty of forfeiture of the ship, a master who, without the authority of his owners, but with a knowledge of the prohibition, ships and carries native labourers, and so brings about the seizure and condemnation of his ship, commits an act of barratry in respect of which his owners may recover against their underwriters. *Australian Insurance Co.* v. *Jackson*, 33 L. T. 286 ; 3 Asp. M. C. 26—P. C.

Absence of Master.]—Where the captain, in the due course of his voyage, put into port for the purpose of repairing damage ; and whilst the repairs were proceeding was absent, and continued so for a much longer time than was necessary to finish such repairs ; and during his absence procured forged papers, and afterwards returned to the vessel ; and, instead of proceeding on the voyage, carried her to a foreign port ; and the jury found that an act of barratry was committed during the absence of the captain, and whilst the vessel was being repaired :—Held, that they were warranted in so doing. *Roscow* v. *Corson*, 8 Taunt. 684 ; 21 . R. 507.

Where the voyage insured was from Jamaica to New Orleans, which lies up the river Mississippi, and the captain proceeded on his voyage as far as the mouth of that river, and then dropped anchor, and went up the river in his boat for a fraudulent purpose of his own :—Held, that the dropping of his anchor with such fraudulent intention was an act of barratry, and not merely a deviation. *Ross* v. *Hunter*, 4 Term Rep. 33 ; 2 R. R. 319.

Collusive Capture—Barratry of Master.]—See *Arcangelo* v. *Thompson*, 2 Camp. 620 ; 12 R. R. 758 ; infra, col. 1107.

Cruising.]—If the captain, contrary to the instructions of his owner, cruises for and takes a prize, and the vessel is afterwards lost in consequence of it, it is an act of barratry, upon which the insured may recover against the underwriters ; although the captain libelled the prize as well for the benefit of his owner as for himself. *Moss* v. *Byrom*, 6 Term Rep. 379 ; 3 R. R. 208.

Trading with Enemy.]—A master had general instructions to make the best purchases with despatch :—Held, that it did not warrant him in going into an enemy's settlement to trade (which was permitted by the enemy), though his cargo could be more speedily and cheaply completed there ; but such act, in consequence of which the ship was seized and confiscated, is barratrous. *Earle* v. *Rowcroft*, 8 East, 126 ; 9 R. R. 385.

Negligence.]—A party shipped goods on board a vessel, the "Black Prince," under a bill of lading, which contained the exceptions of barratry and perils of the sea. The "Black Prince," with the goods on board, was lost in a collision with another vessel, the "Araxes." In an action on the bill of lading for the loss of the goods, there was evidence at the trial that the collision arose from the "Black Prince" starboarding instead of porting her helm, and a collision occasioned by non-observance of such rules is, by the Merchant Shipping Act of 1854, s. 299, to be deemed to have been occasioned by the wilful default of the person in charge of the offending ship :—Held, that the contravention of the rules of the Merchant Shipping Act by those in charge of the "Black Prince," in starboarding instead of porting the helm, did not amount to barratry within the exception in the bill of lading. *Grill* v. *General Iron Screw Collier Co.*, 37 L. J., C. P. 205 ; L. R. 3 C. P. 476 ; 18 L. T. 485 ; 16 W. R. 796—Ex. Ch.

Must be a Wrongful Act.]—In order to constitute barratry the master must be proved to have acted against his better judgment. Mere want of judgment in seamanship or treatment of the vessel is not barratry. *Todd* v. *Ritchie*, 1 Stark. 240 ; 18 R. R. 768.

—— **Not mere Error of Judgment.**]—Where the master acts only for the benefit of his owners it is not barratry, though it may be a deviation

or a breach of contract. *Stamma* v. *Brown*, 2 Str. 1173. And see *S. C.*, cited 8 East, 136. *See* 9 R. R. 389.

Smuggling.]—In a time policy of marine insurance on ship the ordinary perils insured against (including "barratry of the master") were enumerated, and the ship was warranted "free from capture and seizure, and the consequences of any attempt thereat." In consequence of the barratrous act of the master in smuggling, the ship was seized by Spanish revenue officers, and proceedings were taken to procure her condemnation and confiscation. In an action on the policy to recover expenses incurred by the owner in obtaining her release:—Held, that the loss must be imputed to "capture and seizure," and not to the barratry of the master, and that the underwriter was not liable. *Cory* v. *Burr*, 52 L. J., Q. B. 657; 8 App. Cas. 393; 49 L. T. 78; 31 W. R. 894; 5 Asp. M. C. 109—H. L. (E.)

Where the ship was insured whilst engaged "in any lawful trade," and barratry of the master was a risk to be borne by the insurer; the underwriter was held liable for the loss by the master smuggling; the "lawful trade" mentioned being the trade of the owners and not of the master. *Havelock* v. *Hancill*, 3 Term Rep. 277; 1 R. R. 703.

Illegal Trade—Chartered Ship.]—If a chartered ship is lost through the captain engaging in illegal trade under the orders of the charterer, this is not a loss by barratry for which the shipowner can recover against underwriters. *Hobbs* v. *Hannam*, 3 Camp. 93.

Loss by Peril of Sea caused by Barratry of Master.]—See *Heyman* v. *Parish*, 2 Camp. 148; 11 R. R. 688, ante, col. 1082.

b. Who can Commit.

Master—Collusion with Owner.]—The owner of a vessel, fully laden by the freighters, colluded with the captain to run her on shore:—Held, that this amounted to barratry, although by the terms of a charterparty entered into between such owner and the freighters the former was entitled to put goods on board during a previous part of the voyage. *Soares* v. *Thornton*, 1 Moore, 373; 18 R. R. 615.

The master of a vessel, condemned for a breach of blockade, swore he was bound for another destination:—Held, that this did not so disaffirm his owner's privity and consent to the breach of blockade, so as to enable the assured to recover as for a loss by barratry. *Everth* v. *Hannam*, 6 Taunt. 375; 2 Marsh. 72.

—— **Part Owner.**]—Barratry may be committed by a master of a ship who is part owner. *Jones* v. *Nicholson*, 2 C. L. R. 1236; 10 Ex. 28; 23 L. J., Ex. 330.

The master, being part owner, fraudulently sold the ship and cargo and applied the proceeds to his own use:—Held, that this was a loss insured against by the words "barratry of the master," and, per Martin, B., also by the words "all other perils, losses and misfortunes." *Ib.*

By master, a part owner, who had mortgaged his share to his co-owner. See *Small* v. *United Kingdom Marine Mutual Insurance Association*, post, col. 1136.

—— **With Privity of Freighter.**]—See *Bontflower* v. *Wilmer*, infra, col. 1101.

c. Effect and Proof of.

Warranty free from Capture and Seizure.]—In a time policy of marine insurance on ship the ordinary perils insured against (including "barratry of the master") were enumerated, and the ship was warranted "free from capture and seizure, and the consequences of any attempts thereat." In consequence of the barratrous act of the master in smuggling, the ship was seized by Spanish revenue officers, and proceedings were taken to procure her condemnation and confiscation. In an action on the policy to recover expenses incurred by the owner in obtaining her release:—Held, that the loss must be imputed to "capture and seizure," and not to the barratry of the master, and that the underwriter was not liable. *Cory* v. *Burr*, 52 L. J., Q. B. 657; 8 App. Cas. 393; 49 L. T. 78; 31 W. R. 894; 5 Asp. M. C. 109—H. L. (E.)

Loss, whether caused by.]—If, through the negligence of the owner of a ship insured, the mariners barratrously carry smuggled goods on board, whereby the ship is seized as forfeited, the underwriters are not liable for the loss. *Pipon* v. *Cope*, 1 Camp. 434; 10 R. R. 720.

If a ship is insured by the terms of the policy in any lawful trade, and the barratry of the master is mentioned as one of the risks to be borne by the insurer, the underwriters will be liable for a loss which happens by the barratry of the master by smuggling. *Havelock* v. *Hancill*, 3 Term Rep. 277; 1 R. R. 703.

A loss by barratry is well alleged, though the proof is that it happened by the act of an enemy and by barratry conjointly. *Toulmin* v. *Anderson*, 1 Taunt. 227.

Where a ship and a cargo were carried barratrously by the master out of the course of the voyage, and the ship and a part of the cargo were sold, and the remainder sent home by a strange ship:—Held, that this was a total loss of the cargo from the time of committing the act of barratry; and that the underwriters were liable for such loss, with the benefit of salvage only. *Dixon* v. *Reid*, 1 D. & R. 207; 5 B. & Ald. 597; 24 R. R. 481.

The insurer of a ship is not liable for the expenses incurred by the delay of the vessel, for the purpose of recovering her cargo, when detained under process of a foreign country, if the ship itself is not detained by the process. And the circumstances causing the detainer must be positively shewn to have originated in the fraud of the master, in order to support an averment of loss by his barratry. *Bradford* v. *Levy*, Ry. & M. 331; 2 Car. & P. 137; 31 R. R. 657.

A vessel, with liberty to chase and capture prizes, had some Spanish prisoners on board; by means which did not appear they broke loose, rose upon and imprisoned the crew, with the exception of one sailor, who was heard upon the deck in conversation with them. The captain and crew, with the exception of the sailor, were put on shore, and the Spaniards ran away with the ship. Upon a loss alleged to be by barratry of the mariners, this was evidence to be left to the jury that such barratry was committed. *Hucks* v. *Thornton*, Holt, 30; 17 R. R. 594.

A sentence condemning as enemy's property a cargo which the master had barratrously carried into an enemy's blockaded port, although it may be conclusive evidence that the cargo was enemy's

property at the time of capture and condemnation, does not disprove the allegation that the cargo was lost by the captain's barratrously carrying the cargo to places unknown, whereby the goods became liable to be, and were confiscated. *Goldschmidt* v. *Whitmore*, 3 Taunt. 508. See *Exerth* v. *Hannam*, ante, col. 1099.

Barratry with Privity of Freighter.]—Insurance by shipowner; barratry committed with privity of freighter; the underwriter is not discharged unless he can shew that the shipowner was privy to the barratry. *Bontflower* v. *Wilmer*, cited 2 Selw. N. P. (11th ed.), 969.

5. JETTISON.

To Save Capture.]—Where the captain of a ship, in order to prevent a quantity of dollars from falling into the hands of an enemy, by whom he was about to be attacked, threw them into the sea, and was immediately afterwards captured:—Held, first, that this was a loss by jettison, that term in a policy meaning any throwing overboard of the cargo for a justifiable cause; secondly, if not that it was a loss by enemies; and, thirdly, if it was not a loss by jettison, that it was ejusdem generis in the strictest sense, and came within the meaning of the words in the policy, "all other losses and misfortunes." *Butler* v. *Wildman*, 3 B. & Ald. 398; 22 R. R. 435.

Negligence—Ballast.]—To a declaration on a time policy for six months, stating a loss by perils of the sea, the defendant pleaded that though the vessel was lost by perils of the sea, yet, that such loss was occasioned wholly by the wrongful, negligent and improper conduct (the same not being barratrous) of the master and mariners of the ship, by wilfully, wrongfully, negligently and improperly, but not barratrously, throwing overboard so much of the ballast, that the vessel became unseaworthy, and was lost by perils of the sea, which, otherwise, she would have encountered and overcome:—Held, that the plea was bad, and that the underwriter was liable for the consequence of the wilful, but not barratrous act of the master and crew in rendering the vessel unseaworthy before the end of the voyage, by throwing overboard a part of the ballast. *Dixon* v. *Sadler*, 5 M. & W. 405; 9 L. J., Ex. 48. Affirmed, nom. *Sadler* v. *Dixon*, 8 M. & W. 895; 11 L. J., Ex. 435—Ex. Ch.

Deck Cargo Loose.]—A ship on a voyage from Quebec to London, laden with timber, was overtaken in a gale, and in order to enable the pumps to work—the working of them was impeded by the deck cargo getting adrift—the master threw such cargo overboard:—Held, that such jettison was made to avert a danger common to all the interests concerned, ship, freight and cargo; and that the timber so jettisoned, not being at the time wreck within the received meaning of that word, and the sacrifice of it being voluntary, the loss accruing on the same must be held to be general average, and that all interests must contribute to make it good. *Johnson* v. *Chapman*, 19 C. B. (N.S.) 563; 35 L. J., C. P. 23; 15 L. T. 70; 14 W. R. 264.

Goods stowed on Deck.]—Loss of, does not give occasion for general average contribution. *Ross* v. *Thwaite*, 1 Park. Ins. (8th ed.) 23; *Backhouse* v. *Ripley*, *Ib.* p. 24. *See also* X. LOSSES, post, col. 1246.

6. FIRE.

General Average Losses.]—*See Cases* sub tit. X. LOSSES, infra, col. 1240.

How Occasioned.]—In an action on a policy on ship, by which the underwriters insured against fire and barratry of the master and mariners, they are liable for a loss by fire occasioned by the negligence of the master and mariners. *Busk* v. *Royal Exchange Assurance Co.*, 2 B. & Ald. 73; 20 R. R. 350. And see *Bishop* v. *Pentland*, 7 B. & C. 214; 1 M. & Ry. 49; 6 L. J. (O.S.) K. B. 6; 31 R. R. 177.

If a captain of a ship insured burns her, to prevent her falling into the hands of the enemy, this is a loss by fire within the meaning of the policy. *Gordon* v. *Rimmington*, 1 Camp. 123.

If a fire arises on board a ship from the damaged quality of goods on board, which are insured, the underwriters are not liable; but if the loss is not occasioned by the damaged state of the goods on board, the policy is not vitiated by the fact not having been disclosed to the underwriters that the goods were damaged, though they might have a tendency to increase the risk. *Boyd* v. *Dubois*, 3 Camp. 133. And see *Bufe* v. *Turner*, 2 Marsh. 46; 6 Taunt. 338; 16 R. R. 626.

In Warehouse.]—At Canton, an East India ship stayed to clean and refit, for which purpose all the sails and furniture were taken out of the ship and put into a warehouse, built for them on a sand-bank in the river there, where they were accidentally burnt; this is a loss within the words and meaning of a policy of the ship, on its body, tackle, apparel and other furniture, against perils of the sea and fire (expressly), to any ports and places beyond the Cape of Good Hope, and back again to London. *Pelly* v. *Royal Exchange Assurance Co.*, 1 Burr. 341.

Communication of other Policy when necessary.]—The plaintiffs effected a policy of insurance with the defendant as chairman of a fire insurance company for 3,000*l.*, "on wool in bales or fleeces greasy and washed, in all or any shed or store, on station or in transit to Sydney by land only, or in any shed or store, or any wharf in Sydney, until placed on ship." The policy contained a provision as follows: "No claim shall be recoverable if the property insured be previously or subsequently insured elsewhere, unless the particulars of such insurance be notified to the company in writing." The plaintiffs subsequently effected an insurance with a marine insurance company to cover 16,500*l.* upon wool, the risk being described as "at and from the river Hunter to Sydney per ships and steamers, and thence per ship or ships to London, including the risk of craft from the time that the wools are first waterborne and of transhipment or landing and reshipment at Sydney." The frequent practice at the port of Sydney is that wool arriving there for shipment is not delivered direct to the ship for which it is intended, but is conveyed to the stores belonging to the persons who are acting as the stevedores of the ship, and is there pressed for the purpose of reducing its bulk. By the practice and cause of business, the stevedores' receipt is regarded, as between the ship and the shippers, as equivalent to the mate's receipt, and bills of lading are given in exchange for it. Certain wool belonging to the plaintiffs was forwarded by several consignments by several

steamers from the river Hunter to Sydney. The plaintiffs' agent at Sydney had the wool conveyed on its arrival to his own stores, for the purpose of being weighed, and entered into a contract for its conveyance to London on board a ship. The wool was then conveyed from his warehouses to the stores of the stevedores of the ship, who gave the usual receipts for the same. While in the stevedores' warehouses, a portion of the wool was destroyed or damaged by a fire, and the plaintiffs sought to recover such loss upon the policy effected with the defendant's company. The company resisted the claim, upon the ground that the policy of marine insurance above mentioned came within the terms of the provision in the fire policy, and ought to have been communicated to them:—Held, that the marine policy did not cover the wool in the stevedores' warehouses, and was not such an insurance as the plaintiffs were bound under the provisions in the fire policy to notify to the defendant's company, and that the plaintiffs were therefore entitled to recover. *Australian Agricultural Co.* v. *Saunders*, 44 L. J., C. P. 391; L. R. 10 C. P. 668; 33 L. T. 447; 3 Asp. M. C. 63—Ex. Ch.

Steamship.]—A general policy covers the risk of fire at sea in a steamboat, as in any other vessel. *Pattison* v. *Mills*, 1 Dow & Clark, 342; 2 Bligh (N.S.) 519; 31 R. R. 49.

A fire insurance company, in making out a policy on a steamship, referring to conditions indorsed, so far as applicable, used one of their printed forms of conditions applicable to houses, the language being, "if more than twenty pounds of gunpowder be on the premises at the time of the loss, such loss will not be made good":—Held, that the word premises equally applied to a ship, the word being in legal language often used to denote the subject or thing previously expressed. *Beacon Life Assurance Co.* v. *Gibb*, 1 Moore, P. C. (N.S.) 73; 1 N. R. 110; 9 Jur. (N.S.) 185; 7 L. T. 574; 11 W. R. 194.

Held, also, that parol evidence was not admissible to prove that the word premises was not intended to include the steamer. *Ib.*

Held, also, that one of the conditions having specified a limited quantity of gunpowder to be carried on board, it was quite immaterial whether the fire was or was not occasioned by more than the specified quantity of gunpowder being on board. *Ib.*

In Dock.]—A ship was insured for three months against fire, and was described in the policy "as lying in the Victoria Docks, with liberty to go into a dry dock, and light her boiler fires once or twice during the currency of the policy":—Held, that the ship was covered while she was in the river passing from the Victoria Docks to a dry dock, and vice versâ, but not while she was in the river for any other purpose. *Pearson* v. *Commercial Union Assurance Co.*, 45 L. J., C. P. 761; 1 App. Cas. 498; 35 L. T. 445; 24 W. R. 951; 3 Asp. M. C. 275—H. L. (E.)

A policy against loss by fire described a steamboat as "now lying in Tait's Dock, Montreal, and intended to navigate the St. Lawrence and lakes from Hamilton to Quebec principally as a freight-boat, and to be laid up in winter in a place approved by the insurers, who will not be liable for explosion either by steam or gunpowder." The steamboat never left Tait's Dock, and was burnt there:—Held, that the words in the policy implied no agreement to navigate the steamboat as described in the policy, and that consequently the insurers were liable, though the steamboat never left the dock. *Grant* v. *Ætna Insurance Co.*, 15 Moore, P. C. 516; 8 Jur. (N.S.) 705; 6 L. T. 735; 10 W. R. 772.

Ship Stranded—Subsequent Loss by Fire—Time Policy.]—The ss. "Bawnmore" was insured under a time policy valued at 22,000*l.* against loss or damage by fire or explosion only. She was driven ashore by perils of the sea, and whilst stranded totally destroyed by fire. The underwriters denied their liability, on the ground that, at the time the fire occurred, the ship was already a constructive total loss:—Held, upon a preliminary point of law, argued on the assumption that the ship was still capable of being floated and repaired, though at an expense which would exceed her value when repaired, that the assured were entitled to judgment, and that the valuation in the policy was binding upon the underwriters. *Woodside* v. *Globe Marine Insurance Co.*, 65 L. J., Q. B. 117; [1896] 1 Q. B. 105; 73 L. T. 626; 44 W. R. 187; 8 Asp. M. C. 118.

7. Capture and Seizure.

a. What amounts to.

Stress of Weather.]—If a ship is driven by stress of weather on an enemy's coast, and there captured, it is a loss by capture and not by the perils of the sea. *Green* v. *Elmslie*, Peake, 278; 3 R. R. 693.

Recapture.]—When a ship was insured for a voyage or a cruise of three months, and taken by the enemy within that time, but before she was carried infra praesidia hostis, was retaken by an Englishman, and was at the time of action a living ship:—Held, to be a total loss to the insured. *Pond* v. *King*, 1 Wils. 191. See *Dean* v. *Hornby*, 3 El. & Bl. 180; 2 C. L. R. 1519; 23 L. J., Q. B. 129; 18 Jur. 623; 2 W. R. 156, infra.

Arrival at Port—Embargo.]—If a policy is on a ship bound to a foreign port until she is twenty-four hours moored in safety there, and previously to such ship's arrival at her destined port, an embargo is laid on all English vessels in that port, and she on entering is also detained, and her crew made prisoners of war, the assured is entitled to recover. *Minett* v. *Anderson*, Peake, 211; 3 R. R. 692.

Release.]—Money having been expended in reclaiming a cargo on board a ship captured, insured by the owners, upon the event of the ship's arrival at Marseilles; the ship being captured, and restored upon appeal, relinquished her voyage, and was afterwards lost; pending the appeal, the goods were ordered to be sold, and the expenses of the appeal were afterwards defrayed therewith; yet an averment of a loss by capture is bad, because the ship might, notwithstanding the capture, have afterwards arrived at Marseilles. *Kulen Kemp* v. *Vigne*, 1 Term Rep. 304; 1 R. R. 205.

If a ship is justly seized as forfeited for smuggling, and afterwards restored, the underwriters are not liable for any damage happening to the ship by the perils of the sea in the interval between the seizure and the restoration. *Pipon* v. *Cope*, 1 Camp. 434; 10 R. R. 720.

A policy was effected on a Prussian ship against such risks only as were excluded by the clause, "warranted free from capture, seizure and detention, or the consequences of any attempt thereof," with a stipulation that the insurers should pay a total loss thirty days after the receipt of official news of capture or embargo, without waiting for condemnation. The ship was detained by an embargo in a Danish port, after the breaking out of hostilities between that power and Germany:—Held, that the right of the assured to claim for a total loss became vested on the expiration of the thirty days, notwithstanding that the vessel had never been actually taken out of the possession of the captain, and was afterwards (and after action) restored, and arrived safely in London. *Fowler* v. *English and Scottish Marine Insurance Co.*, 18 C. B. (N.S.) 919; 34 L. J., C. P. 253; 11 Jur. (N.S.) 411; 12 L. T. 381; 13 W. R. 658.

Held, also, that the entry of the fact of the embargo in Lloyds' Loss Book, however the intelligence might have been received, was sufficient to satisfy the term "official news" in the policy. *Ib.*

Hostilities—Perils of Sea.]—A policy was effected on 6,500 bags of coffee, warranted "free from capture, seizure and detention, and all the consequences thereof, and free from all consequences of hostilities, riots and commotion." The coffee was shipped on board a vessel bound for New York. At the time of ship sailing a war had broken out between the Northern and Southern States of America; and, as an act of hostility, a light, which had usually indicated the position of Cape Hatteras, was extinguished. The war, and the extinction of the light, were unknown to the captain, and from ignorance of the latter, he fell out of his reckoning, and ran ashore. Certain persons on the coast had recovered 120 bags of the coffee, when they were interrupted by soldiers, who appropriated the 120 bags, and prevented others being saved. The captain and crew were taken prisoners. But for this interference, 1,000 more bags might have been saved before the breaking up of the ship:—Held, that the loss of the ship was by perils of the sea, and not "by the consequences of hostilities," within the meaning of the policy; that as the 1,120 bags were lost by reason of the interference of the soldiers, that loss was covered by the exception, and the insurers were not liable; but that for the remainder the insurers were liable, as for a loss by the perils of the sea. *Ionides* v. *Universal Marine Insurance Co.*, 14 C. B. (N.S.) 259; 32 L. J., C. P. 170; 10 Jur. (N.S.) 18; 8 L. T. 705; 11 W. R. 858.

Capture by Pirates.]—A ship, being insured under a time policy, was captured by pirates. She was afterwards recaptured by an English ship of war, but kept by them as a prize, whereupon the owners gave notice of abandonment. The ship was afterwards sent to England under the care of a prize master, with orders to obtain an adjudication in the court of admiralty, but, meeting with bad weather, put into F., and was sold by the prize master. Afterwards the owners brought an action against the underwriters as for a total loss:—Held, that they were entitled to recover as for a total loss, for capture by pirates was a total loss in the first instance, and such total loss could not be reduced to a partial loss unless either the ship was restored to the possession of the owners before action brought, or they had the power of resuming possession of her before action brought, it being immaterial whether they had the right to immediate possession, and whether the recaptors had any right to detain. *Dean* v. *Hornby*, 3 El. & Bl. 180; 2 C. L. R. 1519; 23 L. J., Q. B. 129; 18 Jur. 623; 2 W. R. 156.

—— **Intention to Keep the Ship.**] — In an action on a policy of insurance upon a ship, in which the subject-matter was warranted "free from capture and seizure, and the consequences of any attempt thereat," it was proved that during the continuance of the risk some natives took forcible possession of the ship in the Brass river, plundered the cargo, and damaged her so that she became a constructive total loss, and that their intention in so taking possession was only to plunder the cargo, and not to keep the ship:—Held, that the acts of the natives constituted a "seizure" within the meaning of the warranty, and therefore that the underwriters were not liable. *Johnston* v. *Hogg*, 52 L. J., Q. B. 343; 10 Q. B. D. 432; 48 L. T. 435; 31 W. R. 768; 5 Asp. M. C. 51.

Illegal Acts by Belligerent.]—By a policy on goods on board the ship "B.," they were warranted "free from capture and seizure, and the consequences of any attempt thereof." The perils insured against were enumerated as usual, viz. "of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of marque and counter-marque, reprisals, takings at sea, arrests, restraints, and detainments of all kinds, and of all other perils, losses and misfortunes":—Held, that the exceptions introduced by the warranty were not confined to legal capture and seizure, but that an illegal capture or seizure was within both the exceptions and the perils enumerated as insured against. *Powell* v. *Hyde*, 5 El. & Bl. 607; 25 L. J., Q. B. 65; 2 Jur. (N.S.) 87; 4 W. R. 51.

A British ship, in her passage down the Danube, passed within shot of a Russian fort, there being then war between Turkey and Russia, but not war between Great Britain and Russia. The Russian fort fired into her and sunk her, alleging that the vessel was mistaken for a Turk, but permitted her crew, after some detention, to depart. It appearing to the court, on the whole of the facts, that the object of the Russians was to detain the ship:—Held, that but for the warranty, the insurers would have been liable; but that the warranty protected them. *Ib.*

The owners of a vessel who, by performing the legal stipulations of a charterparty, provoke confiscation by the illegal and piratical act of a foreign state, do not thereby avoid their assurance. *Sewell* v. *Royal Exchange Assurance Co.*, 4 Taunt. 856.

—— **By Emigrants on Board.**]—Action upon a policy on provisions and freight, on a voyage from Macao to Havannah with Chinese emigrants on board, which contained the words, "warranted free from capture and seizure, and the consequences of any attempt thereat." While the ship was proceeding on her voyage, the Chinese emigrants piratically carried away the ship, and the provisions and stores on board of her, whereby a total loss accrued to the insured:—Held, that this was a loss by seizure within the exception introduced by the warranty, and there-

fore the underwriter was not liable. *Kleinwort* v. *Shepard*, 1 El. & El. 447; 28 L. J., Q. B. 147; 5 Jur. (N.S.) 863; 7 W. R. 227.

Barratry — Proximate Cause.] — In a time policy of marine insurance on ship the ordinary perils insured against (including "barratry of the master") were enumerated, and the ship was warranted "free from capture and seizure and the consequences of any attempts thereat." In consequence of the barratrous act of the master in smuggling, the ship was seized by Spanish revenue officers, and proceedings were taken to procure her condemnation and confiscation. In an action on the policy to recover expenses incurred by the owner in obtaining her release:—Held, that the loss must be imputed to "capture and seizure," and not to the barratry of the master, and that the underwriter was not liable. *Cory* v. *Burr*, 52 L. J., Q. B. 657; 8 App. Cas. 393; 49 L. T. 78; 31 W. R. 894; 5 Asp. M. C. 109—H. L. (E.)

Collusive Capture—Barratry of Master.]—A count on a policy of insurance, laying the loss to be by capture, is sustained by evidence that the ship was captured by a privateer, although there was collusion between the master of the ship and the commander of the privateer; and although the plaintiff might have recovered under a count laying the loss by barratry of the master. *Arcangelo* v. *Thompson*, 2 Camp. 620; 12 R. R. 758.

Mutiny of Passengers.] — Advances for the transport of Chinese passengers payable on their arrival were insured. The Chinese mutinied, seized the ship and refused to go to their destination. The policy covered the piratical seizure of the ship:—Held, that the mutiny was the cause of the loss, and insurers held liable. *Naylor* v. *Palmer*, 10 Ex. 382; 23 L. J., Ex. 323—Ex. Ch.

Wrongful Seizure—Consequent Loss by Perils of Sea.] — A merchant ship was by mistake seized and taken in tow by a British man-of-war. She was thereby exposed to bad weather, by which goods on board were injured. Semble, this was a loss by capture and detention, as well as by perils of the sea. *Hagedorn* v. *Whitmore*, 1 Stark. 157.

Risk of British Capture.]—A policy on a foreign ship made during war, must be understood as containing an exception of all captures made by British ships. *Kellner* v. *Le Mesurier*, 4 East, 396; 1 Smith, 72; 7 R. R. 581.

An insurance effected in Great Britain on a French ship before hostilities commenced between England and France, does not cover a loss by British capture. *Furtado* v. *Rogers*, 3 Bos. & P. 191; 6 R. R. 752.

Insurance by a subject of this country upon foreign property does not cover a loss by capture, in a war afterwards taking place between this country and that of the assured. Proof in bankruptcy, therefore, under such a policy expunged. *Lee, Ex parte*, 13 Ves. 64.

Slaves thrown overboard—Want of Water.]—The captain being out of his reckoning, and the crew in distress for want of water, some of the slaves were thrown over:—Held, not to be a loss by perils of the sea. *Gregson* v. *Gilbert*, 1 Park. Ins. (8th ed.) 138.

By Queen's Ship—Total Loss.]—Merchants in London, as agents for F., a Brazilian subject residing at Loanda, chartered a British ship to carry goods on his behalf from London to Ambriz or Loanda, on the coast of Africa, and to reload there a homeward cargo of African produce for London. They afterwards, on F.'s behalf, insured the outward cargo at and from London to Ambriz or Loanda. The perils insured against were "takings at sea, arrests, restraints and detainments of all kings, princes and people of what nature, condition or quality soever." The ship sailed with this cargo, consigned to F. at Loanda. While on the voyage out she was seized, near Ambriz, by a queen's ship, under 5 Geo. 4, c. 113, s. 4, for being illegally engaged in the slave trade, and was sent to St. Helena for adjudication. Proceedings were instituted in the vice-admiralty court at St. Helena, which court, on 20th November, 1854, condemned the ship to be forfeited, and condemned the shippers of the cargo in penalties amounting to double the value of the goods and in costs, and ordered the goods to be held in deposit till payment of the penalties and costs. The ship and part of the goods were sold under order of the court. The residue of the goods was detained by the court. As soon as the proceedings at St. Helena were known in England, notice of abandonment was given to the underwriters. At that time the decree of the court at St. Helena was not known in England. An appeal to the privy council against this decree was lodged, and on 3rd February, 1858, the privy council reversed the decree of the court below, and ordered restitution of the ship to her owners, and of the goods unsold, and the proceeds of the goods sold, to F. On the 6th July, 1858, the shippers, on F.'s behalf, brought an action against the defendant on the policy, claiming as for a total loss of the cargo. At that time the goods remaining in specie and unsold at St. Helena had deteriorated in value, but could have been forwarded thence to Loanda at a price less than their value when delivered there:—Held, first, that the seizure by the queen's ship of the "Newport," with the goods insured on board, being wrongful, was a loss of the goods by a peril insured against. *Lozano* v. *Janson*, 2 El. & El. 160; 28 L. J., Q. B. 337; 5 Jur. (N.S.) 1401; 7 W. R. 654.

Held, secondly, that the wrongful seizure and the notice of abandonment made the loss total, and that it was still total at the time of action brought; the court drawing the inference of fact that F., as a prudent man, could not then be reasonably expected to take possession of the unsold goods at St. Helena. *Ib.*

Capture—Abandonment—Restoration of Ship after Writ issued, but before Trial.]—The abandonment, as a total loss, of a ship insured against war risks, which has been captured, is not defeated by the restoration of the ship at a date subsequent to the commencement of an action for total loss on the policy by the shipowners against the underwriters. *Ruys* v. *Royal Exchange Assurance Co.*, 66 L. J., Q. B. 534; [1897] 2 Q. B. 135; 77 L. T. 23; 8 Asp. M. C. 294. *And see* VI. WARRANTIES; 9, AGAINST CAPTURE.

b. Proof.

Condemnation.]—The sentence of a condemnation of a foreign court of admiralty cannot be received, without previous proof of the ship

having been captured. *Marshall* v. *Parker*, 2 Camp. 69 ; 11 R. R. 665. S. P., *Visger* v. *Prescott*, 5 Esp. 184 ; 8 R. R. 846.

Lloyds' books are evidence of a capture, but not of notice of a loss to any person in particular, but may go, coupled with other evidence, to the jury. *Abel* v. *Potts*, 3 Esp. 242 ; 6 R. R. 826. See *Fowler* v. *English and Scottish Marine Insurance Co.*, 18 C. B. (N.S.) 919 ; 34 L. J., C. P. 253 ; 12 L. T. 381 ; 13 W. R. 658 ; supra, col. 1105.

If an insured declares upon a total loss by capture, and, after proving a capture, shews a recapture, upon which proceedings were had in an admiralty court, he cannot recover without proving the proceedings in the admiralty court under seal, though he only claims the amount of the loss sustained by the salvage proceedings and sale. *Thellusson* v. *Shedden*, 2 Bos. & P. (N.R.) 228.

If a defendant on a policy would impugn the plaintiff's right to recover for a loss by capture, on the ground that the condemnation appears by the sentence of a foreign court to have proceeded on the want of certain documents not required by the law of nations, which the plaintiff ought to have provided, it is for the defendant to shew the foreign law or treaty which renders such documents necessary. *Le Cheminant* v. *Pearson*, 4 Taunt. 367 ; 13 R. R. 636.

A count on a policy, laying the loss by capture, is sustained by evidence that the ship was captured by a privateer ; although this happened from a collusion between the master of the ship and the commander of the privateer, and the plaintiff might have recovered under a count laying the loss by the barratry of the master. *Arcangelo* v. *Thompson*, 2 Camp. 620 ; 12 R. R. 758.

Condemnation by Enemy's Prize Court of Ship lying in Neutral Port.]—Condemnation in the court of the enemy on a prize ship lying in a neutral port—under special circumstances held valid. *The Henrick and Maria*, 4 C. Rob. 43.

8. Other Risks.

Desertion.]—A ship received considerable damage from tempestuous weather, and the crew, completely exhausted, deserted the ship on the high seas for the mere preservation of their lives ; and the ship was then taken possession of by a fresh crew, who succeeded in conducting her safely into port :—Held, that such desertion of the crew did not of itself amount to a total loss ; and, secondly, the ship having been sold under the decree of the admiralty court to pay the salvage, and it not appearing that the assured had taken any means to prevent such sale, that they had no right to abandon, and that there was no more than a partial loss. *Thornely* v. *Hebson*, 2 B. & Ald. 513 ; 21 R. R. 381.

A ship, deserted at sea by her crew, under a bonâ fide belief that she is sinking, is totally lost. The right of the assured to recover, as for a total loss, is not affected by her being afterwards repaired at an expense equal to her value ; nor is deserting the ship, under the circumstances, negligence in the crew. *Holdsworth* v. *Wise*, 6 L. J. (O.S.) K. B. 134 ; 1 M. & Ry. 673 ; 7 B. & C. 794 ; 31 R. R. 299.

Mutiny.]—The insured cannot recover upon a policy, unless the loss is a direct and an immediate consequence of the peril insured ; a loss by any other means than by wounds or bruises received in the very act of quelling a mutiny, is not within that provision of an African policy which insures against loss by mutiny. *Jones* v. *Schmoll*, 1 Term Rep. 130, n. ; 1 R. R. 196, n.

By Carriers Delivering to Ship.]—A declaration on a policy on goods at and from L. by land carriage to H., and at and from thence by a packet to G., beginning the adventure on the goods from the loading on board the ship, averred that the goods were delivered at L. to carriers, to be carried from L. by land carriage to H. ; and by the fraud and the negligence of the servants and persons employed by the carriers were wholly lost :—Held, that this was a loss within the meaning of the usual form of marine policy. *Boehm* v. *Combe*, 2 M. & S. 172 ; 14 R. R. 611.

Loss by Enemies.]—A captain threw overboard a quantity of dollars to prevent them falling into the hands of an enemy and was immediately captured :—Held, if not jettisoned, a loss by enemies. *Butler* v. *Wildman*, 3 B. & Ald. 398 ; 22 R. R. 435. See also *Dent* v. *Smith*, post, col. 1150.

Policy against Losses under the Passengers Act Amendment Act, 15 & 16 Vict. c. 44—Expense of Forwarding Passengers.]—The plaintiffs, shipowners, effected with the defendants a policy "against all costs, charges and liabilities to which the owners or charterers of the ship 'M. P.' might be subject under clauses 46, 47, 48, 49 and 50 of 15 & 16 Vict. c. 44." The ship struck on a bank sixty miles from her port of destination, and the captain incurred expense in hiring steamships to which, after vain attempts to tow his own ship off the ground, the passengers were transferred, and in which they were taken to their destination :—Held, that assuming the expenses of carrying on the passengers to be covered by the policy, the expense of the attempts to get the ship off were not to be taken into account. *Baines* v. *Royal Exchange Assurance Co.*, 6 W. R. 247.

Thieves.]—Underwriter is liable for robbery by thieves from without. *Harford* v. *Maynard*, 1 Park, Ins. (8th ed.) 36.

V. Interest of Assured.

1. *Freight*, 1110.
2. *Goods and Cargo*, 1118.
3. *Passage-money*, 1125.
4. *Seamen's Wages*, 1126.
5. *Expected Profits*, 1126.
6. *Ship and Furniture*, 1129.
7. *Deck Cargo, Jettison*, 1130.
8. *Bills and Advances for Ship's Use*, 1130.
9. *Bottomry, Respondentia, Mortgage*, 1132.
10. *Commission*, 1136.
11. *Expected Losses*, 1136.
12. *Wagering Policies*, 1137.
13. *Valued Policies*, 1138.
14. *Neutral or Hostile Property*, 1142.
15. *Prize*, 1143.
16. *Legal or Equitable*, 1145.
17. *Averment and Proof of Interest*, 1145.

See also XIII. Freight ; 3, Payment ; 4. Advance.

1. Freight.

A shipowner, who has entered into contracts for freight, has an insurable interest in the freight, although such contracts are not in

writing. *Miller* v. *Warre*, 7 D. & R. 1; 4 B. & C. 538; 1 Car. & P. 237; 4 L. J. (O.S.) K. B. 8.

Ownership.]—Two partners purchased a ship under a bill of sale, conformably to 26 Geo. 3, c. 60; afterwards they took in two other partners, but there was no transfer of the ship to them jointly with the others:—Held, that the four partners had not any insurable interest in the freight of the ship. *Camden* v. *Anderson*, 5 Term Rep. 709. And see *S. C.*, 6 Term Rep. 723; 1 Bos. & P. 272.

The right to freight results from the right of ownership; and these four partners had neither a legal nor an equitable title to the ship. *Ib.*

Freight when Earned.]—Upon a policy for freight the insurers cannot be held responsible where the freight has been actually earned. *Scottish Marine Insurance Co.* v. *Turner*, 1 Macq. H. L. 334; 17 Jur. 631; 1 W. R. 537.

Freight may be insured by a time policy, although it cannot be earned until after the time for which it is insured. *Michael* v. *Gillespy*, 2 C. B. (N.S.) 627; 26 L. J., C. P. 306; 3 Jur. (N.S.) 1219.

Chartered Freight — Commencement of Interest.]—On the 7th August, 1866, the agents of the owners of a ship, lying at Bombay, chartered her at Liverpool for a voyage from Howland's Island to a port in the United Kingdom for a cargo of guano, freight to be paid at port of discharge, the ship to be at Howland's Island on or before the 1st June, 1867, or the charterer to have the option of declaring the charter void. On the 7th September, 1866, an agent, on behalf of the owners of the vessel, effected an insurance with an underwriter at and from Bombay to Howland's Island, while there, and thence to any port, &c., in the United Kingdom, on freight chartered or otherwise valued at 3,600*l.* in the ship. It was lawful for the ship to sail to and touch and stay at any ports whatsoever without prejudice to the insurance, which was against the usual perils. On the 4th September, she sailed in ballast under the charter from Bombay for Howland's Island. She got out of her course, and on the 25th December ran ashore on the coast of New Zealand. The owners declined to furnish the funds necessary for repairing her, and the captain was unable to borrow money on a bottomry bond except on condition that he would charter the ship to the lender for a cargo of timber from New Zealand to England. Ultimately she was abandoned to the holder of the bottomry bond: the repairs were completed and a cargo of timber brought to England for the holder of the bottomry bond:—Held, first, that when the ship sailed from Bombay the chartered freight had come into existence, and the owners had an insurable interest in it. *Barber* v. *Fleming*, 10 B. & S. 879; 39 L. J., Q. B. 25; L. R. 5 Q. B. 59; 18 W. R. 254.

Held, secondly, that the terms of the charterparty which allowed the ship to take in a cargo on the passage from Bombay to Howland's Island did not prevent the interest from attaching. *Ib.*

—— **Risks "incident to Steam Navigation"—Option of Cancelling Charterparty.**]—The plaintiffs, on the 29th of July, 1875, chartered their ship "G." for a voyage from New York to Odessa. The freight was agreed "during the voyage aforesaid" at 5,500*l.* in cash at Hull, England, on the discharge of the cargo in Odessa. "If the vessel has not arrived at the port of New York on or before the 1st of September, 1875, charterers have option of cancelling this charterparty." The plaintiffs, on the 7th of August, 1875, effected an insurance with the defendant "at and from London to New York, while there, and thence to Odessa, viâ Constantinople," on their chartered freight, including, besides the ordinary ones, all risks "incident to steam navigation." The clause in the charterparty giving the option to cancel was not mentioned to the defendant. The ship started from England on the 7th of August, but owing to the failure of her machinery in the British Channel was obliged to put back for repairs, which occupied so much time that she did not reach New York until after the 1st of September, whereupon the charterers cancelled the charter and the freight was lost:—Held, that the interest in the chartered freight had commenced at the time when the charter was cancelled, but that the defendant was not liable, for the freight was not lost by any of the perils insured against, but by the exercise of the option to cancel in the charterparty; and further that the withholding from the defendant information as to the power to cancel vitiated the policy. *Mercantile Steamship Co.* v. *Tyser*, 7 Q. B. D. 73; 29 W. R. 790; 5 Asp. M. C. 6, n.

Ship discharged from Charter by Admiralty, after Damage.]—The plaintiffs were the owners of a steamship named the "P.," which was chartered to the commissioners of the admiralty for transport service for three months certain at an agreed freight, which was not to be payable in the event of the steamship becoming unseaworthy or unfit to perform the service for which she was chartered. One month's freight was to be paid to the plaintiffs in advance. The plaintiffs effected with the defendants a policy of insurance in the ordinary form upon freight. The "P." sailed, under the charter to the admiralty, with troops for South Africa, and soon after the expiration of the first month of the period for which she was chartered she struck on a rock, and was so damaged as to become unseaworthy and unfit to perform the service for which she had been chartered. She was thereupon discharged from the service of the admiralty:—Held, that the plaintiffs could not recover from the defendants the residue of the freight, which the "P." would have earned during the time covered by the policy. *Inman Steamship Co.* v. *Bischoff*, 52 L. J., Q. B. 169; 7 App. Cas. 670; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6—H. L. (E.)

Cargo not on Board.]—The owner of a ship effected a policy on freight at and from the Coromandel coast to Bourbon; the ship put into port on the Coromandel coast for repairs; he purchased a cargo, and had it ready to be sent on board, about seven miles from the port; the ship was lost by accident in going out of the dock; the policy covered perils of the seas, and all other perils, losses and misfortunes:—Held, that his interest in the profit of conveying the cargo was properly described as freight; that the cargo being ready when the ship was about to leave the dock, the risk attached, and that the loss was a loss within the terms of the policy. *Devaux* v. *J'Anson*, 5 Bing. (N.C.) 519; 7 Scott, 507; 2 Arn. 82; 8 L. J., C. P. 284; 3 Jur. 676.

Part Payment—Second Charterparty.]—By a charterparty it was agreed that a ship, then being at M. V., should proceed to F., and thence to S. C., where she was to load a complete cargo, and then proceed to E.; 250*l.* per month for freight, to be paid thus: 250*l.*, one month's freight, at F., and balance on delivery of the cargo at the port of discharge. The vessel sailed, and 250*l.* was paid at F. She arrived at S. C., but, instead of proceeding to E., returned to M. V. A policy was effected, by which 450*l.* freight advanced was insured on the voyage from M. V. to H. A second charterparty was entered into whilst the vessel was still at M. V., by which she was to proceed to H. with the cargo then on board, a part of which she brought from S. C.; freight 250*l.* per month, allowing a "deduction of 250*l.*, which the captain has already received on account of this charter." The first charterparty was not expressly cancelled or annulled. The ship sailed, and was lost:—Held, that the payment at F. was not for services already rendered, but a part payment of an entire sum which remained at risk, and was an insurable interest; and that it was competent for the parties to enter into the second charterparty, and to treat the 250*l.* as a part payment of the entire sum thereby secured. *Ellis* v. *Lafone*, 8 Ex. 546; 22 L. J., Ex. 124; 17 Jur. 213; 1 W. R. 200—Ex. Ch.

Advances on Account of Freight.]—C. & Co., the owners of a brig, wrote to the plaintiffs, merchants at New Orleans, to procure a freight for the vessel, stating that if the plaintiffs accepted a charter for Great Britain, they preferred the captain drawing against freight. In this letter was inclosed a letter from C. & Co. to the captain, in which they referred him to the plaintiffs to procure a charter for the vessel. The captain shewed his letter to the plaintiffs, and asked them if they would draw on account of freight, and they said they would. The vessel was loaded as a general ship for Liverpool, and was intended to be consigned to M. & Co.; the plaintiffs wrote to C. & Co., informing them that the vessel was being loaded as a general ship, and stating that they would draw upon the freight for the amount of disbursements. The captain accordingly drew on M. & Co., requesting them to charge the same to account of freight. M. & Co. refused to accept the draft, and it was indorsed to G. & Co., the plaintiffs' agents, who effected an insurance on freight. The vessel was lost by perils of the seas on her voyage from New Orleans to Liverpool:—Held, that the plaintiffs had insurable interest, and that it was correctly described as "advance on account of freight." *Wilson* v. *Martin*, 11 Ex. 684; 25 L. J., Ex. 217. See also *Watson* v. *Shankland*, XIII. FREIGHT, col. 412.

Count on a policy from Cardiff to Panama, in the ordinary form, and with the ordinary memorandum. The interest was declared to be "on money advanced on account of freight":—Held, that the interest was sufficiently described in the policy. *Hall* v. *Janson*, 4 El. & Bl. 500; 3 C. L. R. 737; 24 L. J., Q. B. 97; 1 Jur. (N.S.) 571; 3 W. R. 213.

Advances made by the charterer to the master at the port of loading, to be repaid by deductions out of freight, give the charterer an insurable interest in a policy on disbursements. *Currie* v. *Bombay Native Insurance Co.*, 6 Moore, P. C. (N.S.) 302; 39 L. J., P. C. 1; L. R. 3 P. C. 72; 22 L. T. 317; 18 W. R. 296.

A charterparty contained the following clause: "Sufficient cash, not exceeding 600*l.*, to be advanced against freight, if required, at ports of loading, subject to insurance and 2½ per cent. commission." The charterers submitted to the captain, as agent for the owners, and he accepted a disbursement account made up of three items: cash actually advanced; commission due to the charterers under the charterparty; premium on a policy of insurance on freight made on owners' behalf:—Held, that such sums, though not all representing actual advances, were nevertheless "freight advances" within the meaning of the charterparty, and were, therefore, rightly insured by the charterers on their own account. *Williams* v. *North China Insurance Co.*, 1 C. P. D. 757; 35 L. T. 884; 3 Asp. M. C. 342—C. A.

Money supplied to the master under a contract in the charterparty to supply cash for the ship's use is not prepaid freight; and the freighter has no insurable interest therein. *Manfield* v. *Maitland*, 4 B. & Ald. 582; 23 R. R. 402.

Amount of Loss.]—When by the terms of a charterparty a part of the freight is made payable in advance, the charterer has a right to deduct the whole amount so paid by him from any freight which may actually be earned in case of the loss of part of the cargo, and not only a proportionate part of it. *Allison* v. *Bristol Marine Insurance Co.*, 1 App. Cas. 209; 34 L. T. 809; 24 W. R. 1039; 3 Asp. M. C. 178—H. L. (E.)

A shipowner chartered his ship for a voyage to Bombay. The charterparty provided that freight was to be paid on unloading, and right delivery of the cargo at the rate of 42*s.* per ton on the quantity delivered, "such freight to be paid one-half in cash on signing bills of lading, the remainder on right delivery of the cargo." Half of the estimated amount of freight was paid in London, and the shipowner insured the unpaid freight. The ship was lost, but half the cargo was saved, and delivered without any additional payment by the charterer. The shipowner then claimed as for a total loss of the unpaid half of the freight:—Held, that on the proper construction of the charterparty and policies he was entitled to recover as for a total loss. *Ib.*

The valuation upon a freight policy is calculated upon all the goods the ship is intended to carry upon the voyage insured; and if, by a peril insured against, the ship is lost, when part only of the goods, the freight of which was intended to be covered, was on board, the valuation must be opened, and the assured can only recover as for that proportionable share. *Forbes* v. *Aspinall*, 13 East, 323; 12 R. R. 352. S. P., *Forbes* v *Cowie*, 1 Camp. 520.

But if there is a loss by a peril insured against of the whole subject-matter of the insurance to which the valuation applied, as of all the intended freight, where the insurance is on freight, the valuation in the policy will not be opened. *Ib.*

Where a ship was chartered from Liverpool to Jamaica, there to take on board a full cargo for Liverpool at the current rate of freight, to be paid at one month from the discharge of her cargo at Liverpool; and the shipowners effected a valued policy on the freight at and from Jamaica to her port of discharge in the United Kingdom; and the ship arrived at Jamaica, and after taking on board one-half of her cargo, was lost by a storm, the remainder of her cargo being on shore and ready to be shipped:—Held,

that the assured was entitled to recover as for a total loss. *Davidson* v. *Willasey*, 1 M. & S. 313; 14 R. R. 438.

A policy was effected on freight on a voyage from A. to B., and a second insurance was effected on freight valued at 10,000*l.* on a like voyage, and thence to C., with a memorandum that if the ship should be lost at B. a settlement should be made as if she had on board an entire freight to C. The ship earned freight to the amount of 2,500*l.* on her voyage from A. to B., and was lost at the latter place:—Held, that the assured could only recover to the amount of 7,500*l.* *Robertson* v. *Marjoribanks*, 2 Stark. 573; 20 R. R. 740.

Valued Policy on Freight at Current Rate—Full Cargo shipped at Lower Rate—Total Loss—Basis of Valuation.]—The plaintiffs, owners of a steamship, effected an insurance on freight valued at 5,500*l.* in the vessel from New Orleans to Liverpool, 1,500*l.* of which amount the defendants underwrote. The insurance was to attach on the freight from the loading of the goods on board the vessel. When the policy was taken out, the vessel was sailing outwards from Hamburg to New Orleans, and the valuation of 5,500*l.* was a reasonable and proper one of the freight expected on a full cargo, having regard to the rates of freights then current at New Orleans. On the outward voyage the vessel met with an accident, in consequence of which she was delayed at New Orleans, and did not sail in due course. She eventually sailed for Liverpool with a full cargo which was shipped at lower rates of freight than those current when the policy was effected, the total actual freight being only 3,250*l.* 7*s.* In the course of the voyage the vessel was lost:—Held, that the policy covered the freight at risk on the voyage in question, and that the valuation of 5,500*l.* was binding upon the defendants with regard to what actually so came at risk under the policy. *Forbes* v. *Aspinall* (13 East, 325; 12 R. R. 352) explained. *The Main*, 63 L. J., Adm. 69; [1894] P. 320; 6 R. 775; 70 L. T. 247; 7 Asp. M. C. 424.

Freight—Salvage—Duty of Shipowner.]—A shipowner shipped goods of his own on his own ship for a particular voyage from Sunderland to Valparaiso, and effected a policy of insurance on "freight." The ship was run into and damaged at the port of loading with the goods on board after the policy had attached, whereby the cargo was so damaged that it had to be unloaded, and the particular adventure was frustrated. The ship was detained in port some six weeks, and all expenses of repairs and demurrage were paid by the owners of the colliding ship. When again in a sea-going condition she was offered a similar cargo to the same port by the owners of the colliding ship; this the shipowner refused, and sailed with another cargo elsewhere:—Held, that the shipowner could recover nothing on the policy, inasmuch as the salvage was, or might have been, equivalent to the freight insured. *Gayner* v. *Sunderland Joint Stock Premium Assn.*, 1 Cab. & E. 293.

Legality of Voyage—Embargo.]—Freighters chartered a foreign ship to take a cargo from London to St. Petersburg, and to load a cargo there, and immediately return to London, paying freight per ton; if political or other circumstances should prevent the shipping a return cargo, or discharging the outward cargo, the freighters might detain the ship at St. P. for forty running days; and if that time elapsed without the outward cargo being delivered, and the return cargo being put on board, the master should be at liberty to return to London, and the freighters should pay him 2,500*l.* upon the arrival of the ship at London; the freighters then procured a policy, whereby the underwriters agreed to pay a total loss in case the ship was not allowed to load a cargo at St. P. The Russian government, when the ship arrived at St. P., presuming that the outward cargo was British, refused permission to unload her, and consequently she could not take in a Russian cargo; on which the master proceeded to Stockholm, whence, after disposing of the outward cargo to disadvantage, he brought home a Swedish cargo to London, and earned freight thereon:—Held, 1st, that the insurance was legal; 2ndly, that the refusal of the Russian government to permit the ship to unload her outward cargo was, in effect, a refusal to allow her to load a cargo at St. P., and that a total loss was incurred; 3rdly, that the proceeding directly from St. P. to London was not a condition precedent to the master's right to recover from the freighters the dead freight of 2,500*l.*, but that he was entitled to the same, notwithstanding the intermediate voyage to Stockholm, and that the freighters were entitled to recover the same from the underwriters; but, 4thly, that the freighters would be entitled to deduct from the sum payable to the master for dead freight the amount of the freight received by him on the cargo from Stockholm to London, though such intermediate voyage was not originally contemplated by the contracting parties. *Puller* v. *Staniforth*, 11 East, 232; 10 R. R. 486.

Where a ship was chartered to take a cargo of lead from London to St. Petersburg, and there receive a return cargo from the freighter's agent, and bring it to London; with a proviso that, if political circumstances should prevent a return cargo being loaded, the master, after waiting at St. P. forty running days without the outward cargo being unloaded, and, without the return cargo being loaded, should be at liberty to return to London, or any port in England; and the ship not having been permitted to unload at St. P. by the Russian government, the master, after waiting there forty days, loaded a return cargo for his own benefit upon the outward cargo, both of which he brought home, and earned new freight on the homeward cargo; which freight was adjudged to him in an action between him and the freighters, over and above the dead freight stipulated to be paid by the charterparty:—Held, that the freighters were entitled to recover the whole of such dead freight upon a policy, whereby the underwriter agreed to pay a loss in case the master should not be allowed to unload the outward cargo at St. P.; the vessel having sailed chartered by the freighters on a voyage from London to St. P. and back; and that the underwriters were not entitled to deduct such return freight earned by the master on his own account, they having agreed with the assured pending this action and pending the action as to the return freight, that in case the plaintiffs (to whom they had paid a percentage loss) should not be able to obtain so large an allowance as the full return freight by reason of any demurrages or expenses being allowed against the freight, the difference should be paid by the underwriters by a further per-

centage, whether the same were settled between the plaintiffs and the ship by arbitration or by legal decision. *Puller* v. *Halliday*, 12 East, 494; 11 R. R. 464.

When Liberty to Touch at Ports.]—A policy on freight, at and from the ship's port of loading at F. to her port of discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading, with leave to discharge, exchange, and take on board goods at any port she might call at, without being deemed a deviation, covers the freight of the goods loaded at an intermediate port. *Barclay* v. *Stirling*, 5 M. & S. 6; 17 R. R. 245.

Time Policy—Chartered Freight.]—See *Hough* v. *Heard*, ante, col. 1068.

Collision—Damages Recovered in respect of Unearned Freight—Right of Underwriters.]—See *Sea Insurance Co.* v. *Hadden*, post, col. 1332.

Insurance during Part of the Voyage of Freight for Whole Voyage.]—Freight may be insured from St. Ubes to Portsmouth upon a ship which sailed with a cargo from St. Ubes for Gothenburg, with intent to proceed first to Portsmouth, to take up convoy on her way to Gothenburg, and without notice to the underwriters that the ship was bound to Gothenburg. *Taylor* v. *Wilson*, 15 East, 324; 13 R. R. 488.

Time Policy on Freight—Exception of Claims "arising from the Cancelling of any Charter" Damage to Ship before Loading—No Consent to Cancel.]—A ship chartered for a voyage, stranded on her way to the port of loading, and sustained such damage as to necessitate repairs which made the voyage contemplated in the charterparty impossible. The shipowner had insured the freight from perils of the sea under a time policy:—Held, that a claim by the shipowner under the policy for the loss of freight so caused was not a claim arising from the "cancelling" of the charter, within an exception in the policy, the charter being at an end through sea perils, and not by consent. *Jamieson and Newcastle Steamship Freight Insurance Assn., In re*, 64 L. J., Q. B. 560; [1895] 2 Q. B. 90; 14 R. 444; 72 L. T. 648; 43 W. R. 530; 7 Asp. M. C. 593—C. A.

Policy on Goods—Freight paid in order to get Possession.]—See *Baillie* v. *Moudigliani*, infra, col. 1125.

Freight Insurable apart from Ship.]—The property in the freight may be distinct from that in the ship, and is an insurable interest. *Mestaer* v. *Gillespie*, 11 Ves. 629; 8 R. R. 261.

Cargo not on Board.]—A ship, with part of her cargo on board, was lost at Jamaica, in passing from port to port to complete her cargo. The owner claimed for a loss of freight on cargo not on board, but which he shewed by letters from merchants and planters the ship was intended to take in:—Held that the underwriters were liable for the loss of freight on the whole cargo. *Parke* v. *Hebson*, cited, 2 Br. & B. 326, 329; 23 R. R. 451, 453.

Freight to be earned by the ship is not recoverable under a policy on ship and freight if the ship is lost before any of the goods are on board. *Tonge* v. *Watts*, 2 Str. 1251.

Profitable Charter — Loss of Cargo and Freight.]—See *Asfar* v. *Blundell*, post, col. 1125.

Policy free from "Claim consequent on Loss of Time, whether arising from a Peril of the Sea or otherwise"—Frustration of Adventure by Peril of Sea, involving Delay for Repair.]—A time policy of marine insurance on the freight of a ship against risks which included perils of the sea contained the clause "Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." The ship in pursuance of a charterparty loaded a cargo and sailed, and on the following day her mainshaft broke by reason of perils of the sea. She was towed back to the port of loading, and it was there found that the delay necessary for the repair of the damage would frustrate the object of the adventure, and the charterers, as they were entitled, determined the charterparty, and the shipowners lost the freight:—Held, that the loss of freight was consequent on loss of time arising from a peril of the sea within the meaning of the clause, and that the underwriters were not liable under the policy. *Bensaude* v. *Thames and Mersey Marine Insurance Co.*, 66 L. J., Q. B. 666; [1897] A. C. 609; 77 L. T. 282; 46 W. R. 78; 8 Asp. M. C. 315—H. L. (E.)

2. Goods and Cargo.

Shipowners.]—A shipowner who was in the habit of receiving shipments of cotton to be carried on deck, sometimes at the request and risk of the shippers, sometimes for his own convenience, and under a clean bill of lading, at his own risk—to protect himself as to jettison in the latter case, entered into open policies of insurance as to which the usage was that he was bound to declare all his risks in order of shipment, and rectify any mistake even after loss known. His agent, by negligence or by mistake, gave a clean bill of lading for a certain shipment and gave no notice to him, but such shipowner on discovering the omission altered his declarations by inserting this shipment though after loss known:—Held, that the shipowner had an insurable interest, as at law a written contract cannot be varied on the ground of negligence or mistake, and was entitled to alter the declarations both according to the usage, which could not be said to be unreasonable, and according to the doctrine to be deduced from decided cases, that by the usages of merchants and underwriters, recognised by the courts without formal proof, such declarations may be altered even after loss known, if the alterations are made innocently and without fraud. *Stephens* v. *Australasian Insurance Co.*, 42 L. J., C. P. 12; L. R. 8 C. P. 18; 27 L. T. 585; 21 W. R. 228; 1 Asp. M. C. 450.

—— **Amount Recoverable.**]—J. & Son were lightermen and effected an insurance in the form of an ordinary Lloyd's policy at and from all wharves on the Thames, from Wandsworth to the Victoria Docks, which contained the following clause:—"To cover and include all losses, damages, and accidents amounting to 20*l.* or upwards in each craft, to goods carried by J. & Son as lightermen, or delivered to them to be waterborne, either in their own or other craft, and for which losses, damages, and accidents, J. & Son may be liable or responsible to the

owners thereof, or others interested." The policy was subscribed by different underwriters for different sums amounting to 2,000*l.*, and one underwrote the policy for 100*l.* A loss happened to goods carried by J. & Son in a barge for which they became liable to those interested in the goods to the amount of 1,100*l.* The total value of the risks of J. & Son in this and other barges at the time of the loss, and covered by the policy, amounted to 20,000*l.*:—Held, that J. & Son were entitled to be indemnified for the loss actually sustained, viz. 1,100*l.* and to recover from the one underwriter 55*l.*, his proportion; and that the sum to be recovered was not merely such a proportion of their loss as the sum for which he had subscribed the policy, viz. 100*l.*, bore to the value of all the goods afloat and covered by the policy at the time of the loss, viz. 20,000*l.* *Joyce* v. *Kennard*, 41 L. J., Q. B. 17; L. R. 7 Q. B. 78; 25 L. T. 932; 20 W. R. 233; 1 Asp. M. C. 194.

Carriers.]—An insurance on goods is sufficient to cover the interest of carriers in the property under their charge; for, in general, if the subject-matter of insurance is rightly described, the particular interest in it need not be specified. *Crowley* v. *Cohen*, 3 B. & Ad. 478; 1 L. J., K. B. 158.

Foreign Consignor.] — The defendants, an English firm, traded with D., a Spanish shipping agent at Havannah. The plaintiffs who were Spanish merchants at Havannah, consigned a cargo of goods to the defendants through the agency of D. The defendants knew that D. was acting for a third party who was alluded to as the "interesado," but the name of the plaintiffs was not disclosed. The defendants effected an insurance in London on the ship in the name of themselves and for the benefit of all parties interested. The ship having been lost, the policy-money was paid to the defendants, and D. being insolvent, the plaintiffs claimed the whole of the money after deducting the premiums and expenses. The defendants claimed a lien for the balance of their general account due from D.:—Held, that an action lay by the Havannah principals against the London merchants for the policy moneys; that the London merchants were not entitled to a lien upon the moneys for the balance of their general account with the Havannah agents, and could not in that action set-off their claim to that balance, or set-off anything except the premiums, stamps and commission in respect of the insurance. *Mildred* v. *Maspons*, 53 L. J., Q. B. 33; 8 App. Cas. 874; 49 L. T. 685; 32 W. R. 125; 5 Asp. M. C. 182—H. L. (E.)

Agent of Consignor.]—A., having consigned a cargo to B., and drawn bills on him to the amount of it in favour of C., his general agent, sent these bills together with the bills of lading to C., desiring him to transmit them to B., that B. might have an opportunity of insuring; he also drew a bill for 300*l.* on C. which was accepted. B. refused to take the cargo or accept the bills drawn on him. C. then effected a policy in his own name and informed A. who approved of his conduct:—Held, that C. had an insurable interest to the amount of 300*l.* *Woolf* v. *Horncastle*, 1 Bos. & P. 316; 4 R. R. 808.

Indorser of Bill of Lading.]—The indorsement and delivery of a bill of lading to a creditor primâ facie convey the whole property in the goods from the time of its delivery; but if the intention of the parties appears to have been only to bind the net proceeds in case of the arrival of the goods, then an insurance made on account of the indorser after such indorsement is good. *Hibbert* v. *Carter*, 1 Term Rep. 745; 1 R. R. 388.

Consignees.] — The plaintiffs were cotton brokers and agents in London, who were accustomed to receive consignments of cotton from Bombay for sale on behalf of the shippers, who drew bills of exchange on them against the consignments; the bills of exchange were usually negotiated in India, sent to this country with the bills of lading attached as security, presented to and accepted by the plaintiffs against delivery of the shipping documents; and the plaintiffs were in the habit of effecting open floating policies of insurance with the defendants "as well in their own names as for and in the name or names of all and every person or persons to whom the same doth, may or shall appertain in part or in all." Cotton having been shipped, bills of exchange drawn on the plaintiffs against it, negotiated and sent with the bills of lading and accepted against delivery of the documents, they declared the cotton against two open floating policies previously made and not yet exhausted; and the cotton being lost, the bills of exchange paid by them, and the bills of lading obtained, brought an action on the policies, averring that they, or some or one of them, were interested to the full amount named, and that the insurances were made for the use and benefit and on account of the persons so interested:—Held, per Bovill, C.J., and Denman J., that they had an equitable interest in every part of the cotton, and that it was intended that not only their interests but those of the other parties interested should be covered, and that the plaintiffs having such an interest and a duty of selling and managing, were in law entitled so to insure and were the only persons to bring an action, and might aver, as they did in their declaration, and recover to the full extent, applying the proceeds to their own benefit to the extent of their own claims, and holding the residue for the other persons interested; but per Brett and Keating, JJ., the plaintiffs were consignees for sale of goods not arrived, who had made advances on goods, but had only a contract right as to them, and though interested in every part were not the legal owners, and therefore they were by law limited to the recovery of their own beneficial interest, which alone they could properly insure and recover. *Ebsworth* v. *Alliance Marine Insurance Co.*, 42 L. J., C. P. 305; L. R. 8 C. P. 596; 29 L. T. 479; 2 Asp. M. C. 125.

Under Invalid Contract.]—H. & Co., being owners of two ships, called the "Antelope" and the "Maria," trading to the coast of Africa, and which were expected to arrive at Liverpool, with cargoes of palm oil, agreed verbally to sell to the plaintiff 200 tons of oil; 100 tons to arrive by the "Antelope," and 100 by the "Maria." The "Antelope" did afterwards arrive with 100 tons of oil on board, which were delivered by H. & Co. to the plaintiff. The "Maria," having 50 tons of palm oil on board, was lost by peril of the sea. The plaintiff having insured the oil on board the "Maria," together with the expected profits

thereon :—Held, that he had no insurable interest, as the contract he had entered into with H. & Co., being verbal only, was incapable of being enforced. *Stockdale* v. *Dunlop*, 6 M. & W. 224; 4 Jur. 681; 9 L. J., Ex. 83.

Purchase of Cargo—When Property passes.]—A. & Co., in London, contracted with B. & Co., of Calcutta, for the purchase of a cargo of "new crop Rangoon rice, per 'Sunbeam,' 707 tons register, at 9*s.* 1½*d.* per cwt., cost and freight payment by sellers' draft on purchasers at six months' sight, with documents attached." B. & Co. chartered the "Sunbeam" to go to Rangoon and ship a cargo of rice, and A. & Co. effected a policy of insurance "at and from Rangoon, to any port of discharge in the United Kingdom or Continent by the 'Sunbeam,' on rice, as interest may appear, amount of invoice to be deemed the value." The "Sunbeam" went to Rangoon, and the loading commenced, but after 8,878 bags of rice were on board she sprang a leak and sank, and the ship and the rice were totally lost; 400 more bags would have completed the loading. The captain afterwards signed bills of lading for the 8,878 bags, and B. & Co. drew bills for the price upon A. & Co., who accepted and paid them with knowledge of the loss. In an action on the policy of insurance :—Held, that A. & Co. had no insurable interest in the rice that was shipped. *Anderson* v. *Morice*, 46 L. J., C. P. 11; 1 App. Cas. 713; 35 L. T. 566; 25 W. R. 14; 3 Asp. M. C. 290—H. L. (E.)

After Stoppage in transitu.]—After a stoppage in transitu, the vendee ceases to have an insurable interest in goods. *Clay* v. *Harrison*, 5 M. & Ry. 17; 10 B. & C. 99; 8 L. J. (O.S.) K. B. 90.

And a policy effected before the stoppage becomes thereby void. *Ib.*

Double Sale — Interest of First Vendee.]—B. sold to the plaintiff, to be delivered at Portsmouth, from 500 to 700 barrels of oats, to be shipped by I. from Youghal. Four days afterwards B. advised the plaintiff that I. had engaged room in the packet to take about 600 barrels of oats on the plaintiff's account. On the following day the plaintiff insured 400*l.* on oats per the packet; the oats were shipped, but the packet being bound for Southampton, and refusing to touch at Portsmouth, B. sold the oats again, and delivered the bill of lading to O. at Southampton; the plaintiff insisting that he was entitled to the oats, and would assert his right by action. In the meantime the packet was lost, and after a long dispute, the plaintiff, in consideration of 60*l.*, by indorsement on the policy, vested the interest in the insurance in B. :—Held, that the plaintiff had a sufficient interest when the policy was effected, and that he was entitled to sue the underwriter on this policy. *Sparkes* v. *Marshall*, 3 Scott, 172; 2 Bing. (N.C.) 761; 2 Hodges, 44; 5 L. J., C. P. 286.

Purchase after Loss.]—A party may make an insurance on goods lost or not lost, though he has acquired his interest in them after a partial loss, unless he bought them with a knowledge of the damage. *Sunderland* or *Sutherland* v. *Pratt*, 11 M. & W. 296; 2 D. (N.S.) 813; 12 L. J., Ex. 235; 7 Jur. 261.

Price of Cargo objected to by Purchaser—Property passing nevertheless.]—A., who had been in the habit of buying largely guano from B. & Co., of Liverpool, at prices which were settled at the beginning of each year, wrote to them on the 14th of February, ordering a shipment of 100 tons, provided freight did not exceed 6*s.* 6*d.* On the 26th, B. & Co. wrote in answer, "We have suceeeded in fixing the schooner 'Anne and Isabella' to carry about 115 tons, at your limit of 6*s.* 6*d.* per ton. We presume we may value upon you at six months from the date of shipment, at 10*l.* per ton"; adding, in a postscript, "Please say if you purpose effecting insurance at your end." On the 3rd of March A. wrote objecting to the price, but concluding with a request that some flowering shrubs should be sent to him, in charge of the captain. On the same day A. effected an insurance on the guano, per "Anne and Isabella." The guano was shipped at Liverpool on the 4th of March, under a bill of lading, making it deliverable to B. & Co., or their assigns. The bill of lading (unindorsed) was sent from Liverpool to one of the members of the firm of B. & Co. (then in Belfast), who was about to pay A. a friendly visit at Londonderry. That gentleman arrived at A.'s house on the evening of Saturday, the 7th of March, when he told A. that he had received the bill of lading and invoice of the guano, and a draft for A.'s acceptance for the amount; and on the morning of the 9th they went together to A.'s office, and there the bill of lading was indorsed and handed over with the invoice to A., who thereupon accepted the bill. In the course of the same day they heard, for the first time, that the "Anne and Isabella," with the guano on board, had been wrecked on the coast, near Londonderry: —Held, that the property in the guano passed to A. by the contract from the time of its shipment, A.'s letter of the 3rd of March not being a repudiation, though expressing some dissatisfaction at the price; and that A. had an insurable interest in the cargo at the time of the loss. *Joyce* v. *Swann*, 17 C. B. (N.S.) 84. See *Seagrave* v. *Union Marine Insurance Co.*, infra, col. 1125.

Captain's Goods, &c.]—A policy on "goods, specie, and effects" belonging to a captain, by usage of trade, extends to money expended by him in the course of the voyage for the use of the ship, and for which he charges respondentia interest. *Gregory* v. *Christie*, 3 Dougl. 419.

Possessory Interest.]—The plaintiff agreed with one W. for a sum of 10,000*l.* to transport the obelisk known as "Cleopatra's Needle" from Alexandria to London, and there to erect it upon some public site to be afterwards selected. To cover expenses (about 4,000*l.*) the plaintiff caused two policies to be effected with the respective defendants "upon the goods and merchandises in the good ship or vessel called 'The Cleopatra' iron vessel containing the obelisk . . . . . valued at 4,300*l.* . . . . . against the risk of total loss only"; the risks insured against being the ordinary sea risks, and the suing and labouring clause being in the ordinary form. In the course of the voyage "The Cleopatra" got adrift in a storm in the Bay of Biscay; and was ultimately picked up by another steamer and carried into Ferrol, where the salvors detained her under a claim for salvage. The Admiralty Division awarded them 2,000*l.* salvage and costs. In actions upon the policies :—Held, 1. That the plaintiff, being the owner of "The Cleopatra," and having possession of the obelisk, and (possibly)

a lien upon it for his expenditure, had a sufficient insurable interest, at least to the extent of his outlay: 2. That the true effect of both policies was, an insurance, not on "cargo" or "freight" only, but on the vessel and her cargo: 3. That, under the suing and labouring clause, the assured was entitled to recover the 2,000*l.* awarded to the salvors, but not the costs of the proceedings in the Admiralty Court, nor the expenses incurred by him in refitting "The Cleopatra" at Ferrol and towing her to London. *Dixon* v. *Whitworth*, 48 L. J., C. P. 538; 4 C. P. D. 371; 40 L. T. 718; 28 W. R. 184; 4 Asp. M. C. 326.

Respondentia.]—Insurance on goods does not extend to respondentia interest. *Glover* v. *Black*, 3 Burr. 1394.

Goods at Purchasers' Risk—Sale of Goods "f. o. b."]—D. sold to B. 200 tons of German sugar, "f. o. b. Hamburg; payment by cash in London in exchange for bill of lading"; the price to be variable according to the percentage of saccharine matter, which was not to exceed or fall short of certain limits. B. resold to the respondent the same quantity at an increased price, but otherwise upon similar terms. D. also sold to the respondent 200 tons upon similar terms. To fulfil these contracts 390 tons (being ten tons short) were shipped in bags on one vessel at Hamburg for Bristol, no bags being set apart for one contract more than the other. Each bag was marked with its percentage of saccharine matter, and bills of lading with marks corresponding to the bags were sent to D. to be retained till payment in accordance with the contracts. The respondent was insured in floating policies "upon any kind of goods and merchandises" between Hamburg and Bristol, and duly declared in respect of this cargo. The ship sailed from Hamburg for Bristol and was lost. After receiving news of the loss, D. allocated 2,000 bags, or 200 tons, to B.'s contract, and 1,900 bags, or 190 tons, to the other contract. In an action upon the policies:—Held, that the sales being "f. o. b. Hamburg," the sugar was at the respondent's risk after shipment; that he had an insurable interest in it, and that the underwriters were liable. *Inglis* v. *Stock*, 54 L. J., Q. B. 582; 10 App. Cas. 263; 52 L. T. 821; 33 W. R. 877; 5 Asp. M. C. 422—H. L. (E.)

Full Cargo—Freight and Passage Money.]—A vessel had been chartered on a voyage from Sydney to Calcutta and London, but upon her arrival at Calcutta, the voyage to England was abandoned because of the charterers having stopped payment, and the ship took 360 coolies, and the necessary provision for their use, and 12,000 bags of rice for Mauritius. The passage-money of the coolies amounted to 1,994*l.*, and was payable on their arrival at Mauritius, and the bill of lading freight of the rice amounted to 1,412*l.* On hearing this the owner of the vessel, who wished to insure the freight on the rice only, caused a policy of insurance which had originally been effected for 1,000*l.* upon chartered freight valued at 7,000*l.* on the voyage from Sydney to Calcutta and London, to be altered by the underwriters inserting a declaration "that the within voyage is from Sydney to Calcutta, and thence to Mauritius, instead of as before stated," and that "the within interest is to be on freight valued at 2,000*l.*" The sum insured remained unaltered as 1,000*l.* The insurer was not informed that coolies were carried. Though there did not appear to exist a customary use of the word "freight" in insurance business, yet the most frequent course was to insure passage-money by some distinguishing term when it was intended to insure it, and the premium for insuring such upon a voyage from Calcutta to Mauritius was generally less than for insuring freight of goods upon the same voyage. The vessel was wrecked near Mauritius, and the rice and freight were wholly lost, but 348 of the coolies were saved, and their passage-money was paid:—Held, that the freight of the rice only was insured, but that as the rice was not a full cargo, and there was nothing to shew what the total freight would have been had the vessel been filled up with cargo, the policy was an open policy for half the loss of freight of the rice, not exceeding 1,000*l.*, and the underwriters were liable, therefore, for the amount of such half, namely, 706*l.* *Dinoon* or *Denoon* v. *Home and Colonial Assurance Co.*, 41 L. J., C. P. 162; L. R. 7 C. P. 341; 26 L. T. 628; 20 W. R. 970; 1 Asp. M. C. 309.

Open Policies—Declaration of Shipments at less than real Value.]—The defendants effected with the plaintiff, a Lloyd's underwriter, a series of open policies for certain specified sums to cover shipments to be declared and valued as interest might appear. The policies were effected at different dates, and were to succeed each other in the order of date. The value of the shipments were declared at considerably less than their real value, so that when the later policies were effected the earlier policies were in fact more exhausted than they would appear to be from the declarations. The undervaluation of the shipments was systematically and fraudulently made by the defendants, and the fact that they had been so undervalued was concealed from the plaintiff when he underwrote the later policies:—Held, that, under these circumstances, a jury would be justified in finding that the concealment was of a fact of which it was material that the plaintiff should have been informed, in order to guide him in deciding whether he would underwrite these later policies or not, or at what rate; and that on the jury so finding the plaintiff was entitled to have such later policies set aside and cancelled. *Rivaz* v. *Gerussi*, 50 L. J., Q. B. 176; 6 Q. B. D. 222; 44 L. T. 79; 4 Asp. M. C. 377—C. A.

Purchasers of Goods also Charterers.]—Where the charterers of a vessel were also the purchasers of a cargo of wheat to be shipped on board, and the master of the vessel from time to time received delivery from the vendors:—Held, that such delivery from time to time was a delivery to the purchasers, that it vested in them a right of possession and property, and that, consequently, they had an insurable interest in such wheat as had been so delivered. *Anderson* v. *Morice* (supra, col. 1121) distinguished; *Oxendale* v. *Wetherell* (9 B. & C. 387) approved. *Colonial Insurance Co. of New Zealand* v. *Adelaide Marine Insurance Co.*, 56 L. J., P. C. 19; 12 App. Cas. 128; 56 L. T. 173; 35 W. R. 636; 6 Asp. M. C. 94—P. C.

Profit on Charter—Destruction of Merchantable Character of Cargo—Loss of Freight.]—The plaintiffs, who had chartered a steamship at

a lump sum freight of 3,900*l.*, insured her with the defendants, who were underwriters. The interest insured was described in the policy as "2,000*l.* on profit on charter . . . . warranted free from all average." The plaintiffs did not inform the defendants that the vessel was chartered for a lump sum freight, nor of the amount of their bills of lading freights. During the voyage the vessel came into collision with another ship, and was submerged for twenty-four hours. A large portion of the cargo, consisting of dates, was condemned by the sanitary authorities, and not allowed to be delivered to the consignees. The dates were, however, sold, transhipped and exported for distilling purposes. In an action brought by the plaintiffs upon the policy to recover for a total loss:—Held, that the dates being unmerchantable as such, no freight was payable in respect of them; that there was, therefore, no profit on the charter, and that the plaintiffs were entitled to recover. *Asfar* v. *Blundell*, 65 L. J., Q. B. 138; [1896] 1 Q. B. 123; 73 L. T. 648; 44 W. R. 130; 8 Asp. M. C. 106—C. A.

Policy on Goods—Capture—Freight paid in order to get Possession.]—Cargo owner who pays to the shipowners freight pro ratâ itineris in order to get the proceeds of the cargo, which had been captured by the enemy, sold, and afterwards the proceeds restored on appeal, cannot recover the freight so paid against the insurer of the goods. *Baillie* v. *Moudigliani*, 1 Park, Ins. (8th ed.) 116.

Goods consigned by Debtor to be held for Creditor.]—A. being indebted to B., without any order from him consigns goods to C., to be held for B., and indorses the bill of lading to C.:—Held, that B. had an insurable interest in the goods so consigned. *Hill* v. *Secretan*, 1 Bos. & P. 315; 4 R. R. 806.

Assignee of Cargo under void Indorsement of Bill of Lading.]—The defendant having as security for a debt taken an indorsement of the bills of lading of cargoes, which indorsement was void by reason of an act of bankruptcy committed by the indorsee before the indorsement, effected an insurance of the cargoes; and, a loss happening, he recovered against the underwriters on a count averring interest in the assignees of the bankrupt:—Held, that the assignees could not recover over this money as had and received by the defendant for their use. *Grant* v. *Hill*, 4 Taunt. 380.

Broker nominal Shipper and Consignee—Goods Purchased.]—A broker, who is nominal shipper and consignee of cargo, and a mere agent of the vendor or purchaser, and who has not possession or custody of the goods as carrier or bailee, nor any liability to account for their loss by the perils insured against, has no insurable interest. *Seagrave* v. *Union Marine Insurance Co.*, 1 H. & R. 302; 35 L. J., C. P. 172; L. R. 1 C. P. 305; 12 Jur. (N.S.) 358; 14 L. T. 479; 14 W. R. 690. See also *Joyce* v. *Swann*, 17 C. B. (N.S.) 84, supra, col. 1122.

Insurance of Cargo by Shipowner in respect of his Liability as Carrier.]—See *Hill* v. *Scott*, ante, col. 74.

3. Passage-money.

Expenses of Forwarding.]—If any passengers for a passenger ship shall, without any neglect or default of their own (as by reason of the ship being lost), find themselves within any colonial or foreign port or place other than that at which they may have contracted to land, the master of the ship is bound under the 15 & 16 Vict. c. 44, ss. 49, 50, 51, to forward them to their original destination, and the amount expended by him in forwarding them may be recovered from the underwriters of a policy on the passage-money against all costs, charges and liabilities to which the owner may be subjected under ss. 46, 47, 48, 50, 51. *Gibson* v. *Bradford*, 4 El. & Bl. 586; 24 L. J., Q. B. 159; 1 Jur. (N.S.) 520; 3 W. R. 183.

—— **Of Maintenance.**]—A policy was made at and from Liverpool to Boston on passage-money valued at 700*l.* The policy was in the usual printed form, with this memorandum: "On passage-money of emigrants, subject to pay a loss pro ratâ, and subject to the clauses and conditions made under ss. 47 to 51 of the Passengers Act, 1852, 15 & 16 Vict. c. 44, compensation clause excepted, and against these risks only." The ship, being a passenger ship within the act, sailed, and by a peril of the sea was driven into a foreign port, where she necessarily remained repairing damages for more than six weeks, after which she proceeded with the passengers to Boston, and arrived there. During the detention at the foreign port the passengers were maintained by the insured at a cost exceeding the passage-money:—Held, that this was not a loss incurred under the enumerated sections, and that the underwriters were not liable to make it good. *Willis* v. *Cooke*, 5 El. & Bl. 641; 25 L. J., Q. B. 16; 1 Jur. (N.S.) 1164; 4 W. R. 54.

Policy on "Freight" held not to Cover Passage-money.]—See *Dinoon* or *Denoon* v. *Home and Colonial Insurance Co.*, ante, col. 1124.

4. Seamen's Wages.

Not Insurable.]—A seaman cannot insure his wages—per Lord Stowell. *The Neptune*, 1 Hag. Adm. 227, 232. S. P., *The Lady Durham*, 3 Hag. Adm. 201.

—— **Goods in lieu of Wages.**]—Where a mate of a ship or a sailor is to receive something at the end of the voyage in lieu of wages (e.g., slaves), he cannot insure it. *Webster* v. *De Tastet*, 7 Term Rep. 157; 4 R. R. 402.

5. Expected Profits.

Validity.]—Expected profits on a cargo may be insured. *Grant* v. *Parkinson*, 6 Term Rep. 483; 3 Bos. & P. 85, n.; 3 Dougl. 16.

Description.]—An insurance may be effected on profits generally without more description, and engrafted upon a policy on ship and goods, in the common printed form for a certain voyage; with a return of premium for short interest, the assured proving an interest in the cargo. *Eyre* v. *Glover*, 16 East, 218; 3 Camp. 276; 13 R. R. 801.

An insurance on the imaginary profits of a cargo of indigo from Bordeaux to be sold at Hamburg is good. *Henrickson* v. *Margetson*, 2 East, 549, n.; 6 R. R. 509, n.

Possible Profits.]—The owner of a ship and D. shipped goods on a voyage from Hamburg to a port in Asiatic Russia. The adventure was

expected to be enormously profitable. The whole cargo shipped was valued at 8,000*l.*, but the total insurances effected amounted to 20,000*l.*, the profits being variously estimated at from 80 to 125 per cent. To secure these profits the goods had been overvalued to the extent of 25 to 30 per cent., and there were heavy insurances of commissions. Amongst the cargo was a shipment of spirits costing 1,000*l.*, but valued at 2,800*l.* The ship went down in fine weather in mid-ocean without any known cause. D. brought an action to recover commission, profits on charter, and 1,800*l.* of the 2,800*l.* insured on spirits. It was pleaded that the loss was not the consequence of perils of the sea, that the concealment of the over-insurance was concealment of a material fact, and that the goods were shipped with the fraudulent design of sinking the ship:—Held, that an insurance on profits must be taken to mean possible profits. *Ionides* v. *Pender*, 27 L. T. 244; 1 Asp. M. C. 432.

Upon an insurance on profits valued at 400*l.*, where the plaintiff declared as for a total loss, and it appeared that after a shipwreck, by which many of the slaves, on the profits of whom the insurance was made, were lost, but the remainder reached the market and were there sold; and it did not appear what profit was made of them, or whether, if all had arrived, any profit would have been made; though it was found that the produce of those who were sold did not give a profit upon the whole adventure:—Held, that the plaintiff was not entitled to recover. *Hodgson* v. *Glover*, 6 East, 316; 8 R. R. 495.

Foreign Government Bounty.]—A French law provided that "the vessel which shall have fished, either in the Pacific by doubling Cape Horn, or by passing through the Straits of Magellan, or to the south of Cape Horn, at 62 degrees of latitude at the least, shall obtain on its return a supplemental bounty, if it brings back in the produce of its fishing one-half at least of its burthen, or if it can prove a navigation of sixteen months at least":—Held, that a vessel which had caught fish to the amount of half its burthen in the Atlantic, then doubled Cape Horn and fished without success, and was lost within sixteen months after setting sail, had not complied with the conditions of the law so as to be entitled to the bounty. *Devaux* v. *Steele*, 8 Scott, 637; 6 Bing. (N.C.) 358.

Held, also, that the practice of the French government to allow the bounty under such circumstances was a mere matter of expectation, and did not constitute a vested interest which could be the subject of insurance. *Ib.*

Position of Cargo.]—A declaration on a policy stated that M. agreed to buy 6,000 bags of rice, supposed to have been shipped at Madras on board the "E. B.," to arrive on or before the end of May, and guaranteed equal to samples, at 19*s.* per cwt.; that he agreed to sell the same 6,000 bags at 20*s.* 6*d.* per cwt. on the like terms; that he had just reason to expect by reason of the contracts and the arrival of the rice to make a profit of 675*l.*, and thereupon caused a policy to be effected "on profit on rice loaden or to be loaden on board the 'E. B.' at and from Madras, beginning the adventure on the goods and merchandises from and immediately following the loading thereof on board the ship at Madras." When the "E. B." was at Madras ready to receive the 6,000 bags of rice on board, which were lying ready to be shipped, and when 1,200 bags had been put on board, she was blown out to sea and so damaged that 1,200 bags of rice were spoiled, and she was disabled from taking on board the remaining 4,800 bags, which were sent to London in another ship, and arrived there in June. The "E. B." having been repaired, arrived at London in November. The assurance company paid M. for the loss of profit on the 1,200 bags of rice, but refused to pay anything for the loss of profit on the 4,800 bags:—Held, first, that M. had an insurable interest in the expected profit on the rice, and might, by a policy adapted to the case, have insured that special interest from the time that the rice was appropriated by the vendors and ready to be shipped at Madras against any of the events by which it might be defeated, viz., loss of the ship, or of the whole of the rice, or part of the rice, or the delay of the voyage. *Royal Exchange Assurance Co.* v. *M'Swiney*, 14 Q. B. 634; 19 L. J., Q. B. 222; 14 Jur. 998—Ex. Ch.

Held, secondly, that according to the meaning of the policy, M. insured the ordinary profit on rice, and only against losses by perils of the sea directly affecting the rice, and consequently the profits on the rice; and therefore the policy attached only on such rice as was actually put on board. *Ib.*

Held, thirdly, that if the policy attached to the profit of the rice on shore, there had been no loss of that profit by perils of the seas, but only a retardation of the voyage, which was not insured against by the policy. *Ib.*

Nature of Loss.]—Where profits are insured against perils of the sea, the liability of the underwriters does not attach unless the profits themselves are lost by a peril insured against. *Chope* v. *Reynolds*, 5 C. B. (N.S.) 642; 28 L. J., C. P. 194; 5 Jur. (N.S.) 822; 7 W. R. 208.

A. bought goods of B., to arrive at Bristol by the ship "James Daly" from the West Coast of Africa, and effected an insurance with C. against the ordinary perils, with a memorandum indorsed on the policy, declaring the insurance to be "on profit in palm oil, valued at the rate of three guineas per cent., per 'James Daly.'" "The James Daly," while on her voyage to Bristol with the oil on board, was lost by a peril insured against, but the oil was brought home undamaged by another vessel, and was sold by B. to a third person:—Held, that there had been no such loss of the subject-matter of insurance as was contemplated by the policy. *Ib.*

Where profits were insured by a policy on goods "beginning the adventure upon the said goods from the loading thereof on board the said ship," and the ship was lost before she reached the port at which the cargo was ready to be shipped, it was held that the policy never attached, and that the owner could not recover under it for the delay in the shipment of the cargo and consequent loss of profits. *Halhead* v. *Young*, 6 El. & Bl. 312; 25 L. J., Q. B. 290; 2 Jur. (N.S.) 970; 4 W. R. 530.

Interest in Profits on Cargo bought.]—See *Royal Exchange Assurance Co.* v. *M'Swiney*, supra.

Valued Policy]—Profits on cargo may be insured by a valued policy. *Barclay* v. *Cousins*, 2 East, 544; 6 R. R. 505.

6. Ship and Furniture.

Owners.]—When a ship is purchased in the name of two persons, A. and B., but the purchase-money is by arrangement between them paid by A. only; and B., in order to give some security to A. for the payment of his share, authorises A. to insure the ship in his, A.'s name alone, and in case of the loss of the ship to receive the whole insurance money, and so pay himself the amount due to him from B.; A. has an insurable interest in the whole ship, and may, in an action on a valued policy, recover in his own name the full amount insured. A statement by B. to a third person of this arrangement with A., being a declaration against his, B.'s interest, is evidence against the insurers to shew A.'s insurable interest. *Provincial Insurance Co. of Canada* v. *Leduc*, 43 L. J., P. C. 49; L. R. 6 P. C. 224; 31 L. T. 142; 22 W. R. 929; 2 Asp. M. C. 338—P. C.

A person who makes insurances as the owner of a ship must stand so registered at the custom-house at the time and the production of the register from the custom-house is conclusive evidence of ownership. *Marsh* v. *Robinson*, 4 Esp. 98; 3 R. R. 617.

Where it is stipulated by a charterparty, that, in case the ship is lost during the voyage, the charterer shall pay the owner a sum of money, which is estimated as the value of the ship, the owner has still an insurable interest in the ship during the voyage. *Hobbs* v. *Hannam*, 3 Camp. 93; 13 R. R. 764.

A. having insured his ship, afterwards transferred it, but without the policy, to B. The transfer on the register, though absolute in form, was, in fact, by way of mortgage. The ship having foundered:—Held, that A. being liable for the mortgage debt, had a sufficient interest in the ship to entitle him to recover the whole loss. *Hutchinson* v. *Wright*, 25 Beav. 444; 27 L. J., Ch. 834; 4 Jur. (N.S.) 749; 6 W. R. 475.

Held, also, that the policy of the 17 & 18 Vict. c. 104, did not apply to such a case. *Ib.*

A shipowner whose ship is mortgaged may, if he remains in possession, insure his ship to the full amount of her value. *Provincial Insurance Co. of Canada*, v. *Leduc*, supra.

Tackle.]—A policy upon a ship employed in the Greenland trade, on "ship, tackle, apparel, and furniture," does not, by the usage of trade, cover the fishing-tackle. *Hoskins* v. *Pickersgill*, 3 Dougl. 222.

Provisions.]—Provisions in a ship for the use of the crew are protected by a policy on the ship and furniture. *Brough* v. *Whitmore*, 4 Term Rep. 206; 2 R. R. 361.

Wages.] — Seamen's wages and provisions during an embargo are not covered by an insurance on the body of the ship, *Robertson* v. *Ewer*, 1 Term Rep. 127; 1 R. R. 164. S. P., *Eden* v. *Poole*, 1 Term Rep. 132, n.

Ship Assigned to secure Debt.]—A. having insured 800*l.* upon his own ship, and being greatly indebted to B., deposits securities with B., and assigns the ship to him absolutely. The ship was afterwards lost. In an action on the policy the underwriters contended that the policy was void, for want of interest, under 19 Geo. 2, c. 37; A. having sold the ship before the loss:—Held, that, the assignment to B. being no more than a pledge or security for debt, A. had a sufficient interest in the ship at the time of her loss. *Alston* v. *Campbell*, 4 Bro. P. C. 476.

Hull and Machinery — Disbursements.]—An insurance upon hull and machinery of a steamship by a time policy does not cover items of expenditure for the voyage upon coals, stores, and provisions. *Roddick* v. *Indemnity Mutual Marine Insurance Co.*, post, col. 1178.

Wages and Expenses in Port of Distress not covered by Policy on Ship.] — Extraordinary wages paid to seamen and provisions expended during the detention of a ship for repairs in a port of distress are not covered by a policy on ship. *Fletcher* v. *Poole*, 1 Park, Ins. (8th ed.) 115.

7. Deck Cargo, Jettison.

Insurable Interest.] — An insurance broker effected an open policy on a cargo of cotton on board the ship of his principal. It was intended to ship the cotton on board at the shipper's risk, which should have been expressed in the bill of lading, but by a mistake of the shipowners' agent in the foreign port at which the cotton was put on board, a clean bill of lading was given. On the voyage the vessel encountered heavy weather, and the cotton, owing to its being carried on deck was compelled to be jettisoned. The broker gave notice to the insurance company of the loss, but other open policies having been effected with the same insurance company by the same shipowners for cotton shipped subsequently, and declarations having been made on these policies by the broker, although no declaration had been made in respect of the cotton that had been lost, he, on discovering that a mistake had been made, and that, contrary to his instructions, a clean bill of lading had been given, instead of one expressing that the cotton was shipped at the shipper's risk, altered the declarations on the policies by substituting for certain cotton therein the cotton which had been jettisoned:—Held, that the shipowners being liable for the loss of the goods by jettison through their being carried on deck, had an insurable interest in respect of which they, and therefore their agent, were entitled to recover. *Stephens* v. *Australasian Insurance Co.*, 42 L. J., C. P. 12; L. R. 8 C. P. 18; 27 L. T. 585; 21 W. R. 228; 1 Asp. M. C. 458.

8. Bills and Advances for Ship's Use.

Advances by Charterer.]—Advances made by the charterer to the master at the port of loading, to be paid by deductions out of freight; give the charterer an insurable interest in a policy on disbursements. *Currie* v. *Bombay Native Insurance Co.*, 6 Moore, P. C. (N.S.) 302; 39 L. J., P. C. 1; L. R. 3 P. C. 72; 22 L. T. 317; 18 W. R. 296. *See also cases* ante, col. 1113.

Money Lent to Captain.]—A policy on money lent to the captain, payable out of the freight, is illegal, and the premium cannot be recovered from the underwriter. *Wilson* v. *Royal Exchange Assurance Co.*, 2 Camp. 626; 12 R. R. 760.

Bills for Expenses.]—A memorandum for a charter stated that one-half of the freight was to be paid in cash on unloading and right delivery of the cargo, and the remainder by bill on

London, at four months' date, thirty running days to be allowed for loading and discharging, and ten days' demurrage at 4*l.* per day, the captain to be supplied with cash for the ship's use. In pursuance of this last stipulation the master drew a bill of exchange on the freighters which was duly accepted and paid:—Held, that the freighters had no insurable interest in such bill. *Manfield* v. *Maitland*, 4 B. & Ald. 582; 23 R. R. 402.

An East India captain, having borrowed money from A., in order to secure him, arranged with B. that C. should draw bills on D. (A.'s agent at Calcutta) in favour of the captain, payable thirty days after the arrival of the ship; which bills A. was to indorse to B., who was to negotiate them in Calcutta, upon the captain's consigning to D. goods to double the amount of the bills:—Held, that B. had no insurable interest in these bills; and that, even if he had, he was not entitled to recover upon a policy describing them as bills of exchange. *Palmer* v. *Pratt*, 9 Moore, 358; 2 Bing. 185; 3 L. J. (o.s.) C. P. 250; 27 R. R. 583.

The master of a ship drew a bill on his owners for supplies for the ship, and wrote on the bill, "If this be not honoured, the holder will insure the amount, and place the premium to the drawer's account." The bill being dishonoured, the holder insured the ship for three months, and declared interest in the bill, which was to be sufficient proof of interest; the ship was lost after the three months:—Held, that the owner of the bill was authorised to insure for his own benefit, and was warranted in insuring for three months, and that he might recover the premium against the drawer. *Tasker* v. *Scott*, 1 Marsh. 556; 6 Taunt. 234; 16 R. R. 608.

—— **Invalid Hypothecation.**]—A ship having put into a foreign port in a damaged state, the master borrowed money of a merchant there, for necessary repairs and disbursements; to secure which he drew bills upon his owner, and also executed an instrument which purported to be an hypothecation of the ship, cargo, and freight. By this instrument the merchant who advanced the money forebore all instrument beyond the amount necessary to insure the ship to cover the advances, and the master took upon himself and his owner the risk of the voyage, making the money payable at all events, and subjecting the ship to seizure and sale by virtue of process, "out of the High Court of Admiralty of England, or any court of vice-admiralty possessing jurisdiction at the port at which the ship might at any time happen to be lying, or to be according to the maritime law and custom of England," in the event of the bills being refused acceptance or dishonoured:—Held, that this not being such an hypothecation as could be enforced in the Court of Admiralty, the payment of the money borrowed not being made to depend upon the arrival of the vessel, the merchant had no insurable interest in the ship. *Stainbank* v. *Shepard*, 13 C. B. 418; 1 C. L. R. 609; 22 L. J., Ex. 341; 17 Jur. 1032; 1 W. R. 505—Ex. Ch.

Expenses of Cargo.]—A shipowner who has paid money in order to release the ship and cargo from a claim for salvage, has a lien on the cargo for the proportion of those expenses payable to him by the owners of the goods, and an insurable interest in the cargo in respect of such lien. *Briggs* v. *Merchant Traders' Ship Loan and Assurance Association*, 13 Q. B. 167; 18 L. J., Q. B. 178; 13 Jur. 787.

The plaintiff agreed with one W. for a sum of 10,000*l.* to transport the obelisk known as "Cleopatra's Needle" from Alexandria to London, and there to erect it upon some public site to be afterwards selected. To cover the expenses (about 4,000*l.*) plaintiff caused two policies to be effected with the respective defendants "upon the goods and merchandises in the good ship or vessel called 'The Cleopatra' iron vessel containing the obelisk . . . valued at 4,000*l.* . . . . against the risk of total loss only"; the risks insured against being the ordinary sea risks, and the suing and labouring clause being in the ordinary form. In the course of the voyage the "Cleopatra" got adrift in a storm in the Bay of Biscay; and was ultimately picked up by another steamer and carried into Ferrol, where the salvors detained her under a claim for salvage. The Admiralty Division awarded them 2,000*l.* salvage and costs. In actions upon the policies:—Held, 1. That the plaintiff, being the owner of the "Cleopatra," and having possession of the obelisk, and (possibly) a lien upon it for his expenditure, had a sufficient insurable interest, at least to the extent of his outlay: 2. That the true effect of both policies was, an insurance, not on "cargo," or "freight" only, but on the vessel and her cargo: 3. That, under the suing and labouring clause, the assured was entitled to recover the 2,000*l.* awarded to the salvors, but not the costs of the proceedings in the Admiralty Court, nor the expenses incurred by him in refitting the "Cleopatra" at Ferrol and towing her to London. *Dixon* v. *Whitworth*, 48 L. J., C. P. 538; 4 C. P. D. 371; 40 L. T. 718; 28 W. R. 184; 4 Asp. M. C. 326.

Advances on Ship—"Full interest admitted."]—A policy insuring cash advances on a ship is within 19 Geo. 2, c. 37, s. 1. Such a policy containing the term "full interest admitted" is avoided by that statute. *Smith* v. *Reynolds* (1 H. & N. 221; 25 L. J., Ex. 337; 4 W. R. 644); and *De Mattos* v. *North* (37 L. J., Ex. 116; L. R. 3 Ex. 185; 18 L. T. 797), followed. *Berridge* v. *Man On Insurance Co.*, 56 L. J., Q. B. 223; 18 Q. B. D. 346; 56 L. T. 375; 35 W. R. 343; 6 Asp. M. C. 104—C. A.

Advance by Agent — Bill Accepted.] — A., having consigned a cargo to B., and drawn bills on him for the price of it in favour of C., his general agent, sends these bills, together with the bills of lading, to C., desiring him to forward them to B., in order that he might insure. He also draws a bill for 300*l.* on C., which is accepted. B. refuses to take to the cargo, or to accept the bills. C. then insures in his own name, informing A., who approves. The goods are lost, and C. sues on the policy:—Held, that the policy was good within 28 Geo. 3, c. 56; and that C. had an insurable interest to the amount of 300*l.* *Wolff* v. *Horncastle*, 1 Bos. & P. 316; 4 R. R. 808.

Advances for Transport of Coolies payable on their Arrival—Loss by Mutiny of Coolies.]—See *Naylor* v. *Palmer*, ante, col. 1107.

9. BOTTOMRY, RESPONDENTIA, MORTGAGE.

Bottomry—Policy decreed to be delivered up.]—One having no interest in the ship lends 300*l.* on a bottomry bond, and insures 450*l.* on the ship; policy decreed to be delivered up. One having no interest in a ship insures it, the assurance is

void, though the policy runs interest or no interest. But if he is interested in the ship, he may insure more than the value of his interest. Where one insures a ship, if he would have any benefit of the insurance, he must renounce his interest in the ship. *Goddart* v. *Garrett*, 2 Vern. 269.

Insurance held Valid.]—One lends 250*l.* on a bottomry bond, and afterwards insures on the same ship. The ship is lost. He shall have both the benefit of the insurance and the money due on the bond too. *Harman* v. *Vanhatton*, 2 Vern. 716; Eq. Ca. Abr. 371.

What is Insurable Bottomry Interest.]—An instrument executed in a foreign port by the master of a ship, reciting that his vessel, bound to London, had received considerable damage, and that he had borrowed 1,077*l.* to defray the expenses of repairing her, proceeded as follows: "I bind myself, my ship, her apparel, tackle, &c., as well as her freight and cargo, to pay the above sum, with 12*l.* per cent. bottomry premium; and I further bind myself, ship, her freight and cargo, to the payment of that sum with all charges thereon, in eight days after my arrival at the port of London; and I do hereby make liable the vessel, her freight and cargo, whether she do or do not arrive at the port of London, in preference to all other debts or claims, declaring that this pledge or bottomry has now, and must have, preference to all other claims and charges, until such principal, with 12*l.* per cent. bottomry premium, and all charges, are duly paid":—Held, that this was an instrument of bottomry, for an intention sufficiently appeared from the whole of it that the lender should take upon himself the peril of the whole voyage; that the words, "my arrival," must be understood to mean "My ship's arrival;" and that the words, "I make liable the vessel, her freight and cargo, whether she do or do not arrive at London," were intended only to give the lenders a claim on the ship, in preference to other claims, in case of the ship's arrival at some other than the destined port, and not to provide for the event of the loss of the ship. *Simmonds* (or *Simonds*) v. *Hodgson*, 3 B. & Ad. 50; 1 L. J., K. B. 51—Ex. Ch. Overruling 3 M. & P. 385; 6 Bing. 114; 7 L. J. (o.s.) C. P. 239.

The master of a ship borrowed money of the plaintiffs for repairs, and gave them, by way of security, bills drawn by him upon the owner of the ship and upon the consignee of the cargo, and also an instrument of hypothecation, by which he took upon himself and his owner the risk of the voyage, made the money repayable at all events, and the ship subject to seizure, and to process of the Admiralty Courts at any place, should the bill be not accepted or paid, the plaintiffs forbearing all interest beyond the amount necessary to insure the ship to cover their advances:—Held, that a court of admiralty would not enforce this instrument; and therefore, that the plaintiffs took no interest in the ship. *Stainbank* v. *Fenning*, 11 C. B. 51; 13 C. B. 418; 20 L. J., C. P. 226; 15 Jur. 1082.

—— **Respondentia.**]—An insurance on goods does not extend to a respondentia interest. *Glover* v. *Black*, 1 W. Bl. 306, 399, 405, 422.

—— **Joint-bond.**]—An action cannot be maintained on a policy where the plaintiff's interest is founded on a bottomry bond made jointly to the plaintiff and another, although they are general partners in trade. *Everth* v. *Blackburn*, 6 M. & S. 152; 2 Stark. 66.

—— **Damages.**]—Where repairs are ordered by the underwriters, for the payment of which a bottomry bond is given, and they refuse to pay it on the arrival of the ship, in consequence of which the ship is sold, they are liable for all the damage which accrues to the owner in consequence of that refusal. *Da Costa* v. *Newnham*, 2 Term Rep. 407.

—— **East India Trade.**]—The 7 Geo. 1, c. 21, s. 2, prohibiting loans of bottomry by British subjects, upon foreign ships engaged in the East India trade, is repealed. *The India*, Br. & Lush. 221; 33 L. J., Adm. 193; 12 L. T. 316.

—— **Total Loss.**]—An assured on bottomry cannot recover against the underwriter, unless there has been an actual total loss of the ship; for if the ship exists in specie in the hands of the owners, though under circumstances that would entitle the assured on the ship to abandon, it will prevent its being an utter loss within the meaning of the bottomry bond. *Thomson* v. *Royal Exchange Assurance Co.*, 1 M. & S. 30; 14 R. R. 388.

A lender on bottomry cannot recover if a loss happens by capture, if it is such as to occasion a total loss; but if the ship is taken and detained for a short time and yet arrives at the port of destination within the time limited (if time is mentioned in the condition), the bond is not forfeited, and the obligee may recover. *Joyce* v. *Williamson*, 3 Dougl. 164.

There is no average or salvage on a bottomry bond. *Ib.*

—— **Constructive.**] — The conditions of a bottomry bond provided for its defeasance on payment of the amount of the bond, "or, in case of the loss of the ship or vessel, such an average as by custom shall have become due on the salvage, or if on the voyage the ship or vessel should be utterly lost, cast away, or destroyed." The ship having become a constructive total loss, the bondholder, by a decree in the Admiralty Court, obtained payment to him of the proceeds of the ship, which had been paid into court, and which were insufficient; the court holding that a bottomry bond was only discharged by payment or by an absolute total loss, and that the condition providing for defeasance on payment of such average as by custom should have become due, did not refer to the case of a constructive total loss. In an action by the bondholder on a policy of insurance upon the bond:—Held, that the doctrine of constructive total loss was not applicable to a policy of insurance on bottomry, and that the condition of defeasance did not apply to the case of a constructive total loss. *Broomfield* v. *Southern Insurance Co.*, 39 L. J., Ex. 186; L. R. 5 Ex. 192; 22 L. T. 371; 18 W. R. 810.

—— **Foreign Law, how far Applicable to English Policy.**]—A policy of marine insurance was effected with English underwriters by an English merchant upon goods shipped in a French ship, and it was thereby provided that general average was to be payable as per judicial foreign statement. The ship was damaged by a collision and put into port for repairs, the cargo, however, being uninjured. The master, not

having funds to do the necessary repairs, gave a bottomry bond on ship, freight, and cargo. The ship and freight proving insufficient to satisfy the bond, the assured had to pay the deficiency in order to obtain possession of his goods :—Held, that the policy was not to be construed according to French law, except so far as the parties had expressly stipulated that it should be, and that there being no loss by perils of the sea according to English law, the assured could not recover from the underwriters the amount which he had paid as above mentioned. *Greer* v. *Poole*, 49 L. J., Q. B. 463 ; 5 Q. B. D. 272 ; 42 L. T. 687 ; 28 W. R. 582 ; 4 Asp. M. C. 300.

—— **Freight Earned and Received.**]—A ship with a cargo on board, left Pernambuco on a voyage to Liverpool on the 29th June, 1839 ; in proceeding out of the harbour at Pernambuco she struck on a rock, and was obliged to put back to be repaired. The master, after several surveys, and with the concurrence of the persons to whom he had been addressed by the owner to procure a cargo, proceeded to repair the ship, the repairs continuing from the 29th of June, 1839, till the 4th of January following. The expenses of the repairs amounted to 7,132*l.* 3*s.* 8*d.*, a sum much exceeding the value of the ship and freight, and which sum the master, not being able to procure it in any other manner, was compelled to borrow on bottomry, and accordingly executed a bottomry bond, charging the ship, freight and cargo. The cargo, which had been necessarily taken out during the repairs, was reshipped, and the ship sailed on the 6th January, 1840, and arrived with the cargo at Liverpool ; the obligees of the bottomry bond received the freight under a decree of the Court of Admiralty :—Held, in an action against the underwriters on freight claiming for a total loss, that the plaintiff was not entitled to recover, in respect either of a total or of a partial loss of freight, the freight having actually been earned, and its receipt by the obligees of the bottomry bond being in law a receipt by the plaintiff. *Benson* v. *Chapman*, 8 C. B. 950 ; 2 H. L. Cas. 696 ; 13 Jur. 969.

Lender on Respondentia not Liable for Average Losses—Aliter by Law of Denmark.]—Action on policy upon respondentia bond on ship and goods at and from B. to C. The ship was Danish, and an average loss was sustained on goods to the amount of 6*l.* 15*s.* per cent. The plaintiff by the Danish law was required to contribute, as holder of the respondentia bond, and having so contributed sued his English underwriters :—Held, that the underwriters were not liable, as by English law the lender on respondentia is not liable for average losses. *Walpole* v. *Ewer*, 2 Park, Ins. (8th ed.) 898.

Mortgage of Ship—Policy by Mortgagor on behalf of Mortgagee—Barratry by Mortgagor as Master.]—A mortgagee advanced the part owner of a ship a sum of money upon a mortgage of his shares in the ship, it being a part of the arrangement that the mortgagor should be the master of the ship, and that an insurance should be effected by the mortgagor to cover the interest of the mortgagee. In pursuance of the arrangement the mortgagor caused an insurance to be effected to cover the interest of the mortgagee and his own interest. The perils covered by the policy of insurance included perils of the sea and barratry of the master and mariners. The ship having been lost, as the underwriters of the policy alleged, by the barratry of the mortgagor as master :—Held, that, assuming the allegation to be true, then, if the mortgagor was master for the mortgagee, the mortgagee was entitled to recover against the underwriters for a loss by barratry ; and if the master was not master for the mortgagee, the mortgagee was entitled to recover for a loss by perils of the sea. *Small* v. *United Kingdom Marine Mutual Insurance Assn.*, 66 L. J., Q. B. 736 ; [1897] 2 Q. B. 311 ; 76 L. T. 828 ; 46 W. R. 24 ; 8 Asp. M. C. 293—C. A.

—— **Mortgagees—Insurance against Absolute Total Loss—Payment off.**]—The mortgagees of a ship agreed with the mortgagors to effect an insurance on the ship at the mortgagors' expense, the policy to be held by them as part of their security. After the ship had sailed, the mortgagees effected an insurance against absolute total loss only. On the voyage the ship was driven ashore in a gale, and having become a constructive total loss, notice of abandonment was given by the mortgagees to the underwriters. The mortgagees immediately gave notice that they would look to the mortgagees as if they were their underwriters for a full insurance, and recovered from them the full value of the ship. The ship remained for two months exposed to the perils of the sea, when she became a complete wreck, and was then sold without prejudice to the rights of the parties. After the sale, but before this action, the mortgage was paid off :—Held, in an action by the mortgagees against the underwriters claiming for an absolute total loss, that the mortgagees, though their mortgage had been paid off, had an insurable interest in the ship, the mortgagors having ceded to them their rights under the policy when they were paid the full value of the ship. *Levy* v. *Merchants Marine Insurance Co.*, 1 Cab. & E. 474 ; 52 L. T. 263 ; 5 Asp. M. C. 407.

10. Commission.

Nature of.]—A., residing in Dublin, having agreed with B. & C. at Jamaica to send out two ships annually, for which they were to provide cargoes, to be consigned to him, chartered a ship which was to proceed from Bristol to St. Thomas, where she was to deliver an outward cargo (the property of another person), and thence to Jamaica, where she was to take in a cargo from B. and C. for Dublin, and, by the terms of the charterparty, A., in consideration of guaranteeing the homeward cargo, was to receive a commission of 2½ per cent. upon the homeward freight. The ship was captured on her passage from St. Thomas to Jamaica :—Held, that A. had not then an insurable interest either in the commission on the freight or in the commission on the sale of the homeward cargo. *Knox* v. *Wood*, 1 Camp. 543 ; 10 R. R. 746.

Legality.]—An insurance on the "commission, privileges," &c., of the captain of a ship in the African trade, is legal. *King* v. *Glover*, 2 Bos. & P. (N.R.) 206 ; 9 R. R. 638.

11. Expected Losses.

On Collisions.]—Quære, whether an insurance against damages, that a shipowner may be liable to pay in consequence of his ship running down another, is not illegal. *Delaney* v. *Robson*, 5 Taunt. 605. See *Taylor* v. *Dewar*, 5 B. & S. 58 ; 33 L. J., Q. B. 141 ; 10 Jur. (N.S.) 361 ; 10 L. T. 267 ; 12 W. R. 579.

On Exchange.]—An underwriter does not insure against any loss that may arise from the difference of exchange. *Thelluson* v. *Bewick*, 1 Esp. 77.

12. Wagering Policies.

General Rule.]—A policy containing any of the words forbidden by 19 Geo. 2, c. 37, s. 1, is illegal, if the insurance relates simply to "ship {and/or} ships, steamer {and/or} steamers," and does not exclude British vessels. *Allkins* v. *Jupe*, 46 L. J., C. P. 824; 2 C. P. D. 375; 36 L. T. 851.

A policy was affected upon commission and profit upon "ship {and/or} ships, steamer {and/or} steamers"; and the following clause was inserted: "Warranted free from all average and without benefit of salvage, but to pay loss on such part as shall not arrive." The goods to which the commission and profit insured related were shipped on board a British vessel, which was lost by the perils of the sea. The assured having sued to recover the amount of the underwriter's subscription, or, if the policy were void, the premium paid by the assured:—Held, that the policy was rendered illegal by 19 Geo. 2, c. 37, s. 1, for the insurance was "without benefit of salvage," and the terms of the policy did not exclude British ships. *Ib.*

Held, also, that the illegality was so far the fault of the assured that he could not recover back the premium. *Ib.*

The insured is entitled to recover as for a total loss, upon a mixed policy of insurance of a peculiar sort, though a valued policy, if a fair one, and within the exception of 19 Geo. 2, c. 37, s. 2. *Da Costa* v. *Firth*, 4 Burr. 1966.

On Profits.]—A policy on profits made "free from average, but without benefit of salvage to the assurer," is void under 19 Geo. 2, c. 37, s. 1. *De Mattos* v. *North*, 37 L. J., Ex. 116; L. R. 3 Ex. 185; 18 L. T. 797. S. P., *Mortimer* v. *Broadwood*, 20 L. T. 398; 17 W. R. 653.

An insurance on profits on goods laden on board a ship is an insurance on goods within 19 Geo. 2, c. 37, s. 1. *Smith* v. *Reynolds*, 1 H. & N. 221; 25 L. J., Ex. 337; 4 W. R. 644.

Therefore a policy declared to be "on profit on cotton, say 150 bales, said profits valued at 350*l.*, and in case of loss or accident, the policy to be considered a sufficient proof of interest, and the policy warranted free from average, and without benefit of salvage, that is, should the vessel from any cause whatever be unable to bring on her cargo, then a total loss is to be paid," is a policy on goods within 19 Geo. 2, c. 37, s. 1, and is therefore void as containing terms prohibited by that statute. *Ib.*

No Property.]—An agreement to pay 20*l.* to the defendant at the next port a ship should reach, provided that, if she did not save her passage to China, he would pay to the plaintiff 1,000*l.* at the end of one month after she arrived in the river Thames, without reference to any property, though one of the parties had some goods on board liable to suffer by the loss of the season, is a wagering policy. *Kent* v. *Bird*, Cowp. 583.

An insurance "on the ship, at and from Bristol to St. Thomas and Jamaica, and thence back to Dublin, on commission valued at 1,000*l.*," which appeared to bear insurance upon the commissions expected to arise upon the sale and disposition by the plaintiff in Dublin, of produce expected to be shipped on board the ship at Jamaica, is a wagering policy. *Knox* v. *Wood*, 1 Camp. 543; 10 R. R. 746.

Proof of Interest.]—A memorandum as follows: "In consideration of forty guineas for 100*l.* received of ——, we, who have hereunto subscribed our names, do for ourselves, assume, engage and promise that we respectively will pay unto the —— the sum and sums of money which we have hereunto respectively subscribed, in case the Imperial Brazilian mining shares be done at or above 100*l.* per share, on or before the 31st December, 1829," is a policy of insurance within 14 Geo. 3, c. 48, and void, the assured not being interested in the subject-matter insured or his name mentioned in the body of the instrument. *Paterson* v. *Powell*, 2 M. & Scott, 399; 9 Bing. 320; 2 L. J., C. P. 13.

If a policy dispenses with all proof of interest, it is a wagering policy within 19 Geo. 2, c. 37, and void; but if the insurer must prove his interest, and the policy only saves him the trouble of shewing its amount, it is a valued policy and good. *Murphy* v. *Bell*, 4 Bing. 567; 1 M. & P. 493; 6 L. J. (o.s.) C. P. 118; 29 R. R. 630.

Where a policy stipulated "that the goods insured were and should be valued at five tierces of coffee, valued at 27*l.* per tierce, say 135*l.*, that policy to be deemed sufficient proof of interest":—Held, that it was void under the statute. *Ib.*

Where an insurance is interest or no interest the plaintiff is not required to prove his interest, for the defendant cannot controvert that. *Depaba* v. *Ludlow*, 1 Comyns Rep. 360.

Abandonment.]—A wagering policy cannot be abandoned by the assured at any time. *Kulen Kemp* v. *Vigne*, 1 Term Rep. 304.

Interest or no Interest.]—Wager policies, interest or no interest, were formerly valid. *Asseviedo* v. *Cambridge*, 10 Mod. 77.

History of policies with these words; they have proved a great temptation to fraud. See *Saddlers' Co.* v. *Badcock*, 2 Atk. 556.

Policy, interest or no interest, without benefit of salvage. The ship was captured, but afterwards arrived safe at her port of delivery:—Held, that the underwriters were liable. *Spencer* v. *France*, cited, 2 Burr. 695.

Warranted free from all Average and without Benefit of Salvage—19 Geo. 2, c. 37—21 & 22 Geo. 3, c. 48—Ireland.]—A policy containing a provision that the property insured is warranted free from all average and without benefit of salvage, and that no further proof of interest than the policy shall be required is a wagering policy; but is not void at common law and is valid in Ireland. The statute 19 Geo. 2, c. 37, does not apply to Ireland by 21 & 22 Geo. 3, c. 48 (Ir.) *Keith* v. *Protection Marine Insurance Co.*, 10 L. R., Ir. 365.

Recapture—Total Loss—Wager Policy.]—On a policy, interest or no interest, a recapture after being in an enemy's port will not avail the insurer. *Dean* v. *Dicker*, 2 Str. 1250.

13. Valued Policies.

Validity.]—A valued policy of insurance is not to be considered as a wagering policy. *Lewis* v. *Rucker*, 2 Burr. 1167.

A wagering policy, and a policy on interest,

are contracts distinct in their nature and incidents. *Cousins* v. *Nantes*, 3 Taunt. 512; 13 R. R. 696.

It must appear on the face of the policy of which species the contract is. *Ib.*

If the policy is in the common form, it is a policy on interest. *Ib.*

If goods are fraudulently overvalued in a policy with intent to cheat the underwriters, the contract is entirely vitiated, and the assured cannot recover even for the value actually on board. *Haigh* v. *De la Cour*, 3 Camp. 319; 13 R. R. 813. And see *Amery* v. *Rogers*, 1 Esp. 207.

Value Conclusive.]—In a valued policy the agreed total value is conclusive. *Irving* v. *Manning*, 1 H. L. Cas. 287. S. P., *Erasmus* v. *Banks*, infra.

On a valued policy, the insured cannot recover more than the actual loss which happened, at the time when he chose to abandon. *Hamilton* v. *Mendes* or *Mendez*, 2 Burr. 1198; 1 W. Bl. 276.

The value of the ship insured stated in the valued policy is in the absence of fraud conclusive between the parties, however largely in excess of the true value. *Barker* v. *Janson*, 37 L. J., C. P. 105; L. R. 3 C. P. 303; 17 L. T. 473; 16 W. R. 399.

In a valued policy, unless there is a charge of fraud, in a bill filed in chancery for discovery, to the effect that the value of the cargo insured is below the amount insured, it is sufficient if the defendant swears to the value as stated in the invoice. *Aubert* v. *Jacobs*, Wightw. 118.

A valued policy amounts to an agreement that the particulars of value shall not be inquired into—per Wood, B. *Ib.*

A policy was effected for 6,000*l.* on a ship valued at 6,000*l.* She was run down and sunk by another ship, and the underwriters paid the owners the 6,000*l.* as for a total loss. Afterwards the sum of 5,000*l.* was recovered in the Court of Admiralty in respect of her against the owners of the other ship. Her real value was 9,000*l.*; and there was no other insurance upon her:—Held, that as between the underwriters and the assured, her value must be taken to be 6,000*l.* for all purposes. *North of England Iron Steamship Insurance Co.* v. *Armstrong*, 39 L. J., Q. B. 81; L. R. 5 Q. B. 244; 21 L. T. 822; 18 W. R. 520.

Opening in Case of Partial Loss.]—The word "valued" is an estoppel on both parties in case of a total loss, but not in case of a partial loss (agreed). *Erasmus* v. *Banks*, cited, 3 Dougl. 86.

An average loss opens a valued policy. *Le Cras* v. *Hughes*, 3 Dougl. 81.

A party insured by one policy for 1,700*l.* on the ship "S.," valued at 3,000*l.*, and by another for 2,000*l.* on the same ship, valued again at 3,000*l.*, cannot receive more than 3,000*l.* on the two policies. *Irving* v. *Richardson*, 1 M. & Rob. 153; 2 B. & Ad. 193; 9 L. J. (O.S.) K. B. 225.

The amount of the valuation can only be disputed on the ground of fraud, but the insurer's interest may be contested. *Williams* v. *North China Insurance Co.* 1 C. P. D. 757; 35 L. T. 884; 3 Asp. M. C. 342—C. A. S. P. *Lidgett* v. *Secretan*, infra.

What Included.]—Under a valued policy it may be shewn what it was that was intended to be valued, with a view to disputing interest in the whole subject of valuation. *Williams* v. *North China Insurance Co.*, supra.

The assured upon a valued policy on freight is entitled to recover the whole amount, though part of the goods only was on board at the time the ship was lost; the rest being ready to be shipped. *Montgomery* v. *Eggington*, 3 Term Rep. 362; 1 R. R. 718.

By a time policy the ship, valued at 2,000*l.*, and goods, valued at 8,000*l.*, were insured in a barter voyage to the coast of Africa, and it was stipulated that the outward cargo should be considered homeward interest twenty-four hours after arrival at first port or place of trade, with liberty to extend the valuation of the homeward cargo. The vessel, with the outward cargo on board, arrived at Kinsembo, the first place of trade on the coast of Africa, and there landed a portion of her cargo; and after remaining at Kinsembo more than twenty-four hours, she sailed thence with the remainder, without having received any other goods there, and was totally lost:—Held, that the assured was only entitled to recover upon this policy the value of that portion of the cargo which was actually on board at the time of the loss. *Tobin* v. *Harford*, 17 C. B. (N.S.) 528; 34 L. J., C. P. 37; 10 Jur. (N.S.) 859; 10 L. T. 817; 12 W. R. 1062—Ex. Ch.

In an action against an underwriter upon a valued policy, evidence of the value of the goods on board having been gone into at the trial, and parts of the cargo not covered by the policy having been included in the calculation, the court sent the case back for a new trial. *Richman* v. *Carstairs*, 2 N. & M. 562; 5 B. & Ad. 651; 3 L. J., K. B. 28.

What are.]—A policy on "goods valued at 1,400*l.*" is a valued policy, without stating the particulars of goods valued. *Franco* v. *Natusch*, 1 Tyr. & G. 401.

A policy was effected upon freight, to "be valued at as under." The policy was in the usual form, containing the common memorandum, which was immediately followed by the words, "on freight, warranted free of capture, seizure, piracy, detention or the consequences of any attempt thereat." In the margin, nearly opposite but a little above these words, the sum of 1,300*l.* was written in figures:—Held, that this was not a valued policy. *Wilson* v. *Nelson*, 5 B. & S. 354; 33 L. J., Q. B. 220; 10 Jur. (N.S.) 1044; 10 L. T. 523; 12 W. R. 795.

—— **Declaration of Interest.**]—Where there is a policy on goods as may be thereafter declared and valued, the declaration of interest, to be available, must be communicated to the underwriters, or some one on their behalf, before intelligence is received of the loss; but the declaration of interest is not a condition precedent, and, if none is made, the policy is then open instead of being valued, and, upon proof of interest at the trial, the assured will be entitled to recover. *Harman* v. *Kingston*, 3 Camp. 150; 13 R. R. 775.

Capture.]—Goods protected by a valued policy, being captured, were condemned as lawful prize, the captors paying the freight:—Held, that the assured might nevertheless recover as for a total loss. *Marshall* v. *Parker*, 2 Camp. 69; 11 R. R. 665.

Repairs.]—The owner of a vessel effected two policies of insurance upon her, one for the outward voyage, in which the risk was "at and

from London to Calcutta, and for thirty days after arrival," and the other for the homeward voyage, in which the risk was "at and from Calcutta to London." In each policy the vessel was valued at a specific sum. The vessel arrived at Calcutta damaged from an injury received during the outward voyage by striking on a reef, and after the expiration of the outward policy, and when the risk under the homeward policy had attached, she was totally destroyed by fire. At that time her repairs rendered necessary by the damage sustained on her outward voyage had been begun, but were not finished. The underwriter admitted a liability to a partial loss under the outward policy, and a total loss under the homeward policy:—Held, that such losses were to be assessed under each policy as if the other policy had never been made, and that the loss under the outward policy was to be assessed on the principle of the assured being entitled to be paid the diminution in value of the vessel at the end of her voyage from the damage which she had received by striking on the reef, although all the expense of repairing such damage had not been actually incurred; and that in assessing the total loss under the homeward policy the underwriter was not entitled to any deduction from the valuation of the vessel in the policy in respect of the expense of such repairs which had not been incurred, as the valuation of a vessel in a valued policy is, in the absence of fraud or wagering, the conventional sum to be paid if the vessel is lost, whatever may then be her actual value. *Lidgett* v. *Secretan*, 40 L. J., C. P. 257; L. R. 6 C. P. 616; 24 L. T. 942; 19 W. R. 1088; 1 Asp. M. C. 95.

Rights of Underwriters to Damages from Vessel causing Loss.]—When a vessel insured by a valued policy is destroyed by collision, the underwriters, after paying the amount insured, are entitled to the damages recovered from the colliding vessel, although the amount insured by the policy is less than the actual value of the vessel insured. *North of England Iron Steamship Insurance Co.* v. *Armstrong*, 39 L. J., Q. B. 81; L. R. 5 Q. B. 244; 21 L. T. 822; 18 W. R. 520. See *Simpson* v. *Thomson*, 3 App. Cas. 279; 38 L. T. 1; 3 Asp. M. C. 567—H. L. (Sc.)

Right to Compensation paid by Sovereign State.]—The respondents effected with underwriters valued policies of insurance (including war risks) on a cargo, which was afterwards destroyed by the "Alabama," a Confederate cruiser, and the underwriters paid to the respondents as on an actual total loss the valued amounts, which were less than the real value. The United States, out of a compensation fund created after the loss and distributed under an act of congress passed subsequently to the loss, paid to the respondents the difference between their real total loss and the sum received from the underwriters. Under the act of congress no claim was allowed for any loss for which the party injured should have received compensation from any insurer, but if such compensation should not have been equal to the loss actually suffered, allowance might be made for the difference; and no claim was allowed by or on behalf of any insurer either in his own right or in that of the party insured:—Held, that the underwriters were not entitled to recover the compensation from the respondents. *Burnand* v. *Rodocanachi*, 51 L. J., Q. B. 548; 7 App. Cas. 333; 47 L. T. 277; 31 W. R. 65; 4 Asp. M. C. 576—H. L. (E.)

Whole Sum Recoverable.]—In the case of a valued policy on ship and cargo, the assured must recover the whole sum underwritten, because he could not have any return of premium for short interest, if the ship had arrived safe. *MacNair* v. *Coulter*, 4 Bro. P. C. 450.

Profits on Cargo.]—See *Barclay* v. *Cousins*, ante, col. 1128.

Value not Stated.]—Where the valuation clause in a policy is not filled up, but at the foot of the policy the amount of the insurance is inserted, such statement cannot be treated as the valuation, if without difficulty the value intended to be protected can be ascertained. *Asfar* v. *Blundell*, 65 L. J., Q. B. 138; [1896] 1 Q. B. 123; 15 R. 481; 73 L. T. 648; 44 W. R. 130; 8 Asp. M. C. 106—C. A.

Excess of Value beyond Amount insured warranted uninsured—Further Insurance to cover Risk of Underwriter's Insolvency.]—See *General Insurance Co. of Trieste* v. *Cory*, post, col. 1178.

14. Neutral or Hostile Property.

Whether Insurable.]—Neutral property taken by a king's ship, but ordered to be restored by the Court of Admiralty, though it pronounced the cause of seizure good, is a lawful object of insurance. *Visger* v. *Prescott*, 5 Esp. 184; 8 R. R. 846.

An insurance cannot be effected on neutral property, though bound to an enemy's port. *Esposito* v. *Bowden*, 7 El. & Bl. 763; 27 L. J., Q. B. 17; 3 Jur. (N.S.) 1209; 5 W. R. 732—Ex. Ch.

And where an embargo had been laid on provisions in Ireland, an insurance on provisions on board a vessel to an enemy's port was void. *Delmada* v. *Motteux*, 1 Term Rep. 85, n.

An insurance by a subject of this country upon foreign property does not cover a loss by capture, on a war afterwards taking place between this country and that of the assured. *Lee, Ex parte*, 13 Ves. 64.

Where goods, the produce of Holland, purchased in that country during hostilities between Holland and Great Britain, by a British agent resident there and shipped for British subjects, were insured by them in this country:—Held, that this was a legal insurance. *Bell* v. *Gilson*, 1 Bos. & P. 345; 4 R. R. 823.

Every insurance on alien property by a British subject must be understood within this implied exception, that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer. *Brandon* v. *Curling*, 4 East, 410; 1 Smith, 85; 7 R. R. 592. S. P., *Kellner* v. *Le Mesurier*, 4 East, 396; 1 Smith, 72; 7 R. R. 581.

Legality—Insurance of Enemy's Property.]—Insurance of enemy's property is illegal, and no action can be maintained thereon. *Bristow* v. *Towers*, 6 Term Rep. 35; 3 R. R. 113, n.

Enemy's Property.]—An underwriter on French property in time of peace is not liable for a loss occasioned by capture by a king's ship during hostilities between France and England,

which commenced after the policy was effected, and terminated before action brought. *Gamba* v. *De Mesurier*, 4 East, 407 ; 7 R. R. 590.

15. PRIZE.

Whether Insurable.]—Captors of a ship seized as a prize may insure their interest therein, and are not entitled to a return of premium, although afterwards adjudged to be no prize, and restitution is awarded to the owner by the Court of Admiralty. *Boehm* v. *Bell*, 8 Term Rep. 154 ; 4 R. R. 620.

After an order by the king in council, gazetted on the 5th September, 1807, to detain and bring into port all Danish vessels ; a hired armed ship of his majesty took off Lisbon, on the 10th, and carried in thither, a Danish vessel ; and without instituting any proceedings in the Admiralty Court there (though Portugal was an ally with England in the war), sold her cargo to defray the expense of repairs and took in a loading on freight for London, with which she sailed on 3rd November, on which day hostilities were declared against Denmark, by another order of council ; and on 12th November, an insurance was made by order of the prize agent appointed by the captors, in consequence of a letter written by him in October, before the declaration of hostilities, directing the plaintiff to insure "for my account the Danish vessel, 'Knud Terkelson,' which has been detained by his majesty's armed ship 'Duchess of Bedford,' and for which I am authorised to act as agent" ; and concluding with expressing the agent's confidence that the plaintiff would do the best for the interest of the concerned ; and after such insurance was effected, the king, by another order of council, reciting the circumstances, adopted the insurance :—Held, that his majesty, having a lawful possession of the captured vessel through the aid of his officers and servants, whose possession was legalised by the previous order to detain Danish vessels, whether known to them or not at the time of the capture, had an insurable interest therein, and that it was competent for him to adopt the insurance made by order of the agent appointed by the captors. *Routh* v. *Thompson*, 13 East, 274 ; 11 East, 428 ; 10 R. R. 539.

Upon a joint capture by the army and navy, the officers and crews of the ships before condemnation have an insurable interest by virtue of the Prize Act, which usually passes at the commencement of a war. *Le Cras* v. *Hughes*, 3 Dougl. 81 ; 2 Park, Ins. (8th ed.) 568.

A prize taken by the navy and army conjointly was insurable, on account of the interest of the captors, under 45 Geo. 3, c. 72, s. 3, which granted a prize so taken to the joint captors after condemnation, subject only to the apportionment of the Crown as to the respective shares. *Stirling* v. *Vaughan*, 11 East, 619 ; 2 Camp. 225.

The expectation arising from the habit of the Crown as to restoring a prize taken without letters of marque is an insurable interest. *Nichol* v. *Goodall*, 10 Ves. 157.

Preliminary Claim.]—If a ship or a cargo insured is taken and condemned as prize, it is not necessary for the insured to make any claim or appeal before they call on the underwriters. *Tyson* v. *Gurney*, 3 Term Rep. 477.

Restitution—Hotchpot.]—The ship "Ross," belonging to the plaintiffs, and the ship "Atlantic" to Fisher & Co., and the cargoes to other persons, were insured on a former voyage, and captured by the Spaniards and carried into Spain ; and the underwriters upon the "Atlantic," of whom the defendant was one, paid as for a total loss. But while proceedings for condemnation were pending in the prize court in Spain, Cowan (residing there) having been severally empowered by the different owners to claim restitution, and to enter into compromise with the captors for giving up part of the cargoes on the restitution of the remainder and of the ships, and to defray all costs and charges thereon, and to forward the ships and goods restored to London, and to pay all demands on the ships and goods, agreed with the captors, subsequent to the cessation of hostilities, that upon giving up to them part of each cargo, the rest and the ships should be restored for the common benefit of the original owners of both ships and cargoes, in the lump. On which Cowan advised the plaintiffs that he should consign the "Atlantic" to them, with their own ship the "Ross," and draw bills on them for the general expenses of effecting the arrangement with the captors, and for the outfit of both ships, and referred to this information to guide them with respect to insurance, on which the plaintiffs insured the "Atlantic" by a policy, "on ships or on salvage charges, or on any interest as may be hereafter declared by the assured" ; and, after a subsequent capture of her by the French, brought an action against the defendant (who had also underwritten this second policy), and averred the interest to be first in themselves ; and, secondly, in Fisher & Co., the original owners of the ship "Atlantic" :—Held, that the plaintiffs had an insurable interest, as well on account of the whole property captured (of which they owned the other ship "Ross") having been restored at the sacrifice of part of the cargoes, for the common benefit of all, which created in them a hotchpot interest in the ship "Atlantic" ; and also as representing Cowan, who was empowered to act as an attorney for all the original owners, and to whom such restitution in hotchpot was made for their common benefit, and who had incurred charges and drawn bills on the plaintiffs on account of the common concern, which had been accepted and paid by them ; and Cowan having had authority to insure from Fisher & Co., the original owners, under their order, on obtaining restitution, to forward the ship to London, and to pay all claims and demands on her. *Robertson* v. *Hamilton*, 14 East, 522 ; 13 R. R. 303.

Commissioners for Sale of Prizes—Insurable Interest.] — Commissioners appointed by the Crown for the care, management and sale of Dutch ships brought to this country held to have an insurable interest in Dutch ships captured by a British man-of-war and on their way to England, under instructions to capture, with a view to their provisional detention. Held, also, that they might recover upon a loss of such ships by perils of the sea, though the loss happened after a proclamation for general reprisals against the Dutch. *Lucena* v. *Crawfurd*, 3 Bos. & P. 101 ; 2 Bos. & P. (N.R.) 269 ; 6 R. R. 623—Ex. Ch.

Commissioners appointed under an act of parliament to take possession of Dutch ships brought into ports of Great Britain, may insure in their own names such ships seized abroad, and whilst on their voyage to Great Britain. *Crawfurd* v. *Hunter*, 8 Term Rep. 13 ; 4 R. R. 576.

16. Legal or Equitable.

Trustee.] — Insurable interest exists in a trustee in respect of the legal interest in a ship, as in the cestui que trust in respect of the equitable. *Yallop, Ex parte*, 15 Ves. 67; 10 R. R. 24.

Cestui que trust.]—An equitable interest is insurable; and both the trustee and the cestui que trust have an insurable interest, the former in respect of his legal interest, and the latter in respect of the equitable interest. *Houghton* or *Howton, Ex parte*, 17 Ves. 251; 1 Rose, 177; 11 R. R. 73.

Foreigner Trustee.] — An American, who is owner of a ship only as trustee, and would not thereby be entitled to the privileges of the American flag under the laws of his own country, has a sufficient interest to maintain an action on a policy. *Rhind* v. *Wilkinson*, 2 Taunt. 237; 11 R. R. 551.

17. Averment and Proof of Interest.

Averment.] — A defendant must plead the plaintiff's want of interest specially. *Mills* v. *Campbell*, 2 Y. & C. 389.

It is necessary in a declaration on a policy truly to describe the interest on which the policy is effected. *Cohen* v. *Hannam*, 5 Taunt. 101; 14 R. R. 702.

So, the declaration must aver in whom the interest is vested, if it is a policy on interest. *Cousins* v. *Nantes*, 3 Taunt. 513; 12 R. R. 696.

A declaration on a policy on a foreign ship need not aver any interest in the assured; though there are no such words as "interest or no interest" in the policy. *Nantes* v. *Thompson*, 2 East, 385; 6 R. R. 458.

If a British subject has an interest in any part of a cargo on a valued policy, he may recover to the extent of the policy on a count averring interest in himself, if he proves some interest, although alien enemies may be interested in other parts of the cargo. *Feise* v. *Aguilar*, 3 Taunt. 506; 12 R. R. 695.

An averment of interest at the time of effecting the policy is immaterial, and need not be proved; it is sufficient if the plaintiff is interested at the commencement of the risk. *Rhind* v. *Wilkinson*, 2 Taunt. 237; 11 R. R. 551.

In a declaration on a policy, the plaintiff averred that Messrs. H., at the time of effecting the policy, and at the time of the loss, were interested in the cargo, which was the subject of the insurance, "to a large amount, to wit, to the amount of all the money ever insured thereon"; at the trial it appeared, that, previously to effecting the policy, Messrs. H. had admitted another mercantile house to a joint concern in the cargo insured:—Held, that the averment was supported by the evidence. *Page* v. *Fry*, 2 Bos. & P. 240; 5 R. R. 583.

A. & B., trading under the firm of A. & Co., engaged in an adventure, and afterwards received C. & D. as sharers therein; a policy was effected on account of A. & Co., and a loss having happened, the interest was averred in the declaration to be in A. & B. It was left to the jury to say whether all the adventurers were intended to be included, which they found in the affirmative:—Held, that the plaintiff was entitled to recover accordingly. *Carruthers* v. *Shedden*, 1 Marsh. 416; 6 Taunt. 14.

Joint owners of property insured for their joint use and on their joint account cannot recover upon a count on the policy, averring the interest to be in one of them only. *Bell* v. *Ansley*, 16 East, 141; 14 R. R. 322. And see *Hiscox* v. *Barrett*, 16 East, 145, c.

Where the plaintiffs averred that they were the persons residing in Great Britain who received the order for and effected the insurance; this was considered as a material averment, and not sustained by evidence of a letter received by them after the policy was effected, directing them to make assurance; although the policy was originally on goods on board the ship called the "Ann," or ships, or by whatsoever other name the ship should be named; and the plaintiffs, upon the receipt of the letter, procured a memorandum to be made on the policy, signed by the defendant, declaring the interest to be on board the "Herald," the ship mentioned in the letter. *Bell* v. *Janson*, 1 M. & S. 201.

Where the plaintiff effected an insurance on a ship, as well in his own name, as for and in the name of all and every other person, in the usual form, for the benefit of S., an alien enemy, and procured a licence to legalise the voyage, and a loss happened; and two years afterwards S., by letter to the plaintiff, adopted the insurance:—Held, that the plaintiff might recover against the underwriter, averring the interest in S. *Hagedorn* v. *Oliverson*, 2 M. & S. 485; 15 R. R. 317.

Property in Ship—Proof.]—In an action on a policy, the property in the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the register acts. *Robertson* v. *French*, 4 East, 130; 4 Esp. 246; 7 R. R. 535.

The production of the register from the custom-house is conclusive evidence of the ownership. *Marsh* v. *Robinson*, 4 Esp. 98; 2 Anstr. 479; 3 R. R. 617.

Freight.]—A shipowner who has entered into contracts for freight, has an insurable interest in the freight, though the contract for freight is not in writing. *Miller* v. *Warre*, 7 D. & R. 1; 4 B. & C. 538; 1 Car. & P. 237; 4 L. J. (o.s.) K. B. 8.

Goods.]—In an action on a policy on goods the bill of lading signed by the captain is not evidence to prove the plaintiff's interest in the goods. *Dickson* v. *Lodge*, 1 Stark. 226; 18 R. R. 764.

A bill of lading signed by a master of a vessel since deceased, for goods to be delivered to a consignee or his assigns, he paying freight, is admissible as evidence of the consignee having an insurable interest in the goods. *Haddow* v. *Parry*, 3 Taunt. 303; 12 R. R. 666.

But if the master guards his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading alone is not evidence, either of the quantity of the goods or of property in the consignee. *Ib.*

To prove an interest in the insured, the production of the bill of lading, and the evidence of the captain of the ship that he had the goods mentioned in it on board, are sufficient. *M'Andrew* v. *Bell*, 1 Esp. 373.

A shipowner, who was in the habit of receiving shipments of cotton to be carried on deck under a clean bill of lading, at his own risk,

entered into open policies of insurance as to which he was bound, according to usage, to declare all his risks in order of shipment, and rectify any mistake even after loss known. His agent, by negligence or mistake, gave a clean bill of lading for a certain shipment and gave no notice to him, but such shipowner, on discovering the omission, altered his declaration by inserting this shipment, though after loss known: —Held, that the shipowner had an insurable interest, as at law a written contract cannot be varied on the ground of negligence or mistake, and that he was entitled to alter the declaration. *Stephens* v. *Australian Insurance Co.*, 42 L. J., C. P. 12; L. R. 8 C. P. 18; 27 L. T. 585; 21 W. R. 228; 1 Asp. M. C. 458.

The mere fact of a person's name appearing in a bill of lading as the shipper and consignee of the goods is only primâ facie, and not conclusive evidence that such person has an insurable interest in such goods. *Seagrave* v. *Union Marine Insurance Co.*, 1 H. & R. 302; 35 L. J., C. P. 172; L. R. 1 C. P. 305; 12 Jur. (N.S.) 358; 14 L. T. 479; 14 W. R. 690.

S., who was a broker, sold for his principals on commission a cargo of goods, which were shipped under a bill of lading, which made the goods deliverable to the order of S. or his assigns, and he retained the possession of such bill of lading until the purchaser had accepted a bill for the amount of the goods. S. was not a factor, but a mere agent, who had not possession of the goods, or any lien on them for advances, commission, or otherwise. The goods were lost on the voyage; and in an action upon a policy which S. had effected upon the cargo, the jury found that there was no sale of the goods until after their loss; and the judge ruled that S. had an insurable interest, as the bill of lading made the goods deliverable to him or his assigns:—Held, that such ruling was wrong as a matter of law, and that S., having in fact nothing to suffer, and incurring no liability by the loss, had no insurable interest. *Ib.*

Subscription to Policy.]—In an action on a policy on a foreign ship, where there is a stipulation that the policy shall be sufficient proof of interest, if there is judgment by default, the plaintiff, on the writ of inquiry, need only prove the defendant's subscription to the policy, without giving any evidence of interest. *Thelluson* v. *Fletcher*, 1 Dougl. 315; 1 Esp. 73.

Searcher's Report.]—A copy from the custom-house of the searcher's report of the cargo kept there is evidence. *Johnson* v. *Ward*, 6 Esp. 48.

Inclination of the Courts to favour Interest.]—It is the duty of the court always to lean in favour of an insurable interest, if possible, for it seems to me that after underwriters have received the premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection, and one which has no real merit, certainly not as between the assured and the insurer—per Brett, M.R. *Stock* v. *Inglis*, 53 L. J., Q. B. 356; 12 Q. B. D. 564; 51 L. T. 449; 5 Asp. M. C. 294—C. A. See *S. C.*, on app. ante, col. 1123.

VI. WARRANTIES.

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And see VII. CONCEALMENT AND MISREPRESENTATION, col. 1178.

1. CONSTRUCTION GENERALLY.

Warranty or Representation.]—A representation is a statement or an assertion made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. It is not an integral part of the contract, and the contract is not broken, although the representation proves to be untrue, unless it was made fraudulently, and except in the cases of marine policies of insurance. *Behn* v. *Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204; 9 Jur. (N.S.) 620; 8 L. T. 207; 11 W. R. 496—Ex. Ch.

Whether a descriptive statement in a written instrument is a mere representation, or whether it is a substantive part of the contract, is a question of construction for the court to determine. *Ib.*

A statement in a contract descriptive of the subject-matter of it, or of some material incident thereof, when intended to be a substantive part of the contract, is generally regarded as a warranty or a condition on the failure or non-performance of which the other party may, provided the condition has not been partially executed in his favour, repudiate the contract in toto. *Ib.*

In policies and charterparties the word "warranty" is synonymous with condition. *Ib.*

Whatever is written in the margin of a policy of insurance is a warranty, and must be literally complied with. *De Hahn* v. *Hartley*, 1 Term Rep. 343; 2 Term Rep. 186; 1 R. R. 221.

If a stipulation is written on a separate paper, though pinned or wafered to the policy, it is not a warranty, but only a representation. *Pawson* v. *Barnevelt*, 1 Dougl. 12, n.

A warranty inserted in a policy must be literally and strictly complied with: a representation to the underwriter need only be substantially performed; but, if false in a material point, it will avoid the policy. *Pawson* v. *Watson*, Cowp. 785; 1 Dougl. 11, n.

A warranty does not include any thing not necessarily implied in it; therefore a warranty that a ship should have twenty guns was held not to mean also that she should have the necessary complement of men to work all the guns. *Hyde* v. *Bruce*, 3 Dougl. 213. And see per Lord Eldon, *Rees* v. *Berrington*, 2 Ves. 541.

A false warranty in a policy will vitiate it, though the loss happens in a mode not affected by the falsity. *Woomer* or *Woolmer* v. *Muilman*, 1 W. Bl. 427; 3 Burr. 1419.

The statements as to the state of the ship and as to the voyage contained in a slip of paper attached to the policy by a wafer, held not to be a warranty but representations only. *Bize* v. *Fletcher*, 1 Dougl. 12, n. (4).

Extent of.]—A representation made to the first underwriters extends to all the others. *Barber* v. *Fletcher*, 1 Dougl. 305.

But in another case it was doubted how far a representation made to one underwriter should be taken to extend to the rest, and what should be evidence of it. *Marsden* v. *Reid*, 3 East, 572; 7 R. R. 516. And see *Bell* v. *Carstairs*, 14 East, 374; 2 Camp. 544; 12 R. R. 557; 11 R. R. 593.

The rule that a representation made to the first underwriter is made to the other underwriter questioned by Lord Ellenborough. *Forester* v. *Pigon*, 1 M. & S. 13; 3 Camp. 380.

No evidence can be received of representations made by the insurance broker to other underwriters than the defendant, subsequently to the first underwriter; and evidence of representations to the first underwriter is received more on precedent than on reason. *Brine* v. *Featherstone*, 4 Taunt. 869; 14 R. R. 689. See also *Provincial Insurance Co.* v. *Leduc*, post, col. 1162.

By Broker.]—A representation made by an insurance broker when the names of the underwriters are put upon a slip, is binding on the assured, unless qualified or withdrawn by some communication upon the subject between that time and the execution of the policy. *Edwards* v. *Footner*, 1 Camp. 530.

The broker who insured shewed to the underwriters a paper detached from the policy stating that the ship was to sail with twelve guns and twenty men. There were no men or guns on board when the policy was subscribed and only ten guns and six swords and sixteen men when she sailed:—Held, that the statement was a representation and not a warranty, and that the policy was in force. *Pawson* v. *Ewer*, 1 Dougl. 12, n.

2. Nationality.

And see 7, Neutrality.

Insuring a ship by an English name does not amount to a warranty or a representation that she is an English ship. *Clapham* v. *Cologan*, 3 Camp. 382.

Where a policy described the insurance to be on goods on board the ship called "The American ship President," this was taken to be all the name of the ship, and not a warranty of her being an American ship called the "President." And where the policy, after such name, had the words "or by whatever other name the ship should be called," it was holden to be no variance that the real name of the ship was the "President"; the indentity of the ship meant to be insured with that name being proved. *Le Mesurier* v. *Vaughan*, 6 East, 382; 2 Smith, 492; 8 R. R. 500. S. P., *Hall* v. *Molineux*, 6 East, 385, n.; 8 R. R. 503.

A warranty of a ship being American does not mean that she is American built, but that she is the property of an American subject. *Wilson* v. *Backhouse*, Peake's Add. Cas. 119.

A policy was effected by the shippers on gold, portion of the cargo of a ship to sail from London to Constantinople. At the time of the insurance the vessel was English, but subsequently, and before sailing, she was sold to a Russian company and received a certificate as a Russian ship, her British certificate of registry being cancelled. On the voyage she was wrecked in Turkish waters and within the jurisdiction of the port of Constantinople, where by convention all shipping disputes were determined by the law of the country whose flag the ship bears, in the consular court of such country. The gold was taken on shore before any expense was incurred about the remainder of the cargo or the ship, and was deposited with the Russian authorities. The ship having become a total wreck, and legal proceedings having been taken in the court of the Russian consulate, the owners of the gold were compelled, in order to obtain possession of it, to pay a sum of money for salvage claims and legal expenses incurred in respect of the ship and the rest of the cargo, and adjudged to be chargeable on the gold. Some of these charges would not have been incurred had the vessel remained under the English flag and subject to the English law, and had the salvage claims been adjusted according to that law:—Held, first, that there being no express warranty in the policy against change of nationality, none could be implied, and the insurers could not take advantage of the change to escape from or to limit their liability. *Dent* v. *Smith*, 38 L. J., Q. B. 144; L. R. 4 Q. B. 414; 20 L. T. 868; 17 W. R. 646.

Held, also, that these payments were a loss, the direct consequence of the wreck which enabled the Russian authorities to enforce them, and as such were within the perils insured against, and must be borne by the insurers. *Ib.*

A representation that cargo insured was Swedish, which was true in fact, though contradicted by sentence of a French admiralty court:—Held, not to prevent the assured recovering. *Nonnen* v. *Reid*, 16 East, 176.

Absence of documents required by French ordinances:—Held, not to prevent assured from recovering. *Ib.*

Policy on a ship warranted American. Sentence of Frence prize court at St. Domingo, condemning the ship to captor either as not being American, or as not being properly documented as American, is conclusive evidence that she was not American. *Baring* v. *Claggett*, or *Christie*, 3 Bos. & P. 201; 5 East, 398; 4 R. R. 520; 6 R. R. 759; 7 R. R. 719.

A ship warranted to belong to a particular state must be properly documented as such. *Rich* v. *Parker*, 7 Term Rep. 705; 4 R. R. 552. S. P., *Barzillay* v. *Lewis*, 3 Dougl. 126.

3. Seaworthiness.

a. Sufficiency Generally.

Implied Warranty of.]—There is an implied agreement on the part of the assured that the ship insured shall be in a proper state and condition to perform the voyage. *Mills* v. *Roebuck*, 1 Park, Ins. (8th ed.) 460.

Disclosure of Defects.]—As an assured impliedly warrants the ship insured to be seaworthy, whatever forms an ingredient in seaworthiness is not necessary to be disclosed by the assured to the underwriter in the first instance, unless information upon the subject is particularly called for, and then the assured must disclose truly what he knows in the respect

required. *Haywood* v. *Rogers*, 4 East, 590 ; 1 Smith, 289 ; 7 R. R. 638.

At what Period.]—A ship may be seaworthy in harbour, in a state which would not be sufficient for a voyage ; therefore, on a policy at and from the port at which the ship was undergoing repairs at the time of insurance :—Held, that although not seaworthy for a voyage, she was sufficiently so in harbour, and there was no breach of the implied warranty. *Hibbert* v. *Martin*, 1 Camp. 538. S. P., *Forbes* v. *Wilson*, 1 Park on Ins. (8th ed.) 472.

A ship is seaworthy if she is sufficiently furnished for the service in which she is for the present time engaged. *Annen* v. *Woodman*, 3 Taunt. 299 ; 12 R. R. 663.

Therefore, a ship much out of repair is seaworthy in harbour, and is protected under the word "at." *Ib.*

The implied warranty of seaworthiness, in a policy on a ship, does not extend to her being seaworthy at every port which she leaves in the course of her voyage. *Holdsworth* v. *Wise*, 1 M. & Ry. 673 ; 7 B. & C. 794 ; 6 L. J. (o.s.) K. B. 134 ; 31 R. R. 299.

The implied warranty of seaworthiness refers to the commencement of the risk ; the only exception is where pilots are, or a particular description of crew is, necessary in certain parts of the voyage. *Hollingworth* or *Hollingsworth* v. *Brodrick*, 7 A. & E. 40 ; 2 N. & P. 608 ; 8 L. J., Q. B. 80 ; 1 Jur. 430.

—— **Different Stages of Voyage.**]—A ship insured at and from New Orleans to Liverpool. She was lying on the mud in the Mississippi and was seaworthy for that position ; but her bottom was worm-eaten, so that she was unfit for a sea voyage. She sailed, and before reaching the sea her bottom was put into good repair :—Held, that the policy attached. *Oliverson* v. *Loughman*, 4 M. & S. 346.

Action for loss of ship insured by a time policy. Demurrer to a plea, that during the time for which the ship was insured, and before the loss, the ship was unseaworthy and might and ought to have been repaired and kept seaworthy by the assurer, the plea not alleging that the assurer knew of the unseaworthiness or that the non-repair caused the loss, upheld. *Hollingworth* v. *Brodrick*, supra.

Effect of sending to Sea in unseaworthy Condition.]—If a shipowner knowingly and wilfully sends his ship to sea in an unseaworthy condition, the knowledge and wilfulness are essential elements in the consideration of his claim to recover on an insurance policy. But there is no implied warranty of seaworthiness in a time policy. *Dudgeon* v. *Pembroke*, 46 L. J., Ex. 409 ; 2 App. Cas. 284 ; 36 L. T. 382 ; 25 W. R. 499 ; 3 Asp. M. C. 393—H. L.

Ship sinking in fine weather—Facts raising Presumption of Unseaworthiness.]—See *Dudgeon* v. *Pembroke*, supra, and *cases* supra, col. 1088.

Insurance of Goods — Unseaworthiness of Ship.]—Where the ship was unseaworthy at the commencement of the voyage and was obliged to put into a port, and some goods were spoilt and obliged to be sold :—Held, that the shipper of the goods could not recover against his insurer, although he knew nothing as to the seaworthiness or otherwise of the ship. *Oliver* v. *Cowley*, 1 Park, Ins. (8th ed.) 470.

Insurer not aware of Unseaworthiness.]—A ship sailed from the Thames repaired and seaworthy, as the owner and shipwright thought, but before reaching Portsmouth was leaky and was condemned as unfit to proceed :—Held, that the underwriters were discharged. *Lee* v. *Beech*, 1 Park, Ins. (8th ed.) 468.

From Capture.]—A ship, to be seaworthy, must be provided with storm-sails, and rendered as secure as possible from capture, as well as from the perils of the sea. *Wedderburn* v. *Bell*, 1 Camp. 1 ; 10 R. R. 615.

Neutrality.]—A neutral vessel is not seaworthy unless she is provided with documents to prove her neutrality. *Steel* v. *Lacy*, 3 Taunt. 285 ; 12 R. R. 658.

What Voyage.]—By the law of marine insurance there is an implied warranty in every insurance of a ship that the vessel shall be seaworthy, by which is meant that she shall be in a fit state as to repairs, equipment and crew, and in all other respects to perform the voyage insured, and to encounter the ordinary perils at the time of sailing upon it. If the assurance attaches before the voyage, it is enough that the state of the ship is commensurate to the risk ; and if the voyage is such as to require a different complement of men, or state of equipment in different parts of it, as if it was a voyage down a canal or a river, and thence to and on the open sea, it is enough if the vessel is, at each stage of the navigation in which the loss happened, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during their voyage, and their negligence or misconduct is no defence to an action on the policy when the loss has been immediately occasioned by the perils insured against. *Biccard* v. *Shepherd* or *Commercial Marine Insurance Co.* v. *Namaqua Mining Co.*, 14 Moore, P. C. 471 ; 5 L. T. 504 ; 10 W. R. 136—P. C.

The seaworthiness, of which, in the absence of express stipulation, there is an implied warranty in every voyage policy, is a relative term depending on the nature of the ship as well as of the voyage insured. *Clapham* v. *Langton*, 34 L. J., Q. B. 46 ; 10 L. T. 875 ; 12 W. R. 1011—Ex. Ch. S. P., *Burgess* v. *Wickham*, 3 B. & S. 669 ; 33 L. J., Q. B. 17 ; 8 L. T. 47 ; 11 W. R. 992.

Therefore, on a policy "on a voyage from the Tyne to Odessa," it being shewn that the vessel was an iron steamer of very light draught of water, constructed for river navigation only, that this was disclosed to the underwriters before the policy was effected, and the dimensions of the vessel then stated to them, and that (though it was impossible to make her fit to encounter the ordinary perils of ocean navigation) the ship had been made as seaworthy as her size and construction would admit ; the underwriters were held liable on her being lost by the perils insured against. *Ib.*

Three vessels, insured on a voyage from L. to G., were warranted to sail from L. on or before the 15th of August. L. was on a river, and bridges crossed the river below L., so that the vessels could not insert their masts, and the depth of water would not allow of the heavier anchors and other apparel of the vessels being put on board. They all left L. before the 15th,

and arrived at A., at the mouth of the river, where they were supplied with necessaries for a short coasting voyage to M., to which they proceeded, and were there fully provided for their long sea voyage to G. By a local law, vessels were required to go to M. for certificates to entitle them to sail, but they might have been fully equipped for sea at A. if the materials had been sent there from M.; but this would have caused expense and possibly delay. One of the vessels was ready to leave M. some days before the others, but was detained in order to have their company, on the alleged ground of safety. They all left M. on the 23rd, which was as soon as was practicable after their certificates had been granted; and they were subsequently lost at sea:—Held, that as the nature of the voyage required different preparations for different portions of it, and the vessels had been properly equipped for each portion, the warranties of seaworthiness had been complied with, and the vessels had "sailed on their voyage" before the 15th of August. *Bouillon* v. *Lupton*, 15 C. B. (N.S.) 113; 33 L. J., C. P. 37; 10 Jur. (N.S.) 422; 8 L. T. 575; 11 W. R. 966.

Held, also, that the delay of the third vessel was reasonable. *Ib.*

Though there are different degrees of seaworthiness, according to the nature of the voyage, yet, where there are several stages in a voyage, which involve different equipments, a vessel must be seaworthy for each stage at the commencement of each stage. *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada*, infra.

—— **Rules of Association.**]—The rules of an insurance association provided that, "should any vessel entering the association proceed on an American voyage, her insurance should cease." Another rule was, that the managing underwriters should survey each ship insured, in hull and materials, once a year, without distinction, and order such stores and repairs as they might deem necessary, which stores must be got and repairs done on due notice being given, otherwise the ship should not be insured. The policies were all to be time policies for one year:—Held, that the effect of not complying with an order of the managing underwriters was, that the ship must be considered unseaworthy, and the policy which had before been effected on her void. *Stewart* v. *Wilson*, 12 M. & W. 11; 13 L. J., Ex. 27; 7 Jur. 1020.

—— **Inland Policy.**]—A policy headed "Inland Hull policy" insured the ship "West" against perils of lakes, rivers, canals, fires, jettisons, except damage from rottenness, inherent defects, and other unseaworthiness," "at and from Montreal to Nova Scotia." At the commencement of the voyage the boiler was defective, and after leaving Quebec, and on getting into salt water, the "West" met with bad weather and was lost:—Held, that the warranty of seaworthiness at the commencement of the voyage applied, although the policy was an inland policy, the voyage being expressed by the policy to be from Montreal to Halifax. *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada*, 39 L. J., P. C. 53; L. R. 3 P. C. 234; 22 L. T. 559; 18 W. R. 769.

—— **Express Warranty.**]—The express provision as to seaworthiness in the policy did not exclude the implied warranty. *Ib.*

—— **Inland Vessel used for Ocean.**]—When a vessel built for inland navigation is insured for an ocean voyage, there is an implied warranty that she shall be made as seaworthy for the voyage as such a vessel can be made by ordinary available means. *Turnbull* v. *Janson*, 36 L. T. 635; 3 Asp. M. C. 433—C. A.

A steamer of light construction, built for inland navigation in Trinidad, was insured for the voyage out. On the voyage she broke in two at sea, and went down. In an action on the policy, the jury found that the vessel was not seaworthy as an ocean-going vessel, and was not made as seaworthy as she might have been by ordinary available means:—Held, that on these findings the defendant was entitled to judgment. *Ib.*

Policy on Salvage.]—In a voyage policy on salvage there is an implied condition or warranty of seaworthiness. *Knill* v. *Hooper*, 2 H. & N. 277; 26 L. J., Ex. 377; 5 W. R. 791.

It being now well established as a rule of law that in an insurance for a voyage, either on ship or on goods, or on freight, a warrant of seaworthiness, for the voyage of the ship insured, or of the ship in which the goods are carried, is to be implied, but seaworthiness being a relative term, and the question of what it involves in each case being one of fact, there is no exception to the rule in the case of an insurance on salvage, that is, on ship and cargo, in respect of the lien of the insured for salvage service rendered, there being no exclusion of such a warranty; and words in the policy, reciting that the ship and cargo must have been abandoned by the original crew and taken into port by the salvor, the insured, in whose interest the insurance is effected, do not amount to an implied exclusion of it, being merely explanatory of the interest insured. *Ib.*

The question to what extent the vessel, under such circumstances, is to be seaworthy, is for the jury, who will say whether the ship was, at the commencement of the voyage, in such a state as to be reasonably capable of performing it. *Ib.*

b. On Time Policy.

No Implied Condition.]—By the law of England, in a time policy effected on a ship then at sea, there is no implied condition that the ship shall be seaworthy on the day when the policy is intended to attach. *Gibson* v. *Small*, 4 H. L. Cas. 353; 1 C. L. R. 363; 17 Jur. 1131.

In a time policy, there is not an implied warranty that the ship is seaworthy wherever she may be, or however situated, at the commencement of the risk; but only that she is seaworthy so far as the assured could provide for her being so when the risk commenced; e.g. if she was in a port at the time that she was in a proper condition for such a port: if at sea, that she was seaworthy when the particular voyage commenced; the term "seaworthy" in a policy for time, as in a voyage policy, implying not necessarily fitness to go to sea, but fitness to encounter the hazards of the situation in which she is placed when the risk attaches. *S. C.*, in the exchequer chamber, 16 Q. B. 128; 20 L. J., Q. B. 152; 15 Jur. 325.

A time policy contains no implied warranty of seaworthiness, either at the commencement of the risk or at any other time. Per Willes, J., in *Thompson* v. *Hopper*, El. Bl. & El. 1049; 27 L. J., Q. B. 441; 6 W. R. 857.

To a declaration on a policy alleged to have been made on the 1st of May, 1852, "at and from the meridian of the day of sailing from Suez, to the meridian of the 20th of March, 1853," averring that afterwards the ship set sail and departed from Suez, and that the day of her so sailing from Suez was after the 20th of March, 1852, and before the 20th of March, 1853, and that after the meridian of the day of sailing from Suez, and before the meridian of the 20th of March, 1853, the ship was by the perils of the sea wholly lost, the defendant pleaded that the ship was not at the time of sailing from Suez, or at any time on the day of sailing from Suez, or at any time afterwards during the continuance of the risk in the insurance mentioned, seaworthy: —Held, that the plea was no answer to the action, the policy being in substance a time policy; and, consequently, there being no implied warranty that the vessel was seaworthy on the day when the policy was intended to attach. *Michael* v. *Tredwin*, 17 C. B. 551; 25 L. J., C. P. 83.

In a time policy the law, in the absence of special stipulations in the contract, does not imply any warranty that the vessel should be seaworthy. *Dudgeon* v. *Pembroke*, 46 L. J., Q. B. 409; 2 App. Cas. 284; 36 L. T. 382; 25 W. R. 499; 3 Asp. M. C. 393—H. L. (E.)

Continuing Obligation.]—In an action brought for a total loss, by stranding, within the time of the running of a time policy, after leaving an intermediate port, the defence was that at the time of the loss the vessel was unseaworthy by reason of an insufficient crew, she having sailed from the intermediate port without sufficient hands to work the vessel, although she had sufficient crew at the time she started for the voyage:—Held, that the warranty of seaworthiness in a time policy, at the commencement of the risk, is not a continuing obligation cast upon the assured while the risk is running. *Jenkins* v. *Heycock*, 8 Moore, P. C. 351; 1 C. L. R. 406; 5 Moore Ind. App. 361.

Weather proximate cause of Loss—Constructive Total Loss.]—A wooden barque, over twenty years old, just past her half-time survey, was insured for twelve months from December 2nd. She sailed on December 3rd, reached Rio, and sailed again for Astoria. She met with heavy weather off the Horn, and had to run for Barbados, in consequence of straining and leaking. She was found to be not worth repairing, her timbers for the first time being found to be rotten, and it was found that the leakage was due to her defective state and the weather: —Held, that the proximate cause of the loss being weather, the underwriters were liable for a constructive total loss; no finding as to whether she was seaworthy when the risk began. *Kenneth* v. *Moore*, 10 Ct. of Sess. Cas. (4th ser.) 547.

c. Carrying Goods.

Implied Condition.]—To an action by a shipowner against a shipper of goods to recover his proportion of average loss, he pleaded that his promise was subject to a condition, viz. that the ship was seaworthy at the commencement of the voyage, and that she was not seaworthy:—Held, a bad plea. *Schloss* v. *Heriot*, 14 C. B. (N.S.) 59; 32 L. J., C. P. 211; 10 Jur. (N.S.) 76; 8 L. T. 246; 11 W. R. 596.

He also pleaded, that there never was any express promise to the effect in the declaration mentioned; that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned and arose from and in consequence of such unseaworthiness:—Held, a good plea, inasmuch as it shewed that the shipowner's actionable negligence and misconduct produced the very damage for which he sought to recover contribution from the shipper. *Ib.*

Ship and Cargo.]—A policy was made "on wine in casks, on or under deck," in a named ship. The wine was stowed wholly on deck, and so loaded the ship was unable to stand the rough weather which she encountered, except by jettison of the wine; she was, however, in respect of herself and the underdeck cargo, at no time in very real danger, on account of the facility with which the deck cargo could be got rid of, which was effected by staving in the casks of wine. The weather was of the rough character to be expected at the time of the year. In an action against the underwriters for the loss of the wine: —Held, that the warranty of seaworthiness implied on voyage policies extends to the ship including the cargo, and is not fulfilled if the ship only can be made safe on an ordinary voyage by the destruction of the insured cargo. *Daniells* or *Daniels* v. *Harris*, 44 L. J., C. P. 1; L. R. 10 C. P. 1; 31 L. T. 408; 23 W. R. 86; 2 Asp. M. C. 413.

Deck Cargo.]—A ship sailing from British North America for a port in the United Kingdom, with part of the cargo on deck, in violation of 16 & 17 Vict. c. 107, ss. 170, 171, 172, is not a statutory unseaworthiness. *Wilson* v. *Rankin*, 35 L. J., Q. B. 87; L. R. 1 Q. B. 162; 13 L. T. 564; 14 W. R. 198—Ex. Ch. *See*, post, col. 1207.

Warranted no Iron—Steel.]—A policy of insurance on a ship contained a clause, "Warranted no iron, or ore, or phosphate cargo, exceeding the net registered tonnage." In an action on the policy against the underwriters:—Held, that the warranty was broken by shipping a quantity of steel in excess of the net registered tonnage. *Hart* v. *Standard Marine Insurance Co.*, 58 L. J., Q. B. 284; 22 Q. B. D. 499; 60 L. T. 649; 37 W. R. 366; 6 Asp. M. C. 368—C. A.

Condition as to Goods.]—It is not a condition precedent to the attaching of a policy on goods against sea risks, that the subject of insurance should, at the commencement of the voyage, be fit to encounter the ordinary vicissitudes of a voyage. *Koebel* v. *Saunders*, 17 C. B. (N.S.) 71; 33 L. J., C. P. 310; 10 Jur. (N.S.) 920; 10 L. T. 695; 12 W. R. 1106.

Ship Overloaded—Discharge.]—A ship insured at and from a port, sailed on her voyage in an unseaworthy state, in consequence of having a greater cargo than she could safely carry. The defect was discovered before any loss accrued, and part of the cargo was discharged, and a loss subsequently accrued, in no degree attributable to her having been overladen in the early part of the voyage:—Held, that the underwriters were liable for such loss. *Weir* v. *Aberdeen*, 2 B. & Ald. 320; 20 R. R. 450.

d. Crew.

Negligence of.]—Underwriters are responsible for the misconduct or negligence of the captain and crew, but the owner, as a condition precedent, is bound to provide a crew of competent skill. *Shore* v. *Bentall*, 7 B. & C. 798, n.; 1 M. & Ry. 111; 31 R. R. 302, n.

Where, in a policy on a voyage up the Mediterranean, on the coast of Spain, the underwriters stipulated that they would not be liable higher up the Mediterranean than Tarragona, the assured could not recover, where the captain of the ship, through entire ignorance of the coast, which the occasion and the terms of the policy required him to distinguish, went into Barcelona, an enemy's port, which is higher up than Tarragona; for this was either a deviation without any just cause, or there was a failure of an implied warranty on the part of the assured, that a captain and crew of competent skill and knowledge for the declared purpose of the voyage should be provided. *Tait* v. *Levi*, 14 East, 481; 13 R. R. 289.

Insufficiency.]—The underwriters were not liable where the crew was insufficient, in not having a person on board able to take the captain's place on his being dangerously ill, and the ship was consequently obliged to deviate from her course to find a person to direct her. *Clifford* v. *Hunter*, M. & M. 103; 3 Car. & P. 16.

The question, whether a ship, on a voyage from Madras to London, is not seaworthy if she has no person on board her, besides the captain, who is capable of navigating her, is a question of fact for the jury, and not a question of law to be determined by the judge. *Ib.*

As a full complement of men is not necessary in harbour, a ship does not seem to be seaworthy for want of a crew till she sails on the voyage without a crew. *Annen* v. *Woodman*, 3 Taunt. 299; 12 R. R. 663.

Where a ship sailed on her outward voyage from Liverpool to Cuba, with a crew of thirteen men, and, on her arrival at the latter place, three had died and two deserted there, and the captain could only procure eight men for the whole of the homeward voyage, and two for Montego Bay in Jamaica (ten men being a competent crew to navigate the vessel); and he accordingly touched at Montego Bay for the sole purpose of landing those two men and procuring others in their stead, which he did; and the vessel was lost by the perils of the sea in proceeding from thence on the voyage to Liverpool:—Held, that on a policy from Cuba to Liverpool, the ship was not seaworthy as to her crew for the whole of her homeward voyage when she sailed from Cuba; or that, even if she then had a sufficient crew, the touching at Montego Bay was a deviation; and that the circumstances of her having become seaworthy by having a sufficient crew at the time of the loss did not entitle the assured to recover against an underwriter on the policy. *Forshaw* v. *Chabert*, 6 Moore, 369; 3 Br. & B. 158; 23 R. R. 596. See also *Graham* v. *Barras*, post, col. 1163.

Absence.]—Where the assured have once provided a sufficient crew, the negligent absence of all the crew at the time of the loss is no breach of the implied warranty that the ship should be properly manned. *Busk* v. *Royal Exchange Assurance Co.*, 2 B. & Ald. 73; 20 R. R. 350. And see *Bishop* v. *Pentland*, 7 B. & C. 214; 1 M. & Ry. 49; 6 L. J. (O.S.) K. B. 6; 31 R. R. 177.

Where no Contract.]—A plea to an action on a policy that the master of the vessel on which the policy was effected had not entered into an agreement in writing with the seamen, pursuant to 5 & 6 Will. 4, c. 19, s. 2, wherefore the voyage was illegal, is ill, as the non-compliance with the statute by the master did not make the voyage itself illegal or the vessel unseaworthy. *Redmond* v. *Smith*, 2 D. & L. 280; 8 Scott (N.R.) 250; 13 L. J., C. P. 159; 8 Jur. 711.

Number of.]—A warranty on the margin of a policy, "thirty seamen besides passengers," means thirty persons belonging to the ship's company, including cook, surgeon, boys, &c. *Bean* v. *Stupart*, 1 Dougl. 11.

e. Pilot.

Absence of.]—A ship, homeward bound to the port of London, received a pilot at Orfordness, as directed by 5 Geo. 2, c. 20, and dropped him before she reached her moorings in the river Thames, after which, before she was safely moored, an accident happened and the vessel was sunk; the underwriter on the ship and cargo was held discharged from his liability, there not being a pilot on board at that time, though it did not appear that the loss was directly imputable to want of skill in those who navigated the vessel. *Law* v. *Hollingsworth*, 7 Term Rep. 160. See *Dixon* v. *Sadler*, 5 M. & W. 415; 9 L. J., Ex. 48; and 8 M. & W. 895—Ex. Ch., supra, col. 1101.

A captain neglecting to employ a pilot where necessary, discharges the insurers. *Hollingworth* or *Hollingsworth* v. *Brodrick*, 7 A. & E. 40; 2 N. & P. 608; 8 L. J., Q. B. 80; 1 Jur. 430.

f. Repairs.

Insufficient.] — Where a vessel had been lengthened, and insured for a foreign voyage, but the new parts were not fastened with hanging knees:—Held, that she was not seaworthy for such a voyage at the commencement of the risk. *Watt* v. *Morris*, 1 Dow, 32.

To a declaration upon a policy for twelve months, which stated that the vessel was lost by the perils of the sea, a plea that, after the policy, the ship became unseaworthy, that she could have been rendered seaworthy, that the plaintiff neglected to repair her, and that by reason of the premises, she remained in an unseaworthy state until the time of the loss, is bad, as it should, at all events, have stated that the plaintiff knew of the unseaworthiness, and that he had an opportunity of repairing her. *Hollingsworth* v. *Brodrick*, supra.

Where a vessel is sent to sea in a state not fit for the particular voyage, and without encountering any more than ordinary risk is obliged, owing to the defective state in which she sailed, to put into a port for repair, the shipowner, though the defects were not known to him, and he has acted without fraud, cannot recover against the insurer the expenses of such repairs as were rendered necessary in consequence of the unseaworthy state of the vessel, though there is no warranty of seaworthiness. *Fawcus* v. *Sarsfield*, 6 El. & Bl. 192; 25 L. J., Q. B. 249; 2 Jur. (N.S.) 665.

g. Tackle and Furniture.

Cables.]—Under the implied warranty as to seaworthiness, it is necessary not only that the hull of the vessel should be tight, staunch, and strong, but that she should be also furnished with ground-tackling sufficient to encounter the ordinary perils of the sea; and therefore, where it appeared that the best bower-anchor and the cable of the small bower-anchor were defective, the vessel was not seaworthy. *Wilkie* v. *Geddes*, 3 Dow, 57; 15 R. R. 17.

In a policy by a member of a mutual insurance club, there was a memorandum that "all ships were to be inspected and approved by a committee of the club, and that all chain-cables were to be properly tested":—Held, in an action for a loss, that it was not a condition precedent which made it necessary for the insured to prove that a chain-cable had been tested previously to the voyage. *Harrison* v. *Douglas*, 6 N. & M. 180; 3 A. & E. 396; 1 H. & W. 380.

Medicines.]—When the sickness of the master or crew is set up as an excuse for deviation, it is incumbent on the assured to shew that proper medicines and necessaries for the voyage were on board, in a case where the nature of the voyage requires that there should be a surgeon on board. *Woolf* v. *Claggett*, 3 Esp. 257; 6 R. R. 830.

Warranted to have twenty Guns—Insufficient Men to man them.]—Warranty that a ship had twenty guns. It is no breach of warranty that she has twenty-five men only, sixty being required to man the guns. *Hide* v. *Bruce*, 3 Dougl. 213.

h. Lighters.

On an insurance of goods on a voyage policy, until the same are safely landed at the port of discharge, "including all risks to and from the ship," there is no implied warranty that the lighter used at the end of the voyage to convey the goods from the ship to the shore shall be seaworthy for that purpose. *Lane* v. *Nixon*, 35 L. J., C. P. 243; L. R. 1 C. P. 412; 12 Jur. (N.S.) 392; 14 W. R. 641.

Where there is a warranty that a ship shall set out upon a voyage seaworthy, the insurer is to be liable for the ordinary incidents in the usual course of the voyage. If the hiring of lighters at the end of the voyage is one of the usual incidents, the insurer must take the consequence of the local lighters being unfit to put the goods on shore. *Ib.*

i. Proof.

Opinion.]—Upon a question concerning the seaworthiness of a ship, after the evidence of persons who have been examined as to her condition, experienced shipwrights, who never saw her, may be called to say, whether, upon the facts sworn to, she was, in their opinion, seaworthy or not. *Beckwith* v. *Sydebotham*, 1 Camp. 117; 10 R. R. 652. S. P., *Thornton* v. *Royal Exchange Co.*, Peake, 25.

Onus of Proof.]—In an action on a policy of insurance it was proved at the trial that the vessel put back from inability to proceed eleven days after she started on her voyage: the judge directed the jury that the time which elapsed between setting sail and putting back was sufficiently short to shift the onus of proof from the underwriters, and make it incumbent on the assured to prove that the unseaworthiness arose from causes occurring subsequently to setting sail:—Held, a misdirection. *Pickup* v. *Thames Marine Insurance Co.*, 47 L. J., Q. B. 749; 3 Q. B. D. 594; 39 L. T. 341; 26 W. R. 689; 4 Asp. M. C. 43—C. A.

It is a clear and established principle, that if a ship is seaworthy at the commencement of the risk, though she becomes otherwise in one hour afterwards, the warranty is complied with, and the underwriter is liable. *Watson* v. *Clark*, 1 Dow, 344; 14 R. R. 73.

But where the inability of a ship to perform the voyage insured appears in a short time from the period of her setting sail, the presumption is, that the inability arose from causes existing previously to the commencement of the voyage, and that she was not then seaworthy. *Ib.*

The age of a ship is not of itself any proof of unseaworthiness, but is of weight in evidence. *Ib.*

Where a ship sailed, and soon afterwards encountered a storm, became leaky, put back, and was found, on survey, to be materially decayed, and a damage was discovered which could not fairly be considered as the effect of the storm:—Held, that she was not seaworthy when she sailed on the voyage insured; and that, on a question as to seaworthiness, honesty of intention is no answer, but the fact of seaworthiness must appear, or otherwise the underwriter is discharged; and though a vessel, after sailing, encounters a storm, yet, unless the damage which renders her unfit for the voyage can be fairly considered as the effect of such storm, the implied warranty is not complied with. *Douglas* v. *Scougall*, 4 Dow, 269; 16 R. R. 69.

A ship, soon after her sailing on a voyage insured, was found to be unfit for sea; the question whether she was seaworthy at the commencement of the risk or the voyage (when not otherwise ascertained) must be decided by rational inference from the circumstances. And a ship is primâ facie to be deemed seaworthy; but if it is found, soon after her sailing, that she is not sound, without probable and adequate cause, by stress of weather or otherwise, to account for it, the rational inference is, that, notwithstanding appearances, she was not seaworthy. *Parker* v. *Potts*, 3 Dow, 23; 15 R. R. 1.

Estoppel by Agreement.]—In an action against the underwriters of a policy for a total loss, the declaration stated that they agreed that the ship should be considered, and was thereby allowed to be, seaworthy in her hull, tackle and materials for the voyage, the insured declaring, that, to the best of their belief, and according to their knowledge and information, the ship, at the time of the insurance, was, in all respects, seaworthy for the voyage; that the vessel, during her voyage, by stormy winds and tempestuous weather, and by the force and violence of the winds and waves, became leaky, strained, riven and damaged, insomuch that by means thereof it became necessary for her preservation for her to sail to the nearest port of safety; that she accordingly sailed to the nearest port of safety; that on her arrival there, she was unfit to prosecute her voyage without being repaired and refitted; that she was found to be unseaworthy and unfit to prosecute her voyage, unless great repairs were done upon her; that such repairs could not be done; that it was not

possible to obtain any repairs sufficient to enable her to proceed on her voyage, or to proceed to any other port to be repaired; that it became expedient and necessary to abandon the voyage and to sell the ship, and that the ship was sold; by means of which premises the voyage was not performed, and the vessel was wholly lost to the assured:—Held, that, whether the loss of the vessel was occasioned by unseaworthiness or by perils of the sea, the underwriters were bound by their admission, and could not dispute the seaworthiness. *Parfitt* v. *Thompson*, 13 M. & W. 392; 14 L. J., Ex. 73.

Held, also, on motion in arrest of judgment, that it sufficiently appeared that the loss of the vessel was occasioned by the perils insured against. *Ib.*

Verdict against Evidence—Second new Trial refused.]—In an action on a policy of insurance, the jury having found a verdict for the plaintiff on a question of seaworthiness, the court granted a new trial on the ground that the verdict was against the weight of the evidence. A second jury having found a verdict for the plaintiff on the same evidence, the court refused to grant a second new trial (Vaughan, J., and Coltman, J., dissentientibus). *Foster* v. *Steele*, 3 Bing. (N.C.) 892; 5 Scott, 25; 6 L. J., C. P. 265.

Consolidation—Refusal to open.]—The court having granted a new trial on the ground that the verdict was against the evidence in a question of seaworthiness, and having refused a second new trial upon a verdict the same way, upon the same evidence; refused also to open the consolidation rule and re-try the question in another action against another underwriter on the same policy. *Foster* v. *Alvez*, 3 Bing. (N.C.) 896; 4 Scott, 535.

4. Position of Ship.

Safety on a given Day.]—A policy on a ship at and from H. to V., with a warranty that the ship was "in port" on a previous day, means the port of H., and it is not sufficient that she was safe in some other port on that day. *Colby* v. *Hunter*, M. & M. 81; 3 Car. & P. 7.

In a representation that a ship was seen safe on such a day, and had performed two-thirds of her voyage, if it turns out that she had got as far as was represented, but was lost two days before the day mentioned, the mistake is material, and makes the policy void. *Macdowall* v. *Fraser*, 1 Dougl. 260.

—— **Time of Day.**]—Goods were insured from the lading of them on board the ship, lost or not lost, and warranted well on a particular day; the ship was lost on that day, before the policy was underwritten; and it was holden that the underwriter was liable, for the warranty is complied with if the ship was safe at any time of that day. *Blackhurst* v. *Cockell*, 3 Term Rep. 360; 1 R. R. 717.

Not to enter St. Lawrence after certain Date.]—When a ship is insured on a time policy at and from Montreal, to trade between the Island of Newfoundland, Nova Scotia, Cuba, and Quebec and Montreal, and the policy contains a stipulation in the following words: "Not allowed under this policy to enter the Gulf of St. Lawrence before the 25th April, nor to be in the Gulf after the 15th November; nor to proceed to Newfoundland after the 1st December, or before the 15th March, without payment of additional premium, and leave first obtained, war, risk, and sealing voyages excepted"; the policy is not to be construed as declaring that the vessel may proceed from any of the ports named in the policy to Newfoundland on or before the 1st December, notwithstanding it might have to pass through the Gulf after the 15th November; but under that clause the vessel is neither to be in the Gulf after the 15th November, nor to proceed to Newfoundland from any port after the 1st December; and if the ship enters the Gulf after the 15th November she commits a breach of warranty within the words of the policy, and the underwriters are not liable for any loss occurring in consequence of that breach, unless they accept abandonment with a knowledge of the breach. *Provincial Insurance Co. of Canada* v. *Leduc*, 43 L. J., P. C. 49; L. R. 6 P. C. 224; 31 L. T. 141; 22 W. R. 929; 2 Asp. M. C. 338—P. C.

A time policy of marine insurance on A.'s ship, from the 29th of May, 1878, to the 28th of May, 1879, contained the words "warranted no St. Lawrence between the 1st of October and the 1st of April." The vessel was lost on the voyage home. The underwriters refused A.'s claim for a total loss on the ground of breach of warranty, inasmuch as the vessel had navigated in the Gulf of St. Lawrence during the prescribed period. A. contended that the above words referred exclusively to the river St. Lawrence. Admittedly no general custom of merchants could be proved; but the facts established that the great river which discharges the waters of the North American lakes, and the gulf into which it flows, both bear the name of "St. Lawrence"; that the navigation of both, though of the gulf in a less degree than of the river, was within the prohibited period dangerous:—Held, that the evidence disclosed no ambiguity or uncertainty sufficient to prevent the application of the ordinary rules of construction; and according to those rules the whole St. Lawrence navigation, both gulf and river, is within the fair and natural meaning of these negative words, and therefore prohibited during the months in question. *Birrell* v. *Dryer*, 9 App. Cas. 345; 51 L. T. 130; 5 Asp. M. C. 267—H. L. (Sc.)

Evidence as to.]—If an insurance broker states by way of inference and computation that a ship is at a certain place at the time of effecting a policy, it is not a ground of avoiding the policy, though the broker was utterly mistaken; the underwriter not taking the pains to inquire what were the facts on which the broker formed his conclusion. *Brine* v. *Featherstone*, 4 Taunt. 869; 14 R. R. 689.

In Dock — Liberty to go into dry Dock.]—A time policy against fire was effected on a steamship. The policy described it as then "lying in the Victoria Docks," but gave it "liberty to go into dry dock, and light the boiler fires once or twice during the currency of this policy." The only dry dock into which the ship could go was Lungley's Dock, at some distance up the river. To go there it was necessary to remove the paddle-wheels; they were removed in the Victoria Docks, and the ship was then towed up to Lungley's Dock. The necessary repairs there having been completed, the ship was brought out and moored in the river, preparatory to replacing the paddle-wheels. This operation

could have been perfectly performed in the Victoria Docks, but it was found that in such case it was customary, as the more economical course, to replace the paddle-wheels while the ship lay in the river. Before the wheels had been replaced the ship was burnt:—Held, that the policy covered the ship while in the Victoria Docks, and while passing from them to the dry docks, and while directly returning from the dry dock to the Victoria Docks; but did not cover the vessel while moored in the river for a collateral purpose. *Pearson* v. *Commercial Union Assurance Co.*, 45 L. J., C. P. 761; 1 App. Cas. 498; 35 L. T. 445; 24 W. R. 951; 3 Asp. M. C. 275—H. L. (E.)

Question for Jury.]—Whether a vessel warranted free from capture in port was in port or not at her capture is for the jury. *Reyner* v. *Pearson*, 4 Taunt. 662; 13 R. R. 723.

Warranted safe in Port—What Port.]—A policy on ship contained the words "lost or not lost at Cardiff to Ballyshannon beginning the adventure from loading thereof at Cardiff"; and subsequently "that the said vessel was warranted safe in port":—Held, that "port" meant the port of departure; and that the vessel being in another port the warranty was broken. *Kernahan* v. *National Assurance Co.*, 10 L. R., Ir. 319.

Safely moored in Harbour—Change of Moorings.]—Action on policy of insurance against fire on the ship "H." for one month on the terms that the ship should be safely moored in Portsmouth harbour during the month. The ship was burned within the month. She had been shifted about in the harbour for cleaning her bottom, taking in cargo, and other purposes; but had been in the harbour all the time:—Held, that the plaintiff could recover. *Clarke* v. *Westmore*; cited, Selw. Nisi Pr. (11th ed.) 1003.

5. To Sail on a given Day.

Departure—What is.]—A warranty to sail on or before a particular day is not fulfilled if the ship does not completely unmoor on that day, though she then has her cargo and passengers on board, and is quite ready to sail, and is only prevented doing so by stress of weather. *Nelson* v. *Salvador*, M. & M. 309; 31 R. R. 733.

The warranty to "depart" before a certain day, which is used by the Royal Exchange Assurance Company in their policies, does not mean merely to break ground, but fairly to set forward upon the voyage; therefore, where a ship in complete sea-readiness weighed anchor with some little prospect of more favourable weather, but in half an hour was beaten back, and came to anchor within the bar, half a mile nearer to the sea than the place of loading:—Held, that this was not a departure within the warranty. *Moir* v. *Royal Exchange Assurance Co.*, 6 Taunt. 241; 1 Marsh. 570; 3 M. & S. 461; 4 Camp. 84; 16 R. R. 330.

—— **Insufficient Crew.**]—A warranty to sail on or before a particular day is not complied with by leaving the harbour on that day, without having a sufficient crew on board, although the remainder of the crew is engaged and ready to sail. *Graham* v. *Barras*, 3 N. & M. 125; 5 B. & Ad. 1011

Nature of Port—Loading.]—Policy on goods by ship or ships, from Demerara to London, warranted to sail from Demerara on or before the 1st of August, 1823; usage found for small vessels to load and unload all their cargo in the river of Demerara, and for large vessels to load and unload part of their cargo on the outside of a shoal off Demerara, about ten miles at sea. The insured goods were loaded on board a small vessel, which completed her cargo in the river, the captain of which, having obtained his clearance, set sail on the 1st of August, proceeded down the river, and about two miles out to sea, and there anchored at low water, by the advice of his pilot. On the 3rd of August he crossed the shoal, and proceeded on his voyage, in the course of which the vessel was lost by perils of the sea:—Held, that the vessel sailed from Demerara on the 1st of August within the meaning and in satisfaction of the terms of the policy. *Lang* v. *Anderton*, 5 D. & R. 393; 3 B. & C. 495; 1 Car. & P. 171; 3 L. J. (O.S.) K. B. 62; 27 R. R. 412.

—— **Dropping down River.**]—A policy contained a warranty "not to sail for B. N. A. after the 15th of August." The vessel on the morning of the 15th of August, was cleared at the custom-house of D., and ready for sea. She was then lying in the Custom-house Dock, which opens into the river L., which forms part of D. harbour. She was afterwards, on the same day, hauled out of dock and warped down the river L. about half a mile, towards the mouth of the harbour, which was some miles distant, for the purpose of proceeding on her voyage to Q. in B. N. A. At the time of so moving the vessel, the master and crew knew it to be impossible to get to sea that day. The next day she was warped a little farther down the river, and on the 17th, when the wind changed she got to sea. The jury having found that the master and crew fully intended to sail for Q. on the 15th of August, if it had been possible, and did all they could, and used every means and exertion so to do, and that they intended by so doing to put themselves in a better situation for the prosecution of the voyage, and not merely and solely to fulfil the warranty:—Held, that the vessel was in the prosecution of her voyage on the 15th of August, and that the warranty not to sail to B. N. A. after that day had been complied with. *Cockrane* v. *Fisher*, 1 C. M. & R. 809; 5 Tyr. 496; 4 L. J., Ex. 328—Ex. Ch.

A policy on freight and goods, per ship named at and from Portneuf to London, warranted to sail on or before the 28th October; and on the 26th the ship dropped down from Portneuf with an incomplete crew for the voyage, and on the 28th reached Quebec, which was the nearest place where she could obtain a clearance, and there completed her crew, and on the 29th obtained her clearance, and sailed the next day:—Held, that the dropping down from Portneuf to Quebec on the 26th was not a compliance with the warranty. *Ridsdale* v. *Newnham*, 3 M. & S. 456; 4 Camp. 111; 15 R. R. 327.

A plaintiff effected an insurance on freight by a ship, subject to certain regulations, which provided that the vessel should not sail from ports in Ireland after the 1st September; and that the time of clearing at the custom-house should be deemed the time of sailing, provided the ship was then ready for sea. The plaintiff's ship being in the port of Sligo, dropped down the

river before the 1st of September, in readiness for sea, except that she had not her full quantity of ballast, there being a bar at the mouth of the river, which the ship could not have crossed with that quantity on board. Boats were in waiting on the outside on the 1st September to ship the remainder of the ballast, and the vessel crossed the bar on that day, but struck in doing so, and the master, to ascertain what damage she had received, put into an adjacent port without taking the rest of his ballast, which was not done till the 4th, and the vessel proceeded upon her voyage on the 8th :—Held, that the ship's dropping down the river, and crossing the bar without her full ballast, was not a sailing ; and that, until her ballast was completed, she was not ready for sea, within the rule referred to by the policy. *Pettigrew* v. *Pringle*, 3 B. & Ad. 514.

Embargo.]—If a ship, warranted to sail on or before a particular day, is prevented from sailing on the day by an embargo, the warranty is not complied with. *Hore* v. *Whitmore*, Cowp. 784.

On a warranty to sail from Jamaica, on or before a day certain, if the ship departs from her port on that day, with all her cargo and clearances on board and proceeds to the place of rendezvous in the island, expecting to find convoy and proceed immediately, but is detained there by an embargo till after the day, the departure is a compliance with the warranty, although the captain knew of the embargo when he sailed, the embargo being only till convoy should be ready. *Earle* v. *Harris*, 1 Dougl. 357.

Even though the place of rendezvous is out of the direct course of the voyage, it is no deviation. *Bond* v. *Nutt*, Cowp. 601 ; 1 Dougl. 367, n.

Delay for Convoy.]—A ship being insured at and from Surinam, and all or any of the West India islands to London, a warranty to sail on or before the 1st of August is satisfied by the ship sailing from Surinam, her last port of landing, before the 1st of August, and going into Tortola on the 4th to seek convoy, though she did not sail from Tortola, which is one of the West India islands, direct for London till afterwards. *Wright* v. *Shiffner*, 11 East, 515 ; 2 Camp. 247 ; 11 R. R. 263.

A French ship being warranted to sail from Guadaloupe on or before the 31st December, if she takes in all her loading and papers, and leaves her port of loading before that day, and sails to another port of the island in the direct course of her voyage, and merely in the hopes of joining convoy, and to take the governor's dispatches for France, the warranty is complied with, though the governor there should detain her beyond the day, it being a condition inserted in one of her clearances, that she should pass that way to take the orders of government. *Thellusson* v. *Fergusson*, 1 Dougl. 361. And see *Thellusson* v. *Pigou*, 1 Dougl. 366, n. ; *Thellusson* v. *Staples*, ibid.

Nature of Representation as to Time of Sailing.]—A representation that the ship is expected to sail from the coast of Africa on such a day is not material, so as to vitiate the policy, although it should turn out that she actually sailed six months before. *Barber* v. *Fletcher*, 1 Dougl. 305.

A., a merchant in London, having an order in 1810, from B., a merchant in Perth, for goods, to be shipped from London for Dundee, sent the goods to the wharf on Saturday, 24th February, the vessel then taking in goods being the "K." (unarmed), which had been substituted by the shipping company for the "D." (armed), the company announcing on the 23rd and 24th February to all that inquired that the "K." and not the "D." was to sail on the 25th (Sundays and Thursdays being the regular sailing days). A. despatched the invoice on the 27th February, dated on that day, with advice that the goods had been sent by the "D." not naming the 24th as the day when the goods were sent to the wharf, and leaving it to be inferred from the date of the invoice that the furnishing was made on the 27th, and that the sea risk did not commence till the 1st March. The "K." sailed with the goods on the 25th February, and was captured on the 2nd March by a privateer. In an action by A. against B. for the price of the goods :—Held, that he could not recover, the Lord Chancellor being of opinion, that if B. had insured upon the representation sent him, he could not have recovered from the underwriters. *Arnot* v. *Stewart*, 5 Dow, 274 ; 16 R. R. 123.

The agents to the owners of a ship instructed their correspondents by a letter, stating "that the "Brilliant" will sail from Nassau for Clyde on the 1st May, a running ship," to effect an insurance, which they accordingly did, at the same time showing the letter to the underwriters. The ship in fact sailed on the 23rd April, on account of a favourable opportunity of convoy, and was captured on the 11th May :—Held, that the expression in the letter was positive, and not a mere statement of expectation ; and that being a material representation, the fact of its being untrue vitiated the policy. *Dennistoun* v. *Lillie*, 3 Bligh, 202 ; 22 R. R. 13.

A representation to the underwriters at the time of effecting a policy by the owner of goods on board a ship as to the time of her sailing being made, bonâ fide, upon probable expectation, does not conclude him. *Bowden* v. *Vaughan*, 10 East, 415 ; 10 R. R. 340.

In effecting a policy from Russia to this country, while the ship was on the outward voyage, the broker represented to the underwriters that a cargo was ready for her, and she was sure to be an early ship :—Held, that this amounted only to a representation of what was expected on the part of the insured, and that the underwriters were liable, although from the delay in beginning to load the cargo, the voyage home was changed from a summer to a winter risk. *Hubbard* v. *Glover*, 3 Camp. 313. See *Brine* v. *Featherstone*, 4 Taunt. 869 ; 14 R. R. 689.

Construction of Rules.]—A plaintiff effected a policy, subject to certain rules, one of which was, that ships were not to sail from any port on the east coast of Great Britain to any port in the Belts, between the 20th December and the 15th February. The plaintiff's vessel sailed from Newcastle-upon-Tyne on the 8th February for a port in the Belts, and was lost in the Baltic on the 14th February :—Held, that the rule in question was a warranty, and not an exception ; and that the word "to" in the rule meant "towards" and not "arriving at," and consequently that the plaintiff was not entitled to recover in respect of the loss. *Colledge* v. *Harty*, 6 Ex. 205 ; 20 L. J., Ex. 146.

Order of Voyages.]—Insurance on a voyage from C. to D., on a representation that the ship was first to sail from A. to B., and from B. to C.; the voyage from A. to B. was performed, but that from B. to C. being unavoidably prevented, the ship returned to A., and thence proceeded immediately to C., and in performing the voyage from C. to D. was lost: this was held a good commencement of the voyage insured. *Driscol* v. *Passmore*, 1 Bos. & P. 200; 4 R. R. 782.

Words in Margin—Date of Sailing.] — On the policy was written in the margin "In port 20th July, 1776":—Held, to be a warranty. *Kenyon* v. *Berthon*, 1 Dougl. 12, n.

In the Month of October — Meaning.] — The meaning of a statement that a ship insured would sail "in the month of October" from the West Indies explained by evidence of merchants to mean after October 25th. *Chaurand* v. *Angerstein*, Peake. 61.

Warranty to Sail after a Day named—Sailing before the Day.]—Policy on goods "at and from Martinico to Havre de Grace with liberty to touch at Guadaloupe, warranted to sail after 12th January, and on or before 1st August, 1778." The ship having performed her outward voyage, sailed from Martinico on the 6th November, 1877, for Guadaloupe, where she took in all her cargo without returning to Martinico. She sailed from Guadaloupe on 26th June, 1778, and was captured:—Held, that the warranty was not complied with as she sailed from Martinico before 12th January, 1778. *Vezian* v. *Grant*, 2 Park, Ins. (8th ed.) 671.

6. To Sail with Convoy.

What Convoy.] — The term "convoy" in a policy means such convoy as shall be appointed by government. *D'Eguino* v. *Bewicke*, 2 H. Bl. 551; 3 R. R. 503.

A policy was effected on a ship, on a voyage from A. to C., warranted to depart with convoy for the voyage. The convoy appointed was to B., a port in the course, and near to C. This was a compliance with the warranty, and the underwriters were liable, the ship being captured in the passage from B. to C. *Ib.*

Where there is a warranty in a policy that the ship shall sail with convoy, she may sail without convoy from her loading port to the place of rendezvous for convoy for the voyage, although there be convoy for ships on other destinations between the loading port and place of rendezvous. *Warwick* v. *Scott*, 4 Camp. 62.

Sailing Orders.]—Sailing orders are necessary to the performance of a warranty to depart with convoy unless particular circumstances exempt the insured from the general rule. *Webb* v. *Thompson*, 1 Bos. & P. 5; 4 R. R. 757.

A warranty to depart with convoy is not complied with unless sailing instructions are obtained before the ship leaves the place of rendezvous, if by due diligence of the master they can be then obtained. *Anderson* v. *Pitcher*, 2 Br. & B. 164; 3 Esp. 134; Stark. 262; 5 R. R. 565.

Performance.]—It is not sufficient to sail with a convoy appointed for another voyage, though it may be bound upon the same course for a great part of the way. *Cohen* v. *Hinckley*, 1 Taunt. 249; 11 R. R. 660.

If a convoy has sailed, a ship cannot legally endeavour to overtake it. *Ib.*

Where there are no convoys appointed at the port from which a ship commences her homeward passage, she is not bound to call for convoy at a port in the course of the voyage, from which convoys are appointed. *Park* v. *Hammond*, 4 Camp. 344; 2 Marsh. 189; 6 Taunt. 495; Holt, 80; 16 R. R. 658.

A ship cannot legally proceed without convoy from port to port to join convoy, unless she has obtained a licence to sail without convoy. *Hinckley* v. *Walton*, 3 Taunt. 131.

A bill of lading signed by the captain, stating the ship to be bound to the port of destination with convoy, amounts to an undertaking, binding on the owner, that the ship shall sail with convoy. *Sanderson* v. *Busher*, 4 Camp. 54, n.

On a representation that a ship will sail with convoy, whereby the plaintiff was induced to put his goods on board, the promise is complied with if she follows the convoy and joins it, so as to prevent the plaintiff from maintaining an action against the owner for a loss from another cause after she had joined. Aliter, if, by reason of this representation, the owner of the goods in an insurance made thereon was induced to warrant that she would sail with convoy. *Christin* v. *Ditchell*, Peake's Add. Cas. 141; 4 R. R. 898.

A vessel which sails with convoy, and is driven back by weather into her port of clearance, may lawfully sail thence again with her cargo on the voyage, without waiting for the next convoy from the same port, or joining convoy from any other port. *Laing* v. *Glover*, 5 Taunt. 49.

She must keep with the convoy unless separated by necessity. *Waltham* v. *Thompson*, Marsh. Ins. (4th ed.) 294.

Convoy Dispersed by Weather.] — Policy on the "Ceres" at and from Oporto to Lynn, with liberty to touch at any port on the coast of Portugal, to join convoy particularly at Lisbon, at twelve guineas, to return 6*l.* if she sail with convoy from the coast of Portugal and arrive. The "Ceres" sailed from Oporto with a sloop and cutter appointed to protect the trade to Lisbon, from which place she was to sail with a larger convoy to England. Between Oporto and Lisbon the fleet was dispersed by weather, and the "Ceres" ran for England and arrived:—Held, that the assured was entitled to a return of premium. *Audley* v. *Duff*, 2 Bos. & P. 111; 5 R. R. 549.

Customary Rendezvous—The Downs.]—Warranted to depart with convoy means from the customary place where convoys are to be had, as the Downs. The general usages of merchants are taken notice of by the courts in construing policies. *Lethulier's Case*, 2 Salk. 443.

During Passage to Join Convoy.]—A ship warranted to depart with convoy is at the insurers' risk during her passage to join the rendezvous for convoy. *Gordon* v. *Morley*, 2 Str. 1265.

A ship warranted to depart with convoy was captured on her way from the Downs to join the convoy at Spithead:—Held, the assurers were liable. *Campbell* v. *Bordieu*, 2 Str. 1265; *Gordon* v. *Morley*, supra.

Ship and goods insured from Gothenburg to

London warranted to depart with convoy from Flechery. The ship sailed from Gothenburg, and after waiting at Flechery for two months, joined the convoy off the port in bad weather, and was captured before she could get her sailing orders :—Held, that the warranty was complied with. *Victoria* v. *Cleeve*, 2 Str. 1250.

A ship warranted to sail with convoy was captured after sailing from Tortola with a vessel sent by the admiral to bring up merchant ships to join convoy at St. Kitts ; she fell to leeward, and was captured whilst on her passage to England by herself :—Held, that the warranty was complied with. *Manning* v. *Gist*, 3 Dougl. 84. And see *Thellusson* v. *Fergusson*, and Cases, supra, col. 1165.

No Sailing Orders.]—A ship held to have sailed with convoy though she arrived so late at the rendezvous that she had no sailing orders, she having in fact sailed with the convoy. *Verdon* v. *Wilmot*, 2 Park, Ins. (8th ed.) 696, n.

The Convoy may be one or different Ships.]—A warranty to sail with convoy means such a convoy as the government pleases to appoint ; whether of one or different ships for different parts of the voyage is immaterial. *Smith* v. *Readshaw*, 2 Park, Ins. (8th ed.) 708.

Convoy for the Voyage.]—A ship warranted to depart with convoy must sail with convoy the whole voyage. *Lilly* v. *Ewer*, 1 Dougl. 72 ; *Jefferyes* v. *Legendra*, 1 Show. 320 ; 3 Lev. 320 ; 2 Salk. 443 ; 4 Mod. 48.

Breach of Warranty—Policy never Attaches.]—If the ship insured is warranted to sail with convoy, and does not, the policy never attaches, and the premium must be returned. *Long* v. *Allan*, 4 Dougl. 276.

Void Licence to Sail without Convoy.]—An admiralty licence for a ship to sail without convoy, describing her as on a voyage to Gibraltar, when, in fact, she sailed with instructions to make for Palermo without touching at Gibraltar unless ordered into the bay by cruisers—is fraudulent and void ; and an insurance on such ship and goods on board from hence to Palermo, without convoy, is void, and will not cover a loss during the last part of the voyage, though the ship did, in fact, put into Gibraltar, being driven in by stress of weather. *Ingham* v. *Agnew*, 15 East, 517 ; 13 R. R. 516.

Protection of Armed Ship not Appointed by Government.]—Sailing under the protection of an armed ship not appointed by the government as convoy is not a compliance with a warranty to sail with convoy. As a general rule, sailing orders must be obtained to comply with such warranty. *Hibbert* v. *Pigon*, 3 Dougl. 224.

Action by Goods Owner for Losing Benefit of Policy.]—The charterer of a ship put her up as a general ship with notice that she would sail with convoy. The plaintiff shipped goods by her, and insured them with warranty that the ship would sail with convoy. Peace having been made, and no convoy appointed, the ship sailed without convoy, and was lost by collision. The policy being void, the plaintiff sued the charterer for breach of contract, whereby the plaintiff lost the benefit of his policy and recovered. *Phillips* v. *Baillie*, 3 Dougl. 374.

Change of Convoys.]—Ship insured at and from Cadiz to Amsterdam warranted to sail with convoy for the voyage. The ships sailed from Cadiz with British convoy, and were lost before reaching the Downs, where they were to have fresh convoy for Amsterdam. Underwriters held liable, this being the usage. *De Garray* v. *Clagget*, 2 Park, Ins. (8th ed.) 708.

Separated from Convoy—Weather.]—A ship warranted to sail with convoy was separated from her convoy by a gale, and whilst she was endeavouring to reach her destination, and to fall in with her convoy, she was captured. The underwriters were held liable. *Harrington* v. *Halkeld*, 2 Park, Ins. (8th ed.) 639.

Delay by Plaintiff's Fault.]—The ship was delayed in taking on board the plaintiff's goods, and afterwards made all possible effort, but failed to join the convoy with which she ought to have sailed :—Held, that the assured could recover on the policy. *Magalhaens* v. *Busher*, 4 Camp. 54.

Fault of Assured—No Convoy.]—Where by the neglect of the insured the ship failed to sail with convoy the insurers are discharged. *Taylor* v. *Woodnen*, 2 Park, Ins. (8th ed.) 707.

7. Neutrality.

And see 2, Nationality.

At what Time.]—Under a warranty in a policy that the ship and cargo are neutral property, it is sufficient that they are neutral when the risk commences. *Eden* v. *Parkinson*, 2 Dougl. 732.

If goods are insured from A. to B. in a neutral ship, it is sufficient to charge the underwriters that the ship was neutral when she sailed. *Tyson* v. *Gurney*, 3 Term Rep. 477.

Any forfeiture of neutrality by the wilful act of the assured, or of the master, after the commencement of the voyage insured, is a breach of warranty. *Garrels* v. *Kensington*, 8 Term Rep. 230 ; 4 R. R. 635.

Ownership.]—A ship having American papers, and belonging to a person born in America, but resident in England, was not a neutral sufficient to satisfy a warranty of her being American, and protected by the American flag, during the American war. *Tabbs* v. *Bendelack*, 3 Bos. & P. 207, n. ; 4 Esp. 108.

To prove a warranty, that a ship insured was of a particular nation, it is primâ facie evidence that she carried the flag of that nation at times when she was free from all danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port. *Arcangelo* v. *Thompson*, 2 Camp. 620 ; 12 R. R. 758.

The Merchant Shipping Act, 1854, s. 107, makes the register primâ facie proof of disputed nationality, but such inference may be overborne by circumstantial evidence to the contrary. *The Princess Charlotte*, Br. & Lush. 75.

Insuring a ship by an English name does not amount to a warranty or a representation that she is English. *Clapham* v. *Colegan*, 3 Camp. 382. *See Cases*, cols. 1149, 1150.

Documents.]—An assured upon an American ship and cargo, provided with such a passport as

was required by the treaty between America and France, and with all other usual American papers and documents, was entitled to recover against an underwriter of a policy on such ship and goods, in case of a capture by a French privateer, notwithstanding a sentence of condemnation of the same as lawful prize by a French court of admiralty. *Price* v. *Bell*, 1 East, 663.

Goods insured on board a ship generally by her name, without any addition of country, and not represented to be of any particular country at the time of the policy subscribed, though the broker had said she was an American when the ship was subscribed, and though she was in fact an American, need not be documented as such. *Dawson* v. *Atty*, 7 East, 367.

If an insured vessel was warranted to carry a French licence, it was not sufficient to shew that the captain of the vessel in 1813, before the vessel sailed from Dantzic, received a document which purported to be a French licence, without shewing that he received it from some officer or person in authority under the French government; but proof that, after the arrival of the vessel at Bordeaux, she was allowed to remain there for upwards of a month after an inspection of the French licence and other documents by the officer of the French government, was primâ facie evidence that the document was genuine. *Everth* v. *Tunno*, 1 Stark. 508; 1 B. & Ald. 142.

A neutral vessel is not seaworthy unless she is provided with documents to prove her neutrality. *Steel* v. *Lacy*, 3 Taunt. 285; 12 R. R. 658.

Sentence of Foreign Court—Effect of Condemnation.]—The sentence of a foreign admiralty court is evidence only of what it expressly affirms in its adjudicative part, not of what may be gathered from it by way of inference. *Fisher* v. *Ogle*, 1 Camp. 418 (overruled by *Baring* v. *Royal Exchange Assurance Co.*, infra.)

Where a foreign court of prize professes to condemn a ship and cargo on the ground of an infraction of treaty in not being properly documented, as required by the treaty between the captors and captured; such sentence is conclusive in our courts against a warranty of neutrality of such ship and cargo in an action upon a policy against the underwriter; although inferences were drawn in such sentence from ex parte ordinances in aid of the conclusion of such infraction of treaty. *Baring* v. *Royal Exchange Assurance Co.*, 5 East, 99; 7 R. R. 657. See *Price* v. *Bell*, supra.

On a policy of insurance, a condemnation by a foreign court of admiralty is not conclusive evidence that the ship was not neutral, unless it appears that the condemnation went upon that ground. *Bernardi* v. *Motteux*, 2 Dougl. 575. S. P., *Saloucci* v. *Johnson*, 4 Dougl. 224, infra.

A warranty of Danish property (Denmark being then a neutral power), in a policy on ship and goods, was holden to be conclusively disproved by a sentence of the court of admiralty, condemning the ship and cargo, because the master and crew had broken their neutrality in the course of the voyage insured, by forcibly rescuing the ship, which had been seized and carried into port by a belligerent power for the purpose of search. *Garrels* v. *Kensington*, 8 Term Rep. 230; 4 R. R. 635.

If a ship insured is merely represented as neutral, a sentence of a foreign court of admiralty, condemning her for a violation of the laws of neutrality, is not evidence to falsify the representation. *Von Tungeln* v. *Dubois*, 2 Camp. 151.

The protest is of itself evidence only to contradict the captain's evidence, not to shew a variance between it and the condemnation. *Christian* v. *Coombe*, 2 Esp. 490.

A sentence of condemnation of a neutral by a British vice-admiralty court abroad is sufficient evidence from which to presume that the ship condemned had been engaged in some illegal transaction, though the ground of condemnation does not appear in the sentence. *Gibson* v. *Mair*, 1 Marsh. 39; 15 R. R. 668.

A sentence of condemnation in a French court of admiralty is admissible in an action here between the assured and underwriters of a policy containing a warranty of neutrality. *Lothian* v. *Henderson*, 3 Bos. & P. 499; 7 R. R. 829.

A warranty of neutrality in a policy is not falsified by a sentence of a foreign court of admiralty, condemning a ship for navigating contrary to the ordinances of that belligerent state, to which the neutral country had not assented. *Pollard* v. *Bell*, 8 Term Rep. 434; 5 R. R. 404. S. P., *Bird* v. *Appleton*, 8 Term Rep. 562; 5 R. R. 468.

Goods were insured, warranted neutral, on board the "Thetis," "a Tuscan ship." The ship and goods were captured by Spaniards and condemned:—Held, that the sentence was conclusive that the goods were not neutral. *Saloucci* v. *Woodman*, 3 Dougl. 345.

By sentence of a French admiralty court, it appeared that the ship warranted American had been condemned as enemy's property, because she had not on board a rôle d'equipage, in accordance with a treaty between France and America:—Held, that the sentence was conclusive evidence against the warranty of neutrality, though the ship was in fact American. *Geyer* v. *Aguilar*, 7 Term Rep. 681; 4 R. R. 543.

The sentence of a foreign admiralty court, that a ship warranted Dutch was English, is conclusive against the assured. *Barzillai* v. *Lewis*, 3 Dougl. 126.

If it can be discovered, upon the face of a sentence of a foreign prize court, that the condemnation was on the ground that the property was enemy's property, the sentence is conclusive evidence in this country that the property was not neutral. *Bolton* v. *Gladstone*, 5 East, 155; 7 R. R. 674. On appeal, 2 Taunt. 85; 11 R. R. 532.

In an action upon a policy in which the goods were warranted American, the sentence of a foreign prize court condemning goods as English, is not conclusive evidence of their ownership, if the grounds assigned in the sentence do not warrant the conclusion drawn from them. *Calvert* v. *Bovill*, 7 Term Rep. 523; 4 R. R. 517.

A ship was warranted Portuguese. She was captured by a French privateer and condemned for having an English supercargo on board, contrary to a French ordinance:—Held, that the warranty was not broken. *Meyne* or *Mayne* v. *Walter*, 1 Park, Ins. (8th ed.) 730.

Sentence of Belligerent Admiralty Court sitting in Neutral Country.]—The sentence of an admiralty court sitting under a commission

from a belligerent in a neutral country is not recognised in this country. *Donaldson* v. *Thompson*, 1 Camp. 429 ; 10 R. R. 717.

A sentence of condemnation given by the consul of the captor's country in the port of an ally and an enemy of this country, where the prize lay, is valid and conclusive as to the property being British. *Oddy* v. *Bovill*, 2 East, 473 ; 6 R. R. 482.

Neutral Goods in Enemy's Armed Ship.]—Neutral goods on board enemy's armed ship are liable to capture. *The Fanny*, 1 Dods. 441.

Neutral carrying on Enemy's Colonial Trade.]—It is a breach of neutrality for the neutral to carry on, during war, trade between the mother country and her colonies from which the neutral is excluded in time of peace. *The Immanuel*, 2 C. Rob. 186.

Neutral Ship carrying Despatches.] — A neutral ship does not violate her neutrality by carrying despatches from an ambassador of a belligerent from the neutral country to the belligerent sovereign. *The Caroline*, Lush. 334 ; 5 L. T. 89.

Contraband Goods.]—See *The Jonge Margaretha*, 1 C. Rob. 189 ; *The Jonge Tobias*, 1 C. Rob. 329.

Breaking Blockade.]—See *The Juffrow Maria Schroeder*, 3 C. Rob. 147.

8. Against Confiscation.

Seizure with Permission of Government.]—A warranty from loss by confiscation of the government in the ship's port of discharge, does not apply to a case where, upon the arrival of the ship in the roads of Pillau within the Prussian dominions, she was boarded by two different parties, one of Prussian soldiers, and the other the crew of a French privateer, who disputed the possession of her, but agreed to take her into Pillau, in order to settle their claims ; upon which the Prussian government referred the matter to the French government at Paris, where the ship was condemned as prize to the French captors, and afterwards given up to them. For the terms of the warranty import something more to be done on behalf of the local government at the port of discharge, than the mere act of seizure by or with the permission of such local government. *Levi* v. *Allnutt*, 15 East, 267.

"In Port of Discharge."]—A policy contained a warranty by the assured against confiscation by the government in the ship's port of discharge. A vessel destined to discharge at Pillau anchored two German miles from Pillau, three English miles without the roadstead, where vessels unload, in order to come over the bar into the inner harbour ; and was captured at her moorings by soldiers coming off in a boat from Pillau :—Held, that this loss was not within the warranty. *Levy* v. *Vaughan*, 4 Taunt. 387 ; 13 R. R. 643.

Where goods insured were warranted free from seizure in the port of discharge, the captain, having arrived within about two miles and a half from the harbour of the place to which he was destined, cast anchor and made a signal for a pilot ; a pilot-boat, in consequence, came out with douaniers on board, who carried him into the harbour, where the cargo was seized and condemned :—Held, that this was a seizure in her port of discharge, within the meaning of the warranty. *Oom* v. *Taylor*, 3 Camp. 204.

Though a policy on goods contains a clause of warranty freeing the underwriter from seizure in the ship's port of discharge ; yet the assured having declared generally as for a loss by hostile seizure without negativing that it was in the ship's port of discharge, is no cause for arresting the judgment after verdict. *Rucker* v. *Green*, 15 East, 288.

Under a policy on goods from London to any ports or places in the Baltic, backwards and forwards, with leave to touch, stay and trade at all places for all purposes, and to take in and discharge goods wheresoever the ship might touch at ; and in case it should be found dangerous to enter such ports and places, or the captain was not allowed to discharge the cargo, with leave to return, until he found a port which he could enter with safety : the insurance to continue until the ship and goods arrived at as above ; upon the ship until moored at anchor twenty-four hours in safety, and upon the goods until the same should be there discharged and safely landed ; at a premium of fourteen guineas, to return 7*l.* per cent. for arrival ; with warranty of the goods free from capture or seizure in the ship's port or ports of discharge :—Held, that the ship having arrived in the outer road of Pillau, which is a bar harbour, where large ships like this are obliged to discharge part of their cargoes into lighters, to enable them to go over the bar into the inner harbour, where they discharge the remainder ; and the captain having anchored two miles and a quarter farther out than ships usually lie for this purpose and having gone on shore to report his ship and cargo, and to obtain permission to discharge his cargo, and to give directions for it ; and having returned in five or six days, when he was accompanied by Prussian soldiers and a pilot, who took possession of the ship and cargo, and discharged part of it into a lighter in the place where the ship remained at anchor, and afterwards carried her over the bar into the inner harbour, where the goods were finally confiscated ; this was an arrival in the captain's elected port of discharge, so as to discharge the underwriters from the loss by seizure there, within the meaning of the policy. *Dalgleish* v. *Brooke*, 15 East, 295 ; 13 R. R. 476.

British goods on board a neutral ship, being insured from London to any ports or places of discharge on the continent, with liberty to carry simulated papers, &c., free of capture or seizure in her port or ports of discharge ; and the ship, having received instructions to proceed to the river Jahde with a supercargo, who, when arrived there, was to go to Varel, which lies thirty-nine miles up the river, and there give notice to a correspondent of the ship's arrival, and receive directions where the goods might most safely be landed, Varel and the whole adjacent country being then occupied by the enemy : —Held, that a seizure by the enemy in boats from the shore, while the ship was lying on and off in the middle of the river, fifteen miles up, where it is two miles wide, waiting for directions from the supercargo, who had gone up to Varel to get instructions where to land the cargo, was a seizure in a port of discharge

within the exemption in the policy. *Jarman* v. *Coape*, 13 East, 394 ; 2 Camp. 615 ; 12 R. R. 374.

Free from Capture and Seizure — Barratry.]—In a time policy of marine insurance on ship the ordinary perils insured against (including "barratry of the master") were enumerated, and the ship was warranted "free from capture and seizure, and the consequences of any attempts thereat." In consequence of the barratrous act of the master in smuggling, the ship was seized by Spanish revenue officers, and proceedings were taken to procure her condemnation and confiscation. In an action on the policy to recover expenses incurred by the owner in obtaining her release :—Held, that the loss must be imputed to "capture and seizure," and not to the barratry of the master, and that the underwriter was not liable. *Cory* v. *Burr*, 52 L. J., Q. B. 657 ; 8 App. Cas. 393 ; 49 L. T. 78 ; 31 W. R. 894 ; 5 Asp. M. C. 109—H. L. (E.)

Where previous Stranding.]—An American ship, insured from New York to London, warranted free from American condemnation, having for the purpose of eluding her national embargo, slipt away in the night, was by force of the ice, wind and tide, driven on shore, where she sustained only partial damage, but was seized the next day, and afterwards, with great difficulty and expense, got off, and finally condemned by the American government for breach of the embargo :—Held, that as there was ultimately a total loss by a peril excepted out of the policy, the assured could neither recover for a total loss, nor for any previous partial loss arising from the stranding, which in the event became wholly immaterial to the assured. Aliter, in case of actual disbursements made for repair of damage occasioned by sea perils before the total loss, which appeared to be governed by the general authority given to the assured to "labour and travail," &c. for the defence, safeguard and recovery of the property insured. *Livie* v. *Janson*, 12 East, 648 ; 11 R. R. 513.

Stranding—Seizure by Enemy.]—Where, on a policy on goods warranted free from capture and seizure, the ship when within eight or nine miles of port was obliged to come to an anchor for want of a pilot, and afterwards drifted on to a sand, and was totally wrecked ; and whilst she remained on the sand, she was seized by persons acting under the authority of the Spanish government, and the goods were taken on shore by them in a damaged state, and confiscated ; and no portion of them ever came into the possession of the assured :—Held, that this was a loss by the perils of the seas, and not by capture or seizure, the proxima causa being the loss of the ship. *Hahn* v. *Corbett*, 9 Moore, 390 ; 2 Bing. 205 ; 3 L. J. (O.S.) C. P. 253 ; 27 R. R. 590.

Warranted to have Passes—Passes granted to Ship under another Name.]—Warranty that the ship should have four passes, English, French, Polish and Dutch ; the goods to be of a Polish subject on board the "City of Warsaw." The passes were dated in April or May and the ship did not receive the name of "City of Warsaw" until August :—Held, that the underwriters were not liable. *Anon.*, Skinner, 404.

9. Against Capture.

Generally.]—A ship to be seaworthy must be rendered as secure as possible from capture as well as from perils of the sea. *Wedderburn* v. *Bell*, 1 Camp. 1 ; 10 R. R. 615.

By whom.]—A policy on a foreign ship must be understood as containing an exception of all captures made by the authority of our own government. *Kellner* v. *Le Mesurier*, 4 East, 396 ; 1 Smith, 72 ; 7 R. R. 581.

—— **Emigrants on Board.**]—Action on a voyage policy from Macao to Havana "warranted free from capture and seizure and the consequences of any attempt thereat." The clause stating the perils insured against included enemies, pirates, rovers, thieves, surprisals, takings at sea, and barratry of the masters and mariners. The insurance was declared to be on 7,300*l.* expended in provisions for emigrants, and advances on freight. While the ship was on her voyage the emigrants piratically seized and carried away the ship :—Held, that such taking possession of the vessel was a seizure within the meaning of the warranty, and that the assurers were not liable. *Kleinwort* v. *Shepard*, 1 El. & El. 447 ; 28 L. J., Q. B. 147 ; 5 Jur. (N.S.) 863 ; 7 W. R. 227. *See also Cases* ante, cols. 1104, seq.

Whether in Port.] — Whether a vessel, warranted free of capture in port, is in a port or not at the time of her capture, is purely a question of fact for a jury. *Reyner* v. *Pearson*, 4 Taunt. 662 ; 13 R. R. 723.

Whether the place where a vessel casts anchor is within her port of discharge, is a fact for the jury, not a question of law. *Levin* v. *Newnham*, 4 Taunt, 722 ; 14 R. R. 648.

A warranty in a policy against capture in port does not protect the underwriters from a loss happening from capture in a place which is not within the limits of any port, although it may be within the headlands at the mouth of a river. *Baring* v. *Vaux*, 2 Camp. 541 ; 11 R. R. 791.

If a vessel is taken at her moorings, being neither within the caput portûs, nor within that part of a haven where ships unload, the underwriter is not discharged by a warranty against capture in the ship's port of destination. *Keyser* v. *Scott*, 4 Taunt. 660 ; 13 R. R. 721.

If a ship is warranted free of capture or of seizure in port or ports, a capture by an enemy's ship, while the vessel insured is lying in an open road, outside a harbour, is not within the warranty. *Brown* v. *Tierney*, 1 Taunt. 517 ; 10 R. R. 599.

A warranty against capture in the ship's port of discharge, does not include capture in the open sea on the outside of the port, by a force issuing from the port of discharge. *Mellish* v. *Staniforth*, 3 Taunt. 499.

Ship warranted free from capture in port. A letter announcing her capture in port was received by the assured and the premium was returned. The capture was in fact not in port : —Held, that the return of the premium did not prevent the assured recovering on the policy. *Reyner* v. *Hall*, 4 Taunt. 725 ; 14 R. R. 650.

Goods warranted free from capture or seizure in the port of discharge were seized whilst the ship was lying in Pillau roads outside the river bar, about three miles from Pillau, the port of

discharge :—Held, that the warranty was broken. *Maydhew* v. *Scott*, 3 Camp. 205.

Deviation to avoid Capture.]—Where a policy contains no warranty against seizure in port, if the ship, to avoid such seizure, runs to sea before she is properly loaded, and is in consequence obliged to go to a port out of the direct course of the voyage insured, the underwriters are liable for a subsequent loss. *O'Reilly* v. *Gonne*, 4 Camp. 249 ; 16 R. R. 788.

Otherwise where the policy contains a warranty against seizure in port. *O'Reilly* v. *Royal Exchange Assurance Co.*, 4 Camp. 246 ; 16 R. R. 786.

10. As to Cargo.

Misrepresentation.] — Where an agent of a shipowner, effecting a policy on a ship, misrepresented the nature of the cargo which she was to carry, but this was not inserted in the policy, and it did not appear that the underwriter was induced by the misrepresentation to accept the risk :—Held, that the jury was warranted in finding that the misrepresentation was not material, and that it did not vitiate the policy. *Flinn* v. *Headlam* or *Tobin*, 9 B. & C. 693. *S. C.*, M. & M. 367 ; 31 R. R. 739.

Meaning of "The Cargo."]—An insurance declared to be on "the cargo," being 1,031 hhds. wine, does not amount to a warranty that the wine constitutes the whole cargo, and that no other goods will be taken on board. *Muller* v. *Thompson*, 2 Camp. 610 ; 12 R. R. 753.

Contraband.]—Whilst war was existing between the United States of America and the Confederate States, goods were insured on a voyage from London to Matamoras by a policy which contained a warranty against contraband of war. Matamoras was a neutral port belonging to Mexico, but the intention of the insured from the beginning was to send the goods on to the Confederate States by transhipping them at Matamoras, and conveying them across the river which divided Mexico from the territory then in the possession of the Confederate States. Some of the goods which were so insured consisted of artillery harness :—Held, that such goods were contraband of war, and that there was therefore a breach of the warranty, which avoided the whole insurance. *Seymour* v. *London and Provincial Marine Insurance Co.*, 41 L. J., C. P. 193 ; 27 L. T. 417 ; 1 Asp. M. C. 423.

Condition of Goods.] — It is not a condition precedent to the attaching of a policy on goods against sea risks that the subject of insurance should, at the commencement of the voyage, be fit to encounter the ordinary vicissitudes of a voyage. *Koebel* v. *Saunders*, 17 C. B. (N.S.) 71 ; 33 L. J., C. P. 310 ; 10 Jur. (N.S.) 920 ; 12 W. R. 1106.

11. Uninsured.

"Hull and Machinery"—"Warranted Uninsured"—"Honour" Policy.]—A time policy of marine insurance effected upon the "hull and machinery" of a steamship does not, in the absence of proof that in marine insurance the words "hull and machinery" have acquired a special meaning, cover disbursements :—Quære, whether the effecting of a p. p. i. or "honour" policy, which is null and void under 19 Geo. 2, c. 37, is a breach of a warranty to stand uninsured. *Roddick* v. *Indemnity Mutual Marine Insurance Co.*, 64 L. J., Q. B. 733 ; [1895] 2 Q. B. 380 ; 14 R. 516 ; 72 L. T. 860 ; 44 W. R. 27 ; 8 Asp. M. C. 24—C. A.

Valued Policy—Warranty that Part of Ship's Value remain Uninsured.]—A shipowner, whose ship is valued at 12,000*l.*, who insures her for 9,600*l.*, and warrants that as to 2,400*l.* he will be his own insurer, commits no breach of his warranty by taking out a further insurance to cover such portion of the original sum insured as he has notice is likely to become ineffective by reason of the insolvency of underwriters. *General Insurance Co. of Trieste* v. *Cory*, 66 L. J., Q. B. 313 ; [1897] 1 Q. B. 335.

12. Free from Average.

See X. Losses, infra, cols. 1247, seq.

VII. CONCEALMENT AND MISREPRESENTATION.

1. *When Material Generally*, 1178.
2. *Knowledge of Agents*, 1185.
3. *Known Course of Proceeding*, 1188.
4. *Intelligence at Lloyds'*, 1189.
5. *State and Condition of Ship and Cargo*, 1191.
6. *Time of Sailing*, 1194.
7. *Ship's Name when in Danger*, 1196.
8. *Port or Place of Sailing or Loading*, 1197.
9. *Commencement of Hostilities*, 1198.
10. *Terms of Insurance*, 1199.
11. *Proof*, 1199.
12. *Chancery Jurisdiction*, 1200.

1. When Material Generally.

Fraud.]—The suppression or concealment of material intelligence respecting a matter of insurance, whether by principal or agent, and whether fraudulent or not, vitiates the policy. *Thompson* v. *Buchanan*, 4 Bro. P. C. 482.

Correction.]—Where parties are contracting, either of them, unless he is under a duty to the other, may keep silence even as to facts which he believes would be operative on the mind of the other ; if, however, one of them has made a statement which he believes to be true, but which in the course of the negotiation he discovers to be false, he is bound to correct his erroneous statement. *Davies* v. *London and Provincial Marine Insurance Co.*, 47 L. J., Ch. 511 ; 8 Ch. D. 469 ; 38 L. T. 478 ; 26 W. R. 794.

All due Information.]—In marine insurance the basis of the contract between the underwriter and the assured is that the latter will communicate to the former information of every material fact of which the assured has or in the ordinary course of business ought to have knowledge ; and that the latter will take the necessary measures by the employment of competent and honest agents to obtain through the ordinary channels of intelligence in use in the mercantile world all due information as to the subject-matter of the insurance. *Proudfoot* v. *Montefiore*, 8 B. & S. 510 ; 36 L. J., Q. B. 225 ; L. R. 2 Q. B. 511 ; 16 L. T. 585 ; 15 W. R. 920.

A person at Sunderland effected a policy of insurance, and said no accounts had been received of the ship. His counting-house was at Belfast, and at the time of saying this accounts had been

received there, though this was unknown to him:—Held, that his statement was not false or fraudulent. *Greenwell* v. *Nicholson*, 1 Jur. 285.

Upon effecting a policy of marine insurance, the assured is bound to disclose everything which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters in practice act. *Ionides* v. *Pender*, 43 L. J., Q. B. 227; L. R. 9 Q. B. 531; 30 L. T. 547; 22 W. R. 884; 2 Asp. M. C. 266.

The concealment by the assured at the time of effecting a marine policy of insurance of a fact which is material to enable a rational underwriter, governing himself by the principles on which underwriters in practice act, to judge whether he shall accept the risk at all, or at what rate, will vitiate the policy, although the fact may not be material with regard to the risk insured. *Rivaz* v. *Gerussi*, 50 L. J., Q. B. 176; 6 Q. B. D. 222; 44 L. T. 79; 4 Asp. M. C. 377.

Rumours.]—It is the duty of the assured not only to communicate to the underwriter articles of intelligence, which may affect his choice, whether he will insure at all, and at what premium he will insure, but likewise all rumours and reports which may tend to enhance the magnitude of the risk. *Lynch* v. *Hamilton*, 3 Taunt. 37; 12 R. R. 591.

Knowledge of Underwriter.]—A person proposing a marine insurance is bound to communicate every fact within his knowledge that is material; though, if a particular fact is known to the underwriter at the time, he cannot afterwards set up as a defence to an action on the policy that the fact was not communicated; but if a material fact is not communicated, which, though known to the underwriter once, was not present to his mind at the time of affecting the insurance, the non-communication affords a good defence to the underwriter; and it is not enough for the assured to shew that the particulars supplied by the assured, coupled with the underwriter's previous knowledge, would, if the underwriter had given sufficient consideration to the subject, have brought to his mind the material fact not communicated. *Bates* v. *Hewitt*, 36 L. J., Q. B. 282; L. R. 2 Q. B. 595; 15 W. R. 1172.

Knowledge of, or concealment from the particular underwriter may be material, but not the knowledge or ignorance of subsequent underwriters of a different policy. *Foley* v. *Tabor*, 2 F. & F. 663.

On a condition in a policy, that it should be void if the assured should omit to communicate any matter material to be made known to the insurer:—Held, that this meant some matter, not only material, but also unknown to the insurer; and that it did not apply to something which it might well be presumed was well known to the insurer or his agents. *Pimm* v. *Lewis*, 2 F. & F. 778.

Letter leading to Inquiry.]—A material concealment is a concealment of facts, which, if communicated to the underwriter, would induce him either to refuse the insurance altogether, or not to effect it except at a greater premium than the ordinary premium; and a letter containing facts, which, if communicated, would lead to an inquiry, which would produce important information, ought to be shewn by the assured to the underwriter. *Elton* v. *Larkins*, 8 Bing. 198; 1 M. & Scott, 323; 5 Car. & P. 86, 385.

Facts coming to Knowledge of Assured after Slip.]—When underwriters have (as by initialling a slip) made a contract of assurance, which, although invalid at law and in equity for want of statutory requisites, is nevertheless, in practice, and according to the usage of those engaged in marine insurance, a complete and final contract binding upon them in honour and good faith whatever events may subsequently happen, the assured need not communicate to the underwriters facts which afterwards come to his knowledge material to the risk insured against; and the non-disclosure of such facts will not vitiate the policy of insurance afterwards executed. *Cory* v. *Patton*, 41 L. J., Q. B. 195, n.; L. R. 7 Q. B. 304; 26 L. T. 161; 20 W. R. 364; 2 Asp. M. C. 302. See *S.C.*, 43 L. J., Q. B. 181; L. R. 9 Q. B. 577; 30 L. T. 758; 23 W. R. 46; 1 Asp. M. C. 225.

At the time of signing a slip the assured was aware of but did not communicate a material fact. The underwriter afterwards became acquainted with this fact, and signed a policy in conformity with the slip under protest:—Held, that the policy was vitiated by the concealment. *Nicholson* v. *Power*, 20 L. T. 580.

A proposal for insurance on freight was made and accepted on the 11th of March. On the 16th the ship was lost. On the 17th, the assured, with knowledge of the loss, but without communicating it to the insurers, demanded a stamped policy. The insurers then, for the first time, required to be informed as to the amount of the insurance upon the hull, and inserted in the policy (which the assured accepted), the following warranty: "Hull warranted not insured for more than 2,700*l.* after the 20th of March." The vessel was then insured for an additional 500*l.* in an insurance club, by the rules of which all ships belonging to members were insured from the 20th of March in one year to the 20th of March in the following year, "and so on from year to year unless ten days' notice to the contrary be given"; and in the absence of notice the managers of the club were to renew each policy on its expiration:—Held, that the risk having been accepted by the insurers on the 11th of March, the addition on the 17th of a term for their benefit, and not affecting the risk, did not prevent the policy from being one drawn up in respect of the risk accepted on the 11th, and, therefore, the concealment of the loss was not a concealment of a material fact so as to avoid the policy. *Lishman* v. *Northern Maritime Insurance Co.*, 44 L. J., C. P. 185; L. R. 10 C. P. 179; 32 L. T. 170; 23 W. R. 733; 2 Asp. M. C. 504—Ex. Ch.

Underwriter, Estoppel by Conduct.]—Where the assurer discovers the concealment of a material fact between the initialling of the slip and the issuing of the stamped policy, but issues the policy without protest, he is not estopped from disputing his liability, nor is the burden of proof thrown on him to shew that the assured was not misled into treating the contract as still subsisting. *Morrison* v. *Universal Marine Insurance Co.*, 42 L. J., Ex. 115; L. R. 8 Ex 197; 21 W. R. 774—Ex. Ch.

Underwriters having agreed upon the terms for a marine insurance with the broker of the assured, initialled the slip and debited the broker

with the premium, in ignorance of facts material to be communicated to them, and known to the broker. Shortly afterwards the underwriters discovered the concealment, and mentioned it to the broker, but raised no objection, and afterwards, at the usual time, executed and delivered to the broker in silence a stamped policy in accordance with the slip. News of a total loss having arrived, they repudiated their liability on the ground of the concealment, and the assured sued them on the policy. It is the usage to issue a stamped policy in accordance with the slip, no matter what might happen after the slip was initialled:—Held, that since the assured had not been induced to alter his position by a belief that the underwriters had elected to treat the contract as binding, the delivery of the stamped policy was not an act of estoppel, nor even primâ facie evidence of an election, so as to make it incumbent on the underwriters to shew that the assured did not understand, or had no right to understand, the conduct of the underwriters as an election. *Ib.*

Materiality a Question for Jury.]—If facts not disclosed by the broker for the insured, in a representation of the state of the ship, appear material to the jury, though they did not to the broker, who merely on that account abstained from mentioning them, the insurance is void. *Shirley* v. *Wilkinson*, 1 Dougl. 306, n.; 3 Dougl. 41.

Non-disclosure—Seaworthiness.]—As an assured impliedly warrants the ship insured to be seaworthy, whatever forms an ingredient in seaworthiness is not necessary to be disclosed by the assured to the underwriter, in the first instance, unless information on the subject be particularly called for, and then the assured must disclose truly what he knows. Therefore, where the assured of a ship had received a letter from his captain informing him that he had been obliged to have a survey on the ship at Trinidad, on account of her bad character, but the survey which accompanied the letter gave her a good character:—Held, that the non-disclosure of the letter and survey did not avoid the policy, although, if disclosed, the premium would have been higher. *Haywood* v. *Rodgers*, 4 East, 590; 7 R. R. 638.

Insurance after Loss.]—Action for deceit, shipowner obtaining increase of policy after ship lost. New trial. *Anon.*, Lofft, 212.

Goods of Enemy insured as Goods of Friend.]—If goods are insured as the goods of a Hamburgher who is an ally, and the goods are the goods of a Frenchman, an enemy, the policy is void for fraud. *Anon.*, Skinner, 327.

Fact material under Foreign Law.]—The insured is not bound to disclose a fact made material by a foreign ordinance of which he is ignorant. *Meyne* or *Mayne* v. *Walter*, 1 Park, Ins. 431 (8th ed.) 730.

Change of Nationality.]—A ship was transferred by fictitious sale from the British to the Belgian flag, in order to escape board of trade inspection. She was afterwards insured, and the fact of her change of flag was not communicated to the insurers:—Held, that the concealment was of a material fact, although the ship was not suggested to be unseaworthy. *Hutchinson*, v. *Aberdeen Sea Insurance Co.*, 3 Ct. of Sess. Cas. (4th. ser.) 682.

Enemies' Cruisers in Neighbourhood.]—If the assured has heard that privateers are cruising in the neighbourhood of his ship it is his duty to communicate the fact to his underwriters. *Beckwaite* v. *Nalgrave*, cited, 3 Taunt. 1.

The assured had information that there were enemies' cruisers in the neighbourhood of his ship, and did not communicate the fact to his underwriters:—Held, that he could not recover on the policy. *Durrell* v. *Bederley*, Holt, 283; 8 R. R. 739. *And see* 17 R. R. 639.

Ship in Danger.]—A merchant having heard that his ship was in great danger, if not lost, insured her without communicating his information to his underwriters. Upon bill in chancery to be relieved against the insurance as fraudulent, a decree was made that the policy be delivered up and the premium returned. *De Costa* v. *Scandret*, 2 P. Wms. 170.

The assurer concealed the fact that from a ship in company with the ship insured he had heard that she was leaky and had been lost sight of in a hard gale; she was afterwards captured by Spaniards:—Held, that the concealment vitiated the policy. *Seaman* v. *Fonereau*, 2 Str. 1183.

If a person insure a ship when on a voyage, knowing her to be in extraordinary peril, or to have suffered damage, and does not communicate it to the insurer, it is a fraud. *Pole* v. *Fitzgerald*, Ambl. 214; 4 Bro., P. C. 439. Willes, 461.

Time Policy—Voyage—Cargo.]—When effecting a time policy the insurance broker represented to the underwriter that the ship was to sail for Pernambuco with coals and home with sugar. She was in fact chartered for Imbituba with iron; but it was not proved that the broker knew this:—Held, that there had been no misrepresentation of material facts. *Harvey* v. *Seligman*, 10 Ct. of Sess. Cas. (4th. ser.) 680.

The ship was lost by shipwreck at her port of discharge, which was an open roadstead:—Held, that, the port not being notoriously dangerous, and the shipowner not knowing that it was so, and iron not being an exceptionally dangerous cargo, there had been no concealment of material facts. *Ib.*

Direction to Jury.]—By the rules of Lloyds', a vessel classed for seven years is bound to undergo a "half-time survey" in her fourth year, and upon the report of such survey, the committee of Lloyds' determine whether she is to retain her classification or not. If she has satisfactorily undergone the survey and retains her classification, the letters "H. T." are placed opposite to her name in the book, with the date of the survey. If the report is not satisfactory, she is degraded, and if a survey is not had, or is declined, she is struck out of the register. Each subscriber to Lloyds' is furnished with a copy of this book, which is corrected from time to time, and he can get further information from the secretary of Lloyds'. Notice was given to an owner of a ship classed A 1, and built in 1865, by the surveyor, on the 22nd of October 1869, that she was due for half-time survey, and he was asked when she would be ready for survey. He replied on the 23rd of October, that he had decided not to continue her in Lloyds' book. On the 28th of October, his agent inquired of an underwriter at what rate an insurance could be effected upon the ship, and the book being looked

at in which she stood A 1, seven years from 1865, a quotation was given to him. On the 15th of November she was initialled for insurance, and the policy was issued, dated the 1st of December, 1869. On the 16th of November she had been struck out of the book, and the owner was so informed on the 17th. The ship was wrecked, and became a total loss on the 31st of December. An action having been brought upon the policy, it was pleaded that there had been concealment of material facts by the owner and his agents. The judge, at the trial, asked the jury, first, was the ship on the 15th of November, in the ordinary business sense degraded from her class? To this question the jury answered "No." Secondly, was the fact that the owner had resolved not to continue the ship on the list, and had so stated to the surveyor, a material fact? To this question the jury answered "No." Thirdly, ought the underwriter to have known on the 15th November that the continuance of the class must depend on whether the ship had been then lately surveyed and passed, or would within a few days be surveyed and passed or repaired, and if "Yes," ought the knowledge to have put the underwriter to ask whether the ship had been surveyed, or was about to be surveyed? To this question the jury answered "Yes," and a verdict was entered for the plaintiff:—Held, by Mellor, J., Lush, J., and Hannen, J., first, that the judge was not bound to direct the jury as matter of law, that the verdict must be found for the underwriter; and secondly, that there was no misdirection. By Cockburn, C.J., that there was no misdirection, but that there was proof of the concealment of a material fact, which ought to have been communicated to the underwriter, there being positive knowledge on the part of the owner that he had refused to have the ship surveyed, while there was only a possible inference on the part of the underwriter that there had been such refusal. *Gandy* v. *Adelaide Marine Insurance Co.*, 40 L. J., Q. B. 239; L. R. 6 Q. B. 746; 25 L. T. 742; 1 Asp. M. C. 188.

On effecting an insurance on freight from Belize to Rendez-vous Point on the Honduras coast (the exact locality of which was not known to either party) and thence to London, the agent of the assured read to the agent of the assurers a letter which the owner of the vessel had received from the captain from Belize, in which Rendez-vous Point was thus described: "It is considered by the pilot here as a good and safe anchorage, and well sheltered. I have been out and seen the place, and consider it quite safe." It was admitted that this statement of the captain was made bonâ fide; but there was evidence that Rendez-vous Point was not at the particular season a safe anchorage. In an action upon the policy, for a total loss, the judge told the jury that in his opinion the letter did not amount to a statement of a fact, but merely of an opinion; and he left two questions to them: First, was the letter read to the agent of the assured? Secondly, did the captain and the pilot consider that Rendez-vous Point was a safe anchorage? The jury answered both questions in the affirmative, and a verdict was entered for the plaintiff:—Held, no misdirection, and that the verdict was warranted by the evidence. *Anderson* v. *Pacific Fire and Marine Insurance Co.*, L. R. 7 C. P. 65; 26 L. T. 130; 20 W. R. 280; 1 Asp. M. C. 220.

The question for the jury in such a case is whether the facts connected with the captain's letter, its date and contents, the time of its receipt and so forth, were such facts as would have properly influenced the judgment of a reasonable underwriter in determining whether to accept the risk. *Stribley* v. *Imperial Marine Insurance Co.* 45 L. J., Q. B. 396; 1 Q. B. D. 507; 34 L. T. 281; 24 W. R. 701; 3 Asp. M. C. 134. See *Rickards* v. *Murdock*, and *Mackintosh* v. *Marshall*, post, col. 1199.

Misrepresentation—Onus Probandi.]—Where payment of a risk is resisted by insurers on the ground of misrepresentation, the onus is on them to prove very clearly that such misrepresentation has been made. *Davies* v. *National Fire and Marine Insurance Co. of New Zealand*, 60 L. J., P. C. 73; [1891] A. C. 485; 65 L. T. 560—P. C.

Ship entitled to sail without Convoy—Materiality.]—The fact that a ship being foreign built, was entitled to sail without convoy:—Held, not to be material to be communicated to underwriters. *Long* v. *Duff*, 2 Bos. & P. 209.

Reinsurance—Appropriation.]—The plaintiffs were the London agents of an insurance company, who had also an agent at Calcutta. The company issued policies on cargoes proceeding from Calcutta to the United Kingdom, reinsuring the excess above 5,000*l.* on any one ship, through their agents, the plaintiffs, with the defendants, lost or not lost, in any one ship as might be declared. From time to time the plaintiffs received advices from the agent at Calcutta, stating the names of the ships, and particulars of the excess of 5,000*l.* upon each, whereupon they declared the ships to the defendants, together with the amount of the excess, indorsments of which were made upon the back of the policy which was thereby appropriated to the particular risk. By a letter of the 15th February, 1860, the Calcutta agent informed the plaintiffs of an excess insured by the company on the ship "R." on the 16th March; both the plaintiffs and defendants had information, as the fact was, that the "R." had been destroyed by fire. On the 17th March, the plaintiffs appropriated the whole of the amount remaining on the then current policy to other ships. On the 19th March, the plaintiffs effected a fresh policy with the defendants in continuance of the former one; and on the 21st the plaintiffs received the letter of the Calcutta agent of the 15th of February; whereupon they immediately declared to the defendants that the policy of the 19th would be appropriated to the excess of 5,000*l.* on board the "R."; and on the 26th March made an indorsement thereof upon the policy, the defendants disputing their right to do so:—Held, that the fact of the loss of the "R." being known to both plaintiffs and defendants at the time of the issuing of the policy was immaterial, as it was not at that time known to either party that the company had undertaken any risk with respect to the ship; and that the declaration and appropriation were sufficient. *Gledstanes* v. *Royal Exchange Insurance Corporation*, 5 B. & S. 797; 34 L. J., Q. B. 30; 11 Jur. (N.S.) 108; 11 L. T. 805; 13 W. R. 71.

Craft Risk—Employment of Lightermen with Restricted Liability—Notice.]—On policies of marine insurance on goods, which included risks on crafts and lighters, underwriters to the knowledge of the plaintiffs charged a higher rate of

premium where the insurance was with no recourse against lightermen (which meant where the lighterage was done on the terms that the liability of the lightermen was to be less than that of common carriers, namely, for negligence only), than they charged where there was such recourse, and the liability of the lightermen was to be that of common carriers. The plaintiffs effected with the defendant, a Lloyd's underwriter, a policy of marine insurance on goods which included risk on craft and lighters, and was not with no recourse against lightermen. At the time of effecting such policy the plaintiffs had an arrangement with one H., by which he was to do all the plaintiff's lighterage on the terms that he was only to be liable for negligence:—Held, that if the plaintiffs intended that the goods so insured should be landed under such arrangement with H., it was a fact which a prudent and experienced underwriter would take into consideration in estimating the premium, and that therefore a jury would be justified in finding that the non-communication of it to the defendant was the concealment of a material fact which vitiated the policy. A mere disclosure of the existence of such arrangement to the defendants' solicitor is not notice of it to the defendant. *Tate* v. *Hyslop*, 54 L. J., Q. B. 592; 15 Q. B. D. 368; 53 L. T. 581; 5 Asp. M. C. 487—C. A.

Policy "on Profit on Charter"—Destruction of Merchantable Character of Cargo—Loss of Freight—Total Loss—Concealment by Assured.]—The plaintiffs, who had chartered a steamship at a lump-sum freight of 3,900*l.*, insured her with the defendants, who were underwriters. The interest insured was described in the policy as "2,000*l.* on profit on charter . . . warranted free from all average." The plaintiffs did not inform the defendants that the vessel was chartered for a lump-sum freight, nor of the amount of their bills of lading freights. During the voyage the vessel came into collision with another ship, and was submerged for twenty-four hours. A large portion of the cargo, consisting of dates, was condemned by the sanitary authorities, and not allowed to be delivered to the consignees. The dates were, however, sold, transhipped, and exported for distilling purposes. In an action brought by the plaintiffs upon the policy to recover for a total loss:—Held, that the dates being unmerchantable as such, no freight was payable in respect of them; that there was, therefore, no profit on the charter, and that the plaintiffs were entitled to recover. Held, also, that there had been no concealment by the plaintiffs. *Asfar* v. *Blundell*, 65 L. J., Q. B. 138; [1896] 1 Q. B. 123; 73 L. T. 648; 44 W. R. 130; 8 Asp. M. C. 106—C. A.

2. Knowledge of Agents.

Duty to Disclose—To Underwriters.]—Any person acting by the orders of the insured, and who is anywise instrumental in procuring the insurance, is bound to disclose all he knows to the underwriter, before the policy is effected. *Fitzherbert* v. *Mather*, 1 Term Rep. 12; 1 R. R. 134.

—— **To Principal.**]—An agent, whose duty it is in the ordinary course of business to communicate information to his principal as to the state of a ship and cargo, ought to do so by electric telegraph, where that mode of communication is in general use; and if the agent omits to discharge this duty, and the principal, being thus left in ignorance of a fact material to be communicated to the underwriter, effects an insurance, the insurance is void, on the ground of concealment or misrepresentation. *Proudfoot* v. *Montefiore*, 8 B. & S. 510; 36 L. J., Q. B. 225; L. R. 2 Q. B. 511; 16 L. T. 585; 15 W. R. 920. S. P., *Holland* v. *Russell*, post, col. 1263.

The plaintiff, in Liverpool, employed an agent at Smyrna to buy madder on his account, and to ship and consign the cargoes to him; the agent purchased and shipped a cargo of madder, and advised the plaintiff on the 12th of January, and sent the shipping documents on the 19th of January. The ship sailed on the 23rd of January, but was stranded in the course of that day, and the cargo became a total loss. Intelligence of the loss was communicated to the agent on the 24th of January, and on the 26th, the next post day, he wrote to the plaintiff announcing the loss, but purposely abstained from telegraphing, in order that the plaintiff might not be prevented from insuring. The plaintiff, on the 21st of January, after the receipt of the letters of the 12th and 12th, but before the receipt of the letter of the 26th, and without any knowledge of the loss—which, however, had been telegraphed and posted in Lloyd's lists—effected an insurance:—Held, that the plaintiff could not recover against the underwriter. *Ib.*

Where the plaintiffs, on 25th October, 1811, effected an insurance on a ship, at and from her port of lading to her port of discharge, and on the 25th of July preceding, the ship, whilst in her port of lading, was driven on a rock by a storm, but got off without appearing to have suffered material damage, and the captain afterwards wrote a letter to the plaintiffs, without communicating the accident, which letter reached them on the 5th October; and the ship afterwards arrived at her port of discharge, where the captain made a protest, detailing the accident, and stating that the planks of her bottom must have been chafed, and her bottom otherwise injured, by striking on the rock:—Held, that the plaintiffs could not recover as for an average loss arising from the accident; for the captain was bound to communicate the accident, and, for want of such communication, the antecedent damage was an implied exception out of the policy. *Gladstone* v. *King*, 1 M. & S. 35; 14 R. R. 392.

Action by shipowner on two policies of insurance on the "Jessie" and her freight, lost or not lost, at and from Mazagan to the United Kingdom. The "Jessie" had arrived at Mazagan after a seventeen days' voyage on the 27th of December. Shortly afterwards she lost an anchor in a storm, as to which loss the captain made a protest. On the 9th of January he wrote to the assured, to the effect that he had commenced loading, did not know when he would finish, but would write again. He made no mention of the loss of the anchor. This letter was received on the 24th of January. No subsequent letter was received by the assured. The "Jessie" sailed on the 15th of January, and was never heard of again. On the 24th of February the assured wrote to his agents to insure the ship and freight, saying, "I do not know when he was ready to sail. I have not had the sailing letter yet." No mention was made of the letter of the 9th of January, or of its contents. The agents on the

26th of February effected the policies which were sued on:—Held, first, that the mere fact that when the policy was effected there was an antecedent average loss, which the captain had omitted to communicate to the owner, and the owner, therefore, could not communicate to the underwriter, was not enough to avoid the policy altogether. *Stribley* v. *Imperial Marine Insurance Co.*, 45 L. J., Q. B. 396; 1 Q. B. D. 507; 34 L. T. 281; 24 W. R. 701; 3 Asp. M. C. 134.

Held, secondly, that the question which ought to have been left to the jury was not whether the "Jessie" was at the time when the policy was effected an overdue or missing ship, but whether the facts connected with the letter of the 9th of January, its date and contents, the time of its receipt, and so forth, were such facts as would have properly influenced the judgment of a reasonable underwriter in determining whether to accept the risk. *Ib.*

A merchant resident at Sydney shipped goods for England on board the ship "C.," and, by another ship that sailed after her, wrote to an agent in England, and desired him if he received that letter before "C." arrived to wait for thirty days, in order to give every chance for her arrival, and then effect an insurance on the goods. The letter was received, and the agent having waited more than thirty days, employed a broker to effect an insurance, and handed the letter to him. The broker told the underwriters when the "C." sailed, and when the letter ordering the insurance was written, but he did not state when it was received, nor the order to wait thirty days after the receipt of it before the insurance was effected. The "C." never arrived. In an action on the policy, no fraud was imputed to the plaintiff; but several underwriters were called for the defendant, who stated that in their opinion the matters not communicated were material; and the jury being of opinion that a material part of letter had been concealed, found a verdict for the defendant:—Held, that the jury was bound to find that the part of the letter not communicated to the underwriters was material, and, consequently, the policy was void. *Rickards* v. *Murdock*, 10 B. & C. 527; 8 L. J. (O.S.) K. B. 210.

A ship on an African voyage, the common duration of which is several months, and sometimes extends to twelve months or more, arrived on the coast in August, 1799; and in February, 1800, her then commander wrote a letter to his owners, mentioning an attack on her at another place on the coast by the natives, who killed the captain and several of the crew, and wounded others; by means of which and of a fever, the crew were reduced to five, and all those sickly, and not a man to be procured at hand; that they had been plundered of their clothes, &c., their cabin stores were exhausted, and they did not know what to do. A second letter, dated 21st April, 1800, from Gaboon river, mentioned their arrival there on the 24th March; that the natives, finding them weakly handed, and their goods taken from them, did as they pleased; that they had then nine men on board, but their provisions run very low; that he had mentioned certain parts of the cargo in his last letter, and expected to ship the rest, and to sail at the end of the next month. An insurance was effected in September, 1800, on the production of the last letter only, "at and from the ship's arrival at her first place of trade on the coast of Africa," &c.:—Held, sufficient, that the last letter truly stated the then condition and circumstances of the ship; which, though better than when the first letter was written, was yet no fraudulent concealment of former circumstances; the second letter, both in its terms and contents, referring to a former letter, which it was the fault of the underwriters not to have called for, if they thought that a particular knowledge of former difficulties, in part subdued, and to the extent truly stated in the second letter, would have varied the risk. *Freeland* v. *Glover*, 7 East, 457; 3 Smith, 426; 6 Esp. 14; 9 R. R. 803.

Concealment by Agent through whom Policy not effected.]—The plaintiffs instructed a broker to reinsure an overdue ship. Whilst acting for the plaintiff the broker received information material to the risk, but did not communicate it to them, and the plaintiffs effected a reinsurance for 800*l.* through the broker's London agents. Afterwards the plaintiffs effected a reinsurance for 700*l.*, lost or not lost, through another broker. The ship had in fact been lost some days before the plaintiffs tried to reinsure, but neither the plaintiffs nor the last-named broker knew it, and both he and the plaintiffs acted throughout in good faith:—Held, that the knowledge of the first broker was not the knowledge of the plaintiffs, and that the plaintiffs were entitled to recover upon the policy for 700*l.* *Fitzherbert* v. *Mather* (supra, col. 1185), *Gladstone* v. *King* (supra, col. 1186), *Stribley* v. *Imperial Marine Insurance Co.* (supra), and *Proudfoot* v. *Montefiore* (supra, col. 1186) commented on. *Blackburn* v. *Vigors*, 57 L. J., Q. B. 114; 12 App. Cas. 531; 57 L. T. 730; 36 W. R. 449; 6 Asp. M. C. 216—H. L. (E.)

Concealment of Facts by Agent through whom Policy not effected.]—The plaintiffs, underwriters in Glasgow, employed there a firm of insurance brokers to reinsure a ship which was overdue. The brokers received information tending to shew that the ship, as was the fact, was lost. Without communicating this information to the plaintiffs, they telegraphed in the plaintiffs' name to their own London agents, stating the rate of insurance premium which the plaintiffs were prepared to pay. Communications followed between the plaintiffs and the London agents, and the London agents, through a firm of London insurance brokers, effected a policy of reinsurance at a higher rate of premium, which policy was underwritten by the defendant:—Held, that the policy was void on the ground of concealment of material facts by the agents of the assured. *Blackburn* v. *Vigors* (supra) considered. *Blackburn* v. *Hasam*, 57 L. J., Q. B. 479; 21 Q. B. D. 144; 59 L. T. 407; 36 W. R. 855; 6 Asp. M. C. 326.

Capture Known to Clerk of Insured.]—An insurance was effected in consequence of intelligence that the ship had been captured, communicated to the clerk of the insured, but not proved to have been communicated to the insured:—Held, that the policy was void. *Stewart* v. *Dunlop*, 4 Bro. P. C. 482.

3. Known Course of Proceeding.

Public or Private Facts.]—The concealment of private facts, not of public facts, or conclusions from facts, will vacate a policy. *Carter* v. *Boehm*, 1 W. Bl. 593; 3 Burr. 1905.

Nature of Trade.]—An underwriter is bound to know the nature and peculiar circumstances

of the branches of trade to which the policy relates. *Noble* v. *Kennaway*, 2 Dougl. 510.

Underwriters are not entitled to notice of the part of a ship where goods are stowed, whether on deck or otherwise. *Dacosta* v. *Edmund*, 2 Chit. 227; 4 Camp. 142; 16 R. R. 763.

Policy on forty carboys of vitriol; they were carefully stowed on deck, but caught fire, and were necessarily thrown overboard during the voyage. Carboys of vitriol are sometimes stowed on the deck, and sometimes bedded in sand in the hold, where they are considered safer:—Held, that the underwriters were liable, although there was no communication to them that the carboys were to be stowed on deck. *Ib.*

Where, on an insurance on goods from London to Jamaica generally, the goods insured were destined to a particular plantation in that island; and the usual course in such a case was for the ship to proceed to an adjoining port, and there tranship her cargo into shallops; but no communication of this fact was given to the underwriters:—Held, that they were still liable for a loss which occurred after such transhipment on board the shallops. *Stewart* v. *Bell*, 5 B. & Ald. 238; 24 R. R. 342.

According to the usage of the Newfoundland trade, when ships arrive on the coast, they are either employed for some time in fishing (called banking), or they make an intermediate voyage in the American seas, before beginning to take in their homeward cargo, during which they are protected by a separate policy; therefore, in effecting a policy, "lost or not lost, at and from Newfoundland to a port in Europe," although the ship is to be employed in banking, it is not necessary to disclose the fact to the underwriters, as their risk only commences from the time when the banking or intermediate voyage ends, and they are bound to know the nature and circumstances of the branch of trade to which the policy relates. *Vallance* v. *Dewar*, 1 Camp. 503; 10 R. R. 738.

An insurance on a vessel engaged in the African wood and ivory trade, without stating to the underwriters the fact of her intended mutual or combined trading with another ship on the African coast; such mutual trading was proved to have occasionally prevailed in such African voyages, but the usage was not so general or well known as to render it unnecessary to communicate the fact expressly to the underwriters, and the omission to do so was held to be fatal to the policies, on the ground that the mutual trading varied the risk and altered the nature of the voyage. *Tennant* v. *Henderson*, 1 Dow, 324.

4. Intelligence at Lloyd's.

Necessity of Communicating.]—In effecting a policy, a circumstance of intelligence in Lloyd's lists need not be communicated to the underwriters, however important it may be to the computation of the risk; for it is to be presumed within their knowledge, and to be taken into account. *Friere* v. *Woodhouse*, Holt, 572; 17 R. R. 639, 679. And see *M'Andrew* v. *Bell*, 1 Esp. 373; *Proudfoot* v. *Montefiore*, ante, col. 1186.

In an action on a policy, Lloyd's shipping list is admissible against the underwriter, without proof of his having seen it, and is primâ facie evidence of the time of sailing. But where there was a concealment by the insurer of material facts, and an allegation of facts which were untrue, viz. as to the time of sailing, and the underwriter had acted thereon, without, in fact, seeing the list at Lloyd's:—Held, that the underwriter was not bound thereby, and that the judge ought to point out to the jury, as material, such concealment and misrepresentation. *Mackintosh* v. *Marshall*, 11 M. & W. 116; 12 L. J., Ex. 337.

Where it was known at Lloyd's that the "Sophia" of Bristol was at sea without convoy, and the broker inquired of the plaintiff at Bristol, whether that was the ship insured, and was informed it was, and that the plaintiff supposed she had been prevented by adverse winds from joining convoy at Falmouth, but the broker got the policy altered without disclosing this answer to the underwriters:—Held, that this concealment vacated the policy. *Sawtell* v. *Lowdon*, 5 Taunt. 359; 1 Marsh. 99.

—— **Private Intelligence.**]—The announcement in the foreign lists filed at Lloyd's of the sailing of a ship out of the port from which she is insured, does not, where such communication is material, dispense with the assured's disclosing a letter received from his captain before the policy is effected, announcing the day of his intended departure. *Elton* v. *Larkins*, 8 Bing. 198; 1 M. & Scott, 323; 5 Car. & P. 86, 385.

Two prizes being carried into Liverpool, the captor gave orders to effect an insurance on them in London. One of the prizes arriving on Sunday, the owner sent a despatch to his agent in London, stating that fact, and expressing fears as to the other ship. The express reached the broker on Tuesday, and on that day an entry was made at Lloyd's of the arrival of the vessel at Liverpool. On Wednesday the captor's agent effected an insurance on the other vessel, at a premium of fifty guineas per cent., without communicating to the underwriters the fact of the express:—Held, that this was not a concealment which vitiated the policy. *Court* v. *Martineau*, 3 Dougl. 161.

L. was accustomed to insure at Lloyd's upon floating policies quantities of cochineal shipped for him from the Canaries; he declared the name of the ship upon receipt of each bill of lading. He received information that a large quantity would be shipped in the "Candida," and by the same mail an anonymous letter reached Lloyd's containing a statement that the owners intended to lose that ship on her next voyage, in order to make the underwriters pay. A notice of this letter was openly affixed to a board at Lloyd's; and L. was aware of the contents of the letter, but considered them unworthy of credit. At this time L. reasonably expected that the bills of lading by the "Candida" would be the next to be declared by him, and in that case they would be covered by policies previously made. He entered into the policy sued upon without communicating to the underwriter his intelligence of a cargo to be shipped by the "Candida," or the contents of the anonymous letter. By accident the bills of lading of the "Candida" came to L. after those of later shipments, and this policy was declared upon the "Candida":—Held, in an action to recover for a total loss of part of the cochineal which had been jettisoned from the "Candida," that he had been guilty of a concealment which invalidated the policy. *Leigh* v. *Adams*, 25 L. T. 566; 1 Asp. M. C. 147.

5. State and Condition of Ship and Cargo.

Grounding of Ship.]—A plaintiff, as agent for the owners, who were foreigners, of a steamer, insured her for twelve months, beginning from the 21st of January, 1857, through H., an insurance broker. On the 15th January, 1857, H. applied to the defendant to become the insurer. On the same day the plaintiff received a letter from the master, stating that she had been aground, had received some heavy blows, and had made her way in a sinking state into the port of C. This letter the plaintiff communicated to H. the same day, but H. did not communicate it to the defendant. On the 22nd January the defendant wrote to H. saying, having heard that the ship had been on shore, he considered his risk did not commence until she had been surveyed and repaired. To this letter no reply was made by H.; but H., having been debited for the whole premium in the books of the defendant, remained so debited till after the loss, which took place on the 9th October, 1857:—Held, first that the concealment of the fact of the ship having been aground was the concealment of a material fact, and vitiated the policy. *Russell* v. *Thornton*, 6 H. & N. 140; 30 L. J., Ex. 69; 6 Jur. (N.S.) 1080; 2 L. T. 574; 8 W. R. 615—Ex. Ch.

Held, secondly, that there was no waiver, by the defendant, of this, nor any evidence of the parties having entered into a new contract of insurance, commencing from the date of the 22nd January. *Ib.*

Age of Ship.]—If a representation is made by the assured to an underwriter, however honestly or innocently, that a ship is new when in fact she is old, a policy on goods on board of her made by him will be vitiated, for the age of the vessel must be material in considering the premium. *Ionides* v. *Pacific Fire and Marine Insurance Co.*, 41 L. J., Q. B. 190; L. R. 7 Q. B. 517; 26 L. T. 738; 21 W. R. 22; 1 Asp. M. C. 330—Ex. Ch.

Seaworthiness.]—Whatever forms an ingredient in seaworthiness need not be disclosed by the assured to the underwriter unless information upon the subject is particularly called for, and then the assured must fully disclose what he knows. *Haywood* v. *Rogers*, 1 East, 590; 1 Smith, 289; 7 R. R. 638.

New Metalling.]—A shipowner stated in a proposal for insurance that his ship had been last metalled in 1867. The bottom was then overhauled, and new metal put where required:—Held, that he had not made a material misstatement so as to vitiate the policy. *Alexander* v. *Campbell*, 41 L. J., Ch. 478; 27 L. T. 25. *S. C.*, 27 L. T. 462; 1 Asp. M. C. 447, post, col. 1357. Reversed by L.JJ., on another point.

Delay for Repairs.]—If the owner of a ship receives a letter from the captain, written on her arrival at a foreign port, giving such an account of her as to render it probable that she must remain there for the purpose of being repaired, beyond the time that would be necessary for her to take in her cargo; this letter need not be communicated to the underwriters, in effecting a policy of insurance upon her, at and from the foreign port to a port in England, unless information on the subject is particularly called for. *Beckwith* v. *Sydebotham*, 1 Camp. 116; 10 R. R. 652.

Overloading—Discharge.]—A ship insured at and from a port sailed on her voyage in an unseaworthy state, in consequence of having a greater cargo than she could safely carry; the defect was discovered before any loss accrued; and part of the cargo was discharged, and a loss subsequently accrued in no degree attributable to her having been overladen in the early part of her voyage:—Held, that the underwriters were liable for such loss. *Weir* v. *Aberdeen*, 2 B. & Ald. 320; 20 R. R. 450.

The vessel having sailed and put back to the Downs, and then sailed again, and laboured and strained much from being overloaded, and then put back a second time; and upon an application to the underwriters for liberty for the ship to go into port to discharge part of her cargo, it was only communicated to them that the ship was too deep in the water:—Held, that as the subsequent loss had not in any degree arisen from her having so strained and laboured, the communication of that fact was immaterial, and that the communication made was quite sufficient. *Ib.*

Nature of Cargo—Bad Stowage.]—As a policy on a ship may be avoided, by unseaworthiness, caused either by overloading or bad stowage, tending to increase the danger or difficulty of navigation, and so to enhance the rate of premium, the not mentioning the nature of the cargo, if the proportion of dead weight in it must lead to bad stowage, may be such a concealment as will vitiate the policy. But it will not be so if the underwriter knew, or had reason to believe, that the cargo would include some proportion of dead weight, and the agent of the assured, when he effected the insurance, did not know what proportion. *Foley* v. *Tabor*, 2 F. & F. 663.

—— **Declaration of Name of Ship.**]—The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared is, that he will insure any goods of the description specified which may be shipped on any vessel answering the description in the policy to which the assured elects to apply the policy; the object of the declaration of the vessel's name is to identify the particular adventure, and the assent of the underwriter is not required to the declaration, for he has no option to reject any vessel which the assured may select. *Ionides* v. *Pacific Fire and Marine Insurance Co.*, 41 L. J., Q. B. 190; L. R. 7 Q. B. 517; 26 L. T. 738; 21 W. R. 22; 1 Asp. M. C. 330. *See* ante, col. 1034.

If the description in the policy designates the subject with sufficient certainty, or suggests the means of doing it, a mistake as to the name of the ship or as to other particulars, will not annul the contract, and a mistake in the name of the vessel, which does not prejudice the underwriter, does not defeat the policy. *Ib.*

—— **Name of Ship uncertain — Usage at Lloyd's.**]—When an assured expects, but is not certain, that goods will come by a particular ship, the name of such ship is not a material fact the non-disclosure of which prevents the policy from attaching; nor in such a case is there any usage of underwriters at Lloyd's compelling the assured to disclose it. *Knight* v. *Cotesworth*, 1 Cab. & E. 48.

—— **Materiality of Misstatement.**]—Where an agent of a shipowner effecting a policy on a ship misrepresented the nature of the cargo she was to carry, but this was not inserted in the policy, and it did not appear that the underwriter was induced by the misrepresentation to accept the risk:—Held, that the jury was warranted in finding that the misrepresentation was not material, and that it did not vitiate the policy. *Flinn* v. *Headlam* or *Tobin*, 9 B. & C. 693; M. & M. 367; 31 R. R. 739.

Contraband.]—A policy contained a warranty against contraband. Part of the goods consisted of artillery harness, and were shipped during the war between the United States of America and the Confederate States, with the intention of sending them on from a neutral port to the Confederate States:—Held, that such goods were contraband of war, and the whole insurance void. *Seymour* v. *London and Provincial Marine Insurance Co.*, 41 L. J., C. P. 193; 27 L. T. 417; 1 Asp. M. C. 423.

An insurance was effected on goods at a premium of ten guineas per cent., to return 5 per cent. for convoy and arrival. The assured concealed from the underwriter that the vessel was to be a running ship, although he was aware of it:—Held, that this was a concealment of a fact material to the risk, and avoided the policy. *Reid* v. *Harvey*, 4 Dow, 97; 16 R. R. 38.

Cargo to be Shipped—Anonymous Letter.]—L. was accustomed to insure at Lloyd's upon floating policies quantities of cochineal shipped for him from the Canaries; he declared the name of the ship upon receipt of each bill of lading. He received information that a large quantity would be shipped in the "Candida," and by the same mail an anonymous letter reached Lloyd's, containing a statement that the owners intended to lose that ship on her next voyage in order to make the underwriters pay. A notice of this letter was openly affixed to a board at Lloyd's; and L. was aware of the contents of the letter, but considered them unworthy of credit. At this time L. reasonably expected that the bills of lading by the "Candida" would be the next to be declared by him, and in that case they would be covered by policies previously made. He entered into the policy sued upon without communicating to the underwriter his intelligence of a cargo to be shipped by the "Candida," or the contents of the anonymous letter. By accident the bills of lading of the "Candida" came to L. after those of later shipments, and this policy was declared upon the "Candida":—Held, in an action to recover for a total loss of part of the cochineal which had been jettisoned from the "Candida," that he had been guilty of a concealment which invalidated the policy. *Leigh* v. *Adams*, 25 L. T. 566; 1 Asp. M. C. 147.

Deck Cargo.]—In an action upon a policy the defendant pleaded that the fact that the ship insured was to carry a deck cargo was not disclosed, and it was contended that such concealment avoided the policy:—Held, that it did not avoid the policy entirely, but only as regarded the cargo carried on deck. *Clarkson* v. *Young*, 22 L. T. 41.

Over-valuation of Goods.]—Upon effecting a policy of marine insurance the assured is bound to disclose everything which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters in practice act. When, therefore, in an action on a policy of marine insurance, it appeared that goods had been insured at a value very greatly over their real value, without disclosing the over-valuation to the underwriter; and it was proved that underwriters do, in practice, act on the principle that it is material to take into consideration whether the over-valuation is so great as to make the risk speculative:—Held, that this practice is rational; and that it was proper to leave to the jury, whether the valuation was so excessive, and whether it was material to the underwriter to know of such over-valuation. *Ionides* v. *Pender*, 43 L. J., Q. B. 227; L. R. 9 Q. B. 531; 30 L. T. 547; 22 W. R. 884; 2 Asp. M. C. 266.

Goods Shipped after Clearance.]—It is no objection to the assured on goods recovering for a loss by a peril within the policy, that after the captain had obtained his manifest and custom-house clearances, as required by 13 & 14 Car. 2, c. 11, s. 3, goods of the assured were put on board by the packer, who had previously made all the necessary entries at the custom-house. *Carruthers* v. *Gray*, 15 East, 35; 3 Camp. 142.

Cotton on Deck—Damaged Cotton—Concealment.]—The plaintiffs, who had insured a cargo of damaged cotton, re-insured the same with the defendant, but did not inform him that it was damaged cotton. The slip contained the terms, "cotton on deck, f. p. a. &c., including jettison and washing overboard." When the policy of re-insurance was tendered to the defendant for signature it differed from the slip, for, instead of the words "f. p. a. and c.," &c., it was "f. p. a. &c., as in original policy," and in that policy the risk was described as "f. p. a., but including risk of jettison and washing overboard"; but he signed it without inquiry or objection. The quantity of cotton insured "on deck" amounted to 7,500*l.*:—Held, that the instructions being to insure such a quantity "on deck" clearly shewed that it was damaged cotton, and that, under the circumstances, there was no concealment; also, that, although an attempt had been made to establish that the course of business was to say that cotton was damaged, no such course of business was established. *British and Foreign Marine Insurance Co.* v. *Sturge*, 77 L. T. 208; 8 Asp. M. C. 303.

6. Time of Sailing.

Duty to Disclose.]—The time of a ship's sailing is not, in general, a circumstance necessary to be communicated to the underwriters, except in the case of a missing ship. *Foley* v. *Moline*, 1 Marsh. 117; 5 Taunt. 430; 15 R. R. 541.

It is not necessary to disclose to the underwriters on a policy at and from London, whether the ship has sailed or not. *Fort* v. *Lee*, 3 Taunt. 381; 12 R. R. 670.

Where a vessel has been a long time at sea, it is a fraudulent concealment if that circumstance is not communicated to the underwriter. *Webster* v. *Foster*, 1 Esp. 407.

So, if it is not communicated to the broker employed, whereby he could not answer the inquiries of the underwriters on that point. *Ib.*

Knowledge as to other Ships.]—The assured is not bound to communicate any knowledge he may have of the time of sailing of another ship

from the same place, either before or at the same time as his own, unless he knows of something particular having happened to such other vessel, which might affect the insurance of his own. *Elton* v. *Larkins*, 8 Bing. 198 ; 1 M. & Scott, 323 ; 5 Car. & P. 86, 385.

Where a ship had sailed from Elsineur on her voyage home six hours before the owner, who followed in another vessel on the same day, and having met with rough weather in his passage, arrived first, and then caused an insurance to be effected on his own ship :—Held, that the circumstances were material to be communicated to the underwriter, and that it was not sufficient to state merely that the ship insured "was all well at Elsineur on the 26th July," the day of her sailing. *Kirby* v. *Smith*, 1 B. & Ald. 672 ; 19 R. R. 412.

In effecting a policy on the 8th of January at Whitehaven, on a ship at and from Barbados to Liverpool, a broker's letter was produced, stating that the ship insured was not coppered, but a slow sailer ; was expected to have sailed on the 28th November ; and that the "Barton," a coppered vessel and very fleet, which had sailed on the 24th from Barbados, had arrived on the 5th January ; but no notice was taken of the "Agreeable," another coppered and fleet vessel, which sailed 29th November, having also arrived on the same day as the "Barton." After verdict for the plaintiff, the court refused to grant a new trial on the ground of concealment. *Littledale* v. *Dixon*, 1 Bos. & P. (N.R.) 151 ; 8 R. R. 774.

Two prizes being carried into Liverpool, the captor gave orders to effect an insurance on them in London. One of the prizes arriving on Sunday, the owner sent a despatch to his agent in London, stating that fact and expressing fears as to the other ship. The express reached the broker on Tuesday, and on that day an entry was made at Lloyds' of the arrival of the vessel at Liverpool. On Wednesday the captor's agent effected an insurance on the other vessel at a premium of fifty guineas per cent., without communicating to the underwriters the fact of the express :—Held, that this was not a concealment which vitiated the policy. *Court* v. *Martineau*, 3 Dougl. 161.

A policy on a ship called the "King George," at and from Malaga to London, warranted to sail on the 10th of October, was effected on the 3rd of November following. The insurer communicated to the underwriters that the "King George" and another vessel called the "Fruiter," both sailed for Malaga on the 10th of October, and the underwriters knew that the "Fruiter" had arrived at London some days before ; but the insurer knew also that the captain of the "Fruiter" had seen the "King George" off Oporto on the 21st October, when they had parted company by reason of a gale coming on ; and this fact he did not communicate to the underwriters. The "King George" was lost in a storm at the entrance of the Channel on the 25th October. In an action on the policy, the jury having found for the plaintiff, and that the fact not communicated was not a material one, the court granted a new trial. *Westbury* v. *Aberdein*, 2 M. & W. 267 ; M. & H. 49 ; 6 L. J., Ex. 83 ; 1 Jur. 201.

If it appears that a plaintiff did not intend to insure until he believed her to be missing, and then not until another ship which had sailed at the same time had arrived in safety, the concealment of this fact is fatal. *M'Andrews* v. *Bell*, 1 Esp. 373. And see *Friere* v. *Woodhouse*, Holt, 572 ; 17 R. R. 679.

Communications as to.]—A policy was effected on goods from Berderygge to London, by the consignees on the 13th December, without communicating a letter received by them the day before, but dated the 30th November, informing them that the captain would sail the next day, and directing them, if he should not be arrived, to effect the insurance as low as possible :—Held, a material concealment, though the ship did not in fact set sail until the 24th December. *Willes* v. *Glover*, 1 Bos. & P. (N.R.) 14 ; 8 R. R. 739.

The concealment of letters, stating that the vessel is about to sail next month, is a material concealment, and avoids the policy. *Shirley* v. *Wilkinson*, 3 Dougl. 41 ; 1 Dougl. 306, n.

When the plaintiffs effected a policy on wines, from Oporto to London, on the 12th November, at which time they were in possession of two letters from their correspondents at Oporto ; the first of which, dated 11th October, stated thus, "we are loading the wines on the "Stag," Captain Wheatley, who intends to sail after to-morrow" ; the other, dated the 13th October, enclosed the bills of lading which were filled up "with convoy" ; which letter the plaintiffs did not communicate to the underwriters :—Held, that it was a material concealment. *Bridges* v. *Hunter*, 1 M. & S. 15 ; 14 R. R. 380.

In effecting an insurance the shipowner's correspondent shewed the underwriter a letter written by the shipowner's agent abroad, stating that the ship would sail from Nassau for the Clyde on May 1st. The ship in fact sailed on April 23rd. On May 11th she was captured :—Held, that the statement in the letter was material to the risk and positive, and that, not being true, it vitiated the policy. *Dennistoun* v. *Lillie*, 3 Bligh, 202.

Ready to Sail—Ship had Sailed.]—The broker's instructions stated the ship to be ready to sail on December 24th. The broker represented the ship to be in port, when in fact she sailed on December 23rd :—Held, to be a material misrepresentation. *Fillis* v. *Brutter*, 1 Park, Ins. (8th ed.) 414.

Wrong Statement as to Sailing.]—A letter received stated that the ship sailed from Jamaica on the 24th November. The agent afterwards insured the ship, stating that she sailed in December :—Held, fraudulent ; verdict for underwriter. *Roberts* v. *Fonnereau*, 1 Park, Ins. (8th ed.) 405.

The assured, knowing that his ship had sailed from the coast of Africa on a certain day, stated that she was on the coast on that day, and nothing as to her sailing :—Held, that this was a material concealment and avoided the policy. *Ratcliffe* v. *Shoolbred*, 1 Park, Ins. (8th ed.) 413.

7. Ship's Name, when in Danger.

Not stating.]—If a ship is advertised to be in danger, and the insurer effects a policy on ship or ships, knowing that the ship in danger is one of them, without stating the ships' names, this is a concealment which avoids the policy, although the rumour was false. *Lynch* v. *Hamilton*, 3 Taunt. 37 ; 12 R. R. 591.

An insurance was effected on goods on board ship or ships from the Canary Islands to London, and at the time the assured's agent, who effected

the policy, knew that one of the ship or ships was named the "President"; and at the same time there was a paper of communication stuck up at Lloyd's, that "the 'Howard,' Marsh, arrived off Dover from Teneriffe; sailed 24th ult.; on the 27th off the Salvages, fell in with the 'President,' Owens, from Lanzarette, deep and leaky"; but the agent did not communicate his knowledge of the ship's name to the underwriters:—Held, that the policy was thereby avoided, though the intelligence afterwards turned out to be false. *Lynch* v. *Dunsford*, 14 East, 494; 13 R. R. 295.

—— **Underwriter's Means of Identifying.**]—During the American war of 1863-4, the "Georgia" screw steamer obtained notoriety as a cruiser in the service of the Confederate States; in May, 1864, she put into Liverpool, where she was dismantled, and this was also a subject of public notoriety, and, as such, known to the defendant, an underwriter at Lloyd's; at Liverpool she was bought by the plaintiff at public auction, and converted by him into a merchant vessel. In August, 1864, the plaintiff, through his broker in London, effected with the defendant an insurance of the vessel for six months. The particulars furnished by the plaintiff were, "Georgia," s.s., chartered on a voyage from Liverpool to Lisbon and the Portuguese settlements on the west coast of Africa and back. The vessel sailed from Liverpool, and was immediately captured by a frigate of the United States. In an action on the policy to recover for the loss, the defendant set up as a defence the concealment of the fact that the "Georgia" proposed for insurance was the late Confederate war steamer, and therefore liable to capture by the United States. The jury found that the defendant was not aware that the "Georgia" which he was insuring was the Confederate steamer, but that he had, at the time of underwriting, abundant means of identifying the ship from his previous knowledge coupled with the particulars given by the plaintiff:—Held, that the defendant was entitled to the verdict. *Bates* v. *Hewitt*, 36 L. J., Q. B. 282; L. R. 2 Q. B. 595; 15 W. R. 1172.

8. Port or Place of Sailing or Loading.

The concealment of the true port of loading will vitiate a policy. *Hodgson* v. *Richardson*, 1 W. Bl. 463.

If a ship is insured at and from a certain place, where in fact she is not at the time, but arrives there after some interval (but the fact is not communicated to the underwriters, who do not call for information on the subject), it is a question for the jury, whether the delay which intervened materially varied the risk. *Hull* v. *Cooper*, 14 East, 479; 13 R. R. 287.

The owners, in 1861, effected with an underwriter a policy on bone and bone ash on board a vessel, at and from Buenos Ayres and port or ports of loading in the province of Buenos Ayres, to port or ports of call and discharge in the United Kingdom. The assured knew, at that time, that the vessel was going from Buenos Ayres to L., a port in the province, to complete her cargo; but this fact was not communicated to the underwriter, and he did not know that L. was a port in the province. L. was a place where a trade in hides, bone and bone ashes was carried on between that place and Buenos Ayres; but vessels could not clear from L. to Europe, but had to return to Buenos Ayres to obtain a clearance. There was no artificial port, but only a roadstead protected by natural headlands forming a kind of bay. L. was unknown in 1861 to underwriters as a place of loading; and if underwriters, on a policy as above, had been informed that the vessel was going to load there they would have required a higher premium than the sum charged. The vessel went from Buenos Ayres to L., but being unable to get cargo, she left that place to return to Buenos Ayres, and was lost on her way thither:—Held, that the non-communication of the fact that the vessel was going to L. to complete her cargo was a concealment of a material fact, which vitiated the policy:—Held, also, that L. was a port of loading within the policy. *Harrower* v. *Hutchinson*, 10 B. & S. 469; 39 L. J., Q. B. 229; L. R. 5 Q. B. 584; 22 L. T. 684—Ex. Ch. Reversing 17 W. R. 731.

By a charterparty it was agreed that a ship then being at M. V., should proceed to F., and thence to S. C., where she was to load a complete cargo, and then proceed to E.; 250*l.* per month for freight, to be paid thus: 250*l.*, one month's freight, at F., and balance on delivery of the cargo at port of discharge. The vessel sailed, and 250*l.* was paid. She arrived at S. C., but, instead of proceeding to E., returned to M. V. A policy was effected, by which 450*l.*, freight advanced, was insured on the voyage from M. V. to H. A second charterparty was entered into whilst the vessel was still at M. V., by which she was to proceed to H. with the cargo then on board, a part of which she brought from S. C.; freight 250*l.* per month, allowing a "deduction of 250*l.*, which the captain has already received on account of the charter." The first charterparty was not expressly cancelled or annulled. The ship sailed and was lost. At the time of effecting the policy, nothing was said as to the vessel having been to S. C.:—Held, that it was competent for the parties to enter into the second charterparty, and that there was no misrepresentation or concealment. *Ellis* v. *Lafone*, 8 Ex. 546; 22 L. J., Ex. 124; 17 Jur. 213; 1 W. R. 200—Ex. Ch.

9. Commencement of Hostilities.

Common Knowledge.]—If an insurance is made before the commencement of hostilities, but when everybody expects a war immediately, the insured is not bound to give the underwriters notice, though the ship does not sail till after the war takes place, and the underwriter is liable in case of a capture. *Planche* or *Planchée* v. *Fletcher*, 1 Dougl. 251; 1 Park, Ins. (8th ed.) 360.

Nationality of Assured.]—On a policy effected after a declaration of war by America, but before it was known in this country, where it was not stated in the policy, nor communicated to the underwriter, that the assured was an American subject, and the loss happened in consequence of a seizure by that government, for a forfeiture for a breach of their non-importation act:—Held, that the underwriters were not liable, and that no action could be maintained, even after the termination of the war. *Campbell* v. *Innes*, 4 B. & Ald. 423; 23 R. R. 238.

Special Information.]—The assured, on a policy at and from Riga, were in the possession of a letter from their correspondent there, stating that an order for sending the papers of all ships arriving at that port to Petersburgh had

produced a great sensation, intimating that the papers of the ship insured had been sent to Petersburgh accordingly, and expressing considerable apprehensions for her safety. This letter was not communicated to the underwriters; but the broker informed them of the fact of the ship's papers having been sent to Petersburgh:—Held, that the policy was not vitiated on the ground of concealment, by the non-communication of the letter. *Bell* v. *Bell*, 2 Camp. 479; 11 R. R. 769.

10. Terms of Insurance.

A London merchant, insuring at Leith, represented (contrary to the fact) that he had done some insurances at Lloyd's upon the same voyage, at the same premium given to the Leith underwriters, who (not being well acquainted with the nature of the risk themselves) subscribed the policy from their confidence in the skill and judgment of the London underwriters:—Held, that this was a fraud which vitiated the policy, though the misrepresentation was not such as affected the nature of the risk. *Sibbald* v. *Hill*, 2 Dow, 263; 14 R. R. 160.

11. Proof.

List at Lloyd's.]—The shipping list at Lloyd's, stating the time of a vessel's sailing, is primâ facie evidence against an underwriter as to what it contains, as the underwriter must be presumed to have a knowledge of its contents, from having access to it in the course of his business; but where the insurer, in a letter written for the purpose of effecting the insurance, made a false statement and concealment as to the time of the vessel's sailing, and the underwriter, relying upon that representation, did not in fact look at the list, but acted upon the representation in making the insurance:—Held, that the underwriter was not bound by the contents of the list, so as to render the misrepresentation and concealment by which he was misled immaterial; and that it was the duty of the judge to have pointed out to the jury that misrepresentation and concealment. *Mackintosh* v. *Marshall*, 11 M. & W. 116; 12 L. J., Ex. 337.

Evidence as to Materiality—Opinion.]—Evidence of underwriters' opinion as to the materiality of information received by the assured and not communicated to his underwriters not admitted. *Durrell* v. *Bederley*, Holt, 283; 8 R. R. 739; 17 R. R. 639. S. P., *Carter* v. *Boehm*, 3 Burr. 1909; 1 W. Bl. 593. But see, aliter, *Chaurand* v. *Angerstein*, Peake (N.P.) 43; *Rickards* v. *Murdock*, 10 B. & C. 527; 8 L. J. (O.S.) K. B. 210; *Elton* v. *Larkins*, 5 Car. & P. 592; *Chapman* v. *Walton*, 10 Bing. 57; 3 M. & Scott, 389; 2 L. J., C. P. 210; *Littledale* v. *Dixon*, 1 Bos. & P. (N.R.) 151; 8 R. R. 774; *Haywood* v. *Rodgers*, 4 East, 590; 7 R. R. 638.

A merchant abroad shipped goods for England on board the ship "C." and by another ship that sailed after her wrote to an agent in England desiring him if he received the letter before the "C." arrived to wait thirty days in order to give her every chance to arrive, and then to insure the goods. The agent did as instructed; the broker he employed to insure did not tell the underwriters of the order to wait thirty days before insuring. The "C." never arrived. The assured sued the underwriters on the policy, but failed on account of the suppression of fact by the broker. In an action by the assured against the broker for negligence in effecting the policy:—Held, that the evidence of underwriters and brokers as to the materiality of the suppressed facts was not admissible. *Campbell* v. *Rickards*, 5 B. & Ad. 840; 2 N. & M. 542; 2 L. J., K. B. 204.

The opinion of one conversant with insurance business as to the materiality of facts not communicated to underwriter with regard to the amount of the premium is admissible in evidence. *Berthon* v. *Loughman*, 2 Stark. 258.

Question for Jury.]—The materiality of the intelligence or rumours, which the assured is charged with having suppressed, is a question for the jury, under the circumstances of the case. *Rickards* v. *Murdock*, supra.

Onus.]—In an action on a policy on a ship, where the defendant pleads, that, at the time of making the policy, the plaintiff wrongfully concealed material facts and information, the defendant is bound to prove all the allegations in the plea. *Elkin* v. *Janson*, 13 M. & W. 655; 14 L. J., Ex. 201; 9 Jur. 353.

On proof that the facts were material, and known to the assured, slight evidence of non-communication to the underwriter will shift the burden of proof. *Ib.*

12. Chancery Jurisdiction.

Fraud—Cancellation of Policy—Jurisdiction of Court of Equity.]—If a policy is liable to be completely avoided, as on the ground of fraud or misrepresentation, a court of equity has jurisdiction to direct its delivery up and cancellation, but it has no jurisdiction to direct the cancellation of a policy to any claim on which there is a good legal defence, or to declare that there is no liability upon it. If there is danger of the evidence for the defence being lost, the remedy is, not an action for cancellation, but an action to perpetuate testimony. *Brooking* v. *Maudslay*, 57 L. J., Ch. 1001; 38 Ch. D. 636; 58 L. T. 852; 36 W. R. 664; 6 Asp. M. C. 296.

Where four of many actions against the various underwriters on policies on several ships (individually) had been tried, and verdict passed for plaintiffs at law, the court granted an injunction to restrain them (the plaintiffs at law) from proceeding further in a case where there was a strong suspicion of fraud in the assured, on the money being paid into court; on the ground of answer of one of defendants not having come in. *Kensington* v. *White*, 3 Price, 164.

A merchant having a doubtful account of his ship insures the ship without acquainting the insurers what danger the ship was in:—Held, to be a fraudulent insurance, and the court relieved against the policy. *De Costa* v. *Scandret*, 2 P. Wms. 170.

Bill by underwriter of a policy of marine insurance, the ship insured having been lost, to restrain an action brought by the insured for the amount of the policy, and to have the policy itself delivered up to be cancelled, on the ground of deviation and delay in the voyage and the unseaworthiness of the ship. A verdict was given for the defendant in the suit (plaintiff at law), on the ground of deviation. He then brought the suit to a hearing, insisting that the policy ought to be delivered up:—Held, that the whole case turning upon a mere question of fact, and there being no fraud, there was no equity, and the bill was dismissed, with costs. *Thornton* v. *Knight*, 16 Sim. 509; 13 Jur. 180.

VIII. VOYAGE.

1. *General Legality*, 1201.
2. *Simulated Papers*, 1205.
3. *Clearance*, 1206.
4. *Deck Cargo*, 1207.
5. *Hostile Ports*, 1208.
6. *Ports under Embargo*, 1209.
7. *Neutral Trading*, 1209.
8. *Abandonment of Voyage*, 1211.

1. General Legality.

Part of Voyage.]—If there is any illegality in the commencement of an integral voyage, and an insurance is effected on the latter part of the voyage, which, taken by itself, would be legal, still the assured cannot recover on the policy. *Marryatt* v. *Wilson*, 8 Term Rep. 31 ; 1 Bos. & P. 430 ; *Bird* v. *Pigou*, 2 Selw. N. P. (11th ed.) 966, n.

If a master sails under a charterparty, stipulating for a voyage of which a part is illegal. Semble, that this does not prevent his insuring on, not subject him to forfeiture for, the part antecedent to the illegal act ; for as he cannot be compelled to perform, nor enforce the payment of freight on the illegal part of the adventure, it may be presumed that he will abandon it. *Sewell* v. *Royal Exchange Co.*, 4 Taunt. 856.

If a ship is insured "at and from A. to B.," and there is an illegality in the traffic during her stay at A., the assured cannot recover on the policy for a loss happening between A. and B. *Bird* v. *Appleton*, 8 Term Rep. 562 ; 5 R. R. 468.

Yet an insurance on a ship for a particular voyage is legal, though she may have done some act in a former voyage for which she was liable to seizure ; and the goods may be insured though purchased with the proceeds of a former illegal cargo. *Ib.*

Letters of Marque.]—After an assurance on a ship on a trading voyage, the assured applied to the underwriters for leave to take in guns and a letter of marque, the latter of which was positively refused ; notwithstanding which, the ship sailed with the general letter of marque ; this vacated the policy, although the assured did not in fact make use of the letter of marque for the purpose of cruising, or intend so to do, but merely took it on board for the purpose of cruising on the voyage home. *Denison* v. *Modigliani*, 5 Term Rep. 580.

The assured upon a trading voyage, taking out a letter of marque (but without a certificate, which was necessary to its validity), unknown to the underwriters, solely with a view to encourage seamen to enter, and without any intention of using it for the purpose of cruising, though the vessel was armed for self-defence, is not such an alteration of circumstances as will avoid the policy. *Moss* v. *Byrom*, 6 Term Rep. 379 ; 3 R. R. 208.

Voyage primâ facie Legal.]—Where a policy does not appear on the face of it to be legal, the court will not grant a new trial in order to let the defendant into proof that it was so. Quære, whether trading with an enemy and insurance of an enemy's goods are illegal. *Gist* v. *Mason*, 1 Term Rep. 88 ; 1 R. R. 154.

In an action upon a policy it will be presumed that the ship complied with the law, as to sailing with convoy, until the contrary is proved. *Thornton* v. *Lance*, 4 Camp. 231.

Sailing Contrary to Embargo.]—Policy on neutral ship engaged, contrary to embargo, in supplying provisions West Indies, held invalid. *Dalmady* v. *Motteux*, 1 Term Rep. 89, n. ; 1 R. R. 155, n.

Navigation Laws — Illegality.]—A Swedish ship insured at and from a loading port in the West Indies to Gottenburg, took in part of her cargo at a British West Indian port :—Held, that the assured could not recover, the voyage being illegal under the navigation laws. *Chalmers* v. *Bell*, 3 Bos. & P. 604.

Policy on a ship engaged in trade to the west coast of America without South Sea licence held void, notwithstanding 45 Geo. 3, c. 34, repealing the navigation act as to foreign-built ships. *Dunlop* v. *Gill*, 1 B. & Ald. 334.

Where a British subject, purchasing by the king's licence a hostile-built vessel, which was not entitled or required to have a British register, chartered her on a voyage out to the Azores and home, and sent her to sea with a crew in which there was not the proportion of British mariners required by 12 Car. 2, c. 18, s. 14, this did not avoid a policy on the outward part of the voyage. Nor was it an objection to the same policy, that she was foreign built ; for the 49 Geo. 3, c. 60, s. 1, authorised the ships of any country in amity, by the king's licence, to bring foreign produce to England, though not English built or registered, contrary to the 12 Car. 2, c. 18, ss. 3 & 10, and that a ship purchased by a British subject from an enemy with licence, was the ship of a country in amity. *Sewell* v. *Royal Exchange Assurance Co.*, 4 Taunt. 856.

It was illegal to export manufactures, the produce of Europe, from the Cape of Good Hope to any port to the eastward in his majesty's possessions under 15 Car. 2, c. 7, s. 6. *Gray* v. *Lloyd*, 4 Taunt. 136.

The 3 & 4 Will. 4, c. 54, did not prohibit the importation for home consumption (except in British vessels) of any goods the produce of Europe, excepting those specifically enumerated in s. 2. *Thomson* v. *Irving*, 7 M. & W. 367 ; 10 L. J., Ex. 98 ; 5 Jur. 103.

The navigation laws were not binding on the crown so as to prevent transportation of public stores from one colony to another. *The Swift*, 1 Dods. 320.

Illegality as to Part of Goods.]—Where a party insured to a certain amount, in one policy, goods to be thereafter specified, and in the specifications afterwards made by him were included some goods, the exportation of which was prohibited under pain of forfeiting the goods themselves and treble their value, and which also induced the forfeiture of the ship—the policy was avoided in toto. *Parkin* v. *Dick*, 11 East, 502 ; 2 Camp. 221 ; 11 R. R. 258.

Crew not British.]—The assured can recover upon a ship policy although the ship had not on board the number of British seamen required by 6 Geo. 4, c. 109, and although no certificate of inability to procure them was obtained. *Suart* v. *Powell*, 1 B. & Ad. 266 ; 8 L. J. (o.s.) K. B. 391.

Voyage Contrary to Statutes.]—An assurance of a voyage expressly prohibited by the laws of this country is void. *Johnston* v. *Sutton*, 1 Dougl. 254.

Non-certificated Master — Slave Trade.]—Action on policy. Defence that the master of

the ship, a slave ship, was not certificated in accordance with 31 Geo, 3, c. 54, s. 7. Nonsuit upon proof of want of certificate. *Farmer* v. *Legg*, 7 Term Rep. 186.

Voyage legal by Licence — Expiration of Licence before Voyage ended.]—Insurance on voyage made legal by licence:—Held, valid, although the time specified in the licence had expired. *Schroeder* v. *Vaux*, 15 East, 52; 13 R. R. 758, n.

Licence to G. F. & Co. of London, merchants, on behalf of themselves and others to export on board a ship named, bearing any flag except the French, to a hostile port and to import from thence specified goods, notwithstanding all the documents may represent the ship to be destined to a neutral or hostile port, and to whomsoever such property may appear to belong authorises an enemy, subject of the hostile country to which the ship is licensed legally to export from London, and insurance on such a voyage by his agent here is lawful, and recovery may be had on the policy for a loss occasioned by the act of the trader's own state. *Flindt* v. *Scott*, *Flindt* v. *Crokatt*, 5 Taunt. 674; 15 R. R. 615.

Licence to export to Baltic though not legalising exportation of goods of Russian enemies afterwards seized by the Russian government, enables plaintiff to recover on policy in respect of goods exported by himself and neutrals. *Hagedorn* v. *Bazett*, 2 M. & S. 100.

Licence to export, a certain proportion of the goods to be British:—Held, that exportation of a majority of Spanish goods was in fraud of the licence. *Gordon* v. *Vaughan*, 12 East, 302, note.

Licence applied to ship and voyage sufficient proof of legality without connecting it with plaintiff. *Butler* v. *Allnutt*, 1 Stark. 223.

Where a ship, bound to Cagliari, with liberty to touch, unload, and load at Gibraltar, sailed with a licence to Gibraltar only, arrived there, and departed without obtaining an extension of the licence from the person authorised to grant licences at Gibraltar:—Held, that an insurance on goods from London to Cagliari was void. *Darby* v. *Newton*, 2 Marsh. 252; 6 Taunt. 544.

A ship was permitted by a licence to proceed from D. to L., and thence to B., there to load to the port of destination from which she departed. The vessel proceeded on her voyage from D. to L., and from L. to B.:—Held, that she was not protected by the licence on a further voyage from B. to L. *Everth* v. *Tunno*, 1 B. & Ald. 142; 1 Stark. 508.

Action on policy on gunpowder at and from London to Pernambuco. A licence to export gunpowder had been granted to A. B., the manufacturer, upon condition that the exporter should give certain security. A. B. sold the gunpowder to C. D., and contracted to deliver it on board ship:—Held, that the licence was not complied with by A. B. giving the security mentioned, and that the plaintiff could not recover on the policy. *Camelo* v. *Britten*, 4 B. & Ald. 184.

Licence to Trade — Wrong Description of Grantee.]—A wrong description of the person to whom a licence to trade with the enemy is granted avoids it; and a policy on his goods is void. *Klingender* v. *Bond*, 14 East, 484; 13 R. R. 292.

Duration of Licence.]—A licence was granted to the plaintiff to take a cargo from London to Archangel, and to return thence with grain or other lawful goods, and the licence was limited to 29th September, and afterwards extended to 1st January, 1811. The ship took in a cargo of pitch at Archangel, and started for home, but was driven back by weather to Archangel, where the pitch was sold and the ship laid up for the winter. In August, 1811, she took on board a cargo of wheat and sailed for home:—Held, that the licence covered the voyage with the wheat cargo and that the underwriters were liable for a loss on that voyage. *Siffken* v. *Allnutt*, 1 M. & S. 39.

Voyage legal in Commencement may be legal after Licence Expired.]—A voyage legal in its commencement by a licence for four months which expire during the voyage may be legal throughout, if by special circumstances the voyage is protracted; but the assured must prove the special circumstances. *Leevin* v. *Cormac*, 4 Taunt. 483, n.

Licence obtained by Fraud.]—An admiralty licence obtained for a ship to sail without convoy, describing her as bound on a voyage to Gibraltar, when in fact she sailed hence with instructions to make the best of her way direct to Palermo, without touching at Gibraltar, unless ordered into the bay by any cruisers which she might meet in passing by it, is fraudulent and void, and will not legalise an insurance by the charterer of such ship sailing without convoy, upon goods put on board and insured from hence to Palermo, with liberty to proceed to any ports to seek convoy. *Ingham* v. *Agnew*, 15 East, 517; 13 R. R. 516.

Plaintiff an Alien Enemy.]—Action on ship policy; plea that plaintiff is an alien enemy; replication that plaintiff is resident in the country by the king's licence. The replication is not supported by proof of a licence during peace to trade to a foreign country and back to England, war having broken out before the end of the voyage, and the plaintiff went about in this country without molestation. *Boulton* v. *Dobree*, 2 Camp. 162.

Trading with Enemy.]—The plaintiff, a British born subject, domiciled in America, effected a policy on ship freight and goods from Virginia to any Baltic port. The ship was captured on her voyage to Elsinore, in Denmark, then in amity with America, but at war with England:—Held, that the plaintiff could recover. *Bell* v. *Reid*, *Bell* v. *Butler*, 1 M. & S. 726; 14 R. R. 557.

Trading to ports in Hayti, a French colony partly emancipated from France, then at war with England, the ports in question not being under the dominion of France:—Held, legal, and recovery had upon a policy on cargo. *Blackburn* v. *Thompson*, 3 Camp. 61; 13 R. R. 382.

Trade with Enemy — Insurance of Enemy's Ship.]—Semble, all trading with enemies is not unlawful; nor is insurance of enemies' ships during war. *Henkle* v. *Royal Exchange Assurance Co.*, 1 Ves. Sen. 317.

Recovery on Policy by one who became Enemy after the Loss.]—The British agent effecting a policy on behalf of alien enemies, who became enemies after the loss but before action

brought, is entitled to recover against the underwriter, who had only pleaded the general issue. *Flindt* v. *Waters*, 15 East, 260 ; 3 R. R. 457.

Convoy Act.] — To vacate a policy for an infraction of the Convoy Act, 43 Geo. 3, c. 57, it was not enough to shew that the ship sailed without convoy by the instrumentality of agent of the assured, unless it appeared that the agent had authority from his principal for this purpose. *Carstairs* v. *Alnutt*, 3 Camp. 497.

And it was necessary to prove that it happened with the privity of the owner. *Metcalf* v. *Parry*, 4 Camp. 125 ; 15 R. R. 734.

Every person who shipped goods on board a vessel which sailed without convoy, did it at his own peril of her having a sufficient licence for the whole of the voyage, without which all insurances on his goods were void, by 43 Geo. 3, c. 57. *Wainhouse* v. *Cowie*, 4 Taunt, 178.

In order to shew that a voyage without convoy from a foreign port was illegal, it was incumbent on the underwriter to prove that there was convoy occasionally appointed from that port, or some one resident there authorised to grant licences to sail without convoy. *Wake* v. *Atty*, 4 Taunt. 493 ; 13 R. R. 660.

Omission to Sign Manifest.]—Omission to sign manifest in accordance with 26 Geo. 3, c. 40, s. 1, held to make the whole voyage illegal. *Freard* v. *Dawson*, Marsh. Ins. (4th ed.) 136.

Breach of Revenue Laws of Foreign Country.] —A voyage is not illegal because it infringes the revenue laws of the foreign country. Per Mansfield, C.J. *Lever* v. *Fletcher*, 1 Park, Ins. (8th ed.) 506.

And see XIII. PREMIUMS, 1. RETURN OF, post, cols. 1303, seq.

2. SIMULATED PAPERS.

Leave to Carry.]—A ship not having leave to carry simulated papers, although without such she would certainly have been seized and condemned as coming from an enemy's country, the underwriters were not liable for a loss which ensued from the act of the assured himself. *Horneyer* v. *Lushington*, 15 East, 46 ; 3 Camp. 85 ; 13 R. R. 759.

An assured upon a policy on ship, not having leave to carry simulated papers, cannot recover for a loss by capture ; if it appears by the sentence of the foreign prize court that one of the causes stated for the condemnation was the carrying of simulated papers. *Oswell* v. *Vigney*, 15 East, 70 ; 13 R. R. 375.

American goods in an American ship having been insured on a voyage from America to the Baltic, with liberty to carry simulated papers, and the ship having been captured and condemned by a Danish sentence, which, after suggesting a doubt as to the English character of the owner, stated that the documents rendered it impossible to acknowledge the ship and cargo as neutral ; and the court of appeal, afterwards alleging as grounds of confirmation, first, that the documents were not in due order ; that the sea-letter was informal, and no credit could be given to it as a public document ; secondly, that the ship had false documents ; thirdly, that the documents disagreed with regard to their contents ; fourthly, that a person on board who seemed to be interested in the ship and cargo, had been set on shore in England ; fifthly, that false French certificates d'origine were found on board :—Held, that, taking the whole together, the ground of condemnation was the having on board simulated papers, which, with other circumstances, led to the conclusion that the ship and cargo were hostile British and not neutral American property ; and the not having a sea-passport on board, verified in the manner stated in the sentence, was only a circumstance to shew that the ship carried simulated papers ; even if such a passport was required by any treaty between the United States and Denmark, which did not appear ; and consequently, that the loss was attributable to a cause which the underwriter had sanctioned by the leave to carry simulated papers ; and not from the ship's not being properly documented, as an American ship, for which the assured, as owner of the ship, as well as of the goods insured, would have been answerable ; neither was the condemnation bad, on the ground that the papers had not been properly simulated, so as to attribute the loss to the mere negligence of the assured in the mode of exercising the liberty reserved to them, supposing that would have varied the case. *Bell* v. *Bromfield*, 15 East, 364.

Policy on ships and goods at and from London to any ports in the Baltic, with liberty to carry simulated papers and clearances, and until safely warehoused in the warehouses of the consignees, at the port of discharge, at forty guineas per cent. premium :—Held, that the underwriter was liable for a loss arising from confiscation by the Prussian government, notwithstanding the persons in whom the interest was averred were Prussian subjects, Prussia not being at war with this country ; it being found that, at the time of effecting the policy, all direct commerce between this country and the ports in the Baltic was prohibited by the powers possessing ports there ; but that, notwithstanding, an extensive course of commerce was carried on between this country and those parts by means of simulated papers and clearances, which was well known to all descriptions of persons, such as plaintiffs and defendants. *Simeon* v. *Bazett*, 2 M. & S. 94.

Negligence of Insurance Brokers.]—Insurance brokers are not liable to an action for neglecting to insert in a policy a liberty to carry simulated papers, if the written instructions given them contain no direction for that purpose, although it may have been verbally communicated to them that simulated papers were to be used in the voyage. *Fomin* v. *Oswell*, 3 Camp. 357.

Condemnation of Ship.]—False papers for the purpose of protecting contraband goods by a false destination are cause of condemnation of the ship. *The Edward*, 4 C. Rob. 68.

3. CLEARANCE.

Goods Shipped after.]—It is no objection to the assured on goods recovering for a loss by a peril within the policy, that, after the captain had obtained his manifest and custom-house clearances, as required by 13 & 14 Car. 2, c. 11, s. 3, goods of the assured were put on board by the packer, who had previously made all the necessary entries at the custom-house. *Carruthers* v. *Gray*, 15 East, 35 ; 3 Camp. 142.

4. Deck Cargo.

Privity of Owner Insuring.]—A master of a ship, whose cargo consists of timber and wood goods, clearing out and sailing from a British port of North America for a port in the United Kingdom, with part of the cargo on deck, in violation of the 16 & 17 Vict. c. 107, ss. 170, 171, 172, does not vitiate a policy by the owner of the ship and cargo, unless at the time of the insurance he was privy to the act. *Wilson* v. *Rankin*, 35 L. J., Q. B. 87; L. R. 1 Q. B. 162; 13 L. T. 564; 14 W. R. 198—Ex. Ch.

What are.]—Where on such a voyage the whole of the cargo on freight is stowed below deck, but the captain took on deck a quantity of spars and other articles for the owner with the object of saving expense, in obtaining the materials necessary for refitting the vessel after the voyage, it is a violation of the statute. *Ib.*

Illegality of Whole Voyage.]—A ship sailing upon such a voyage without having obtained a certificate of having cleared out with no cargo on deck is not a statutory unseaworthiness. *Wilson* v. *Rankin*, supra.

By 16 & 17 Vict. c. 107, s. 170, before any clearing officer permits any ship, wholly or in part laden with timber, to clear out from any British port in North America after the 1st September and before the 1st May, he shall ascertain that the whole of the cargo is below deck, and give the master a certificate to that effect. By s. 172, the master shall not sail without such certificate, or place or permit to be upon the deck any part of the cargo, under a penalty of 100*l.* In an action upon a policy of insurance on the cargo and freight:—Held, that a plea that the master had acted in contravention of s. 172, "as the plaintiff well knew before and at the time of loading and of sailing," was no answer, inasmuch as the statute did not by reason thereof make the voyage illegal, and the plea did not shew privity and consent of the plaintiff. *Cunard* v. *Hyde*, El. Bl. & El. 670; 27 L. J., Q. B. 408; 5 Jur. (N.S.) 40.

After 1st September, 1856, orders were given for an insurance on cargo and freight by a ship from a port in North America to a port in the United Kingdom, and the insurance was effected thereupon. Both when the orders were given and when the insurance was effected, it was known to the persons interested in the cargo and freight, and who gave the orders, that much of the cargo was loaded on deck; they intended the ship to sail, so laden, from Miramichi for the United Kingdom before 1st May, 1857; and they ordered the insurance to be effected with an express purpose to cover the whole cargo and freight, including the portion of cargo above deck. On the 10th September, 1856, the ship sailed on the voyage insured, deck laden, and without a certificate to the master from the clearing officer, and the cargo was totally lost:—Held, that the whole voyage was illegal; that the illegality vitiated the insurance with respect to the whole cargo, not merely as to so much of it as was loaded on deck; and that the assured, who were privy to the illegality, could recover nothing from the underwriters. *Cunard* v. *Hyde*, 2 El. & El. 1; 29 L. J., Q. B. 6; 6 Jur. (N.S.) 14.

In an action upon a policy the defendant pleaded that the fact that the ship insured was to carry a deck cargo was not disclosed, and it was contended that such concealment avoided the policy:—Held, that it did not avoid the policy entirely, but only as regarded the cargo carried on deck. *Clarkson* v. *Young*, 22 L. T. 41.

An insurance broker effected an open policy on a cargo of cotton on board the ship of his principal. It was intended to ship the cotton on board at the shipper's risk, which should have been expressed in the bill of lading, but by a mistake of the shipowners' agent in the foreign port at which the cotton was put on board, a clean bill of lading was given. On the voyage the vessel encountered heavy weather, and the cotton, owing to its being carried on deck, was compelled to be jettisoned. The broker gave notice to the insurance company of the loss, but other open policies having been effected with the same insurance company by the same shipowners for cotton shipped subsequently, and declarations having been made on these policies by the broker, although no declaration had been made in respect of the cotton that had been lost, he, on discovering that a mistake had been made, and that, contrary to his instructions, a clean bill of lading had been given instead of one expressing that the cotton was shipped at the shipper's risk, altered the declarations on the policies by substituting for certain cotton therein the cotton which had been jettisoned:—Held, that the shipowners being liable for the loss of the goods by jettison through their being carried on deck, had an insurable interest in respect of which they, and therefore their agent, were entitled to recover. *Stephens* v. *Australasian Ins. Co.*, 42 L. J., C. P. 12; L. R. 8 C. P. 18; 27 L. T. 585; 21 W. R. 228; 1 Asp. M. C. 458.

Held, also, that in the absence of proof of fraudulent intent, the assured's right to recover was not prejudiced by his having altered the declaration even after loss, a usage to that effect having been proved to exist, and which the court would not pronounce to be unreasonable. *Ib.*

5. Hostile Ports.

Legality.]—A policy to any port or ports in the Baltic was legal, though some of those ports were then in a state of war with this country, and though no licence had been obtained, provided the ship was not sailing to a hostile port. *Wright* v. *Welbie*, 1 Chit. 49; 22 R. R. 792.

A policy is not vitiated by giving leave to the ship to proceed to any port in a particular sea, in which there are both hostile and neutral ports, unless it can be shewn that it was intended the ship should, in fact, proceed to one of the former. *Muller* v. *Thompson*, 2 Camp. 610; 12 R. R. 753.

An order of council permitting the consignee of goods coming from an enemy's country, without a licence, to land them here on condition of immediately re-exporting them, does not so legalise the voyage as to enable the master of a ship to recover his freight. *Muller* v. *Gernon*, 3 Taunt. 394.

Expected Hostilities.]—Insurance on provisions "from London to Helsinburgh, the Sound, Copenhagen, all or either"; which provisions were intended for the supply of the British fleet and army engaged in the expedition against Copenhagen, of which they were then in possession, but were about to evacuate it, and were consigned to merchants there and at Elsinore—was good; although, in consequence of expected hostilities with Denmark, an order of the king

in council had issued, prohibiting the clearing out of any British ships to a Danish port, and a clearance was in consequence taken out for Helsinburgh, a Swedish and neutral port in the neighbourhood of Denmark, the adventure being legal, and not contravening the spirit of the order of council. *Atkinson* v. *Abbott*, 11 East, 135; 1 Camp. 535.

Evidence.]—A licence to sail to a hostile port is primâ facie evidence that when a ship left her port of outfit she sailed upon the voyage insured. *Marshall* v. *Parker*, 2 Camp. 69; 11 R. R. 665.

Illegality—Onus on Defendant to Prove.]—If an insurance is made to a port or ports within a district of which part is hostile and part neutral, the presumption is that a neutral port was intended. *Anon.*, 1 Chit. 53.

6. Ports under Embargo.

Voyage to, Illegal.]—A voyage contrary to the regulations of an embargo laid on ports by the king in time of war is illegal, and cannot be the subject of a policy. *Delmada* v. *Motteux*, 1 Term Rep. 85, n.

Knowledge of Blockade.]—A policy on goods from Liverpool to any port in the river Plata was effected, after notification in the "London Gazette" that such ports were blockaded. The ship, after such notification, sailed from Liverpool, and was taken:—Held, that the voyage insured was not illegal, as the vessel might sail for Buenos Ayres without contravening the laws of nations for the purpose of inquiring whether the blockade continued. *Naylor* v. *Taylor*, 4 M. & Ry. 526; 9 B. & C. 718.

A ship was destined to a port which was notified to be under blockade:—Held, that the voyage was not illegal in its inception, as the vessel might have sailed for the purpose of inquiring whether the blockade existed. *Dalgleish* v. *Hodgson*, 5 M. & P. 407; 7 Bing. 495; 9 L. J. (O.S.) C. P. 138.

If a ship, the cargo of which is insured, sails from a British port, and notice is afterwards given in the Gazette that the foreign port to which she is bound is blockaded, it is a question of fact for the jury, in an action upon the policy, the ship having been captured, whether the captain knew of the blockade or not. *Harratt* v. *Wise*, 4 M. & Ry. 521; 9 B. & C. 712; 7 L. J. (O.S.) K. B. 309.

7. Neutral Trading.

Documents.]—A neutral vessel is not seaworthy, unless she is provided with documents to prove her neutrality. *Steel* v. *Lacy*, 3 Taunt. 285; 12 R. R. 658.

Receiving Contraband.]—If a neutral, in consequence of an agreement made in England, meets a British vessel abroad, for the purpose of receiving gunpowder and arms, the voyage of the neutral is thereby rendered illegal and incapable of insurance, though the British vessel has had a licence to export such articles for the purposes of trade. *Gibson* v. *Service*, 1 Marsh. 119; 5 Taunt. 433; 15 R. R. 541. S. P., *Gibson* v. *Mair*, 1 Marsh. 39; 15 R. R. 668.

—— **Carrying to Hostile Country.**]—It is no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country; the voyage and commerce not being of a hostile description, nor otherwise expressly or impliedly forbidden by the law or policy of this country; though the neutral thereby subjects his ship to be detained and carried into a British port for the purpose of search; and therefore a British underwriter after condemnation of the enemy's goods found on board, and liberation of the ship and the rest of the cargo, is liable to the neutral owner of goods insured in the same ship, whose voyage was so interrupted, either as for a total loss, if notice of abandonment upon the loss of the voyage is given in reasonable time, or for an average loss, if such notice is given out of time. *Barker* v. *Blakes*, 9 East, 283; 9 R. R. 558.

Declaration on a policy on goods from London to Matamoras, alleging a loss in the course of the voyage by a peril insured against. A plea, that the goods were contraband of war, and were shipped for the purpose of being sent to and imported into a port in a state engaged in hostilities, and were liable to be seized by the cruisers of a state at war with that state as contraband of war; and that the ship was carrying goods and papers which rendered her liable to seizure by such cruisers, and that the ship and goods were seized accordingly; which is the loss complained of; of all which the defendant, at the time of subscribing the policy, was wholly ignorant:—Held, that the plea was no defence to the action; that the plea did not deny that the goods were sent from a neutral port to a neutral port in a neutral ship; that the allegation that the ultimate destination of the goods was an enemy's port was an allegation of a mental process only; and that the allegation that the ship was carrying goods and papers which made her liable to seizure was immaterial, it not being alleged that the goods were the plaintiff's goods, or that the plaintiff was in any way responsible for the ship's papers. *Hobbs* v. *Henning*, 17 C. B. (N.S.) 791; 34 L. J., C. P. 117; 11 Jur. (N.S.) 223; 12 L. T. 205; 13 W. R. 431.

A policy contained a warranty against contraband. Part of the goods consisted of artillery harness, and were shipped during a war between the United States of America and the Confederate States, with the intention of sending them on from a neutral port to the Confederate States:—Held, that such goods were contraband of war and that the whole insurance was void. *Seymour* v. *London and Provincial Marine Insurance Co.*, 41 L. J., C. P. 193; 27 L. T. 417; 1 Asp. M. C. 423.

Neutral Goods to Hostile or Neutral Port.]—Semble, that an insurance on goods, the property of a neutral, to a port occupied by the enemy, is void. But though a neutral should himself be resident in a place occupied by the enemy, an insurance on goods (his property) to a neutral or friendly port, is valid. *Bromley* v. *Hesseltine*, 1 Camp. 75; 10 R. R. 635.

Confiscation by Neutral Government.]—A neutral insuring against all risks until safely warehoused in the warehouse of the consignee, an adventure, in furtherance of the objects of British commerce, was protected by the policy against confiscation by the act of his own government under the Berlin and Milan decrees. *Bazett* v. *Meyer*, 5 Taunt. 824.

Two neutral Prussians, one of them resident

in England, the other at Königsberg, having a licence to export to all Baltic ports, some whereof were hostile, were not precluded from recovering on an insurance on goods exported, and confiscated by an act of the Prussian government, then neutral. *Anthony* v. *Moline*, 5 Taunt. 711.

Policy covering Illegal Adventure.]—If a policy is in its language large enough to comprise an illegal adventure, the underwriter is not entitled to sue for the premium; therefore, where a broker effected a policy with the plaintiff on goods on board a Spanish ship, at and from New Orleans and Pensacola, both or either, to her port of discharge in the United Kingdom, with a memorandum of receipt of the premium from P. (a merchant in London), which policy was on behalf of a Spanish merchant at Vera Cruz, and at the time of effecting it New Orleans belonged to the Americans, who were at war with this country, and Pensacola to the Spaniards, who were neutrals; and the object of the assured was to cover an importation of cotton wool in Spanish ships from New Orleans to Great Britain:—Held, that the underwriter could not recover from the broker the premium, inasmuch as such adventure from New Orleans with cotton wool was illegal; and if the plaintiff intended to protect it, his subscription was illegal; and if he did not, it was void. *Jenkins* v. *Power*, 6 M. & S. 282; 18 R. R. 375.

Colonial Trade of Enemy.]—Carrying on, by neutral, the colonial trade of the enemy, is illegal. *The Maria*, 5 C. Rob. 365.

8. Abandonment of Voyage.

Unreasonable Delay.]—Mere length of time elapsed between the signing of the policy and the sailing is not sufficient to avoid a policy; it is matter of evidence to be left to the jury, if such a time has elapsed as amounts to an abandonment. *Grant* v. *King*, 4 Esp. 275; 6 R. R. 849.

Though unnecessary delay may avoid a policy, that will not be deemed so which is employed in necessary repairs, if the policy is "at and from the place." *Smith* v. *Surridge*, 4 Esp. 25; 6 R. R. 837.

The defendant underwrote a policy on a pleasure yacht, on the 25th January, "at and from Bristol to London." The vessel was not got ready for sea until the 17th May:—Held, that this, if unaccounted for, was an unreasonable delay on the part of the insured. *Palmer* v. *Fenning*, 9 Bing. 460; 2 M. & Scott, 624.

—— **Variation of Risk.**]—A defendant executed, 28th February, 1824, a policy on freight from Singapore to Europe, with liberty to sail to, touch, and stay at any places whatsoever to load, unload, reload, and for all necessary purposes whatever. The ship sailed from London in September, 1823, and having been detained by the captain for his own purposes at Van Diemen's Land, did not arrive at Singapore till the 30th March, 1825; she sailed thence on the voyage insured, on the 3rd May, 1825:—Held, that by so long a postponement of the risk, the defendant was discharged, a jury having found the delay unreasonable. *Mount* v. *Larkins*, 8 Bing. 108; 1 M. & Scott, 165; 1 L. J., C. P. 20.

Insurance on a voyage from A. to B., from B. to C., and from C. to A.; the voyage from A. to B. was performed, but that from B. to C. being unavoidably prevented, the ship returned to A., where the captain wrote to his broker in London, requesting him to obtain the opinion of the underwriters as to his proceeding directly to C., if the charterer should insist upon it; and was answered by him that he thought the policy at an end; at the instance of the charterer the captain did proceed to C., and on his return from thence to A. the ship was captured:—Held, that the voyage insured was never abandoned. *Driscol* v. *Bovil*, 1 Bos. & P. 313.

A determination made by an agent duly authorised, not to sail upon the voyage insured, but upon a different voyage, is an abandonment of such voyage, and discharges the underwriters. *Tasker* v. *Cunningham*, 1 Bligh, 87; 20 R. R. 33.

A policy on a ship at and from Bristol to London attaches during the vessel's stay at Bristol; therefore, when the assured did not sail till three months after the execution of the policy:—Held, that the delay was a material variation of the risk, and avoided the policy. *Palmer* v. *Marshall*, 8 Bing. 79, 317; 1 M. & Scott, 161, 454; 1 L. J., C. P. 19.

The underwriters on a policy are not discharged by an act on the part of the assured, which to a certain degree increases the risk, if it does not amount to culpable negligence. *Toulmin* v. *Inglis*, 1 Camp. 421; 10 R. R. 715.

In an action on a policy it appeared that the ship stayed at a particular place for a period of 109 days, and whether this was an unreasonable time is a question of fact for the jury. *Bain* v. *Case*, 3 Car. & P. 496; M. & M. 262.

IX. DEVIATION.

1. *Generally*, 1212.
2. *Stress of Weather*, 1215.
3. *Hostile Ports*, 1215.
4. *Restraint*, 1216.
5. *Trading*, 1217.
6. *Liberty to Touch at Ports*, 1219.
7. *Seeking Convoy*, 1223.
8. *Cruising*, 1223.

1. Generally.

Intention.]—A mere intention to deviate, not effected, will not vitiate the policy. *Kewley* v. *Ryan*, 2 H. Bl. 343; 3 R. R. 408.

And an intention to deviate, if the ship is taken before the dividing point, does not vacate the policy. *Thellusson* v. *Fergusson*, 1 Dougl. 361.

Goods were insured from Heligoland to Memel, with liberty to touch at any ports and to seek, join and exchange convoy; warranted free from capture in the port of Memel. The ship sailed with orders to go to Gottenburg to get orders for Anholt or Memel, and was captured on her passage to Gottenburg, which is in the track either for Anholt or Memel:—Held, that this was to be considered as a voyage to Memel, and that the risk had attached; and that the mere intention to deviate which did not avoid the policy; and that the underwriter was liable. *Heselton* v. *Allnutt*, 1 M. & S. 46.

Intention to deviate does not avoid the policy, when the loss is before deviation. *Kingston* v. *Phelps*, cited, 7 Term Rep. 165.

What Voyage.]—If a ship insured for one voyage sails upon another, though she is taken before the dividing point of the two voyages, the

policy is discharged. *Wooldridge* v. *Boydell*, 1 Dougl. 16.

If the voyage described in a policy is "from A. to B. and C." and the ship goes to C. before B. (though C. is nearer to A. than B. is), it is a deviation, and the plaintiff cannot recover for any subsequent loss, if it is not the regular and settled course of the voyage to go to C. first. *Beatson* v. *Haworth*, 6 Term Rep. 533; 3 R. R. 258.

In an action on a voyage policy of insurance, it was proved that the loss occurred in the course of a voyage which was only collateral to, and not necessarily incident to, the voyage described in the policy:—Held, that the assured was not entitled to recover. *Wingate* v. *Foster*, 47 L. J., Q. B. 525; 3 Q. B. D. 582; 38 L. T. 737; 26 W. R. 650; 3 Asp. M. C. 598—C. A.

Premature Sailing.]—If a ship, insured from a certain time, sails before the time on a different voyage from that insured, the assured cannot recover though she afterwards gets into the course of the voyage described in the policy, and is lost after the day upon which the policy was to have attached. *Way* v. *Modigliani*, 2 Term Rep. 30; 1 R. R. 412.

Calling for Pass.]—Policy on goods for a voyage from Dunkirk to Leghorn. The ship called at Dover for a Mediterranean pass:—Held, a deviation. *Townson* v. *Guyon*, 2 Park, Ins. (8th ed.) 620.

Putting into Port on Voyage.]—A ship on a voyage from Dartmouth to Liverpool put into Looe, which she must necessarily pass on the voyage, and was afterwards lost at sea:—Held, a deviation, and underwriter not liable. *Fox* v. *Black*, 2 Park, Ins. (8th ed.) 620.

Necessity.]—A ship insured from A. to B., sailed with intent to touch at C., an intermediate point; to a certain point the voyage was the same, from that point there were three tracks to B., one by the way of C., the two others by different courses; there were advantages and disadvantages attending each, and the captain must elect according to circumstances. The ship took the track by C., with intent to put in there, but was taken before she actually came to the point where she must have turned out of the track to B., by the way of C., for the purpose of putting into the harbour of C., yet the underwriter was discharged, because he was entitled to the advantages of the captain's judgment in electing which of the three tracks it was best to pursue when he came to the first dividing point. *Middlewood* v. *Blakes*, 7 Term Rep. 162; 4 R. R. 405.

If an insured ship quits the courses described in the policy, from necessity, she must pursue such new voyage of necessity in the direct course and in the shortest time, otherwise the underwriters will be discharged. *Lavabre* v. *Wilson*, 1 Dougl. 284.

Implied Contract.]—The law implies a contract by the owner of a vessel, whether a general ship, or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course. *Davis* v. *Garrett*, 4 M. & P. 540; 6 Bing. 716; 8 L. J. (O.S.) C. P. 253.

For Necessary Repairs.]—If a ship needs repairs and goes to the nearest port for that purpose this is not deviation. *Motteux* v. *London Assurance* (*Governor, &c. of*), 1 Atk. 545.

Where a ship in distress put into a port to refit and took in 500 rolls of tobacco for ballast:—Held, not a deviation to avoid the policy. *Guibert* v. *Readhaw*, 2 Park, Ins. (8th ed.) 637.

Policy determined by.]—A wilful deviation in the course of the voyage insured determines the policy; for a loss after the deviation from whatever cause, the insurers are not liable. *Elliot* v. *Wilson*, 4 Brown, P. C. 470.

Partial Loss before Deviation.]—If a loss happens before deviation, the assured shall recover; for the policy is discharged from the deviation only. *Green* v. *Young*, 2 Salk. 444. S. P., *Carter* v. *Royal Exchange Assurance Co.*, cited 2 Str. 1249.

Coming back on Voyage Insured after Deviation.]—A ship insured "from London to her port of discharge within the Straits as high as Messina" sailed for Marseilles, but with instructions to go also to Genoa, Leghorn and Naples. On arriving off Marseilles, the wind was foul for going in, and she went on to Genoa and Leghorn, and was on her way from there back to Marseilles when she was captured. It was found by the jury that the going no further up the Mediterranean than Leghorn was a deviation, and that the insurance was determined at Leghorn. *Clason* v. *Simmonds*, 6 Term Rep. 533, n.; 3 R. R. 260.

Delay.]—A ship from Stockholm to New York was by the course of the voyage to touch at Elsinore for convoy and to pay Sound dues; and the owner of sheep on board took a short stock of provinder for them at Stockholm and laid in the rest at Elsinore before the Sound dues could be paid:—Held, that the policy was not avoided, the voyage not having been delayed; and that the underwriters were liable for a subsequent loss. *Cormack* v. *Gladstone*, 11 East. 347; 10 R. R. 518. And see *Parkinson* v. *Collier*, post, col. 1219.

Goods shipped during the Voyage.]—Goods were insured "at and from G. to a port or ports in the Baltic, with liberty in case of non-admittance to unload at Carlshawn." After the ship had sailed with convoy and while she was lying in a roadstead under orders of the convoy, she took on board some goods which were no part of the original cargo. They were put on board without delay to the ship:—Held, no deviation. *Laroche* v. *Oswin*, 12 East, 131; 11 R. R. 337.

Ship employed as Receiving-ship for Slaves.]—Insurance on ship at and from the coast of Africa to the West Indies, with liberty to exchange goods for slaves. The ship stayed on the coast of Africa several months, and was employed as a receiving-ship for slaves, who were afterwards put on board other ships, being employed as a factory ship:—Held, that this was a deviation. *Hartley* v. *Buggin*, 3 Dougl. 39.

Master compelled by Crew to deviate.]—If the master is forced by the crew to go out of his course, that is not deviation to avoid the policy; nor is it barratry. *Eton* v. *Brogden* 2 Str. 1264.

Knowledge of Deviation by the Underwriter.]—*Gourock Ropework Co.* v. *Fleming*, 5 Ct. of Sess. Cas. (3rd ser.) 501.

2. Stress of Weather.

If a ship is driven out of her loading port into another port, and being there she does the best she can to get to her port of destination, she is not obliged to return to the port whence she was driven. Neither is it a deviation if she completes her lading at the port into which she was driven. Such a deviation may à fortiori be justified under a custom. *Delaney* v. *Stoddart*, 1 Term Rep. 22; 1 R. R. 139.

Where the captain, being delayed by adverse winds and danger, puts into a place of safety in his course, and sends ashore for provisions, it is not a deviation. *Thomas* v. *Royal Exchange Assurance Co.*, 1 Price, 195.

If a ship is forced by stress of weather into any port, she is not protected in breaking bulk while at such port; if she does, it avoids the policy. *Stitt* v. *Wardell*, 2 Esp. 610.

3. Hostile Ports.

When Driven away.]—If a ship insured, on arriving off her port of destination, is prevented from entering it by its being in the hands of the enemy, or by being ordered away by the English commander there, the policy does not remain in force till she reaches a port of safety. *Parkin* v. *Tunno*, 2 Camp. 59; 11 East, 92; 10 R. R. 422. And see *Neilson* v. *De La Cour*, 2 Esp. 619, and *Phelps* v. *Auldjo*, 2 Camp. 350; 11 R. R. 725, infra.

Embargo.]—If a ship with goods on board insured to a foreign port, learning, in the course of her voyage, that an embargo is there laid on all ships of her nation, waits at some place as near thereto as she safely can, till the embargo is removed, the goods will in the meantime be protected by the policy, while the voyage remains legal. *Blackenhagen* v. *London Assurance Co.*, 1 Camp. 454; 10 R. R. 729.

But if she might upon such an occasion put into a friendly port adjoining to her port of destination, and instead of doing so she sails back for her port of outfit, and is lost, she will be considered as having abandoned the voyage insured, and the underwriters will be discharged. *Ib.*

Final Port—Transhipment.]—Action on a policy upon goods on board the "P.," from Liverpool to Macao, Hong Kong, Canton and other ports in China, with leave to tranship and reship the goods on board the same or any other vessel, and with leave for the "P.," or other vessel on board of which the goods might have been transhipped, to proceed from any port in China, to any other port in China, and discharge at any or all of the said places, or remain at the same until it should be deemed expedient to proceed to the port of discharge, and continuing the risk until the goods should be arrived at their final port of destination. The premium was 5*l.* 5*s.* per cent., to return half if the ship discharged at a port in China in the usual course, the port being open. Plea, that whilst the "P." was lying at Hong Kong, it was determined by the agents of the assured that the goods should be finally discharged at Hong Kong; and thereupon the goods were discharged out of the "P." into another ship, appointed and used by them as a warehouse for receiving the goods; and that Hong Kong became the final place of destination of the "P.," and the goods were discharged at their final place of destination. The "P." was much injured by a storm on the voyage, and upon arrival at Macao, the consignees sent her to Hong Kong with the "J. L." which was chartered by them for the purpose of transhipping the cargo. On 21st July, 1841, whilst the cargo was in progress of transhipment, the "J. L." was wrecked, and all the goods on board of her were lost. There was no market at Hong Kong: the object of transhipping the goods was, in the first place, to examine them; in the next place to have them in a place of safety till they could be sent to Canton, or any other market. At that time there was great exasperation against the English. There had been no declaration of war by England against China. After the storming of Canton by the English, on the 24th of May, there was a suspension of hostilities. The English naval commander had no authority to prevent British ships going up to Canton, if they thought fit; they went at their own risk. In July, the "P." was advertised for England:—Held, that these facts did not prove that Hong Kong was made the final port of destination of the goods; that the voyage was not terminated by the transhipment, because it was within the terms of the policy; nor by the hostilities with the Chinese, because there would have been no infraction of British law in the "P." going to Canton. *Oliverson* v. *Brightman*, 8 Q. B. 781; 1 Car. & K. 360; 15 L. J., Q. B. 274; 10 Jur. 875.

In an action upon a similar policy upon other goods in the "P.," which did not give leave to tranship them, a case stated the same facts and evidence:—Held, that the transhipment was not necessary, and constituted a complete deviation not warranted by the policy. *Bold* v. *Rotheram*, 8 Q. B. 781; 1 Car. & K. 360; 15 L. J., Q. B. 274; 10 Jur. 875.

4. Restraint.

In what Cases.]—It is a deviation if the master leaves a port for a particular purpose, by the command of the captain of a king's ship lying there, without any remonstrance. *Phelps* v. *Auldjo*, 2 Camp. 350; 11 R. R. 725. And see *Parkin* v. *Tunno*, supra.

Policy on goods on board a particular ship from A. to B. "against sea risk and fire only"; in the course of the voyage from A. to B. the ship was carried out of the course of the voyage by a king's ship; but being afterwards released, she proceeded on the voyage insured, and while so proceeding the goods insured sustained sea-damage:—Held, that the underwriters were liable for this loss. *Scott* v. *Thompson*, 1 Bos. & P. (N.R.) 181. And see *Tait* v. *Levi*, 14 East, 481; 13 R. R. 289.

Fear of.]—A British ship insured from Hull to St. Petersburg, having sailed under convoy to the Sound, was afterwards stopped in her course by a king's ship in the Baltic, from an apprehension of hostilities, for eleven days, and then proceeded to a point of rendezvous for convoy, where she waited seven days longer, and then sailed under convoy, till the king's officer received intelligence that a hostile embargo was laid on British ships at St. Petersburg, when he ordered the fleet back to the rendezvous, from which place the ship returned to Hull:—Held, that this loss of the voyage was not attributable to the arrest or detainment of the king's officers; but immediately to the fear of the hostile embargo in the port of destination, and therefore

not within the policy; though, if the ship had not been detained in the first instance by the king's officers she would have arrived in time at St. Petersburg to have delivered her cargo before the embargo. *Forster* v. *Christie*, 11 East, 205; 10 R. R. 470.

6. TRADING.

What is.]—By the terms of a policy the insurance was expressed to be an insurance on a vessel and cargo "at and from Liverpool to the west and (or) south-west coast of Africa during her stay and trade therein and back to a port of call or (and) discharge in the United Kingdom." The premium was eight guineas per cent. on the value insured. Twenty per cent. of the premium was to be returned for the risk ending in ten months and forty per cent. for the risk ending in eight months; and there was written in the margin "held covered at 13*s.* 4*d.* per cent. per month if longer than twelve months out." The vessel having stayed a month on the African coast for the purpose of earning salvage, and having been damaged there, and afterwards stranded on her voyage home, the owner sued for a total loss:—Held, that the words "stay and trade" meant "stay for the purpose of trade"; and that—no evidence being given that staying for salvage purposes was staying for an ordinary purpose of the South-West African coast trade—the risk had been substantially varied, that there was in the absence of such evidence no question for the jury, and that the jury was properly directed to find for the underwriters. *African Merchants Co.* v. *British and Foreign Marine Ins. Co.*, 42 L. J., Ex. 60; L. R. 8 Ex. 154; 28 L. T. 233; 21 W. R. 484; 1 Asp. M. C. 588—Ex. Ch.

Implied Condition as to.]—It is not an implied condition in a common policy on ship and freight, that the ship shall not trade in the course of her voyage, if that may be done without deviation or delay, or otherwise increasing the risk of the insurers; and, therefore, where a ship was compelled in the course of her voyage to enter a port for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course by reason of a scarcity at her landing ports, and during her justifiable stay in the port so entered for that purpose, she took on board bullion there on freight, which the jury found did not occasion any delay in the voyage:—Held, not to avoid the policy. *Raine* v. *Bell*, 9 East, 195; 9 R. R. 533.

On a policy at and from London to New South Wales, and from thence to the ship's loading port or ports in the East Indies, and elsewhere, and that she might proceed and sail to, and touch and stay at any ports or places whatsoever and wheresoever and for any purpose whatsoever; the ship sailed from London with convicts to New South Wales, where, having discharged them, she proceeded in ballast to Batavia, where she took on board a quanity of iron, and discharged the same at Sourabaya, and was there loaded with a full cargo of rice, with which she proceeded to the Mauritius, where it was discovered that she had sustained an injury, and she was accordingly broken up:—Held, to be no deviation, although it was insisted that, by the terms of the policy, the ship was only warranted to go to her loading ports and not to trade or take in a fresh cargo. *Armet* v. *Innes*, 4 Moore, 150; 21 R. R. 737.

Policy on a ship "from London to New South Wales, and from thence to all parts and places in the East Indies or South America, with liberty to take in and land goods and passengers and to trade backwards and forwards, and forwards and backwards." On arriving at New South Wales the captain was ordered by his owners to proceed on a trading voyage to New Zealand, and thence direct to South America. He proceeded to New Zealand with passengers, and was returning from thence to New South Wales, when the ship was totally lost:—Held, that the sailing from New South Wales to New Zealand and back was a deviation from the voyage insured, by which the insurers were discharged. *Bottomley* v. *Bovill*, 7 D. & R. 702; 5 B. & C. 210; 4 L. J. (O.S.) K. B. 237; 29 R. R. 221.

Seeking a Cargo—Ports "from thence."]—Insurance on ship at and from Liverpool to ports and places in China and Manilla, all or any, during the ship's stay there for any purposes, and from thence to her port or ports of calling and discharge in the United Kingdom, with liberty to call and stay at all or any ports or places on either side of and at the Cape of Good Hope. The ship sailed from Liverpool direct to a port in China, having on board a cargo for that port and Manilla; and from thence she proceeded to Manilla, and there discharged the remainder of her outward cargo. At Manilla the captain took on board, on freight, 230 chests of opium, for Tongoo, another port in China (not being thereby a tenth part laden), and sailed for Tongoo, there to seek a freight for the United Kingdom and on her voyage thither was lost by perils of the sea. Tongoo is quite out of the direct course from Manilla to the United Kingdom:—Held, that the words "from thence," in the policy, meant not from Manilla only, but "from ports or places in China and Manilla, all or any," and that the sailing from Manilla to Tongoo for the purpose of seeking a homeward cargo was not a deviation. *Pratt* v. *Ashley*, 1 Ex. 257. Affirming *S. C.*, sub. nom. *Ashley* v. *Pratt*, 16 M. & W. 471; 17 L. J., Ex. 135.

—— **Delay at Port.**]—In a policy on a seeking ship, a detention for a reasonable time, for the purposes of the seeking adventure, must be allowed; and whether the time is reasonable, is to be determined by the state of things at the port where the ship happens to be. *Phillips* v. *Irving*, 7 Man. & G. 325; 8 Scott (N.R.) 3; 13 L. J., C. P. 145.

A ship insured, with liberty to touch, stay and trade at several ports, arrived at one of them on the 3rd June, when some necessary repairs were done to her. On the 2nd September she was ready to take in cargo, but, owing to the state of the freight-market and other difficulties, no cargo was put on board till the 10th January following:—Held, that the delay was not unreasonable, so as to amount to a deviation. *Ib.*

Taking Goods on Board during Voyage.]—See *Laroche* v. *Oswin*, 12 East, 131; 11 R. R. 337; ante, col. 1214.

Convoy missed by Trading.]—Insurance on ship from London to Berbice, with liberty to touch and trade at all places. The ship put into Madeira and stayed there to land and ship goods after her convoy had sailed:—Held, a deviation which avoided the policy. *Williams* v. *Shee*, 3 Camp. 469; 14 R. R. 811.

Delay in Landing Goods during Barter.]—Where the policy was on goods until "discharged and safely landed," and the ship arrived on the coast of Africa on May 6th, and during the barter of the cargo in ordinary course the ship was captured on June 4th:—Held, that there had been no deviation. *Parkinson* v. *Collier*, 1 Park, Ins. (8th ed.) 653.

6. Liberty to Touch at Ports.

For what Purpose.]—Liberty to touch at a port for any purpose whatever includes liberty to touch for the purpose of taking on board part of the goods insured. *Violett* v. *Allnutt*, 3 Taunt. 419; 13 R. R. 676.

Under a liberty to touch and stay at all ports for all purposes whatsoever, the stay must be for some purpose connected with the furtherance of the adventure. *Langhorn* v. *Allnutt*, 4 Taunt. 511; 12 R. R. 660.

Whether the purpose is within the scope of the policy is a question for the court. *Ib.*

The policy not limiting the time of stay, whether a ship has stayed an unreasonable time for the purpose is purely a question for the jury. *Ib.*

If liberty is given to touch at a port, the contract not defining for what purpose, but a communication having been made to the underwriter that the ship was to touch for a purpose of trade, it will be intended as a liberty to touch for that purpose. *Urquhart* v. *Barnard*, 1 Taunt. 450; 10 R. R. 574.

A permission to touch and stay at a place confers no privilege to the insured to break bulk or to unload any part of the cargo, and if he does the policy is avoided. *Stitt* v. *Wardell*, 2 Esp. 610.

Policy on voyage at and from Africa to Canaries, Madeira and Lisbon, with liberty to touch, stay, and trade at all ports, &c., in the voyage:—Held, that, after mooring twenty-four hours on the African coast, proceeding south would be a deviation, the leave given being only upon the northwards voyage to Europe. *Ranken* v. *Reeve*, 1 Park. Ins. (8th ed.) 627.

So, a vessel having liberty to discharge goods at a particular place, is not at liberty to take in anywhere. *Sheriff* v. *Potts*, 5 Esp. 96.

On a policy at and from Para to New York, with leave to call at all or any of the Windward and Leeward Islands and colonies on her passage to New York, and to discharge, exchange and take on board the whole or any part of any cargo or cargoes at any ports or places she might call at or proceed to, particularly at all or any of the Windward and Leeward Islands, without being deemed any deviation:—Held, that the ship having proceeded to two of the Leeward Islands for a purpose totally unconnected with the voyage, it was a deviation. *Hammond* v. *Reid*, 4 B. & Ald. 72; 22 R. R. 629.

Where a ship, insured to Martinique, and all or any of the Windward and Leeward Islands, landed the greatest part of her cargo at Martinique, and sailed with the rest to Antigua, where she was wrecked while stopping, partly to dispose of the residue of the outward cargo, and partly to obtain a homeward cargo:—Held, that the underwriters were not liable. *Inglis* v. *Vaux*, 3 Camp. 447. *See also* ante, cols. 1055, 1058, seq.

What Ports.]—Where a vessel sailing from London to Grenada was insured on freight at and from Grenada to London, and arrived in safety, and proceeded to deliver her outward cargo in different bays of the island (where there is but one custom-house), and was lost in entering a bay, to which she was going for the double purpose of delivering the remainder of her outward, and taking in a homeward, cargo:—Held, that this was not a deviation, and that the underwriters were liable for the loss of the homeward freight. *Warre* v. *Miller*, 7 D. & R. 1; 4 B. & C. 538; 1 Car. & P. 237; 4 L. J. (o.s.) K. B. 8.

Under a policy on goods at and from London to any port or ports, place or places, in the Baltic, backwards and forwards, with leave to touch and stay at any ports and places, for all purposes whatsoever; the assured may wait at any port for information as to what port in the Baltic the ship might safely proceed to to discharge her cargo; that being one of the objects of the adventure arising out of the troubled and shifting state of the different governments on the Baltic shore from the pressure of the French arms. *Rucker* v. *Allnutt*, 15 East, 278; 13 R. R. 465.

Policy on a ship "at and from Antigua to England, with liberty to touch at all or any of the West India islands," Jamaica included:—Held, that the ship, under the protection of this policy, might touch at any of the West India islands, although not in the direct course from Antigua to England, and stay at such as she visited the time necessary to complete her homeward cargo. *Metcalfe* v. *Parry*, 4 Camp. 123; 15 R. R. 734.

What is a Port.]—Under a policy insuring a brigantine "at and from L. to S., and thence to Barcelona, and at and from thence and two other ports in Spain to a port in Great Britain":—Held, that Salve, a place lying in a bay, having warehouses and a jetty, with a depth of water sufficient for feluccas but not for large ships, and a good roadstead anchorage, where ships lie and are loaded by means of small craft, having also a custom-house and officers, is a port within the meaning of the policy. *Sea Insurance Co. of Scotland* v. *Gavin*, 4 Bligh. (N.S.) 578; 2 Dow & C. 129.

Loading Port.]—A policy was effected "at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port of discharge in Europe, with leave to touch, stay and trade at all or any ports or places whatsoever and wheresoever, in the East Indies, Persia, or elsewhere, upon goods in certain vessels, beginning the adventure from the loading there of the ships as above." The ship took in part of her cargo at Batavia, then went to Sourabaya, another port in the East Indies (not in the course of a voyage from Batavia to Europe, and not specified by name in the policy), and took in other goods, then returned to Batavia, whence she afterwards sailed for Europe, and was lost by perils of the sea:—Held, that going to Sourabaya was no deviation, and that the goods there taken on board were protected, as that was a loading port within the policy. *Hunter* v. *Leathley*, 10 B. & C. 858; 8 L. J. (o.s.) K. B. 274. Affirmed, *Leathley* v. *Hunter*, 5 M. & P. 457; 7 Bing. 517; 1 C. & J. 423; 1 Tyr. 355; 9 L. J. (o.s.) Ex. 118—Ex. Ch.

Insurance on a ship "at and from her port of lading in North America to Liverpool." She took in part of her cargo at K., in New Brunswick, and then sailed from thence to B. in the

same province, seven miles distant, on the same bay of the sea. She there completed her cargo, and then returned to K. to receive provisions, &c.; after which she sailed for England, and was lost on the voyage. B. was not in the way from K. to Liverpool. B. and K. were situate on creeks, opening into the bay, and were spoken of by some persons as ports, but neither of them had a custom-house. They had custom-house officers, and were under the jurisdiction of the custom-house of St. John, New Brunswick:—Held, that after the ship had begun to load at K., that was her port of lading: that the term "port of lading" in the policy did not allow of her afterwards going to B., and that her doing so was a deviation. *Brown* v. *Tayleur*, 4 A. & E. 241; 5 N. & M. 472; 1 H. & Walms. 578; 5 L. J., K. B. 57.

On a policy at and from Pernambuco or any other port or ports in the Brazils to London, "beginning the adventure from the loading the goods on board ship, on the termination of her course, and preparing for her voyage to London." The ship on the termination of her cruise touched at Pernambuco, but failing to procure a cargo there, she proceeded for St. Salvador, and was lost on her voyage thither:—Held, that the ship's proceeding for St. Salvador, was no deviation. *Lambert* v. *Liddard*, 1 Marsh. 149; 5 Taunt. 480; 15 R. R. 557.

Where a ship was insured at and from Hull to her port or ports of loading in the Baltic Sea and Gulf of Finland, with liberty for her to proceed and sail to and touch and stay at any ports or places whatsoever, for all purposes, particularly at Elsinore, without being deemed a deviation; and she touched and stayed at Elsinore and Dantzic to deliver goods, Pillau being her place of loading:—Held, that this was a deviation. *Solly* v. *Whitmore*, 5 B. & Ald. 45; 24 R. R. 274; and see *Forshaw* v. *Chabert*, 6 Moore, 369; 3 Br. & B. 158; 23 R. R. 596.

Loss, at what Time.] — A policy on pearl-ashes contained the usual clause, that the goods were to be free from average under three per cent., and the voyage was described to be from Liverpool to London. The captain also took in goods at Liverpool for Southampton. The vessel met with bad weather before she reached Southampton, and the water pumped up took the colour out of the captain's clothes, which shewed it was much impregnated with the pearl-ash. On arriving at London (after discharging part of the cargo at Southampton), the pearl-ashes were for the first time examined, and it was discovered they had sustained a loss of sixty per cent., and were in a state of solution, which it was proved could not take place in less than three or four weeks. The vessel had fine weather, and was six days going from Southampton to London:—Held, first, that the voyage was the same as described in the policy up to the time of the ship's deviating from the direct course from Liverpool to London, in order to put in at Southampton; secondly, that it was properly left to the jury to say, whether, previously to the point of deviation, the pearl-ashes had suffered a loss of about three per cent. *Hare* v. *Travis*, 7 B. & C. 14; 9 D. & R. 748; 5 L. J. (o.s.) K. B. 348; 31 R. R. 139.

Employment as Tender.]—Action on a policy on the goods of a vessel called the "Clipper," from Liverpool to any ports or places of loading and trade on the coast of Africa and African islands, during her stay and trade on that coast and islands, and thence to her port or ports of discharging in the United Kingdom, with leave to call at all ports and places, both backwards and forwards, without being deemed any deviation; with liberty for the ship on that voyage to proceed, and sail to and stay at any ports whatever; and with leave to load, unload, &c., goods wheresoever she might proceed to, with any ships, boats, &c., in loading and unloading included; particularly with liberty to tranship on board any vessel or craft in the same employ, with an agreement that the vessel might be employed or used as a tender to any other vessel or ship in the same employ. The vessel arrived at Benin, in Africa, and stayed there thirteen months, during which time she was employed in conveying goods from a vessel in the same employ, at the mouth of the river, to the Cameroons, and putting them on board another vessel, also in the same employ, but on her return with a homeward cargo, was lost:—Held, that the judge who tried the cause was right in telling the jury, that the voyage to the Cameroons was a deviation, and that it was not an acting as a tender within the meaning of the policy. *Hamilton* v. *Sheddon*, 3 M. & W. 49; M. & H. 334; 7 L. J., Ex. 1.

Held, also, that it was a proper question for the jury, whether her stay at Benin was unreasonable or not; and they having found in the affirmative, that it was warranted by the evidence. *Ib.*

Beginning of Adventure.]—In a policy at and from London to Berbice, after the clause "beginning the adventure," &c. were inserted the words "at sea"; and at the bottom of the policy, the words "on ship": the ship without express leave so to do, stopped at Madeira, by which means she lost her convoy, and was captured on her way from thence to Berbice:—Held, that the insertion of the above words did not imply that the risk commenced at sea, so as to justify the deviation; though, at the time of effecting the insurance, the underwriters were informed that the ship had been at Madeira. *Redman* v. *London* or *Lowdon*, 1 Marsh. 136; 5 Taunt. 462; 3 Camp. 503.

In what Order.]—Under a policy from London, to the ship's discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders, or any other purpose; the ship, in touching for orders before she has selected her port of discharge, is not confined to take the ports in the successive order in which they lie in the course of the voyage, but may return to a port she has quitted for orders as to her port of discharge. *Andrews* v. *Mellish*, 5 Taunt. 496; 2 M. & S. 27; 16 East, 312. And see *Driscol* v. *Bovil*, 1 Bos. & P. 313.

After she has selected her port of discharge, she must touch at ports only in their successive order. *Ib.*

If ports of call are named in a policy in a successive order, the ship must take them in the same succession in which they are named. *Gairdner* v. *Senhouse*, 3 Taunt. 16; 12 R. R. 573. And see *Bragg* v. *Anderson*, 4 Taunt. 229; 13 R. R 584.

Under a policy on goods from A. to B., C. and D., the risk attached, where the ship, which was captured before the dividing point, sailed with

intention to proceed directly to D., without first visiting the intermediate places. Though, if she meant to go to more than one of the places so named, she must visit them in the order in which they stand in the policy. *Marsden* v. *Reid*, 3 East, 572 ; 7 R. R. 516.

Intermediate Voyages.]—Liberty to touch and stay at any port, &c., in the voyage ; by usage of the trade may cover intermediate voyages. *Farquharson* v. *Hunter*, 1 Park, Ins. (8th ed.) 105.

7. Seeking Convoy.

It is not a deviation for a ship to leave the regular track for the purpose of seeking convoy, when bonâ fide for the benefit of all concerned, unless expressly prohibited by the terms of the policy. *D'Aguilar* v. *Tobin*, Holt, N. P. 185 ; 2 Marsh. 265.

Deviation for the purpose of joining convoy does not avoid the policy. *Gordon* v. *Morley*, 2 Str. 1265. S. P., *Bond* v. *Gonsales*, 2 Salk. 445 ; Holt, 469.

8. Cruising.

Out of Course of Voyage.]—Whether an insurance of a ship with or without letters of marque upon a certain voyage and commercial adventure from A. to B., enables her to chase for the purpose of hostile attack and capture any vessel she may happen to descry in the course of the voyage insured, in whatever direction, or to any limit, and whether known at the commencement of such chasing to be an enemy or not ; or whether those words are to be confined to a leave to employ force only for the purpose of defence (including a liberty of attack and chase only as far as they may be fairly supposed to promote ultimate security), must, in the absence of any legal decision as to their construction, depend upon the received practice and known sense of commercial men, if there is any such received practice in use among them. But at any rate such words do not appear to authorise direct cruising out of the course of the voyage in search of prize. *Parr* v. *Anderson*, 6 East, 202 ; 2 Smith, 316 ; 8 R. R. 461.

A policy on a ship on a certain commercial voyage, with or without letters of marque, giving leave to the assured to chase, capture, and man prizes, however it may warrant him in weighing anchor, while waiting at a place in the course of the commercial voyage, insured for the purpose of chasing an enemy, who had before anchored at the same place in sight of him, and was then endeavouring to escape, will not warrant him, after the capture, and in the course of the further prosecution of the voyage, in lying-to, in order to let the prize keep up with him, for the purpose of protecting her as a convoy into port, there to have her condemned ; though such port was within the voyage insured. *Lawrence* v. *Sydebotham*, 6 East, 45 ; 2 Smith, 214 ; 8 R. R. 385.

Repairing Prize.]—Leave granted in a policy on a fishing voyage to see prizes into port does not authorise the ship to remain in port till a prize receives necessary repairs, which she could not otherwise have had : and at most extends to seeing the prize moored safely, and giving the necessary orders for her final destination. *Jarratt* v. *Ward*, 1 Camp. 263 ; 10 R. R. 677.

Lying in Wait.]—Liberty given in a policy on a fishing voyage, to chase, capture, and man prizes, does not authorise the ship to lie by nine days off a port, waiting for an enemy's ship to come out when she should have completed her cargo ; although she lay in wait during that time within the limits of her fishing ground. *Hibbert* v. *Halliday*, 2 Taunt. 428 ; 11 R. R. 633.

Time.]—A liberty to "cruise six weeks," in a policy, means, "six weeks successively from the commencement of the cruise." *Syeres* v. *Bridge*, 2 Dougl. 527.

Chasing Enemy.]—Semble, a ship may chase an enemy, but may not cruise, without being guilty of deviation. *Jolly* v. *Walker*, 2 Park, Ins. (8th ed.) 630.

X. LOSSES.

1. *Total Loss*, 1224.
2. *Constructive Total Loss*, 1236.
3. *Average Loss.*
   a. General, Average, 1240.
   b. Warranty against, 1247.
4. *Ajustment.*
   a. Persons adjusting, 1253.
   b. Computation, 1255.
   c. Effect of, 1262.
   d. Payment, 1266.
5. *Expenses—Sue and Labour Clause*, 1267.

1. Total Loss.

Destruction of Vessel.]—A vessel is totally lost within the meaning of a policy, when it becomes as a ship of no use or value to the owner, and is as much lost as if it had gone to the bottom of the sea, or had been broken to pieces, and the whole or a great part of the fragments had reached the shore as wreck. *Irving* v. *Manning*, 1 H. L. Cas. 287 ; 6 C. B. 391.

When Repairs Possible.]—A loss is also to be considered as total, where a prudent owner, if uninsured, would not have repaired. *Ib.*

A ship was insured in a policy, in which the value was stated at 17,500*l.* The ship was injured by storms, was surveyed, and the repairs were estimated at 10,500*l.* When repaired, the vessel would have been of the marketable value of 9,000*l.* The assured abandoned, and claimed as for a total loss. The jury found, that, under the circumstances existing in the case, a prudent owner, uninsured, would not have repaired the vessel :—Held, that the assured could recover as for a total loss. *Ib.*

A Dutch ship, valued in the policy at 8,000*l.*, was injured on a voyage from Rotterdam to Java and Sumatra and back again to a port of discharge in Holland. After commencing her voyage she was stranded on the Goodwin Sands, and plundered : she was ultimately removed to London, and notice of abandonment was given to the underwriters. It was proved, that, at the time she was cast away, she was worth 5,833*l.*, that her value as she lay was 700*l.*, and that the salvage was 420*l.* The expense of repairing the ship in England would have been 4,615*l.* ; if she had been entitled to an English register she would have been worth, when repaired, from 4,500*l.* to 4,700*l.* ; and if she had been a British ship, it would have been prudent for a British owner to repair her. It was proved by Dutch

witnesses, that the expense of repairing her in Holland would not have exceeded 2,915*l.*; and that the trading companies in Holland would not employ a vessel that had been stranded in the manner in which this vessel was stranded, however perfectly she might have been repaired, and that this circumstance would have affected her value in Holland. The judge told the jury that, in considering whether this was the case of a partial or total loss, they ought not to take into account the value stated in the policy; and that, in considering the same question, they ought to look at all the circumstances attending the ship, and to judge whether, under all those circumstances, a prudent owner, if uninsured, would have declined to repair the ship: and that, if so, they might find it a case of total loss:—Held, that this direction was right. *Young* v. *Turing*, 2 Scott (N.R.) 752; 2 Man. & G. 593.

A ship insured in a valued policy for 2,000*l.* was damaged by the perils of the sea; she might have been repaired for 1,400*l.*, but she was not worth repairing:—Held, a total loss. *Allen* v. *Sugrue*, 3 Man. & Ry. 9; 8 B. & C. 561; 7 L. J. (O.S.) K. B. 53.

When a vessel, in consequence of a storm, is injured to such an extent that the cost of her repair would come to more than her value when repaired, the assured is entitled to recover as for a total loss, although the vessel, from the decayed state of some of her timber, requires it to be replaced with new timber, instead of fresh fastenings only; there being no reason to doubt but that the decayed parts were strong enough for the vessel to have safely performed her voyage, if she had not encountered severe weather. *Phillips* v. *Nairne*, 4 C. B. 343; 16 L. J., C. P. 194; 11 Jur. 455.

A ship which was insured ran aground and was much damaged. She was surveyed, and, in consequence of the report of the surveyors, was sold as she lay:—Held, that, to entitle the assured to recover for a total loss, they must satisfy the jury, that, as prudent men and exercising a sound discretion, they would, if they had been uninsured, have sold the vessel as they did; and that the jury must be satisfied, not only that the assured, if uninsured, would have acted as they did, but that they did prudently in so acting. *Domett* v. *Young*, Car. & M. 465. See *Fleming* v. *Smith*, 1 H. L. Cas. 513; *Moss* v. *Smith*, 9 C. B. 94; 19 L. J., C. P. 225; 14 Jur. 1003.

It is the duty of a master, in case of damage to the ship, to do all that can be reasonably done to repair it, bring home the cargo, and earn the freight. *Benson* v. *Chapman*, 2 H. L. Cas. 696; 8 C. B. 950; 13 Jur. 969.

The assured is never bound to abandon, he can always repair if he chooses, and refrain from insisting on a total loss. *Pitman* v. *Universal Marine Insurance Co.*, 51 L. J., Q. B. 561; 9 Q. B. D. 192; 46 L. T. 863; 30 W. R. 906; 4 Asp. M. C. 544—C. A.

Seizure and Sale of Ship.]—Where a ship is seized and condemned by a foreign state, and purchased by the master on behalf of his owner, the owner can only recover as for a partial loss; for the property in the ship is not divested out of him. *Wilson* v. *Foster*, 1 Marsh. 425; 6 Taunt. 25; 16 R. R. 560.

Ship Stranded and not worth Repairing—Subsequent Loss by Fire.]—See *Woodside* v. *Globe Marine Insurance Co.*, ante, col. 1104.

Cargo—Destruction of.]—Policy on fruit from Cadiz to London, with the usual memorandum: in the course of the voyage the fruit was so much damaged by sea water, that it became rotten and stunk; and on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo: the ship also being too much damaged to proceed on the voyage, was sold, and the cargo necessarily thrown overboard:—Held, that the assured were entitled to recover for a total loss. *Dyson* v. *Rowcroft*, 3 Bos. & P. 474; 7 R. R. 809.

—— **Injury to.**]—A vessel was chartered for a voyage, and the cargo was insured against total loss. In the course of the voyage the vessel went aground, became hogged and sustained other injuries, and surveyors recommended her to be stripped with dispatch, and steps to be taken to save the cargo, but no attempt was made to do so; and after several days the master, fearing bad weather, sold the vessel and cargo for the benefit of all concerned. The vessel remained for some days in the same state, and the weather proving fine, the purchasers saved a large part of the cargo:—Held, that the charterers were not entitled to treat the cargo as having been totally lost. *Currie* v. *Bombay Native Insurance Co.*, 6 Moore, P. C. (N.S.) 302; 39 L. J., P. C. 1; L. R. 3 P. C. 72; 22 L. T. 317; 18 W. R. 296.

When a ship is obliged to put back, and the damage she has sustained is of such a nature that she cannot pursue her voyage, and other ships cannot be procured to take the cargo, it is a total loss of ship, cargo and freight, however inconsiderable the damage sustained may be, for the voyage in contemplation is lost. *Wilson* v. *Royal Exchange Assurance Co.*, 2 Camp. 623; 12 R. R. 760.

Insurance on ship, cargo and freight from Tortola to London: the ship was driven back to Tortola; and, being found unfit for the voyage, and it being impossible to repair her, was sold. There were no vessels at Tortola by which the cargo could be forwarded, and it was accordingly sold for nearly the sum insured; the insured having abandoned:—Held, that this was a total loss. *Manning* v. *Newnham*, 3 Dougl. 130; 2 Camp. 624, n.; 12 R. R. 761.

A ship insured arrived in port a mere wreck, and was obliged to be lashed to a hulk to avoid sinking, and in attempting to remove her to the shore a few days afterwards she sank:—Held, that the assured might recover as for a total loss, though her cargo was saved and brought to a profitable market. *Shaw* v. *Felton*, 2 East, 109. *See also Cases*, post, col. 1226.

—— **Cost of Drying and Warehousing—Freight.**]—Where goods have been damaged by perils insured against and are lying at a place short of their destination in such a state that they may be dried and carried on, there is a total loss if the cost of drying and warehousing and other expenses consequent upon the sea damage exceed what they are worth; but the freight payable upon their arrival at their destination is not to be reckoned in this calculation, that being payable in any case. If the shipowner elects not to carry the goods to their destination, his own ship being damaged by sea perils and incapable, the excess only of the cost of carrying the goods from the port of distress to their destination

over the cost of carriage, if there had been no sea damage, is to be considered. *Farnworth* v. *Hyde*, 36 L. J., C. P. 33; L. R. 2 C. P. 204; 11 Jur. (N.S.) 349; 15 L. T. 395; 15 W. R. 340—Ex. Ch.

Injury to Electric Cable.]—An electric telegraph company being about to lay down an electric cable between Ireland and Newfoundland, a shareholder in the company effected an insurance in the form of a marine policy of insurance, with the following words in the margin of the policy: "And to continue until the cable be laid in one continuous length between Ireland and Newfoundland, and until 100 words shall have been transmitted from Ireland to Newfoundland, and vice versâ. The risk of this policy then to cease and determine. This policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable from and including its lading on board the "Great Eastern" until 100 words be transmitted from Ireland to Newfoundland, and vice versâ. And it is distinctly declared and agreed that the transmission of the 100 words shall be an essential condition of the policy." The ship sailed from Ireland with a cable on board of the length of 2,200 miles; and after about 1,200 miles of it had been laid down, in consequence of the electric current not acting, some of it was drawn back into the ship; and whilst this was being done a part of the cable which was on board broke, and the broken end fell into the sea. Some fruitless endeavour was made to raise it, but ultimately the ship returned with the remainder of the cable, about 1,200 miles in length, on board:—Held, first, that the insurance was not on the cable, but on the risk and contingency of successfully laying it down. *Wilson* v. *Jones*, 36 L. J., Ex. 78; L. R. 2 Ex. 139; 15 L. T. 669; 15 W. R. 435—Ex. Ch.

Held, secondly, that the insured was entitled to recover for a total loss. *Ib.*

A person possessed of a share in a telegraph company, established for the purpose of laying down a cable between the United Kingdom and America, insured the same by a policy in the form of a policy of marine insurance. The insurance was expressed to be "at and from the United Kingdom, say from London, and wheresoever the risk may commence, to the Atlantic Ocean, and at and thence, by or in one or more ship or ships, or steamer or steamers, to the place or places of destination, both in the United Kingdom $\frac{\text{and}}{\text{or}}$ the continent, island, or peninsula of America, $\frac{\text{and}}{\text{or}}$ the British or other possessions of America, including and containing all and every accident, danger and risk that may be incurred at sea or on land, in all or any boats, ships and craft whatsoever and wheresoever, until the final, complete and successful laying down of the Atlantic telegraph cable from shore to shore." The blank for the name of the ship was filled up thus: "any ship or ships, or steamer or steamers, or craft as above"; and in the valuation clause the subject of insurance was to be taken as "on one 1,000*l.* share in the Atlantic Telegraph Company, share valued at 1,100*l.* In case of loss the part saved to be sold or appraised for the benefit of the underwriters." The insurance contained the common memorandum, with the addition of a special agreement, in a memorandum annexed to the policy, that the insurance should "cover and include the successful working of the cable when laid down." A cable was finally laid down after a previously abortive attempt, during which a portion of it was lost by perils of the sea; and on the second attempt, during which some more cable was lost, a quantity of superfluous cable was taken out to meet contingencies. It was, however, found impossible to maintain electrical communication, and the telegraph was abandoned. The cause of the failure was the imperfect insulation of the copper wire, arising from defect in the outer covering, occasioned by accident prior to the shipment of the cable, and the commencement of the risk, aggravated by the chemical action of the sea water on the interior of the cable, and not from any mischief done by the mechanical action of the sea:—Held, with respect to the portion of the cable lost by perils of the sea, that the assured was entitled to recover as for a partial loss. *Paterson* v. *Harris*, 1 B. & S. 336; 30 L. J., Q. B. 354; 7 Jur. (N.S.) 1276. And see *S. C.*, 2 B. & S. 814; 9 Jur. (N.S.) 173.

Where several Packages.]—By a marine policy of insurance the insurance was described to be "on 1,711 packages teas, valued at one sum, on a voyage from New York to London," by a ship "warranted by the assured free from damage from dampness, change of flavour, or being spotted, or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils." In case of partial loss by sea damage to certain goods, not including tea, "the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise as far as practicable." The ship met with very bad weather during the voyage, and 449 of the 1,711 packages of the tea were seriously damaged by actual contact of sea water. The rest of the packages arrived sound and in good condition, except by the injury to their reputation from having formed part of a shipment of which 449 packages had been damaged by sea water, and which was the cause, as was usual in such cases, of these packages, though sound and uninjured, not realising so high prices as they would have done if the 449 packages had not been damaged by sea water:—Held, that the packages insured by the policy were divisible, and that the assured was entitled to recover only in respect of the 449 packages which were actually damaged. *Cater* v. *Great Western Insurance Co. of New York*, 42 L. J., C. P. 266; L. R. 8 C. P. 552; 29 L. T. 136; 21 W. R. 850; 2 Asp. M. C. 90.

Where memorandum goods of the same species, shipped in packages, are insured, and it is not expressed, by distinct valuation or otherwise, in the policy, that the packages are separately insured, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only (not being general average), if there is no stranding, though one or more entire package or packages is or are entirely destroyed or otherwise totally lost, by the specified perils. *Janson* v. *Ralli*, 6 El. & Bl. 422; 25 L. J., Q. B. 300; 2 Jur. (N.S.) 566; 4 W. R. 568—Ex. Ch.

An insurance was effected on "master's effects, valued at 100*l.*, free from all average." Some of the articles thus insured were totally lost by the

perils insured against, but others were saved :—Held, that the assured was entitled to recover in respect of the goods which had been totally lost, the word "effects" being obviously employed to save the enumeration of the different articles of which the subject-matter of insurance consisted. *Duff* v. *Mackenzie*, 3 C. B. (N.S.) 16 ; 26 L. J., C. P. 313 ; 3 Jur. (N.S.) 1025.

By a policy of any kind of goods in a vessel, and which were stated to be valued at one entire sum, "the goods so valued" were insured "against total loss only." The goods which were shipped were, in fact, of different kinds and descriptions, and packed in separate packages :—Held, that it was not necessary that the insurer should be informed that it was intended to ship goods of different kinds, and separately packed, as he ought to have expected that all the goods would not be of the same kind ; and that he was liable for a total loss of each separate package, although some of the packages shipped were saved. *Wilkinson* v. *Hyde*, 3 C. B. (N.S.) 30 ; 27 L. J., C. P. 116 ; 4 Jur. (N.S.) 482.

—— **Separate Insurances of Parts.**] — On an insurance of goods in "ship or ships," which were declared to be, and to be valued "on rice to be declared free from particular average," the insurer cannot, by indorsing a declaration of interest with a separate valuation of each bag of rice, create a separate insurance on each bag. *Entwisle* v. *Ellis*, 2 H. & N. 549 ; 27 L. J., Ex. 105 ; 6 W. R. 76.

A policy having been effected on goods "in ship or ships," declared to be "on rice, to be declared free from particular average," the insured indorsed on the policy a declaration, which was afterwards marked with the initials of the underwriters as follows :—[R.] 500 bags rice, per "Laidmans," at 8*s.* 3*d.* per bag, 206*l.* 5*s.* ; [R.] 4,500 bags rice, per "Margaret Skelly," at 8*s.* 3*d.* per bag, 1,856*l.* 5*s.* From each ship certain of the bags of rice were safely landed at their port of destination, others were jettisoned, being cast into the sea to save the ship ; others, in the "Laidmans," on arriving at their port of destination, were cast into the sea, being unfit for consumption ; others in the "Margaret Skelly," were so much injured by sea damage as to be sold at the port of departure, to which that ship was obliged to put back. The underwriters had paid the loss on the goods jettisoned :—Held, that the assured were not entitled to recover the value of the bags of rice cast into the sea at the port of destination, or sold at the port of departure. *Ib.*

Mixture of Cargo.]—Several shippers respectively shipped bales of cotton on board a general ship. Part of the bales were lost on the voyage, part arrived with the marks obliterated, so that their respective owners could not be ascertained, and part arrived so as to be distinguishable and deliverable to the respective owners :—Held, as respects each shipper whose full number of bales could not be distinguished and delivered, that he must be taken to have sustained a total loss of part of his cotton, and a partial loss of the remainder, according to a calculation of the proportion that would be applicable to his cotton, with reference to the whole number of bales lost, and the whole number of bales which arrived indistinguishable. *Spence* v. *Union Marine Insurance Co.*, 37 L. J., C. P. 169 ; L. R. 3 C. P. 427 ; 18 L. T. 632 ; 16 W. R. 1010.

Confiscation and Sale of Cargo.]—A cargo on board a ship bound from Liverpool to Matamoras was insured against the usual perils, including "takings at sea, arrests, restraints, and detainments of all kings, princes and people." The ship sailed and had nearly reached her destination when she was captured by a United States cruiser and taken into New Orleans, where a suit was instituted in the prize court for her condemnation. The insurers contested the suit, electing to treat the loss as a partial one. They obtained the judgment of the court, whereupon the captors appealed. The insured gave a formal notice of abandonment, which the insurers refused to accept. Upon the application of the captors, the ship and cargo were ordered to be sold unless bail were given by the insured. Upon receiving intelligence that this order had been made, they applied to the insurers for assistance in giving bail to prevent the sale. The insurers refused to give any assistance, and in the end the ship and cargo were sold by order of the prize court. The insured brought an action to recover from the insurers, as for a total loss:—Held, that they were entitled to recover the whole amount at which they were insured under the policy, inasmuch as the decree of the prize court, with the sale of the goods under it, was a deprivation of the ownership of the goods, and amounted to a total loss. *Stringer* v. *English and Scottish Marine Insurance Co.*, 10 B. & S. 770 ; 39 L. J., Q. B. 214 ; L. R. 5 Q. B. 599 ; 22 L. T. 802 ; 18 W. R. 1201—Ex. Ch.

Partial Confiscation.]—A cargo insured by a valued policy was confiscated and sold ; but the enemy permitted the foreign consignee to retain from the proceeds the amount of his acceptances ; the assured not having abandoned, the loss became partial only, and the assured was entitled to recover from the underwriter a sum bearing the same proportion to his subscription as the loss ultimately sustained bore to the whole value in the policy. *Goldsmid* v. *Gillies*, 4 Taunt. 803 ; 14 R. R. 671.

Goods insured upon a valued policy having been seized, confiscated, and sold, by order of the enemy's government on their own account, but the necessary documents to verify the loss not having arrived here, the underwriters, on application to pay their subscriptions, agreed to adjust and pay immediately 50*l.* per cent. on account, but no abandonment was made by the assured ; and in the meantime the foreign consignees of the goods, in consequence of remonstrances to the enemy's government, obtained a restoration of half the proceeds of the goods which had been so seized and sold, which half amounted to more than the whole sum at which they were valued in the policy : yet held, that the underwriters were not entitled to recover back the 50*l.* per cent. they had paid on account ; the assured having in fact sustained a loss of half his goods, for which he was no more than indemnified by the 50*l.* per cent. he had received ; and there having been no abandonment to the underwriters ; and the superior value of the proceeds arising from the benefit of the market, in which the underwriters had no concern. *Tunno* v. *Edwards*, 12 East, 488 ; 11 R. R. 458.

Sale of Cargo by Court.]—A cargo of salt, of the value with prepaid freight of about 1,900*l.*, was insured from Liverpool to Calcutta, the policy containing the memorandum warranting

"corn, fish, salt, &c., free from average unless general or the ship be stranded." Having encountered bad weather, lost both her anchors, and had her masts cut away, the ship was taken in tow by salvors and placed on a bank out of the ordinary course of the voyage, where she lay on her port side for several tides, and sustained considerable further injury. The salt was landed in a damaged state, and the ship repaired, though at an expense which exceeded her value when repaired. About one-fifth of the salt might have been made salable, but would have realised no profit. Suits were instituted by the salvors in the admiralty court, and the salt sold under a decree, the entire proceeds being absorbed by the costs:—Held, that there was a partial loss of the salt, but not a total loss, the seizure and sale under the decree of the admiralty court not being a natural or necessary consequence of a peril insured against; and that there was a stranding within the meaning of the memorandum. *De Mattos* v. *Saunders*, L. R. 7 C. P. 570; 27 L. T. 120; 20 W. R. 801; 1 Asp. M. C. 377.

Insurers not Concluded by erroneous Judgment of Foreign Court.]—A cargo of rye, shipped on an Austrian ship for carriage from Ænos, a Turkish port, to Schiedam, was insured by a policy warranted free of particular average. The ship meeting with stormy weather, a portion of the cargo was damaged, and the ship had to put into the port of La Rochelle. Proceedings were taken, at the instance of the captain, in the tribunal of commerce at that port, and in consequence the cargo was landed and warehoused. It was necessary to sell a portion of the cargo immediately, which was accordingly done. On the 21st of February, the court, on the petition of the captain, ordered a sale of the residue, and notice of abandonment was given to the insurers on the ground that, in the opinion of the experts or surveyors, the rye could not be forwarded to its destination. This notice the insurers refused to accept; and on the 5th of March they summoned the captain before the tribunal of commerce for the purpose of having it decreed that there was no occasion to sell the residue of the rye. The court accordingly ordered the residue of the rye to be surveyed, and the surveyors reported that it could be reshipped and conveyed to its destination. This report was confirmed by the court, and notice of it given to the assured, together with notice that any course pursued with the cargo would be for their account and on their responsibility. The rye, however, was not forwarded, and remained until December warehoused at La Rochelle, although the captain might have procured a ship to carry it on. The captain having in the meantime procured advances to meet the expenses caused by the interruption of the voyage, was summoned, by the parties who had made the advances, before the tribunal of commerce; and on the 14th of September the court decreed a sale of the ship, and a statement of general and particular average of the ship and cargo to be drawn up, which was accordingly done. On the 21st of December the tribunal of commerce decreed the sale of the rest of the cargo, on the ground that the weather was unfavourable for its preservation. On the 25th of January the tribunal of commerce decreed that the full amount of the freight due upon the whole voyage was chargeable upon the proceeds of such sale; and an amended average statement, which proceeded on this footing, was confirmed by the court. If the proportion of freight so payable was to be added to the extra expenses incurred in respect of the residue of the cargo so sold, by reason of the interruption of the voyage, including the extra freight in respect of forwarding to the port of destination, the amount would exceed the value of the rye at the port of destination. It was admitted that neither the law of France nor of Austria was in accordance with the decree of the 25th of January, and if the proper proportion of freight had been charged to the residue of cargo sold, the value at the port of destination would have exceeded the expenses:—Held, that there was no constructive total loss of the cargo; inasmuch as the decree for the sale of the residue of the cargo was not due to the perils insured against, but was made for the purpose of paying advances incurred through the captain's breach of duty in not forwarding such rye to its destination; and the insurers were not concluded by the judgment of the French court from denying that there was no total loss, because it was admitted that such judgment was erroneous according to the law which it professed to administer. *Meyer* v. *Ralli*, 45 L. J., C. P. 741; 1 C. P. D. 358; 35 L. T. 838; 24 W. R. 963; 3 Asp. M. C. 324.

Fruit Cargo destroyed by Port Authority.]—Where a fruit cargo being damaged by sea water, was, by order of the authority of the port to which the ship was driven, thrown overboard:—Held, that the assurer was liable for a total loss. *Dyson* v. *Rowcroft*, 3 Bos. & P. 474; 7 R. R. 809.

Election.]—When it is uncertain whether the damage done to a cargo by a peril insured against will result in a partial or total loss, the assured is not bound to make his election how to treat it as soon as some incipient damage has occurred; and his right to claim indemnity for a total loss does not mature till the facts constituting such a loss are ascertained. *Browning* v. *Provincial Insurance Co. of Canada*, L. R. 5 P. C. 263; 28 L. T. 853; 21 W. R. 587; 2 Asp. M. C. 35—P. C.

Of Freight.]—When by the terms of a charterparty a part of the freight is made payable in advance, the charterer has a right to deduct the whole amount so paid by him from any freight which may actually be earned, in case of a loss of part of the cargo, and not only a proportionate part of it. *Allison* v. *Bristol Marine Insurance Co.*, 1 App. Cas. 209; 34 L. T. 809; 24 W. R. 1039; 3 Asp. M. C. 178—H. L. (E.)

A shipowner chartered his ship for a voyage to Bombay. The charterparty provided that freight was to be paid on unloading, and right delivery of the cargo at the rate of 42*s.* per ton on the quantity delivered, "such freight to be paid one-half in cash on signing bills of lading, the remainder on right delivery of the cargo." Half of the estimated amount of freight was paid in London, and the shipowner insured the unpaid freight. The ship was lost, but half the cargo was saved, and delivered without any additional payment by the charterer. The shipowner then claimed as for a total loss of the unpaid half of the freight:—Held, that on the proper construction of the charterparty and policies he was entitled to recover as for a total loss. *Ib.*

Freight may be insured by a time policy, though for a period short of the time necessary to complete the voyage on which such freight is to be earned; and there is a total loss of freight if the cargo is so damaged by a peril of the sea in the course of the voyage as to render it impossible (except at an expense which would greatly exceed its value on arrival) to carry it to its port of destination. *Michael* v. *Gillespy*, 2 C. B. (N.S.) 627; 26 L. J., C. P. 306; 3 Jur. (N.S.) 1219.

If a ship whose freight is insured against perils of the sea suffers sea damage, and can be repaired, so as to bring home her whole cargo, for a sum which, though it exceeds the amount of freight, is not more than a prudent owner, looking to the value of his ship, alone would incur, the underwriters are not liable as for a loss of freight by perils of the sea. *Moss* v. *Smith*, 9 C. B. 94; 19 L. J., C. P. 225; 14 Jur. 1003.

A ship valued at 12,000*l.* was insured from Valparaiso to England; the freight, valued at 4,000*l.*, was also insured by a separate policy. The ship having sailed with a full cargo, consisting of 800 tons of merchandise, was compelled by stress of weather to put back to Valparaiso, where the master, finding upon survey that to repair her, so as to enable her to bring home the entire cargo, would cost a sum exceeding the value of the freight, though less than the value of the ship when repaired, sold her:—Held, not a total loss of either ship or freight. *Ib.*

Freight under a charter was insured, for a voyage from the Cape of Good Hope to Hondeklip Bay, an open roadstead 180 miles up the coast, there to load a cargo of copper ore, to proceed therewith to Swansea, at a freight of 40*s.* per ton. Arrived at Hondeklip Bay, the master received on board a part of the cargo (the whole being ready), when a storm coming on, he was compelled to put to sea with the loss of an anchor and an injury to his windlass; and after beating about the offing, he deemed it expedient to sail for St. Helena, a distance of about 1,800 miles. Finding, on his arrival there, that he could not get an additional anchor or the requisite repairs, the master discharged the portion of the outward cargo which he had not landed at Hondeklip Bay, and proceeded to Swansea with the homeward cargo, short by about 120 tons of a full cargo. The jury, although the master did not run for the Cape, where the necessary repairs might have been obtained, found that the master acted throughout as a prudent owner, uninsured, would have done:—Held, that the underwriters were not responsible as for a total loss of the freight of the 120 tons by perils of the sea. *Philpott* v. *Swann*, 11 C. B. (N.S.) 270; 30 L. J., C. P. 358; 7 Jur. (N.S.) 1291; 5 L. T. 183.

See also *Rankin* v. *Potter*, post, col. 1278.

Where, in case of damage to a ship, the master elects to repair it, the mere fact that the expenses of repair ultimately prove to be greater than the value of the ship, will not be sufficient to shew that he acted beyond the scope of his authority, or to entitle the owner, in an action on a policy of freight, to recover as for a total loss. *Benson* v. *Chapman*, 2 H. L. Cas. 696; 8 C. B. 950; 13 Jur. 969.

Rights of Underwriter on.]—In all cases of insurance on ship, in which the subject is not actually annihilated, the assured, claiming as for a total loss, must give up to the underwriters all the remains of the property recovered, together with all the benefit or advantage incident to it; or rather such property vests in the underwriters. *Stewart* v. *Greenock Marine Insurance Co.*, 2 H. L. Cas. 159; 1 Macq. H. L. 382.

Freight, while the ship is in the course of earning it, is a benefit or an advantage incident to the ship, and therefore becomes the property of the underwriters, paying for a total loss. *Ib.*

Ship Condemned by Process of Law.]—There is no remedy upon the policy where the ship has been seized and condemned by process of law. *Anon.*, 1 Ld. Raym. 724.

Sale of Ship by Court—Proceeds less than Salvage.]—To constitute a total loss it is not necessary that a ship should be actually annihilated or destroyed. If it is lost to the owner by an adverse valid transfer of his right of property and possession to a purchaser by sale under decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated. *Cossman* v. *West* or *British America Assurance Co.*, 57 L. J., P. C. 17; 13 App. Cas. 160; 58 L. T. 122; 6 Asp. M. C. 233—P. C.

Where a ship had been deserted by her master and crew, having been previously placed by them in a sinking condition, but had been subsequently taken possession of by salvors, towed into port, and there sold together with the cargo, by order of the admiralty court, for less than the actual cost of the salvage services:—Held, in actions upon policies on the ship and freight respectively, that, assuming the possession by salvors of a derelict vessel to be only a constructive total loss, the subsequent sale constituted an actual total loss of both ship and cargo. *Ib.*

Salvage less than Freight.]—Where salvage falls short of the freight payable by the assured there is a total loss. *Boyfield* v. *Brown*, 2 Str. 1065.

Right to Compensation paid by Sovereign State.]—The respondents effected with underwriters valued policies of insurance (including war risks) on a cargo, which was afterwards destroyed by the "Alabama," a Confederate cruiser, and the underwriters paid to the respondents as on an actual total loss the valued amounts, which were less than the real value. The United States, out of a compensation fund created after the loss and distributed under an act of congress passed subsequently to the loss, paid to the respondents the difference between their real total loss and the sum received from the underwriters. Under the act of congress no claim was allowed for any loss for which the party injured should have received compensation from any insurer, but if such compensation should not have been equal to the loss actually suffered, allowance might be made for the difference; and no claim was allowed by or on behalf of any insurer either in his own right or in that of the party insured:—Held, that the underwriters were not entitled to recover the compensation from the respondents. *Burnand* v. *Rodocanachi*, 51 L. J., Q. B. 548; 7 App. Cas. 333; 47 L. T. 277; 31 W. R. 65; 4 Asp. M. C. 576—H. L. (E.)

Missing Ship.]—If a ship, for which the underwriters have paid as for a total loss, should chance to turn up, she is to be considered as abandoned and will belong to the underwriters. *Houstman* v. *Thornton*, Holt, 242; 17 R. R. 632.

Abandonment—Goods partly Saved.]—Insurance on 1,950 boxes of soap, at and from Liverpool to Oporto. The ship grounded on the bar at Oporto, and was bilged; seventeen boxes of soap were lost, and the rest were carried ashore in barges, the damage not exceeding 20 per cent. The underwriter being sued, paid into court 20 per cent. upon his subscription:—Held, a total loss, without abandonment, the ship having never arrived. *Buller* v. *Christie*, cited, 2 M. & S. 374; 15 R. R. 277 (not now law).

Capture and Recapture—Recovery as for Total Loss.]—See *Pringle* v. *Hartley*, post, col. 1292.

Warranty against Particular Average—Part of Goods Saved.]—Upon a policy upon hogsheads of sugar warranted against particular average, some part of the sugar in every hogshead being preserved, though less than 3 per cent. on the cargo, it was held that this could not be a total loss. *Hedburg* v. *Pearson*, 7 Taunt. 154.

Part of Cargo Damaged—Whole Sold.]—Bales of silk were insured free from average from Leghorn to Liverpool. The ship put into Gibraltar from stress of weather, and the cargo was necessarily unloaded. Some of the bales were damaged by water, and the master, acting reasonably, sold the whole. No one bale was so damaged as to be worthless. All might have been brought to England and sold as silk, though some was much damaged:—Held, not a total loss. *Navone* v. *Haddon*, 9 C. B. 36.

Fruit Cargo Damaged 80 per cent.]—Where a cargo of fruit was captured and recaptured and brought to its port of destination, but damaged 80 per cent. by delay:—Held, to be a partial loss. *M'Andrews* v. *Vaughan*, 1 Park, Ins. (8th ed.) 253.

Advances for Supplies for Passengers—Mutiny.]—Advances made for supplies to Chinese passengers were insured. On the voyage the Chinese mutinied, seized the ship, and refused to go to their destination:—Held, a total loss of the sums insured. *Naylor* v. *Palmer*, 8 Ex. 739; 10 Ex. 382.

Total or Partial Loss—Suing and Labouring—Conditioning Damaged Goods—Method of ascertaining Partial Loss.]—A Thames lighterman had effected a policy at Lloyd's on goods as interest might appear to cover risk of transit in his lighters between Tilbury and Hammersmith. A barge laden with bags of rice of the declared value of 450*l.* sank in the Thames, and was submerged for two tides. The consignees refused to take delivery, and the rice was kiln-dried at a cost of 68*l.* and sold for 111*l.*:—Held, that this was a partial, and not a total loss. The partial loss was to be ascertained by comparing the value of the rice when sound with the value of the damaged rice after it had been kiln-dried, and not with its value as it arrived damaged at Hammersmith. Under the suing and labouring clause the underwriter was liable for costs reasonably incurred in conditioning damaged goods, and as between him and the assured the loss for which he was liable was not to be calculated on the value of the goods when unconditioned. *Francis* v. *Boulton*, 65 L. J., Q. B. 153; 73 L. T. 578; 44 W. R. 222; 8 Asp. M. C. 79.

2. Constructive Total Loss.

What Damage.]—Where a ship, in consequence of the inability of the master to get it off the rocks where it has struck, has been actually sold, or where a cargo of a perishable nature has been so damaged by the sea that its substance is gone, and it can never reach the destined port in specie, the loss in each instance is an actual, and not a constructive, total loss. *Fleming* v. *Smith*, 1 H. L. Cas. 513.

Where a prudent owner uninsured would have sold, the case amounts to one of actual total loss. *Ib.*

Sale of Injured Cargo.]—Where the underwriter was not answerable for an average loss upon certain hides insured, and in the course of the voyage the hides became so damaged by one of the perils insured against, that they could not have been carried to the place of their destination (in consequence of their state of putridity), whereupon the hides were sold at the nearest port:—Held, that it amounted to a constructive total loss. *Roux* v. *Salvador*, 1 Bing. (N.C.) 526; 1 Scott, 491; 1 Hodges, 49; 4 L. J., C. P. 156. See *Roux* v. *Salvador*, 4 Scott, 1; 3 Bing. (N.C.) 266; 2 Hodges, 209; 7 L. J., Ex. 328.

As a general rule, where the whole or any part of a cargo (having suffered sea damage) is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor can the assured recover as for a total loss. *Rosetto* v. *Gurney*, 11 C. B. 176; 20 L. J., C. P. 257; 15 Jur. 1177.

If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore, as between the underwriters and the assured, impossible; if it can, the cargo is then practically capable of being sent in a marketable state to its port of destination, the master cannot sell it, and the assured cannot recover as for a constructive total loss. The same rule applies, if a part only of the cargo can be saved. *Ib.*

Insurance confined to "absolute Damage caused by the Perils insured against."]—A policy of marine insurance on ship effected with a mutual insurance company incorporated certain by-laws of the company indorsed thereon. The policy (inter alia) expressed it to be thereby declared that the acts of the assurer or assured in recovering, saving, or preserving the property insured should not be considered a waiver or acceptance of abandonment. One of the by-laws provided that, in the event of any ship being stranded or damaged, and not taken into a place of safety, it should be lawful for the directors of the company to use every possible means in their power to procure the safety of the said ship, the owner bearing his proportion of the expense incurred; and that no acts of the company or its agents under or in pursuance of the power thereby reserved to the company should be deemed or taken to be an acceptance or recognition of any abandonment of which the assured might have given notice to such company; and the company, under any circumstances, should only pay for the absolute damage caused by the perils insured against, which was in no case to exceed the sum insured:—Held, that the effect of the by-law was not to exclude a constructive total loss, but that it contemplated a partial loss only, and was intended to deprive the assured of the

right he would otherwise have to claim extraordinary expenditure, by way of salvage or otherwise in addition to the cost of repairs. *Forwood* v. *North Wales Mutual Marine Insurance Co.*, or *Forwood* v. *Provincial Mutual Marine Insurance Co.*, 49 L. J., Q. B. 593; 9 Q. B. D. 732: 42 L. T. 837; 28 W. R. 938; 4 Asp. M. C. 293—C. A.

"Total Loss only."]—A policy on a ship was against "total loss only." During the voyage the ship sustained damage, which amounted to constructive total loss:—Held, that a constructive total loss was within the terms of the policy. *Adams* v. *Mackenzie*, 13 C. B. (N.S.) 442: 32 L. J., C. P. 92; 9 Jur. (N.S.) 849; 7 L. T. 711; 11 W. R. 342.

Time of—Effect on Valued Time Policy.]—A time policy is not prevented from attaching by there having been a constructive total loss of the vessel before commencement of the risk insured. *Barker* v. *Janson*, 37 L. J., C. P. 105; L. R. 3 C. P. 303; 17 L. T. 473; 16 W. R. 399.

Sale by Foreign Tribunal—Cause of.]—A sale of the subject-matter of insurance ordered by a foreign tribunal within whose jurisdiction it has been originally thrown by perils insured against, does not amount to a constructive total loss where the sale is not due to perils insured against, such perils having ceased to operate, but is made for the purpose of repaying advances incurred through the captain's breach of duty in not transhipping the subject-matter of insurance to its destination. *Meyer* v. *Ralli*, 45 L. J., C. P. 741; 1 C. P. D. 358; 35 L. T. 838; 24 W. R. 963; 3 Asp. M. C. 324.

Unnecessary Sale by Master—Ship not irreparably Damaged.]—A ship was driven from her moorings by ice, went ashore, and was much, but not irreparably, injured. In the course of repairs a difficulty arose for want of materials, and the master sold her:—Held, not a total loss. *Furneaux* v. *Bradley*, 1 Park, Ins. (8th ed.) 365.

On Bottomry Bonds.]—The condition of a bottomry bond provided for its defeasance on payment of the amount of the bond, "or, in case of the loss of the ship or vessel, such an average as by custom shall have become due on the salvage, or if on the voyage the ship or vessel should be utterly lost, cast away, or destroyed." The ship having become a constructive total loss, the bondholder, by a decree in the admiralty court, obtained payment to him of the proceeds of the ship, which had been paid into court, and which were insufficient; the court holding that a bottomry bond was only discharged by payment or by an absolute total loss, and that the condition providing for defeasance on payment of such average as by custom should have become due, did not refer to the case of a constructive total loss. In an action by the bondholder on a policy of insurance upon the bond:—Held, that the doctrine of constructive total loss was not applicable to a policy of insurance on bottomry, and that the condition of defeasance did not apply to the case of a constructive total loss. *Broomfield* v. *Southern Insurance Co.*, 39 L. J., Ex. 186; L. R. 5 Ex. 192; 22 L. T. 371; 18 W. R. 810.

Cost of Repairs.]—In June, 1859, the owners, of a ship valued at 17,000*l.* caused themselves to be insured by policies for 16,000*l.* from Bombay to Liverpool. When off Algoa Bay she encountered very severe weather, and such damage that it became necessary to put into Port Louis, in the Mauritius, where she arrived on the 21st August. She was sold by auction under the captain's orders, and afterwards broken up, notice of abandonment being given. The owners had bought the ship in 1855 for 20,000*l.*, and 20 per cent. would be a reasonable deduction in respect of wear and tear at the time when the policy attached. The cost of building such a ship at that time would have been 20,000*l.*, and the cost of repairing her 10,500*l.* Her value, after she had been repaired would have been 7,500*l.*, she being a vessel of exceptional size and class; but an owner wanting such a ship for the particular purposes of his trade, and having to elect either to sell, or to repair, or to purchase, would have elected to repair her, for such a vessel could not have been built or purchased at that time for so small a sum as 10,500*l.*:—Held, that there was only an average loss and not a constructive total loss. *Grainger* v. *Martin*, 4 B. & S. 9; 8 L. T. 796: 11 W. R. 758—Ex. Ch. Affirming 31 L. J., Q. B. 186; 8 Jur. (N.S.) 995.

Questions for Jury.]—Action on a policy as for a total loss of freight to be earned in carrying a cargo of coals and iron from Rio to San Francisco. On the voyage the ship received damage from heavy seas, which compelled her to put into Monte Video, having previously, for safety's sake, thrown overboard some portion of her cargo and landed another portion at the Falkland Islands. On the ship being surveyed at Monte Video, she was found to be incapable of pursuing the voyage with the cargo on board, and no other vessel could be found to take the cargo on. The cost of warehouse room was so great at Monte Video, that in a few months it would have equalled the value of the cargo, and owing to the town being in a state of siege and political revolution, it was unsafe to land the cargo and leave it unwarehoused; under these circumstantes, the captain, being in want of money, sold the cargo, and applied the proceeds to the ship's purposes, and afterwards brought her back in ballast to Liverpool for repairs. At the trial the judge left two questions to the jury: first, was there a constructive total loss of the ship? and secondly, was there a constructive total loss of the goods? The jury answered both questions in the negative, and found a verdict generally for the defendant:—Held, that there was no misdirection, and that the two questions submitted to the jury were, under the circumstances, proper for the determination of the case. *Klingender* v. *Home and Colonial Insurance Co.*, 15 L. T. 16.

The rule is, that to entitle the assured to recover upon a policy, the loss must be the direct and immediate consequence of the peril insured against, and not a remote one. *Ib.*

On Abandonment.]—*See* XI. ABANDONMENT, post, cols. 1277, seq.

On Sale by Master.]—*See* XII. SALE, BY MASTER OF SHIP AND CARGO, post, cols. 1297, seq.

Continuous Perils.]—The mortgagees of a ship agreed with the mortgagors to effect an insurance on the ship at the mortgagors' expense, the policy to be held by them as part of their security. After the ship had sailed, the mort-

gagees effected an insurance against absolute total loss only. On the voyage the ship was driven ashore in a gale, and having become a constructive total loss, notice of abandonment was given by the mortgagees to the underwriters. The mortgagors immediately gave notice that they would look to the mortgagees as if they were their underwriters for a full insurance, and recovered from them the full value of the ship. The ship remained for two months exposed to the perils of the sea, when she became a complete wreck, and was then sold without prejudice to the rights of the parties. After the sale, but before this action, the mortgage was paid off:—Held, in an action by the mortgagees against the underwriters claiming for an absolute total loss, that as the ship when sold had become an absolute total loss from perils which were continuous, the plaintiffs were entitled to recover. *Levy* v. *Merchants Marine Insurance Co.*, 1 Cab. & E. 474; 52 L. T. 263; 5 Asp., M. C. 407.

Notice of Abandonment — Reinsurance.]—Upon a constructive total loss happening to the ship insured, notice of abandonment need not be given to the underwriters of a policy of reinsurance. The owners of a ship insured her for twelve months in an ordinary Lloyd's policy, which contained a suing and labouring clause. The underwriters of the Lloyd's policy reinsured themselves with a French company which reinsured itself with the defendants. The policy underwritten for the French company by the defendants was for 1,000*l.*; bound them to pay the sum that might be paid on the original policy; was to cover the risk of total loss only, and contained a suing and labouring clause. Whilst the policy was in force, the ship went ashore and was much damaged. Her owners gave notice of abandonment to the underwriters of the Lloyd's policy, but notice of abandonment was not given to the defendants; the underwriters of the ship ultimately settled with her owners at 88 per cent. They expended more than 5,000*l.* in floating the ship, and sold her to a builder, who repaired her at a cost of 9,000*l.*, and resold her for 11,200*l.* The cost of floating the ship (after deducting the price paid by the shipbuilders) being added to the 88 per cent. represented a loss of 112 per cent. In an action by the French company as reinsurers against the defendants:—Held, that a constructive total loss had occurred, and that as the defendants had bound themselves to pay as might be paid on the original policy, they were liable to the extent of 1,000*l.*; but that they could not be held liable for more, as the underwriters of the Lloyd's policy were not the "factors, servants, or assigns" of the plaintiffs within the meaning of the suing and labouring clause, and that the defendants were not liable, at least by virtue of that clause, for any part of the expenses incurred in floating the ship. *Uzielli* v. *Boston Marine Insurance Co.*, 54 L. J., Q. B. 142; 15 Q. B. D. 11; 52 L. T. 787; 33 W. R. 293; 5 Asp. M. C. 405—C. A.

Loss of Voyage, not of Ship.]—Insurance on ship at and from Jamaica to any port or ports, cruising, &c., for four months, without further account, &c., and free from average (before 19 Geo. 2, c. 37); the insured had interest in the ship to the amount insured. During the four months the crew mutinied, and the cruise (privateer's) was prevented. At the end of the four months the ship was at Jamaica in safety:—Held, that the assured could not recover. *Pole* v. *Fitzgerald*, Willes, 641; Ambl. 311; 4 Bro. P. C. 439.

Insurance of privateer for two months. The ship was captured and recaptured without material injury; but the cruise was lost:—Held, that the underwriter was liable. *Jenkins* v. *Mackenzie*, 4 Bro., P. C. 447, n. S. P., *Fitzgerald* v. *Wainham*. *Ib.*; *Whitehead* v. *Bance*, 4 Bro. P. C. 446, n.; *Stoney* v. *Brown*, 4 Bro. P. C. 445, n.; *Barclay* v. *Collier*. *Ib.*; *Hanbury* v. *King*. *Ib.*

Capture and Recapture.]—If a ship insured be taken by the enemy and after a possession of nine days, but before she is carried infra præsidia, be retaken by an English man-of-war the property is not changed. *Asseriedo* v. *Cambridge*, 10 Mod. 77. *See*, per Lord Mansfield, 2 Burr. 695.

Ship Derelict—Salvage Claim — Ship Sold Abroad.]—The cargo on board the s.s. "Celestina," owned by a merchant at Chili and insured for 3,300*l.*, took fire, and the ship was abandoned on high seas by her crew. She was soon after picked up by another English ship and towed into Rio, where, the fire being extinguished, she was placed in the hands of the judge to enforce a claim for salvage. This claim was at once settled in England, the underwriters on the cargo contributing the agreed sum of 1,250*l.* in various proportions, and the several policies were indorsed "Settled a claim on account without prejudice." Instructions were sent to Rio for the ship's release, but the Brazilian court refused to release her, and having sold both ship and cargo, retained the proceeds:—Held, that the underwriters must pay a total loss, and were not entitled to deduct the sum paid in settlement of the salvage claim. *Buchanan* v. *London and Provincial Marine Insurance Co.*, 65 L. J., Q. B. 92.

3. Average Loss.

a. General Average.

Mast Cut away—Question for Jury.]—A ship being caught in a storm, portions of the rigging gave way to such an extent that the mainmast began to lurch violently. Whereupon, fearing that the mast would rip up the deck and thereby endanger the ship, the captain ordered it to be cut away, which was done. In an action by the owner of the ship to recover from the owners of the cargo their proportion of general average loss incurred by the sacrifice of the mast, the judge left to the jury the following questions: first, are you of opinion that the mast was virtually a wreck, and gone at the time it went over? secondly, do you find it was hopelessly lost? The jury answered both questions in the affirmative:—Held, that there had been no misdirection, and that substantially the right questions had been left to the jury. *Shepherd* v. *Kottgen*, 47 L. J., C. P. 67; 2 C. P. D. 585; 37 L. T. 618; 26 W. R. 126; 3 Asp., M. C. 544—C. A.

If anything on board a ship which is cut or cast away because it is endangering the whole adventure is in such a state or condition that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average. *Ib.*

Tackle.]—An action lies by a shipowner to recover from the owner of the cargo his proportion of general average loss incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern. *Birkley* v. *Presgrave*, 1 East, 220; 6 R. R. 256.

Repairs and Expenses.]—A ship, in the course of her voyage, was run foul of by another ship, and damaged, and the captain was in consequence obliged to cut away part of the rigging, and to return to port to repair the damage and cutting away, without which the ship could not have prosecuted her voyage or safely kept the sea:—Held, that the expenses of repairs, so far as they were absolutely necessary to enable the ship to prosecute the voyage, but no farther, and of unloading the goods for the purpose of making the repairs, were a general average. Secus, the master's expenses during the unloading, repairing and reloading, and crimpage to replace deserters during the repairs. *Plummer* v. *Wildman*, 3 M. & S. 482; 16 R. R. 334. See also *Grainger* v. *Martin*, ante, col. 1238.

Where, for the safety of the ship, it becomes necessary, during the voyage, to put into a port to refit, the expense of refitting is not a general average. *Jackson* v. *Charnock*, 8 Term Rep. 509; 5 R. R. 425.

But where a ship is obliged to put into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average. *Da Costa* v. *Newnham*, 2 Term Rep. 407. *See also Cases* post, col. 1247.

The wages and provisions of the crew, while the ship remained in port, whither she was compelled to go for the safety of ship and cargo, in order to repair a damage occasioned by tempest, were held not to be the subject of general average; nor the expenses of such repair; nor the wages and provisions of the crew during her detention in port, to which she returned, and was detained there on account of adverse winds and tempest; nor the damage occasioned to the ship and tackle, by standing out to sea with a press of sail in tempestuous weather; which press of sail was necessary for that purpose in order to avoid an impending peril of being driven on shore and stranded. *Power* v. *Whitmore*, 4 M. & S. 141; 16 R. R. 416,

The expenses of the wages and provisions of the crew of a ship while detained in repairing sea damage are excluded by the usual warranty as to average. *De Vaux* v. *Salvador*, 4 A. & E. 420; 6 N. & M. 713; 1 H. & W. 751; 5 L. J., K. B. 134.

Chartered Freight—General Average Charges payable as per Foreign Statement if required.]—Where the chartered freight of a vessel proceeding in ballast to a loading port in pursuance of a charterparty is insured, and the only persons interested in the vessel and the freight insured are the owners of the vessel, there cannot be any general average loss, or any loss to be treated as a general average loss, for which the underwriters are liable, and this is so even though the policy contains a clause providing that general average charges should be payable as per foreign statement if required. *The Brigella*, 62 L. J., Adm. 81; [1893] P. 189; 1 R. 616; 69 L. T. 834; 7 Asp. M. C. 337.

Ransom from Pirates.]—If goods be given up to pirates to save the rest, the loss is general average; aliter, where part are taken by pirates. *Hicks* v. *Palington*, Sir Francis Moore, 297.

Expenses of Steaming.]—A clipper sailing ship, fitted with an auxiliary screw, being on her voyage from Melbourne to England, came into collision with an iceberg, and received such damage that her sailing power was practically destroyed. By means of her screw and her steam power she reached Rio. The expense of repairing her at Rio would have been so great that the master properly determined to have her temporarily repaired, so as to bring her home under steam. It was necessary for this purpose to purchase coals at Rio and at Fayal, and the ship eventually reached home. An action was brought against the owners of a quantity of gold on board by the shipowner, to recover the contribution to general average alleged to be due from them in respect of the expense incurred in obtaining coals at Rio and at Fayal:—Held, that the action was not maintainable, as there was no right to charge this expense to general average. *Wilson* v. *Bank of Victoria*, 36 L. J., Q. B. 89; L. R. 2 Q. B. 203; 16 L. T. 9; 15 W. R. 693.

A sailing ship sailed from Melbourne, bound for London, properly fitted and manned, and seaworthy for the voyage, with coal enough for an ordinary voyage. She had on board, as was usual for such ships on that voyage, a donkey-engine equivalent, for the purposes of pumping and working the ship, to ten men. Without the engine ten more men would have been required. On the voyage severe weather caused the ship to spring a leak, which could only be kept down by constantly working the engine at the pumps. When the engine had thus consumed all the coal except one and a half ton, the captain, acting prudently for the preservation of the ship, cut up and used with the coal some spare spars and wood, part of the ship's stores, not intended to be used as fuel. There was no sudden emergency which rendered the cutting up of the spars and wood necessary, and the ship was exposed to no serious risk from the water she made while there was sufficient fuel on board to work the engine, but it would have been impossible to have kept the ship afloat with the crew alone without working the engine. The captain afterwards bought coal from another vessel, and also in a port into which he ran for that purpose, just enough coal to enable the vessel to reach London in safety. Without the aid of the engine the vessel could not have continued her voyage. The shipowner having sued a shipper of cargo for a general average contribution in respect of the cost of the spare spars and wood, and also of the bought coal:—Held, first, that the cost of the bought coal could not be charged to general average. *Harrison* v. *Bank of Australasia*, 41 L. J., Ex. 36; L. R. 7 Ex. 39; 25 L. T. 944; 20 W. R. 385; 1 Asp. M. C. 198.

Held, secondly, by Kelly, C.B., Bramwell, B., dissentientibus Martin, B., and Cleasby, B., that the cost of the spars and wood could be charged to general average. *Ib.*

Coals consumed in working Stranded Ship off the Ground.]—Where a ship or her tackle are intentionally put to an abnormal use involving an extraordinary risk of injury for the purpose of saving ship and cargo from imminent peril,

any consequent loss to the ship is the subject of general average contribution. Working the engines of a ship whilst she is fast ashore is an abnormal use of them. Consequently, coal consumed in so working the engines is the subject of general average contribution. Per curiam: Injury to the engines in so working them is the subject of general average contribution. *The Bona, English and American Shipping Co.* v. *Indemnity Mutual Marine Insurance Co.*, 64 L. J., Adm. 62; [1895] P. 125; 11 R. 707; 71 L. T. 870; 43 W. R. 290; 7 Asp. M. C. 557—C. A.

Resisting Attack.]—A ship being unable to escape from a privateer, resisted the attack, beat off the privateer, reached her port, and delivered her cargo in safety:—Held, that neither the expense of repairing the ship, nor of curing the wounds of the sailors, nor of the ammunition, was the subject of general average. *Taylor* v. *Curtis*, 2 Marsh. 309; 6 Taunt. 608; Holt, 192; 4 Camp. 337; 16 R. R. 686.

If a ship, in order to escape from a privateer, carries an unusual press of sail, and succeeds in getting away, but sustains damage in so doing, this is a sea risk, not a general average loss. *Covington* v. *Roberts*, 2 Bos. & P. (N.R.) 378; 9 R. R. 669.

Expenses of getting off Stranded Ship.]—Extraordinary expenses incurred in getting off a stranded ship, after the cargo has been removed to a place of safety, are not (in the absence of exceptional circumstances) general average to which the owner of cargo is liable to contribute, although the goods remain in the control of the shipowner's agents. *Walthew* v. *Mavrojani*, 39 L. J., Ex. 81; L. R. 5 Ex. 116; 22 L. T. 310—Ex. Ch.

Semble, that such expenses may, as against the owner of cargo so removed be general average, if the goods cannot be otherwise carried forward, or only at a great expense, or after a delay which would deteriorate the goods. *Ib.*

A ship laden with cargo, while in port, was driven ashore on the 5th of October; the cargo was unshipped, and by the 19th was landed and warehoused in safety under the superintendence and control of the shipowner's agents; an attempt was then made to float the vessel, which was abandoned on the 24th of November. Subsequently a second attempt was made, which, on the 31st of December, succeeded; the ship was taken into port and repaired, and after reshipping the cargo, proceeded to its destination:—Held, that the expenses of getting the vessel off were not general average to which the owners of cargo were bound to contribute. *Ib.*

Expenses incurred in getting off a stranded ship, and taking her to a port for repair, after the entire cargo has been discharged and in safety, are not chargeable to general average, but are chargeable to a particular average on the ship alone. *Job* v. *Langton*, 6 El. & Bl. 779; 26 L. J., Q. B. 97; 3 Jur. (N.S.) 109; 4 W. R. 641.

A ship was chartered to proceed from Liverpool to a foreign port, and there load a return cargo, for freight, payable on delivery of the home cargo. She took on board an outward cargo, sailed and was driven on a bank by a storm near Liverpool, and the cargo was rescued from her, and carried to Liverpool, and there warehoused; the ship still remaining ashore in a situation of peril. Some days afterwards, the ship was got off and taken to Liverpool, where she was repaired, and again took the cargo on board and proceeded on her voyage. It was agreed between the insured and the underwriters on chartered freight, that the freight was to be taken as liable to contribute to general average; and the only question for the court was, whether the expenses, incurred after the goods were in Liverpool, in getting the ship off without which she could not have proceeded on her voyage or earned the chartered freight, were general average to which the ship, freight and cargo were to contribute, or were chargeable to ship alone, or were chargeable on any other principle:—Held, that as the ship and freight were both in peril, and both saved, the freight must contribute as well as the ship, supposing the cargo not to contribute. *Moran* v. *Jones*, 7 El. & Bl. 523; 26 L. J., Q. B. 187; 3 Jur. (N.S.) 663; 5 W. R. 503.

But the court drew the inference of fact, that the whole saving of the cargo and ship was one continued transaction, and on that hypothesis:—Held, that the expenses were general average, to which ship, freight and cargo must contribute. *Ib.*

Raising Sunken Vessel.]—The remuneration which the shipowner is obliged to pay for services rendered in raising and repairing a sunken ship gives a claim to a general average contribution provided such services appear to be for the joint benefit of the ship and cargo. *Kemp* v. *Halliday*, 6 B. & S. 723; 35 L. J., Q. B. 156; L. R. 1 Q. B. 520; 12 Jur. (N.S.) 582; 14 L. T. 762; 14 W. R. 697—Ex. Ch.

Scuttling Ship to extinguish Fire.]—Damage to cargo by scuttling a ship to put out a fire is the subject of general average contribution. *Achard* v. *Ring*, 31 L. T. 647; 2 Asp. M. C. 422.

There is no valid custom excluding the loss from general average. *Ib.*

The plaintiff chartered a ship from the defendant, and by the charterparty it was provided, "all questions of general average to be settled according to the custom of the London underwriters at Lloyd's." A fire broke out on board, the ship was scuttled to extinguish it, and the cargo was damaged thereby. The loss was adjusted as general average, and the plaintiff brought his action to recover from the defendant the ship's contribution. The judge directed the jury that the loss was general average according to law, and the question was whether there was a valid custom excluding such loss from general average. The jury found that no such custom existed, and the verdict was entered for the plaintiff. *Ib.*

Ship on Fire in Harbour — Termination of Adventure.]—To pour water upon the cargo, pursuant to the master's orders, for the purpose of extinguishing a fire which had broken out in a ship's hold, is a general average act; and if the cargo is thereby injured, the owner is entitled to a contribution. Whilst the cargo remains on board a ship after her arrival at the port of destination, the maritime adventure is not terminated so as to absolve the owners of the cargo and the ship from mutual rights and liabilities. The defendants were the owners of the "H.," which, having arrived at her port of destination at the end of a voyage, unloaded about 1,300 tons of her cargo; about 100 tons remained on board. Whilst she was lying at a

wharf, a fire broke out in her hold; and, in order to extinguish it, her master caused water to be poured into her, whereby some goods, forming part of the cargo and belonging to the plaintiffs, were damaged. The "H." might have been scuttled and raised again; but if the fire had not been extinguished, she would have been in peril of partial destruction:—Held, that the defendants were liable to contribute by way of general average for the damage done to the plaintiff's goods. *Whitecross Wire Co.* v. *Savill*, 51 L. J., Q. B. 426; 8 Q. B. D. 653; 46 L. T. 643; 30 W. R. 588; 4 Asp. M. C. 531—C. A.

Sale of Cargo.]—A claim for contribution to general average arises only where a part of the cargo is sacrificed for the preservation of the ship, and the rest of the cargo from an impending danger; not where a part of the cargo is sold to raise money at a port to which the ship has put back for the repair of damage incurred by ordinary perils of the sea. *Hallett* v. *Wigram*, 9 C. B. 580; 19 L. J., C. P. 281.

Deck Cargoes—General Principles as to Jettison.]—Where goods are jettisoned for the common good, the loss, as a rule, comes within general average, and must be borne proportionally "by those interested." To this rule there is an exception, viz. that deck cargo jettisoned is not entitled to general average contribution. To this exception, however, there are two exceptions, viz. that coasting vessels are without the exception, and also those cases where by custom the deck cargo is one customary in the trade, and, perhaps, also from the port. It is said that there is a further exception, viz. where by agreement with the shipper the cargo is shipped on deck. We are of a different opinion. Per cur. in *Wright* v. *Marwood*, 50 L. J., Q. B. 643; 7 Q. B. D. 62; 45 L. T. 297; 29 W. R. 673; 4 Asp. M. C. 451—C. A.

—— **Legality.**]—A declaration by shipowners, against an underwriter of a time policy, upon the hull and stores, alleged that on a certain voyage certain pigs were shipped on board the vessel, and that, from stress of weather, it became necessary, for the preservation of the vessel and her cargo, to throw the pigs overboard, by reason whereof the plaintiffs, in respect of their interest in the hull, had to pay a proportionable part of the value of the pigs, and sustained a general average loss. A plea, that the pigs thrown overboard had been stowed on the deck, by reason whereof the defendant was not liable to contribute any average loss sustained by their jettison, is bad, as the mere fact of stowing the pigs on deck is no answer to the action. *Millward* v. *Hibbert*, 2 G. & D. 142; 3 Q. B. 120; 11 L. J., Q. B. 137; 6 Jur. 706.

Deck-cargo (timber) lawfully laden, pursuant to charterparty, having broken adrift in consequence of stormy weather, and impeding the navigation and endangering the safety of the vessel, was necessarily thrown overboard:—Held, that the shipper was entitled to claim general average in respect thereof, as against the shipowner. *Johnson* v. *Chapman*, 19 C. B. (N.S.) 563; 35 L. J., C. P. 23; 15 L. T. 70; 14 W. R. 264.

In order to make the jettison of cargo the subject of a general average contribution, the facts must be established that there was a maritime peril; that the sacrifice made was to avert a danger common to the whole adventure, and that such sacrifice was voluntary. *Ib.*

The plaintiffs shipped certain cattle as a deck cargo on board the defendant's vessel; during the voyage a storm arose, and owing to stress of weather the master jettisoned the deck cargo by throwing the cattle overboard. The act of jettison was proper and necessary on the part of the master for the safety of the defendant's vessel:—Held, that the plaintiffs could not recover from the defendants a general average contribution for the loss of the cattle. *Johnson* v. *Chapman* (19 C. B. (N.S.) 563) commented on. *Wright* v. *Marwood*, supra.

—— **Custom as to Liability in respect of.**]—A custom that underwriters are not liable, under the ordinary form of policy, for general average in respect of the jettison of goods stowed on deck, is a valid custom, and does not contradict the terms of the policy. *Miller* v. *Tetherington*, 7 H. & N. 954; 31 L. J., Ex. 363; 8 Jur. (N.S.) 1039; 9 L. T. 231; 10 W. R. 356—Ex. Ch. See also *Harley* v. *Millward*, 1 Jones & C. 224.

—— **Deck Cargo at Merchant's Risk.**]—*Burton* v. *English*, 53 L. J., Q. B. 133; 12 Q. B. D. 218; 49 L. T. 768; 32 W. R. 655; 5 Asp. M. C. 187, ante, col. 587.

—— **Custom as to Deck Cargo.**]—*Da Costa* v. *Edmunds*, 4 Camp. 142; 2 Chit. 227; 16 R. R. 763. *Gould* v. *Oliver*, 4 Bing. (N.C.) 134; 5 Scott, 445; 7 L. J., C. P. 68; 2 Man. & Gr. 208; 2 Scott (N.R.) 241; ante, col. 503.

What Recoverable — "According to British Custom."]—A ship was lying at anchor in port with a general cargo on board, when a fire broke out in the forehold. Every effort was made, but without success, to extinguish the fire by throwing water down the hatchways and upon the cargo. Finally, a hole was cut in the side of the vessel, and her fore compartment filled with water. This extinguished the fire, and if it had not been done the cargo would have been destroyed, and the ship seriously damaged if not rendered a total wreck. Part of a quantity of bark shipped on board was damaged or destroyed by the water which was poured or let into the vessel to extinguish the fire. The bark was shipped under a bill of lading, which contained the words, "average, if any, to be adjusted according to British custom." It is the practice of British average adjusters in adjusting losses to treat a loss occasioned by water in the manner above described as not a general average loss:—Held, whether or not the loss was, according to the general law of England, the subject of a general average contribution, that the words "British custom" in the bill of lading must be taken to mean the practice of British average adjusters, so that the claim for general average was expressly excluded. *Stewart* v. *West Indian and Pacific Steamship Co.*, 42 L. J., Q. B. 191; L. R. 8 Q. B. 362; 28 L. T. 742; 21 W. R. 953; 1 Asp. M. C. 528—Ex. Ch.

—— **On Foreign Insurances.**]—An insurer of goods in a foreign country is not liable to indemnify the assured (a subject of that country) who is obliged by the decree of a court there to pay contribution to a general average, which by the law of this country could not have been demanded, where it does not appear that the parties contracted upon the footing of some usage among merchants obtaining in the foreign country, to

treat the same as general average, but such usage is to be collected merely from the recitals and assumption made in the decree. *Power* v. *Whitmore*, 4 M. & S. 141 ; 16 R. R. 416.

Practice of Average Adjusters is not Evidence of Custom of Trade.]—A long continued practice of average adjusters who prepare their statements according to the law as laid down by the courts is no evidence of such a custom or usage of trade as can be impliedly incorporated in a contract between a shipowner and owner of cargo. The defendants, who were the owners of cargo, in an action against them by the shipowner to recover a general average contribution in respect of expenses caused by the ship putting into a port of refuge, landing, storing, and reshipping the cargo, and leaving the port, alleged a custom of trade that in such a case the expenses incurred in and about warehousing the cargo were apportioned among the owners of the cargo alone, and the expenses of reshipping the cargo, port dues, &c., were borne by the owners of the ship and freight. Several witnesses were called who gave evidence to the effect that for sixty or seventy years the practice of average adjusters had been as stated by the defendants, but that, in consequence of the decision in *Attwood* v. *Sellar*, infra, some average adjusters had altered their mode of adjustment in such a case :—Held, that this was not evidence of a custom of trade which could be left to the jury. *Svensdsen* v. *Wallace*, 46 L. T. 742 ; 30 W. R. 841 ; 4 Asp. M. C. 550.

—— **Expenses of Warehousing, &c., and Charges on Vessel leaving Port.**]—Where a vessel goes into a port of refuge, in consequence of an injury to her which is itself the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are the subject of general average. The practice of average adjusters to the contrary held to be contrary to law. *Attwood* v. *Sellar*, 49 L. J., Q. B. 515 ; 5 Q. B. D. 286 ; 42 L. T. 644 ; 28 W. R. 604 ; 4 Asp. M. C. 283—C. A.

A ship on her voyage began to leak dangerously. The master, for the good of all concerned, put into a port of refuge for repairs ; where the cargo was for the benefit of all concerned, landed for repairs. It was then reloaded and the voyage completed :—Held, that the cargo owners were not chargeable with general average contribution in respect of the expenses of reshipping the cargo. *Svensden* v. *Wallace*, 54 L. J., Q. B. 497 ; 10 App. Cas. 404 ; 52 L. T. 901 ; 34 W. R. 369 ; 5 Asp. M. C. 453—H. L. (E.)

Wages and Expenses in Port of Distress, not General Average.]—Extraordinary wages and provisions expended whilst a ship is in a port of distress for repairs are not the subject of general average, except in case of urgent necessity. *Lateward* v. *Curling*, 1 Park, Ins. (8th ed.) 288 ; and see *Fletcher* v. *Poole*, ante, col. 1130.

Sue and Labour Clause.]—*See* 5, EXPENSES—SUE AND LABOUR CLAUSE, infra, col. 1224.

b. Warranty against.

Extent of.]—An insurance free from average, unless general does not extend to the damage received by goods in a storm. *Wilson* v. *Smith*, 1 W. Bl. 507 ; 3 Burr. 1550.

Memorandum—Rice.]—Rice is not corn within the meaning of the usual memorandum of a policy. *Scott* v. *Bourdillon*, 2 Bos. & P. (N.R.) 213.

Partial Loss—Memorandum — Peas — Corn—Malt.]—Peas arrived damaged and were sold for three-fourths less than the freight :—Held, that as the goods mentioned in the memorandum arrived the underwriters were not liable. *Mason* v. *Skurray*, 1 Park, Ins. (8th ed.) 253.

But the word "corn" includes peas and beans. *Ib.*

And malt is corn within the meaning of the clause in a policy to be free from average, &c. *Moody* v. *Surridge*, 2 Esp. 633 ; 5 R. R. 575.

On the memorandum "free from average under 3*l.* per. cent.," the underwriter is liable for the amount of the aggregate of several partial losses, each less than 3*l.* per cent., but amounting together to more. *Blackett* v. *Royal Exchange Assurance Co.*, 2 C. & J. 244 ; 2 Tyr. 266 ; 1 L. J., Ex. 101.

Insurance on goods with the usual memorandum, "corn, fish, &c., warranted free from average, unless general, or the ship should be stranded." A quantity of fish, part of the goods insured, was so much damaged by the perils of the sea, that, on putting into the port of Lisbon, on a survey by the board of health at that place, the fish was declared to be, and in fact was, of no value :—Held, that this is not a total loss of the fish. *Cocking* v. *Fraser*, 4 Dougl. 295.

Under a similar memorandum in a policy of insurance on an electric cable, the subject of insurance in the valuation clause being expressed as "on one 1,000*l.* share in the A. B. Telegraph Company, said share valued at 1,100*l.*" ; where a portion of the cable was lost by peril of the sea, and a portion by perils not insured against :—Held, that the warranty against partial average was applicable, and consequently that the assured could not recover unless a loss of 3*l.* per cent. had been sustained. *Paterson* v. *Harris*, 1 B. & S. 336 ; 30 L. J., Q. B. 354 ; 7 Jur. (N.S.) 1276 ; 5 L. T. 53 ; 9 W. R. 743.

Held, also, that in assessing the damages, the value of the whole cable that ever was exposed to peril, including the portion lost, must be ascertained according to its cost, when shipped free on board ; and that the proportion between that value and the loss actually incurred by the perils insured against would give the percentage payable by each underwriter on his subscription. *Ib.*

Held, also, that in applying this principle, that portion of the cable which was lost in a first attempt to lay down the cable, and which it became necessary to replace by new cable, should be estimated at the cost of the substituted cable ; but, as regarded a portion of the lost cable which was taken out as superfluous cable, by way of a provision against accident, it might be reasonable to consider how far such cable, if not lost, would have been depreciated in marketable value by having been coiled in the hold of a vessel or by other circumstances. *Ib.*

Damages for Collision.]—Insurance on a ship "V.," with the usual warranty as to average. The ship having come into collision with another ship, and proceedings being instituted for the damage done to the other ship, the matter was

referred to arbitrators, who awarded that each ship should bear half of the aggregate loss. The ship "V." on the settlement, had to pay a balance to the other ship:—Held, not to be a loss to which the underwriters were liable. *De Vaux* v. *Salvador*, 4 A. & E. 420; 6 N. & M. 713; 1 H. & W. 751; 5 L. J., K. B. 134.

Expenses of Crew.]—Held, also, that the expense of the wages and provisions of the crew of the "V." during the time she was detained in repairing damage done to herself by perils of the sea, was not such a loss. *Ib.*

Stranding—Goods Insured in Ship and in Craft—Construction of Valued Policy—Advanced Freight included.]—By a policy of insurance certain maize was insured, as to part, from San Nicolas, and, as to the remainder, from Buenos Ayres, for a voyage to the United Kingdom, free from particular average, unless the ship or craft should be stranded. The policy included all risks of steam navigation, and in craft, transhipment, or while waiting transit. The maize was valued in the policy at 7,940*l.* "(included 1,361*l.* 6*s.* 6*d.* for advance on freight)." Between San Nicolas and Buenos Ayres the ship stranded, and a portion of the cargo was discharged into lighters, and part was wetted and part lost. The ship got off, and at Buenos Ayres was surveyed, and was admitted by both parties to be seaworthy to continue her voyage, and thereupon the discharged cargo was reshipped, together with the Buenos Ayres portion of the maize, which had been awaiting the ship in lighters. On the voyage to Europe a large part of the cargo was lost and the remainder damaged owing to perils of the seas. In an action raising the question as to the amount of damage recoverable by the assured under the policy:—Held, that, the stranding having occurred before the Buenos Ayres portion of the maize was on board, the assured were not entitled to recover for particular average loss in respect of it, but only in respect of the maize shipped at San Nicolas:—Held, also, that the assured were not entitled to have the particular average loss calculated on the valuation stated in the policy, without deduction of the amount of the freight advanced. *Thames and Mersey Marine Insurance Co.* v. *Pitts*, [1893] 1 Q. B. 476; 5 R. 168; 68 L. T. 524; 41 W. R. 346; 7 Asp. M. C. 302.

Damage to Goods.]—Where articles essentially different in nature and kind are insured under a general description, as "master's effects," warranted free from all average, the warranty is divisible, and means that the insurers are not to be liable for any partial loss, but are to be liable for a total loss of any of the specific articles insured under that description. *Duff* v. *Mackenzie*, 3 C. B. (N.S.) 16; 26 L. J., C. P. 313; 3 Jur. (N.S.) 1025.

Insurance at and from C. to L. on goods in a ship by name, until the same should be there safely discharged and landed, rice free of particular average, and the ship, with rice and other goods, arrived within the limits of the port of L.: but before she could be brought to her moorings, or be at all unloaded, ran aground and was wrecked, and the whole cargo was greatly damaged, and was taken out of her in craft, and carried to the consignees at L. and sold, and produced upon the whole little more than sufficient to pay freight and salvage; but the rice did not produce sufficient to pay the freight:—Held, that this was a case of particular average only, and therefore, as to the rice, the underwriter was exempted by the warranty. *Glennie* v. *London Assurance Co.*, 3 M. & S. 371; 15 R. R. 275.

Upon a policy on goods free from particular average, no damage short of the absolute destruction of the thing insured will amount to a total loss. *Navone* v. *Haddon*, 9 C. B. 30; 19 L. J., C. P. 161.

A cargo of corn was insured free from average, on a voyage from Dantzic to Hull, by the ship "Isabella." In the course of the voyage the vessel and cargo sustained damage by the sea, and in consequence the vessel was obliged to put into a port in Norway, and there the corn was taken out for the purpose of drying it, and repairing the vessel, and so enabling her to proceed to England with the corn when dried. The corn, however, when taken out appeared to have received considerable damage; and the master, after calling in advice, resolved to sell it, and it was accordingly sold (after having been partially dried) as damaged corn, in the port in Norway:—Held, that the insured could not recover as for a total loss, unless the corn was in such a state in the port in Norway as that, when brought home, it could not have been sold for an amount exceeding the expense of drying and bringing it home; and that it was not a proper question to leave to the jury, whether a prudent uninsured owner would, under similar circumstances, have sold the corn at the port in Norway. *Reimer* v. *Ringrose*, 6 Ex. 263; 20 L. J., Ex. 175.

An insurance was effected upon wheat shipped in bulk, and valued at 1,600*l.*, warranted free from average except general, or the ship were stranded. On the voyage the ship met with tempestuous weather, and made considerable water; and in pumping it out, wheat to the value of about 75*l.* was pumped out with the water and lost:—Held, that the assured could not recover as for a total loss of the part so lost. *Hills* v. *London Assurance Corporation*, 5 M. & W. 569; 9 L. J., Ex. 25.

A policy was effected on a ship and her cargo of guano, which contained the following clause:—"free from all average or claim arising from jettison or leakage, unless consequent upon stranding, sinking, or fire." During the voyage the ship, by tempestuous weather, became leaky, and was compelled to put into port, and was there found unfit to proceed on her voyage, which was abandoned, and the ship and goods sold:—Held, that the assured were entitled to recover as for an average loss. *Carr* v. *Royal Exchange Assurance Corporation*, 5 B. & S. 433; 33 L. J., Q. B. 63; 10 Jur. (N.S.) 316; 10 L. T. 265; 12 W. R. 127.

Freight.]—A policy contained a stipulation that "freight was warranted free from average under 5*l.* per cent. unless general." The interest assured was described as "money advanced to the assured as owner of the ship, on account of freight of the cargo loaded on board her and subject to the risk of the voyage":—Held, that this was an insurance of freight and liable to general average. *Hall* v. *Janson*, 4 El. & Bl. 500; 3 C. L. R. 737; 24 L. J., Q. B. 97; 1 Jur. (N.S.) 571; 3 W. R. 213.

As to what is a Stranding.]—*See* ante, col. 1093.

"Free from Average under 3 per cent. unless general"—Time Policy—Losses on separate Voyages.]—In a valued time-policy of marine insurance the ship and freight were warranted free from average under 3 per cent., unless general, or the ship be stranded, sunk, or burned. The ship made several voyages during the period insured, and incurred particular average losses. Such losses on any one voyage did not amount to 3 per cent., but the total of all the losses on all the voyages exceeded 3 per cent. In an action by the assured on the policy:—Held, that the plaintiffs were not entitled to recover, for although the separate losses on each voyage could be added together, yet the losses occurring on distinct and separate voyages could not be added together so as to bring the amount of the losses up to 3 per cent. *Stewart* v. *Merchant Marine Insurance Co.*, 55 L. J., Q. B. 81; 16 Q. B. D. 619; 53 L. T. 892; 34 W. R. 208; 5 Asp. M. C. 506—C. A.

"Free from Particular Average unless the Ship be stranded"—Insured Goods not on Board at Time of Stranding.]—The stranding referred to in a policy on goods in the usual memorandum "warranted free from particular average unless the ship be stranded" is a "stranding of the ship" whilst the insured goods are on board her. *The Alsace-Lorraine*, 62 L. J., Adm. 107; [1893] P. 209; 1 R. 632; 69 L. T. 261; 42 W. R. 112; 7 Asp. M. C. 362.

Where, therefore, rice insured under a policy containing the above memorandum, was unloaded from the ship in which it had been originally shipped and taken on shore at a port of refuge in order that the ship might be repaired, and the ship stranded whilst the cargo was on shore:—Held, that the warranty prevented the underwriters being liable for a particular average loss on the rice occurring when the rice had been transhipped and was being carried to its destination in another bottom. *Ib.*

Free from Average under £3 per cent. unless Ship be "burnt."]—A ship was insured under a Lloyd's policy containing the usual form of memorandum—viz.: "And all other goods, also ship and freight, are warranted free from average under 3*l.* per cent., unless general, or the ship be stranded, sunk, or burnt":—Held, that a ship is not "burnt" within the meaning of the memorandum where fires that have broken out in the coal bunkers have consumed some of the ship's coals, and done some slight damage to the structure of the ship itself, but have occasioned no interruption of the voyage and no interference with the navigation of the ship. *The Glenlivet* 63 L. J., Adm. 45; [1894] P. 48; 6 R. 665; 69 L. T. 706; 42 W. R. 97; 7 Asp. M. C. 395—C. A.

It cannot be laid down as a definition applicable to every case that a ship is "burnt" within the meaning of the memorandum, whenever the injury by fire is sufficient to render the ship temporarily unnavigable. Whether a partial burning does or does not constitute the ship a "burnt" ship is an inference to be drawn in each particular case by the jury (or judge sitting as a jury) from the actual facts in each particular case. *Ib.*

Free from Average under Three per cent. unless General—General and Particular Average not added together.]—Under the memorandum in a marine policy by which the subject-matter of insurance is warranted free from average under a certain amount per cent., unless general, or the ship be stranded, sunk, or burnt, a general average loss cannot be added to a particular average loss to make up a loss amounting to the specified percentage. A ship was insured by a policy expressed to be against all losses which could not be recovered under an ordinary Lloyd's policy by reason of the insertion therein of the memorandum against average under three per cent., unless general, or the ship be stranded, sunk or burnt. The ship while covered by the policy through stress of weather; incurred a particular average loss; and further damage to her was incurred under such circumstances as to constitute a general average loss. The particular average loss did not amount to three per cent. of her value, but the general and particular average losses taken together did amount to such percentage:—Held, that the assured were entitled to recover the particular average loss under the policy. *Price* v. *A1 Ships' Small Damage Insurance Association*, 58 L. J., Q. B. 269; 22 Q. B. D. 580; 61 L. T. 278; 37 W. R. 566; 6 Asp. M. C. 435—C. A.

—— **Mode of ascertaining whether Loss exceeded 3 per cent.**]—A time policy on ship contained the warranty "free from average under 3 per cent." During a voyage covered by the policy the ship sustained (without its being discovered) a fracture of her stern-post owing to perils of the sea, being a particular average loss within the policy. The voyage having been completed and the cargo delivered, the ship was put into dry dock for the purpose only of being cleaned, scraped, and painted, being in such a state that no prudent owner would have put to sea again without having her cleaned and scraped. When the ship was put into dry dock the injury was for the first time discovered, and the necessary repairs were then effected, and the ship was discharged from dry dock on the eighth day, repaired, cleaned, scraped, and painted. Had she required nothing but cleaning, scraping, and painting, she might have been discharged on the evening of the third day. The repairs alone, without cleaning, &c., would have taken the whole eight days. If the whole or half of the dock dues for the first three days ought to be charged against the underwriters in account, there was a particular average loss exceeding 3 per cent. If the cost of the repairs plus the dock charges for the last five days were alone to be charged against the underwriters, there was not a particular average loss of 3 per cent. If the dock charges for the first three days ought to be attributed partly to the repairs and partly to the cleaning, &c., then (so far as the apportionment was a question of fact) it was to be taken that one-half of those charges should be attributed to each purpose:—Held, that although a contract of marine insurance is a contract of indemnity, and though the result would be that the shipowners would be relieved of part of the dock charges which they would otherwise have had to pay themselves, they were entitled to have the dock charges for the first three days apportioned between the repairs on the one hand and the cleaning, &c., on the other; that the apportionment should be one-half to each purpose, and that there had therefore been a particular average loss exceeding 3 per cent. *Marine Insurance Co.* v. *China Trans-Pacific Steamship Co.*, 56 L. J., Q. B.

100 ; 11 App. Cas. 573 ; 55 L. T. 491 ; 35 W. R. 169 ; 6 Asp. M. C. 68—H. L. (E.)

Ship Docked for Repairs—Survey in Dock—Apportionment of Expenses.]—During a voyage covered by a policy underwritten by the defendants a vessel sustained damage, and was subsequently put into dry dock for the purpose of effecting repairs. The survey of the vessel for the purpose of renewing her classification in Lloyd's Register was not due for some months, but the owners took advantage of her being in dry dock to have the survey made, and her classification was renewed :—Held, that the dock expenses, so far as they were common to the repairs and to the survey, ought to be apportioned in equal moieties between the owners and the underwriters. *Marine Insurance Co.* v. *China Trans-Pacific Steamship Co.* (supra) followed. *Ruabon Steamship Co.* v. *London Assurance*, 66 L. J., Q. B. 841 ; [1897] 2 Q. B. 456 ; 77 L. T. 402.

Average Payable upon Separate Packages—Loss on whole exceeding 3 per cent.]—By the terms of a policy the assurer binds himself to pay average separately on each package of the goods insured. This stipulation does not preclude the assured from recovering an average loss upon the whole exceeding 3 per cent. under the usual clause in the policy. And in such case, although several packages remain uninjured, they are to be included in the average. *Hagedorn* v. *Whitmore*, 1 Stark. 157.

Goods part saved—Warranty against Particular Average.]—See *Hedburg* v. *Pearson*, 7 Taunt. 154, and cases supra 6, TOTAL LOSS.

Warranted free from Damage except by Contact with Sea Water—Goods part wetted, part sold under suspicion of Damage.]—See *Cator* v. *Great Western Insurance Co. of New York*, ante, col. 1228.

Memorandum—Salt.]—Semble, "salt" in the memorandum does not include saltpetre. *Journu* v. *Bourdien*, 1 Park, Ins. (8th ed.) 245.

Warranted free from all Average and without Benefit of Salvage—Wagering policy.]—See *Keith* v. *Protection Marine Insurance Co.* ante, col. 1138.

4. ADJUSTMENT.

a. Persons Adjusting.

Agent.]—If it is established that an agent has authority to sign a policy for an underwriter, it follows that he has authority to adjust it. *Richardson* v. *Anderson*, 1 Camp. 43, n. ; 10 R. R. 628, n.

So, if a person allows his agent to underwrite and settle losses for him, he gives him an implied authority to refer a dispute about a loss to arbitration, and is bound by such act of the agent. *Goodson* v. *Brooke*, 4 Camp. 163.

A plea of payment to an action by A., upon a policy effected by A. as agent, is supported by an indorsement on the policy by A., purporting that the loss had been adjusted, and the balance due from the defendant to A. paid, although the principal has not authorised such a settlement. *Gibson* v. *Winter*, 2 N. & M. 737 ; 5 B. & Ad. 96.

Insurance Broker.]—If an insurance broker keeps a policy he has effected in his hands, he is bound to use reasonable diligence to procure the underwriters to settle and pay any loss that may happen upon it. *Bousfield* v. *Creswell*, 2 Camp. 545 ; 11 R. R. 794.

Where a policy was delivered to a broker for the purpose of settling a loss, which was adjusted by the underwriter, payable at a month, and the broker charged such underwriter in account for the loss, and transmitted an account to the assured, in which he stated himself to be debtor for the amount of the loss, and for the balance of that account, and the assured drew a bill on the broker, which the latter accepted, but did not pay, and the underwriter's name was not struck off the policy :—Held, that he was not discharged. *Russell* v. *Bangley*, 4 B. & Ald. 395.

Insurance brokers holding a policy for the purpose of adjusting a loss, suffered an underwriter's name to be struck out, upon his signing the adjustment ; he gave them credit in his books for the loss, and became bankrupt ; but they never took credit for the amount in their books ; on the contrary, they gave the assured notice of the bankruptcy ; and there was afterwards a settlement of accounts between the brokers and the assured, comprehending the policy in question, on which no demand was made upon them in respect of the bankrupt's subscription :—Held, that they were not liable to the assured for the sum due from the bankrupt on the policy. *Orington* v. *Bell*, 3 Camp. 237.

Insurance brokers, after a total loss and an adjustment, and whilst the policy remained in their hands, erased the name of the underwriter from the policy, debited him with the loss, and gave the assured credit for it ; but the latter never recognised the adjustment :—Held, that the underwriter still continued liable to him for the loss. *Benson* v. *Maitland*, Gow, 205.

Liability for Negligence.]—When parties, in order to ascertain average contribution in dispute, agree that an average adjuster for reward shall ascertain and adjust the amount, and agree to abide by his decision, such average adjuster, having given his decision, is not liable to an action for carelessness, negligence and unskilfulness, if he has acted in good faith. *Tharsis Sulphur and Copper Co.* v. *Loftus*, 42 L. J., C. P. 6 ; L. R. 8 C. P. 1 ; 27 L. T. 549 ; 21 W. R. 109 ; 1 Asp. M. C. 455.

Duty of Shipowner.]—Where a general average loss has occurred, a shipowner may be liable to an action for damages for delivering up the cargo without taking the necessary steps to procure an adjustment of the general average and to secure its payment. The plaintiff shipped goods on board a steamer belonging to the defendants under a bill of lading by which the defendants undertook to deliver the goods at the port of Montreal unto the Grand Trunk Railway, by them to be forwarded (upon the conditions before and after expressed) thence per railway to the station nearest to Toronto, &c. and among the conditions was the following : "The shipowner or railway company is not to be liable for any damage to any goods which are capable of being covered by insurance," &c. In the course of the voyage the plaintiff's goods sustained damage, which came under the heading of general average. The ship returned to Liverpool, and the cargo was discharged and handed over by the defendants to a company to be distributed and disposed for the benefit of the parties concerned,

without giving any assistance to the bailees, the underwriters, or the persons whose goods were damaged to get an average statement made out, or taking any steps to enable the plaintiff to recover contribution:—Held, that the bill of lading did not relieve the defendants from contribution to general average; and that they were liable to an action by the plaintiffs for their omission to secure an adjustment and payment of the general average. *Crookes* v. *Allen*, 49 L. J., Q. B. 201; 5 Q. B. D. 38; 41 L. T. 800; 28 W. R. 304; 4 Asp. M. C. 216.

Notice.]—Where by a memorandum on a policy, the underwriter was to adjust a loss in three months after notice, a direct notice from the assured is not required, if he has had notice by other means. *Abel* v. *Potts*, 3 Esp. 242; 6 R. R. 826.

b. Computation.

By what Law.]—A loss by a general average is to be calculated according to the law of the port of discharge. Therefore, an action will not lie in this country to recover back money paid upon an average loss adjusted at St. Petersburg, according to the law of Russia (the consignor and consignee of the goods and the owner of the vessel being British subjects), although by the law of England an average loss would not be payable under the circumstances. *Simonds* v. *White*, 4 D. & R. 375; 2 B. & C. 805; 2 L. J. (o.s.) K. B. 159; 26 R. R. 560. And see *Smith* v. *Macneil*, 2 Dow, 538.

Foreign Average Statement of Loss, binding Nature of.]—A cargo of rye was insured for 4,160*l.* from Taganrog to Bremen. The policy contained the usual memorandum, "Corn, &c. are warranted free from average unless general or the ship be stranded," &c. and in the margin were the following conditions,—"To pay general average as per foreign statement, if so made up. Warranted free from particular average unless the ship or craft be stranded, sunk, or burnt: but this warranty not to exonerate the underwriters from the liability to pay any special charges for mats, warehousing, forwarding, or otherwise, if incurred, as well as partial loss arising from transhipment. Warranted free from capture and seizure and the consequences of any attempt thereat." After leaving Taganrog, the vessel encountered severe weather, and was compelled to put into two several ports for repair, at each of which the captain, in order to enable him to obtain funds to put her in a condition to continue her voyage, gave a bottomry bond on ship, freight, and cargo, the aggregate of which, with interest, on the arrival of the ship at Bremen, amounted to 2,818*l.* 10*s.* 5*d.* The captain being unable to discharge this obligation, the consignees of the cargo, in order to obtain delivery, paid the amount. On the 3rd of August, 1868, a statement was prepared by an average-stater in Bremen, in which the loss arising upon the bottomry bonds was apportioned between the ship and freight and the cargo as follows:—1,088*l.* 14*s.* 11*d.* as falling upon the cargo, and 1,185*l.* 11*s.* upon the ship and freight. The captain being unable to pay or give security for the 1,185*l.* 11*s.*, so charged upon the ship and freight, the vessel was sold under an order of the Tribunal of Commerce of Bremen, and produced 729*l.* 10*s.* 2*d.*, leaving a balance due to the holders of the bonds (the 1,088*l.* 14*s.* 11*d.* having been paid) of 663*l.* 2*s.* 10*d.* On the 3rd of October, a further or supplemental average-statement was made by the average-stater, in which the last-mentioned sum was stated as "the amount which the cargo had to pay as additional bottomry debt" to the holders of the bonds. These average statements were admitted to be accurate, and correctly made up in accordance with the law in force in Bremen; and it was further admitted that "such a loss as that which occurred in this case is treated at Bremen as a general average loss, and not as a particular average loss":—Held, that the underwriters were bound by the average-statements so made, and consequently that the assured were entitled to recover the 663*l.* 2*s.* 10*d.* *Harris* v. *Scaramanga*, 41 L. J., C. P. 170; L. R. 7 C. P. 481; 26 L. T. 797; 20 W. R. 777; 1 Asp. M. C. 339.

Sugars (consisting of bags in series) were insured from Java to Holland by an English policy which contained this clause, "To cover only the risks excepted by the clause 'warranted free from particular average unless the vessel be stranded, sunk, or burnt': to pay all claims and losses on Dutch terms and according to statement made up by official dispacheur in Holland." There was already a policy effected in Holland on the same goods; but of this the English underwriters had no notice, except so far as it could be implied from the above words. On her voyage to Holland the vessel took the ground under circumstances which would amount to a stranding according to English, but not according to Dutch, law; and a Dutch average-stater (a particular average loss having been incurred) made up a statement of average, which statement it was admitted was properly made up according to the facts, and according to the law of Holland:—Held, that the terms of the policy sued on did not amount to notice to the insurers of an existing Dutch policy, and therefore it was to be construed as if it stood alone, and according to English law. *Hendricks* v. *Australasian Insurance Co.*, 43 L. J., C. P. 188; L. R. 9 C. P. 460; 30 L. T. 419; 22 W. R. 947; 2 Asp. M. C. 44.

Held, also, that, by the latter words of the clause, the defendants were bound to pay according to the foreign average statement, and consequently that the plaintiff was entitled to recover. *Ib.*

A policy on a cargo of wheat shipped from Varna to Marseilles contained the usual memorandum against average unless general, and the following term "general average as per foreign statement." The ship, after starting from Varna, met with heavy weather, and was forced to carry a great press of canvas to avoid a lee shore. This caused her to strain very much, and having sprung a leak and become otherwise disabled, she was brought to the port of Constantinople. It was found, on a survey, that a fifth of the wheat had been damaged; and the surveyors recommended that the voyage should end at Constantinople, and the damaged part of the wheat should be sold, and the rest transhipped to Marseilles. The repairs necessary for the ship would have taken from one to two months. Under these circumstances, the recommendation of the surveyors was carried out and an adjustment of average in respect of ship and cargo was made at Constantinople. In such adjustment the damage which the cargo of wheat had sustained was treated as general average, and in accordance with such average adjustment a certain sum of

money became payable by the underwriters upon the policy. The law by which the adjustment ought to have been regulated according to the law and usages prevailing at Constantinople under the circumstances was the law of France, and the average adjustment was made up in all respects in conformity with such law. In an action on the policy by the owners of the wheat, the underwriters paid into court sufficient to cover the claim on all the items of the average adjustment except the damage to the wheat which, by the law of England, would not under the circumstances be a general average loss:—Held, that the voyage was rightly brought to an end at Constantinople, and the average adjusted there, and that the underwriters were liable in respect of the damage done to the wheat. *Mavro* v. *Ocean Marine Insurance Co.*, 44 L. J., C. P. 229; L. R. 10 C. P. 414; 32 L. T. 743; 23 W. R. 758; 2 Asp. M. C. 590—Ex. Ch.

The insurer of goods to a foreign country is not liable to indemnify the assured (a subject of that country), who is obliged by the decree of a court there to pay contribution to a general average, which by the law of this country could not have been demanded, where it does not appear that the parties contracted upon the footing of some usage among merchants obtaining in the foreign country, to treat the same as general average; but such usage is to be collected merely from the recitals and assumption made in the decree. *Power* v. *Whitmore*, 4 M. & S. 141; 16 R. R. 416.

The plaintiff, on behalf of the finance minister of the Sultan of Turkey, on the 26th of November, 1858, effected an insurance with the defendant, in London, upon a quantity of gold in a ship called the "Dutchman," belonging to Waterford, and in the port of London. The next day she was sold by her owners to a Russian company, her name being changed to the "Dnieper"; and an entry of the sale was made in the registry at Waterford, but neither the plaintiff nor the defendant knew of the sale, or of her name being changed, until the termination of her voyage. The gold was put on board on the 4th of December, and while the ship was on her way to her destination at Constantinople she grounded on a shoal within the jurisdiction of that port. The gold was sent on shore before any expense was incurred in respect of saving the cargo, and the ship became a total wreck. The gold was deposited with the Russian consul, and the owner was forced, in order to get possession of it, to give security for the payment of any claim which might be made upon it according to the law which prevailed at Constantinople. The ship being Russian was subject to Russian law, which authorised the determination of maritime causes at Constantinople by reference to the French code de commerce. A court was duly appointed by the consul-general, and it was adjudged that the case was one which required a settlement of salvage, and ordered that the gold should contribute 7,149*l.* 6*s.* 1*d.* towards the expense of saving the cargo. Under English law the owner of the gold could not have been called upon to pay a great part of that amount, nor would he have had to pay it if the ship had been under an English flag; but the assured was forced to pay it:—Held, in an action to recover from the defendant the amount of his proportion of the sum so paid, that the court could not consider whether the decision of the court at Constantinople was correct or not. *Dent* v. *Smith*, 38 L. J., Q. B. 144; L. R. 4 Q. B. 414; 20 L. T. 868; 17 W. R. 646.

—— **Sue and Labour Clause — Stranding — Expense of Re-shipping Cargo.**]—See *The Mary Thomas*, infra, col. 1265.

—— **Recovery of Sum paid under Foreign Sentence.**]—The plaintiff having been compelled to pay under the sentence of a foreign court general average beyond what he would have had to pay by English law, held entitled to recover that sum against his insurer; usage to that effect being proved. *Newman* v. *Cazalet*, 2 Park, Ins. (8th ed.) 900.

—— **Contributory Value.**]—A policy effected on cargo valued at 825*l.* and 25*l.* cash advanced on freight, contained a clause: "General average payable according to foreign statement, if so made up." The ship was damaged on the voyage, and the master bottomried the ship and cargo for repairs and other expenses. At the port of destination, a general average statement was made up, in which 1,293*l.* was fixed as the contributory value of the cargo. The ship and freight being unable to pay their share of the bond, the residue was by German law payable by owners of cargo "on principles of general average":—Held, that the assured were entitled to recover from the underwriters the whole sum (being under 850*l.*) paid by them in respect of the bottomry bond. *Robinows* v. *Ewing's Trustees*, 3 Ct. of Sess. Cas. (4th ser.) 1134.

—— **Payment in respect of Bottomry Bond.**]—A policy of marine insurance was effected with English underwriters by an English merchant upon goods shipped in a French ship, and it was thereby provided that general average was to be payable as per judicial foreign statement. The ship was damaged by a collision and put into port for repairs, the cargo, however, being uninjured. The master, not having funds to do the necessary repairs, gave a bottomry bond on ship, freight and cargo. The ship and freight proving insufficient to satisfy the bond, the assured had to pay the deficiency in order to obtain possession of his goods:—Held, that the policy was not to be construed according to French law, except so far as the parties had expressly stipulated that it should be, and that there being no loss by perils of the sea according to English law, the assured could not recover from the underwriters the amount which he had paid as above mentioned. *Greer* v. *Poole*, 49 L. J., Q. B. 463; 5 Q. B. D. 272; 42 L. T. 687; 28 W. R. 582; 4 Asp. M. C. 300.

By Foreign Agent of Lloyd's.]—The certificate of an agent for Lloyd's at a foreign port, ascertaining an average loss on a cargo damaged by sea-water, is not of itself admissible as to the amount of the loss in an action by the assured against the underwriters in this country. *Drake* v. *Marryatt*, 2 D. & R. 696; 1 B. & C. 473; 1 L. J. (O.S.) K. B. 161; 25 R. R. 46.

Amount on Ship—Several Valued Policies.]—Where several valued policies are effected upon the same vessel valued differently, and upon a total loss, the assured receives under some of the policies part of the sums insured, in an action upon another policy he is only entitled to recover the difference between the amount received and the agreed value in that policy. *Bruce* v. *Jones*,

1 H. & C. 769; 32 L. J., Ex. 132; 9 Jur. (N.S.) 628; 7 L. T. 748; 11 W. R. 371.

—— **Limit of Liability.**]—The liability of the underwriter is not restricted to the single amount of his subscription, but he may be subject either to several average losses, or to an average loss and a total loss, or to money expended and labour bestowed about the defence, safeguard and recovery of the ship to a much greater amount than the subscription; and it will be recoverable as an average loss. *Le Cheminant* v. *Pearson*, 4 Taunt. 367; 13 R. R. 636.

—— **When Accounts Complicated.**]—In an action on a policy for an average loss, if the account is so complicated that it cannot be adjusted in court, the jury, by consent of the parties, may find for a total loss, the plaintiff entering into a rule to account upon oath for what part of the insured property he may recover. *Barber* v. *French*. 1 Dougl. 294. *See also Cases* 3. AVERAGE LOSS, ante, cols. 1240, seq.

Amount on Freight.]—A policy contained a stipulation that "freight was warranted free from average under 5*l.* per cent., unless general." The interest assured was described as "money advanced to the assured as owner of the ship, on account of freight of the cargo loaded on board her, and subject to the risk of the voyage":—Held, first, that this was an assurance on freight, and liable to general average. *Hall* v. *Janson*, 4 El. & Bl. 500; 3 C. L. R. 737; 24 L. J., Q. B. 97; 1 Jur. (N.S.) 571; 3 W. R. 213.

Held, also, that a custom alleged by plea to exist in London, where the policy was effected, that assurers of money advanced on freight were not liable to make good a general average loss, was no answer to such a policy, which, according to the previous interpretation, expressly stipulated that the assurer should be liable to make good such a loss. *Ib.*

Action on a policy on ship at and from London to the East Indies, until her arrival at her port of discharge on the outward voyage. Loss by perils of the sea. Ship was chartered from London to the East Indies, there to deliver her outward cargo, and return thence with a cargo for England into the Thames, and there make a true delivery, &c.; and it was agreed that the charterers should, upon condition that the ship performed her voyage and arrived at London, and not otherwise, pay freight for every ton of goods that should be brought home, at so much per ton; the ship sailed on the voyage insured, and in the course of her outward voyage incurred an average loss, but was repaired, and afterwards performed her voyage and the freight was received:—Held, that the freight was liable to contribute to general average, and that the underwriter was entitled to deduct in respect of such contribution. *Williams* v. *London Assurance Co.*, 1 M. & S. 318; 14 R. R. 441.

—— **Nett or Gross.**]—The general principle, that the assured shall recover no more than an indemnity in case of loss, may be controlled by a mercantile usage clearly established to the contrary. Therefore, a usage, that the loss in an open policy on freight shall be adjusted on the gross and not on the nett amount of the freight is a legal usage. *Palmer* v. *Blackburn*, 1 Bing. 61; 7 Moore, 339; 1 L. J. (O.S.) C. P. 1; 25 R. R. 599.

In the case of a total loss, on an open policy on freight, the assured is entitled to recover for the gross freight, free from all deductions; and evidence is admissible to shew that, although open policies on freight are of rare occurrence, still, that it is the practice at Lloyd's to pay the assured the amount of the gross and not of the nett freight. *Ib.*

Amount on Ship and Goods.]—A policy was effected for twelve months on ship and goods from Liverpool to the coast of Africa and back, on a barter voyage. The policy contained a stipulation that "outward cargo should be considered homeward, interest twenty-four hours after arrival at first port or place of trade"; and by a memorandum the insurance was stated to be "upon ship valued at 2,000*l.*, and cargo 8,000*l.*, with liberty to increase the valuation of the homeward cargo." The ship sailed to Kinsembo, on the African coast, and there discharged a third of her cargo, and after a stay there of more than twenty-four hours, proceeded towards other ports in order to take in homeward cargo, and was totally lost, together with the two-thirds of the outward cargo which remained on board:—Held, that the valuation applied to what was substantially a full cargo, and not to any quantity of goods substantially less than a full cargo, and entitled the assured to 8,000*l.* in the event of the total loss of a substantially full cargo, or to an indemnity in case of a partial loss, not in any case exceeding 8,000*l.*; and that the principle for the valuation of a partial loss was this:—If the value of the whole of the intended cargo was a datum, the partial loss would be adjusted to the common proportion; but where the value of the whole of the intended cargo could not be ascertained, the proportion which the part lost bore to the whole could not be known, and the mode of estimating a partial loss under a valued policy could not be adopted, and, consequently, that, under the circumstances, the assured would be entitled to the ordinary indemnity as under an open policy underwritten for 8,000*l.* *Tobin* v. *Harford*, 17 C. B. (N.S.) 528; 34 L. J., C. P. 37; 10 Jur. (N.S.) 859; 10 L. T. 817; 12 W. R. 1062—Ex. Ch. And see *Forbes* v. *Aspinall*, 13 East, 323; 12 R. R. 352.

Amount on Goods.]—A partial loss on a policy on goods by reason of sea damage is to be calculated by ascertaining the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the nett proceeds. *Hurry* v. *Royal Exchange Assurance Co.*, 3 Bos. & P. 308; 6 R. R. 804.

The rule for estimating any loss of goods insured by an open policy is to take the invoice price at the loading port, together with the premium of insurance and commission, as the basis of the calculation of the value of the goods; and the rule for estimating a partial loss in the like case is (the same as upon a valued policy) by taking the proportional difference between the selling price of the sound and that of the damaged part of the goods at the port of delivery, and applying that proportion (be it half, a quarter, an eighth, &c.) with reference to such estimated value at the loading port, to the damaged portion of the goods. *Usher* v. *Noble*, 12 East, 639; 11 R. R. 505. S. P., *Langhorn* v. *Allnutt*, 4 Taunt. 511; 13 R. R. 663.

Where goods were injured by perils insured against:—Held, that the loss in value of the goods depended on their value at the time of their arrival at the port of destination, and not at the time of sale, and the underwriters were therefore not liable for a fall in the market price between such arrival and the time of sale. *Cater* v. *Great Western Insurance Co.*, 42 L. J., C. P. 266; L. R. 8 C. P. 552; 29 L. T. 136; 21 W. R. 850; 2 Asp. M. C. 90.

Where goods are shipped on an invoice, an average loss upon a policy must be calculated upon the invoice price, and not upon the price of the market at which the damaged goods arrived. *Waldron* v. *Coombe*, 3 Taunt. 162; 12 R. R. 629.

Average loss of a valued policy is to be estimated by the real value of the goods on board. *Hamilton* v. *Mendez* or *Mendes*, 1 W. Bl. 279; 2 Burr. 1198.

The rule by which to calculate a partial loss on a policy on goods, by reason of sea damage, is the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the nett proceeds; it being settled that the underwriter is not to bear any loss from fluctuation of market or port duties, or charges after the arrival of the goods at their port of destination. *Johnson* v. *Sheddon*, 2 East, 581; 6 R. R. 516.

In ascertaining the general average contribution to be paid by the shipowner in respect of goods jettisoned, the value of such goods is to be taken to be the sum which it may fairly be assumed they would have been worth to the owner at the port of adjustment. If, from the circumstances, and the damaged condition of the rest of the cargo, it may fairly be assumed that the jettisoned goods would, if they had not been thrown overboard, have arrived in the like damaged condition, their value is to be taken to be the sum they would have realised as damaged goods. *Fletcher* v. *Alexander*, 37 L. J., C. P. 193; L. R. 3 C. P. 375; 18 L. T. 432; 16 W. R. 803.

A ship sailed from Liverpool for Calcutta with 2,000 tons of salt on board, all belonging to one merchant. The day after she sailed the ship struck on a bank on the Irish coast, and after throwing overboard 1,000 tons of the salt, was got off and put back to Liverpool, where the remainder of the cargo was unloaded and found to be all (with the exception of about 100 tons) so damaged as to be nearly unfit to be forwarded, and worthless. The charterer had paid 1,250*l.* in advance for freight. In an action by the owner against an underwriter on the ship, to recover a general average contribution in respect of the salt so jettisoned:—Held, that in ascertaining the contribution to be paid by the shipowner to the owner of the cargo, in respect of the salt jettisoned, it was to be valued at the price which it would have been worth at Liverpool had it been brought back there, the average-stater taking into account the probability of its arriving at the port of adjustment in a sound or damaged state, or in a state in which it could have been forwarded, so as to take advantage of the prepaid freight. *Ib.*

Stores.]—Provisions and stores for the use of convicts on board a ship chartered for their conveyance to New South Wales are not subject to general average. *Brown* v. *Stapleton*, 12 Moore, C. P. 334; 4 Bing. 119; 5 L. J. (O.S.) C. P. 121; 29 R. R. 524.

Valuation of Goods—Advance Freight—Memorandum—Amount on which particular Average Loss calculated.]—Insurance on goods valued at 7,940*l.* "including 1,361*l.* 6*s.* for advance on freight; with warranty against particular average unless the ship be stranded. There was a stranding, and particular average loss:—Held, that the policy was one policy upon valued goods, and not a policy on advanced freight, and that the particular average loss was to be calculated upon the whole 7,940*l.* *Thames and Mersey Marine Insurance Co.* v. *Pitts*, [1893] 1 Q. B. 476; 5 R. 168; 68 L. T. 524; 41 W. R. 346; 7 Asp. M. C. 302.

—— **Invoice Price.**]—The value of the goods for the purpose of ascertaining the amount of an average loss is their fair invoice price—per Buller, J. *Dick* v. *Allen*, 1 Park, Ins. (8th ed.) 226.

—— **Premiums included in Value of Goods.**]—An assurer has goods worth 80*l.* 14*s.*; he pays premium 17*l.* 6*s.*, which makes his interest 98*l.* He may insure for 100*l.*, abating 2*l.* per cent.; so that upon a loss he recovers 98*l.*, the value of his interest including premium. *Tuite* v. *Royal Exchange Assurance Co.*, 1 Park, Ins. (8th ed.) 224.

Amount of Loss—Expenses of Sale of Damaged Cargo—Question for Jury.]—Where, in an action on a policy of assurance, the jury found a verdict for an average loss, the court will not interfere or grant a new trial on the ground that it should have been left to the jury to determine whether the expenses of the sale of the damaged cargo should be borne by the underwriters or not; that fact being in the discretion of the arbitrator, by whom the amount of the loss was to be ascertained. *Hudson* v. *Majoribanks*, 7 Moore, 463.

c. Effect of.

Condition precedent to Action.]—Where losses were to be paid in three months after an adjustment by committee of the insurers, and the committee refused to adjust upon the request of the insured:—Held, he might sue on the policy, notwithstanding there had been no adjustment. *Strong* v. *Harvey*, 3 Bing. 304; 11 Moore, 72; 4 L. J. (O.S.) C. P. 57.

Where Fraud or Concealment.]—An adjustment is not binding on an underwriter, although at the time of signing it he had the means of rendering himself acquainted with the history of the voyage and the manner of the loss, if his intention was not then drawn to circumstances he afterwards learns, by which the underwriters were discharged. *Shepherd* v. *Chewter*, 1 Camp. 274; 10 R. R. 681.

Although an adjustment is not conclusive evidence against an underwriter, it is so unless fraud or a misconception of the law or facts upon which it is made is proved. *Christian* v. *Coombe*, 2 Esp. 489. *Rogers* v. *Maylor*, Peake's Add. Cas. 37. And see *Sheriff* v. *Potts*, 5 Esp. 26.

A., as agent for a foreign owner, entered into a policy on a ship. At the time of effecting the insurance, A. was in possession of a letter from the captain, informing him that the ship had received injury, which fact he, without fraudulent intention to deceive, omitted to disclose to the underwriters. The ship was lost, and B., one of the underwriters, paid to A. his amount of the

insurance; but having subsequently become acquainted with the above circumstance brought an action against him to recover it back. A., before he was aware of B.'s intention to dispute the policy, and acting bonâ fide throughout, transmitted to his principal the money he had received from the various underwriters; with the exception of a certain amount for which he had allowed the principal credit in a settled account, and of another which, with the authority of the principal, he had expended in a suit brought by him on behalf of the principal against C., another underwriter on the policy:—Held, first, that in consequence of the concealment from the underwriters of the fact stated in the captain's letter, the policy was voidable at the election of the underwriters. *Holland* v. *Russell*, 4 B. & S. 14; 32 L. J., Q. B. 297; 8 L. T. 468; 11 W. R. 757—Ex. Ch. Affirming 7 Jur. (N.S.) 842.

Held, secondly, that A. being only an agent, of which B. was aware, and having, without notice of B.'s intention to repudiate the contract, paid over to his principal the amount received from the underwriters, B. was not entitled to recover back from A. his amount of the insurance. *Ib.*

Held, thirdly, that there was no difference in this respect between the money actually paid over by A. to his principal, and the moneys which had either been allowed in account between them or expended in the suit against C. *Ib.*

—— **Estoppel.**]—An underwriter, who upon full disclosure of facts, has signed his initials to an adjustment on the policy, without paying the loss, is not precluded afterwards from taking advantage of circumstances with which he had been made acquainted before signing the adjustment. *Herbert* v. *Champion*, 1 Camp. 134; 10 R. R. 657.

After a total loss and an adjustment, and whilst the policy remained in the hands of the broker, the initials of the insurer were struck out of the adjustment to indicate payment, and the broker debited the insurer with the loss:—Held, that the insurer was still liable to the assured, as the principal was never estopped from recovering the amount, unless there was actual payment to the broker, or a credit given. *Jell* v. *Pratt*, 2 Stark. 67.

A ship was insured warranted free from capture in port. A letter announcing her capture stated it to be in port, on which the underwriter and assured adjusted, the former returned, and the latter received back the premium. It afterwards appeared the capture was not in port:—Held, that the assured was not precluded by the adjustment and repayment from recovering on the policy, whether the underwriter's name had been struck off the adjustment only, or off the policy also. *Reyner* v. *Hall*, 4 Taunt. 725; 14 R. R. 650.

Proof of Satisfaction.]—If a policy is produced by the agent of the plaintiff, through whom it was effected, and the defendant's name is struck out, and has written against it, "adjusted the general and particular averages at 30*l.* 9*s.* per cent."; this is proof that the policy had been adjusted, but not that it had been satisfied: but the plaintiff will not be allowed to go into evidence to shew that some of the sums allowed at the time of the adjustment were too small. *Adams* v. *Saunders*, 4 Car. & P. 25; M. & M. 373.

Compensation.]—An insurance was effected on goods on board a ship consigned to Buenos Ayres. The ship, with the cargo, was captured by the Brazilian government, and condemned for an attempted breach of blockade. Notice of the capture was given by the insured to the underwriters, and an offer was made by the insured to abandon. The underwriters declined the offer of abandonment; and after some negotiation it was arranged that, on payment by the underwriters of 35*l.* per cent. on the sum insured, the policy should be delivered up to be cancelled. The percentage was accordingly paid, and the policy cancelled. Some years afterwards, in pursuance of a convention between Great Britain and the Brazilian government, the goods were ordered by the latter government to be restored to the owners, and compensation to be made. A claim was made by the underwriters to the whole or a part of the sum awarded for compensation; but held, that the underwriters having declined the offer of abandonment, the payment of the 35*l.* per cent. was a compromise of their liability under the policy, and that they were not entitled to any portion of the sum awarded for compensation. *Brooks* v. *MacDonnell*, 1 Y. & C. 502. See also *Burnand* v. *Rodocanachi*, 51 L. J., Q. B. 548; 7 App. Cas. 833; 47 L. T. 277; 31 W. R. 65; 4 Asp. M. C. 576—H. L. (E.)

A. insured goods at Canton by a policy which included jettison among the perils insured against. The goods were jettisoned under circumstances which entitled him to a general average contribution from the owners of the ship and of the rest of the cargo, which arrived safely at London, the port of discharge. A. having sued the underwriters for the whole amount insured, without having first collected the contributions to which he was entitled from the other owners of the ship and cargo:—Held, that he was entitled to recover; and that the underwriters having paid him would be then entitled to stand in his place with respect to the general average contribution. *Dickenson* v. *Jardine*, 37 L. J., C. P. 321; L. R. 3 C. P. 639; 18 L. T. 717; 16 W. R. 1169.

Held, also, that the liability of the underwriters under the policy could not be varied by a custom, alleged to exist in the port of London between merchants and underwriters, to hold the latter liable only for the share of the loss cast upon the owner of jettisoned goods in the general average statement. *Ib.*

Settlement—Parol Evidence.]—By a memorandum indorsed on a policy, it was stated that a particular average loss of 54*l.* per cent. had been settled between the plaintiff (an underwriter) and the defendant:—Held, that parol evidence was admissible to shew, that by a previous arrangement it was agreed that, if the other underwriters paid a less sum, the surplus should be repaid. *Russell* v. *Dunskey*, 6 Moore, 233.

Conditional or Absolute.]—The defendant, with several other underwriters, in August, 1814, subscribed a policy on hides from Buenos Ayres to London; the ship was captured, and the plaintiffs abandoned the cargo to the underwriters and claimed a total loss. Some time after the ship was recaptured, and all the underwriters but the defendant, on the 19th October, 1814, adjusted a salvage loss, deducting short interest, to the amount of 64*l.* 18*s.* 3*d.* per cent., which they paid. The defendant, on the 7th February, 1815, adjusted 33*l.* per cent. on account of the subscription to the policy, until the account of the goods insured

could be made up, when a final loss was to be paid to the same amount as by the other underwriters, and if the same exceeded 33*l.* per cent. the defendant was to pay the excess; if short, the insured to return the difference:—Held, in an action to recover such loss, that this was a conditional, and not an absolute adjustment, and as the plaintiffs had not proved that the account of the goods insured had been made up, they were not entitled to recover; and that the defendant was not bound by the former adjustment of the other underwriters. *Gammon* v. *Beverley*, 1 Moore, 563.

General Average payable per Foreign Statement—Sue and Labour Clause—Stranding—Expense of Discharging, Warehousing and Re-shipping Cargo.]—Two policies of insurances were effected by the owners on ship and freight respectively. Each policy provided that general average should be payable according to foreign statement if in accordance with contract of affreightment, and incorporated the ordinary sue and labour clause. On a voyage from Nicholaieff to Rotterdam the vessel stranded on the island of Malta. The cargo was discharged into lighters and the ship was towed into Malta, repaired, re-loaded and subsequently reached her destination. A general average statement was prepared in Holland, and the proportions due according to the law of Holland in respect of ship, cargo and freight were allocated. The underwriters paid their proportions in respect of ship and freight, but the shipowners failed to recover the cargo's proportion from the owners of the cargo, the courts in Holland having decided that the latter were not liable to contribute, inasmuch as the stranding had been occasioned by the negligence of the master, notwithstanding that the policy on the ship covered loss from such negligence:—Held, that the shipowners were not entitled to recover from the insurers either as a partial loss or under the sue and labour clause, the portion debited according to foreign statement to cargo in respect of the expenses incurred in the operations at Malta and in warehousing and re-shipping the cargo. *The Mary Thomas*, 63 L. J., Adm. 49; [1894] P. 108; 6 R. 792; 71 L. T. 104; 7 Asp. M. C. 495—C. A.

Part of Goods Saved—Adjustment of Salvage Loss.]—Indigo was insured on a valued policy at and from the loading port to the port of delivery. The ship sank at the loading port, and the indigo being wetted, was sold by auction at a loss of 71*l.* per cent. A verdict was found for the plaintiff as for a total loss, subject to a reference to an arbitration to ascertain the amount of such loss. The arbitrator awarded a loss of 41*l.* 15*s.* 10*d.* per cent. on the defendant's subscription. The court refused to set aside this award, although it appeared that the indigo was dried by the purchasers and shipped to the port of delivery, where it was sold at a small loss on its value as uninjured. *Hardy* v. *Innes*, 6 Moore, 574; 23 R. R. 630.

Adjustment—Recovery on.]—The underwriter signed an indorsement on the policy: "Adjusted this loss at fifty pounds per cent., to pay in one month"—the word "fifty" being struck out and "forty" inserted by the underwriter, the assured protesting against the alteration:—Held, that the assured could recover the 40 per cent. loss upon the adjustment. *Hewett* v. *Fleeney*, Beawes, Lex Mercator (5th ed.) 333.

Adjustment primâ facie Evidence of Loss.]—An underwriter adjusts a loss in these words:—"Adjusted the loss at 98 per cent., which I agree to pay one month after date":—Held, that no proof of loss was necessary. *Hogg* v. *Gouldney*, Beawes, Lex Mercator. 310; 1 Park, Ins. (8th ed.) 266.

d. Payment.

See also XVII. INSURANCE BROKERS AND AGENTS, post, cols. 1340, seq.

Discharge of Underwriter — Custom as to Settlement with Broker.] — An assured residing at Glasgow employed an insurance broker in London to recover a loss from the underwriter. The loss was settled in part by the underwriter setting off in account against it a debt due to him from the broker for premiums, and as to the residue, by his paying the broker in cash, and the underwriter then erased his name from the policy. The broker became bankrupt, and never paid the loss to the assured. Evidence was given of a usage, that an adjustment payment was generally in a month, and that the practice between the broker and the underwriter was to set off in account between them the amount of premiums due to the underwriter against the loss:—Held, first, that the underwriter was not entitled to treat the set-off in account between him and the broker as payment to the assured, the latter not being bound by a usage which he did not know of. *Scott* v. *Irving*, 1 B. & Ad. 605; 9 L. J. (O.S.) K. B. 89.

Held, secondly, that the assured could not recover the sum which the underwriter had paid in money to the broker within the month, that being made to the broker pursuant to the general authority given to him by the assured. *Ib.*

So held in another case, where the assured lived at Plymouth, that the set-off in account between the underwriter and the broker was not payment to the assured, inasmuch as the broker had only authority to receive payment for the assured in money: that the custom which prevailed at Lloyd's coffee house was not binding on the assured, who were not proved to be cognisant of it, or to have assented to it; and that the erasure of the name of the underwriter from the policy, not having been done with the consent of the assured, did not discharge the former. *Bartlett* v. *Pentland*, 10 B. & C. 760; 8 L. J. (O.S.) K. B. 264.

An insurance broker, as agent of the assured, is only entitled to received payment for them from the underwriters in money; and a custom to set off the general balance due from such broker to the underwriters in the settlement of a particular loss is illegal, as it in fact amounts to an attempt to pay the debt of one person with the money of another. *Todd* v. *Reid*, 4 B. & Ald. 210.

The plaintiff, a shipowner, employed brokers to effect an insurance upon his ship, and the brokers accordingly insured the ship at Lloyd's coffee house with the defendant. The policy was left with the brokers for safe custody. The ship was lost. Afterwards the plaintiff took the ship's papers to the brokers for the purpose of having the loss adjusted with the underwriters. The loss was adjusted, and the sum payable by the defendant, amounting to less than 50*l.*, was placed to his debit by the brokers in their books, in an account current between them. The defendant placed the like sum to the credit of

the brokers in his books, and afterwards, before the end of the year, gave them fresh credit to an amount exceeding 50*l*. A credit note was sent to the plaintiff by the brokers. It was admitted that there was a custom or usage at Lloyd's, between the brokers and underwriters, to settle losses in this manner, and the jury found that the custom was generally known to merchants and shipowners effecting insurances, and it was admitted on behalf of the defendant that the plaintiff was ignorant of the custom :—Held, that the plaintiff was not bound by the custom, and therefore he was entitled to recover the amount of the policy from the defendant as underwriter. *Sweeting* v. *Pearce*, 9 C. B. (N.S.) 534 ; 30 L. J., C. P. 109 ; 7 Jur. (N.S.) 800 ; 5 L. T. 79 ; 9 W. R. 343—Ex. Ch.

When an insurance broker has been employed to receive money for his principal in the general course of his business, and where the known general course of business is for the broker to keep a running account with the principal, and to credit him with sums which he may have received by credits in account with debtors (with whom he also keeps running accounts), and not merely with moneys actually received, the original debtor is discharged, and the broker becomes the debtor according to the meaning and intention and with the authority of the principal. *Stewart* v. *Aberdein*, 4 M. & W. 211 ; 1 H. & H. 284 ; 7 L. J., Ex. 292.

The agents of the assured having, in accordance with the usage, adjusted the amount of the loss with the broker of the underwriter, and received from him a credit note for the amount, to be paid in a month, the broker having funds of the underwriter in his hands sufficient to meet the amount, but after it was due becoming insolvent :—Held, that the underwriter was not discharged. *Macfarlane* v. *Giannacopulo*, 3 H. & N. 860 ; 28 L. J., Ex. 72.

Set off — Premiums due to Executors of Assured.]—There is no right either at law or in equity to deduct a loss on a policy, underwritten by a testator with a broker, from the amount due to the executors for premiums from the same broker, though the circumstances are such as in case of bankruptcy would support a plea of mutual credit. *Beckwith* v. *Bullen*, 8 El. & Bl. 683 ; 27 L. J., Q. B. 162 ; 4 Jur. (N.S.) 558 ; 6 W. R. 286.

A custom that, in case of the death of an underwriter, the premiums should be retained till all the risks had run off, might give such a right. *Ib.*

But the court, where it had power to draw inferences of fact from the evidence, drew the inference that such a custom did not exist at Lloyd's. *Ib.*

Contract between Shipowner in Ireland and Underwriter in England.]—The plaintiff, owner of a vessel belonging to the port of Belfast, instructed N., a Belfast insurance agent, to effect a policy of insurance on the vessel ; the insurance agent, through his London agent R., effected the policy in London with the defendants, and the owner paid N. the premium in Belfast, and there received the policy from him. The defendants alleged that they carried on business at Lloyd's, in the city of London only ; that they neither accepted risks, received premiums, paid losses, nor had any agents out of London ; that the policy was underwritten at Lloyd's in consequence of a proposal made by R. at Lloyd's ; that the premium was paid and the policy delivered by and to R. in London ; that they did not, nor did N. or any other person on their behalf, receive the premium or deliver the policy at Belfast, and that, in accordance with a well-known custom of Lloyd's, any money which might become due under the policy was payable at Lloyd's, and not elsewhere. The plaintiff alleged that he had no notice or knowledge of that custom before effecting the policy. The defendants refused to pay the amount of the policy to the plaintiff :—Held, that the plaintiff, who had no knowledge or notice of the alleged custom before effecting the policy, was not bound thereby ; that the defendants were bound to pay the amount (if any) due on the policy to the plaintiff in Belfast ; that the nonpayment constituted a breach of their contract with the plaintiff, within the jurisdiction, and that he was entitled to an order for leave to serve a writ to recover the amount of the policy on the defendants out of the jurisdiction. *Ward* v. *Harris*, 8 L. R., Ir. 365—C. A.

Payment by Mistake—Recovery back.]—If the amount due upon a loss has been paid with full knowledge of the facts, it cannot be recovered back upon the ground of mistake of law. *Bilbie* v. *Lumley*, 2 East, 469 ; 6 R. R. 479. But see *Buller* v. *Harrison*, post, col. 1341.

5. Expenses—Sue and Labour Clause.

Cattle—"Mortality from Any Cause whatsoever"—Extra Fodder at Port of Refuge.]—Live cattle were insured under a policy of marine insurance against "all risks, including mortality from any cause whatsoever." During the voyage the vessel on which the cattle were shipped was compelled by perils of the sea to put into a port of refuge for repairs, and in consequence of the delay so occasioned it became necessary to provide an additional supply of fodder for the cattle. In an action against the underwriters to recover the expense of the extra fodder, under the suing and labouring clause in the policy :—Held, that the assured were entitled to recover. *The Pomeranian*, 65 L. J., Adm. 39 ; [1895] P. 349.

Drying Rice.]—See *Francis* v. *Boulton*, supra, col. 1235.

Salvage and Repairs.]—General average and salvage do not come within either the words or the object of the suing and labouring clause of a policy of marine insurance. *Aitchison* v. *Lohre*, 49 L. J., Q. B. 123 ; 4 App. Cas. 755 ; 41 L. T. 323 ; 28 W. R. 1 ; 4 Asp. M. C. 168—H. L. (E.)

Salvage expenses are not assessed upon the quantum meruit principle, but on the general principle of maritime law, rewarding persons who by great and perhaps dangerous exertions bring in a ship, for which exertions, if not successful, nothing would have been paid. *Ib.*

The assured who had not abandoned, but had elected to repair, after damage sustained from perils of the sea, was held, therefore, not entitled to recover under that clause the expenses of salvage. *Ib.*

Deduction of One-third.]—But held that, up to the amount insured, he was entitled to recover the cost of repair, with the reduction of one-third new for old, even although the amount calculated upon that principle should exceed the amount that would be payable upon a total loss with benefit of salvage, and should equal the whole sum insured. *Ib.*

The ship "Crimea" was insured with the defendant for 1,200*l.*, being valued in the policy at 2,600*l.* It encountered very bad weather and was in danger of sinking: it was rescued by a steamer, which obtained from the Irish court of admiralty 800*l.* as salvage money. The owner did not abandon, but elected to repair. The defendant's proportion of the repair expenses amounted (after the deduction of one-third new for old) to 1,200*l.*, the full sum he had insured, and he was held liable to that amount; but was held not to be liable to any part of the salvage expenses. *Ib.*

The expenses which may be recovered by the assured under the suing and labouring clause in a policy free of particular average, are confined to the expenses which are necessary to avert a total loss, for which the insurer would be liable. *Meyer* v. *Ralli*, 45 L. J., C. P. 741; 1 C. P. D. 358; 35 L. T. 838; 24 W. R. 963; 3 Asp. M. C. 324.

When a ship partially damaged has been repaired by the owners, the insurers are only liable to the amount of two-thirds of the cost of repair, unless circumstances are shewn to take the case out of the ordinary rule of deduction of one-third for the benefit of the owners from the repairs. *Poingdestre* v. *Royal Exchange Assurance Co.*, Ry. & M. 378; 27 R. R. 759.

Where a ship has been repaired, the underwriters are not entitled to the usual deductions of one-third, new for old, the ship not having been put into the free possession of the owner again. *Da Costa* v. *Newnham*, 2 Term Rep. 407.

If a new ship is insured "on a voyage from Bristol to New York, during her stay there, and back to her port of discharge," and on her passage back from New York to England sustains an injury, which requires repairs, the underwriter is not entitled to deduct one-third new for old, as the whole is to be considered only one voyage. *Fenwick* v. *Robinson*, 3 Car. & P. 323.

A new ship was chartered and insured from London to New South Wales, and the freight made payable on her arrival there. Being unable to procure homeward freight, she went to Madras, and there took in freight to England, and a fresh policy was entered into. The ship was lost on the homeward voyage; the route being a common one for ships chartered to New South Wales:—Held, that the ship was on her first voyage, and that, consequently, the underwriters were not entitled to a new-for-old deduction of one-third. *Pirie* v. *Steele*, 2 M. & Rob. 49; 8 Car. & P. 200.

The rule of deducting one-third new for old, after the first voyage, has grown up to prevent controversy. *Ib.*

A policy contained the following clause: "The usual deduction of one-third of the amount of repairs will not be made by this company in the case of ships built within the limits of the United Kingdom, until after eighteen months, or in the case of colonial-built ships until after twelve months from the date of the builder's certificate, but after such dates respectively the deduction will be made." By custom underwriters make a deduction of one-third new for old only in respect of repairs made after the first voyage of a vessel:—Held, that the expression "usual deduction," had reference to the quantum only, and that in the case of a colonial-built ship the underwriters were entitled to make the deduction of one-third after twelve months from the date of the builder's certificate although the ship had not completed her first voyage. *Byrne* v. *Mercantile Insurance Co.*, 4 H. & C. 506.

An Irish policy is not controlled by a practice prevailing in the Humber, that all ships are considered new ships, so as to exclude the rule of deducting one-third new for old, if they are less than twelve months old. *Thompson* v. *Hunter*, cited, 2 M. & Rob. 51.

Owner Selling instead of Repairing—Mode of estimating Liability.]—Where a ship that is insured is injured by perils insured against, and the owner instead of repairing sells her during the continuance of the risk, the loss to be made good by the underwriters depends on the depreciation in the value of the ship, and not on the amount that it would have cost to repair her with an allowance in respect of new materials for old. The estimated cost of repairs, though rejected as a direct measure of loss, might be the measure of the difference between the ship's sound and damaged values, if no other means can be found for arriving at the loss really sustained. The depreciation in value is to be ascertained by taking the value of the ship (if sound) at the port of distress, and her value there in her damaged condition. To ascertain the liability of the insurers, the proportion so arrived at should be applied to the real value of the ship at the commencement of the risk, if the policy be open, or to the agreed value if the policy be valued (Brett, L.J., dissenting). *Pitman* v. *Universal Marine Insurance Co.*, 51 L. J., Q. B. 561; 9 Q. B. D. 192; 46 L. T. 863; 30 W. R. 906; 4 Asp. M. C. 544—C.A.

Held, by Brett, L.J., that the matter against which the owner was indemnified was the cost of repairs, and not any diminution in the salable value of the ship, and that therefore loss or gain by the sale of the ship was outside the contract of insurance, and was not a matter to be considered between the assured and the underwriter in adjusting either a total or a partial loss on the ship. *Ib.*

On Sale by Court.]—A ship, the "M.," was insured "including the risk of running down or doing damage to any other vessel, the same as the Indemnity Company's policy," valued at 3,000*l.* The Indemnity Company's running-down clause is, that if the ship, by negligence, shall run down any other vessel, "and the assured shall thereby become liable to pay, and shall pay, any sum not exceeding the value of the ship or vessel" (assured) "and her freight, by or in pursuance of judgment of any court of law or equity," the insurers shall pay "such proportion of three-fourths of the sum so paid as aforesaid, as the sum hereby assured shall bear to the value of the ship or vessel hereby assured, and her freight." The "M.," through negligence, ran down another vessel. She was sold under a decree of the court of admiralty, and the proceeds paid over for satisfying the damage. It was admitted that the insured lost his ship, which was of the value of 3,000*l.* and upwards, it being sold against his will, but that the proceeds which were paid over were only 2,110*l.*:—Held, that the underwriters were bound to make good three-fourths of the proceeds actually paid, viz. 2,110*l.*, and not three-fourths of the value of the ship. *Thompson* v. *Reynolds*, 7 El. & Bl. 172; 26 L. J., Q. B. 93; 3 Jur. (N.S.) 464.

Costs of Salvage.]—The plaintiff agreed with one W. for a sum of 10,000*l.* to transport the

obelisk known as "Cleopatra's needle" from Alexandria to London, and there to erect it upon some public site to be afterwards selected. To cover the expenses (about 4,000*l.*) plaintiff caused two policies to be effected with the respective defendants "upon the goods and merchandises in the good ship or vessel called the "Cleopatra" iron vessel containing the obelisk . . . valued at 4,000*l.* . . . against the risks of total loss only"; the risks insured against being the ordinary sea-risks, and the suing and labouring clause being in the usual form. In the course of the voyage the "Cleopatra" got adrift in the Bay of Biscay; and was ultimately picked up by another steamer and carried into Ferrol, where the salvors detained her under a claim of salvage. The admiralty division awarded them 2,000*l.* and costs. In actions upon the policies:—Held, that under the suing and labouring clause, the assured was entitled to recover the 2,000*l.* awarded to the salvors, but not the costs of the proceedings in the admiralty court, nor the expenses incurred by him in refitting the "Cleopatra" at Ferrol and towing her to London. *Dixon* v. *Whitworth*, 48 L. J., C. P. 538; 4 C. P. D. 371; 40 L. T. 718; 28 W. R. 184; 4 Asp. M. C. 326.

Life Salvage—Lloyd's Policy—Liability of Underwriter.]—Life salvage paid by a shipowner under s. 544 of the Merchant Shipping Act, 1894, cannot be recovered from an underwriter under a Lloyd's policy in the usual form with the running down clause attached. *Nourse* v. *Liverpool Sailing Shipowners' Association*, 65 L. J., Q. B. 507; [1896] 2 Q. B. 16; 74 L. T. 543; 44 W. R. 500; 8 Asp. M.C. 144—C.A.

Owner altering Obsolete Ship at less Cost instead of Reinstating.]—A ship, insured on a time policy, had above her main deck a saloon deck for passengers. During the time covered by the policy, the saloon deck was destroyed by fire. At the time of the fire the ship was engaged in carrying cargo, being obsolete as a passenger ship and useless for passenger traffic. After the expiration of the policy the ship was converted into a cargo-carrying ship, and the saloon deck for passengers was not reinstated. The cost of converting the ship was less than the cost of the reinstatement of the saloon deck would have been. The ship, after the alteration, was as valuable for sale or use as she was before the accident. In an action by the shipowners against the underwriters, to recover the cost of reinstatement of the saloon deck:—Held, that as the shipowners were not entitled to recover more than they had lost, they were not entitled to recover the cost of reinstatement, but only the actual cost of converting the ship. *Bristol Steam Navigation Co.* v. *Indemnity Mutual Marine Insurance Co.*, 57 L. T. 101; 6 Asp. M. C. 173.

Costs and Damages.]—The ship "A.." insured in a club, by one of the conditions of which it was provided, that, "in case of damage or loss by contract which any ship in this association may do to others, this society shall be liable to contribute its proportion, but not beyond the sum insured, and also law costs given in any suit or action defended by the previous consent in writing of the managers upon this policy," ran into, and damaged the ship "B." The owners of the injured vessel caused the ship "A." to be arrested under process from the admiralty court; whereupon her owner and the club, in order to procure her release, agreed that they or one of them would pay them "the amount of damage which the ship 'B.' had received from the collision, and also the costs of the proceedings in the court of admiralty against the ship," to be ascertained, in case of dispute, by Mr. Richards, the average-stater:—Held, that the ship "B.," meant the owners of the ship "B.," and that they were entitled to recover the same measure of damages under the agreement that they would have been entitled to in the proceedings in the admiralty court; viz. the expenses of repairing their vessel, the costs incurred in the arrest and detention of the "A." and the loss of freight during the time the "B.'s" repairs were going on. *Heard* v. *Holman*, 19 C. B. (N.S.) 1; 34 L. J., C. P. 239; 11 Jur. (N.S.) 544; 12 L. T. 455; 13 W. R. 745.

A policy on a vessel in the ordinary form of a Lloyd's policy, with the usual suing and labouring clause, had a collision clause attached to it, by which the assurers agreed that in case the vessel should by accident or negligence run down or damage any other vessel, and the assured should thereby become liable to pay and should pay as damages any sum not exceeding the value of the vessel assured and her freight, by the judgment of any court given in a suit defended with the previous consent in writing of the assurers, they would pay such proportion of three-fourths of the sum so paid by the assured as the sum insured on the vessel bore to the value of such vessel and her freight. The assured having afterwards successfully defended, with the written consent of the assurers, a suit in a consular court abroad, in which the assured vessel was charged with negligence in running down another vessel, brought an action against an underwriter of such policy for his proportion of the costs incurred by the assured in defending such suit:—Held, that the assured was not entitled in such action to recover such costs, either on the policy under the collision, or suing and labouring clauses, or on the common count for money paid. *Xenos* v. *Fox*, 38 L. J., C. P. 351; L. R. 4 C. P. 665; 17 W. R. 893—Ex. Ch.

Costs of Compromise.]—Insurers are liable to pay the charge of a compromise bonâ fide made to prevent the ship from being condemned as lawful prize. *Berens* v. *Rucker*, 1 W. Bl. 313.

Cargo in Separate Packages—Damage to certain Packages only—Expense of examining sound Packages.]—Where a cargo of several packages is insured, and some of the packages are damaged by a peril of the sea, the shipper is not entitled to recover from the underwriters the expense of examining the whole cargo to ascertain which of the packages have been damaged. His claim must be restricted to the packages which have in fact been damaged and the expenses incurred in the examination and sale of them; the underwriters are accountable only for the direct operation of sea damage and not for consequential results; they do not guarantee that the goods shall be free from suspicion. *Lysaght* v. *Coleman*, 64 L. J., Q. B. 175; [1895] 1 Q. B. 49; 14 R. 22; 71 L. T. 830; 7 Asp. M. C. 552—C. A.

Expenses of Preserving and Forwarding Goods.]—A ship, with a cargo of palm oil for

Liverpool, was stranded near Pwllheli, on the coast of Wales. It became necessary to land the cargo there, and this was properly done. The ship, after some temporary repair on the beach, was towed to Carnarvon, the nearest port, and there repaired so as to be seaworthy for the completion of the voyage. The oil was forwarded by railway to Liverpool, at a cost to the shipowner of 212*l.* 15*s.* 1*d.*; and the freight was received by him. The oil might have been kept at Pwllheli until the ship was repaired, and then re-shipped at T., a place about seven miles from Pwllheli. This would have been a reasonable course to adopt, and it would have cost 70*l.* In an action against the insurers on freight:—Held, that the shipowner, having incurred expense for the purpose of averting a loss of freight, was entitled to recover, under the suing and labouring clause, so much thereof as was reasonably incurred; and that the proper measure was the sum it would have cost to re-ship the oil at T. *Lee* v. *Southern Insurance Co.*, 39 L. J., C. P. 218; L. R. 5 C. P. 397; 22 L. T. 443; 18 W. R. 863.

In a policy under the suing and labouring clause, may be recovered all expenses which have been incurred for the purpose of averting a loss or damage to the subject-matter of insurance, and not merely those expenses which are incurred where the insured abandons the subject-matter insured, and tries to save what has become the property of the insurers; and the effect of a warranty against particular average is merely to limit the operation of the insurance to a total loss of the subject-matter, and is not to prevent a recovery under the suing and labouring clause of extraordinary expense which may be incurred in preserving it. *Kidston* v. *Empire Marine Insurance Co.*, 36 L. J., C. P. 156; L. R. 2 C. P. 357; 12 Jur. (N.S.) 665; 16 L. T. 119; 15 W. R. 769—Ex. Ch.

A., having chartered his vessel for a voyage, insured the chartered freight with B. by a policy containing a warranty against particular average and the usual suing and labouring clause. The ship was lost, and the goods landed, warehoused, and sent on at a less freight from an intermediate port:—Held, that there was a total loss of freight at the intermediate port, unless it could be averted by such forwarding; that such forwarding was a particular charge within the suing and labouring clause, and did not convert the total into a partial loss within the warranty against particular average, and that A. was therefore entitled to recover the expense of such forwarding from B. in an action on the policy. *Ib.*

A ship during her voyage from India to London was stranded on the coast of France. The shipowner dispatched his manager and other persons to take part in the necessary salvage operations, and the whole of the cargo was saved, transhipped, and brought forward to London and the freight earned. Part of the cargo which could not be identified was sold by the shipowner by arrangement with the consignees through a broker, who received his brokerage. The shipowner incurred considerable trouble in chartering ships to carry on the cargo from France to London, and in sending out lighters and necessary appliances to France, and in the identification of the cargo, preparing for the sale, and answering the inquiries of and arranging with the consignees. In the average statement a remuneration to the shipowner for "arranging for salvage operations, receiving cargo, meeting and arranging with consignees, and receiving and paying proceeds, and generally conducting the business," was charged partly to general average, and partly as particular average on the several interests ratably, the average-stater thinking that the amount was a reasonable remuneration to the shipowner for his services and for commission on the sale of unidentified cargo, and on disbursements:—Held, that under the circumstances the amount was improperly charged and could not be recovered, there being no contract on the part of the owners of the cargo to remunerate the shipowner for his services, a great part of which had been rendered with the object of earning his freight. *Schuster* v. *Fletcher*, 47 L. J., Q. B. 530; 3 Q. B. D. 418; 38 L. T. 605; 26 W. R. 756; 3 Asp. M. C. 577.

Where goods are insured by a policy in the ordinary form, the expression "warranted free from particular average" is not confined to losses arising from injury to, or deterioration of, the goods themselves, but is equivalent to a stipulation against total loss and general average only; and, consequently, includes expenses incurred in relation to the goods. *Great Indian Peninsular Ry.* v. *Saunders*, 2 B. & S. 266; 31 L. J., Q. B. 206; 9 Jur. (N.S.) 198; 6 L. T. 297; 10 W. R. 520—Ex. Ch.

A quantity of iron rails was shipped to be carried to a certain place, for a sum to be paid here, ship lost or not lost. The shippers insured them by a policy "warranted free from particular average, unless the ship be stranded, sunk, or burnt"; with a clause authorising the assured to "sue, labour, and travel for, in, and about, the defence, safeguard and recovery of the goods." The ship was neither stranded, sunk, nor burnt; but there was a constructive total loss of her by perils of the sea. The rails were saved, and sent on in other vessels to their destination, for which the assured was compelled to pay freight to an amount not exceeding the value of the rails:—Held, that this freight was not recoverable under the policy. *Ib.*

A cargo of bacon was insured from Liverpool to New York by a policy containing the exception "warranted free from average, unless general, or the ship be stranded, sunk, or burnt," and a suing and labouring clause in its ordinary form. The ship in the course of its voyage was disabled and the cargo discharged. Part of the bacon was condemned and sold, and the remainder sent on in two vessels; all of which was proper under the circumstances:—Held, that neither the extra freight incurred by reason of the transhipment, nor the cost of warehousing, surveying and cooperage of the goods, could be recovered under the policy. *Booth* v. *Gair*, 15 C. B. (N.S.) 291; 33 L. J., C. P. 99; 9 Jur. (N.S.) 1326; 9 L. T. 386; 12 W. R. 106.

—— **Parol Evidence—"Particular Charges."**]—Evidence was given to shew that expenses incurred in saving the subject-matter of insurance were, by usage, called "particular charges" and not "particular average":—Held, that such evidence was admissible, but that it was in affirmance of the common law, and did not control or vary the policy, and left the case exactly in the same position as if it had not been given. *Kidston* v. *Empire Marine Insurance Co.*, supra.

Question for Jury.]—Where goods are in consequence of the perils insured against lying at a

place different from the place of their destination, damaged, but in such a state that they can at some cost be put into a condition to be carried to their destination, the jury, in order to ascertain whether there is a constructive total loss of the goods, must determine whether or not it is practically possible to carry them on,—that is, whether to do so will cost more than they are worth; and, in determining this, the jury is to take into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and re-shipping the goods; but they are not to take into account the fact that, if they are carried on in the original bottom, or by the original shipowner in a substituted bottom, they will have to pay the freight contracted to be paid; that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not. *Farnworth* v. *Hyde*, 36 L. J., C. P. 33; L. R. 2 C. P. 204; 15 L. T. 395; 15 W. R. 340—Ex. Ch. Affirming, 1 H. & R. 433; 12 Jur. (N.S.) 997.

When the original bottom is disabled by the perils of the sea, so that the shipowner is not bound to carry the goods on, and he does not choose to do so, the jury is not to take into account the whole of the cost of transit from the place of distress to the place of destination which must be incurred by the goods owner if he carries them on, but only the excess of that cost above that which would have been incurred if no peril had intervened. *Ib.*

Damage by Fire.]—In a policy upon a steamer, in the ordinary form, the hull and the machinery were separately valued, with a clause, "average on the whole or on each as if separately insured." The steamer had discharged her cargo at C., and whilst she lay there without any cargo on board, her hull was damaged by fire. The cost of repairs to the hull amounted, after a deduction of the usual one-third, to 386*l.* 12*s.* 6*d.*, including 9*l.* 0*s.* 1*d.* of Lloyd's surveyors' fees. An additional sum of 55*l.* 5*s.* 10*d.* was expended in extinguishing the fire. It was proposed to add this to the other sum, so as to take the case out of the common three per cent. memorandum:—Held, that these expenses must be apportioned to the hull and machinery according to their respective values, and that only the sum due for the hull could be added to the direct loss on the hull. *Oppenheim* v. *Fry*, 5 B. & S. 348; 33 L. J., Q. B. 267; 10 L. T. 539; 12 W. R. 831—Ex. Ch. And see *Achard* v. *Ring*, 31 L. T. 647; 2 Asp. M. C. 422.

Replacing Copper when Vessel damaged and Sold.]—A vessel insured on a time policy started from Calcutta for England. While proceeding down the river Hooghly, she sustained some damage by an accidental collision with a steam-vessel, and after a few days was found to leak so much, as to render it necessary to return. She underwent some repair, and was re-coppered, and again set sail for England; but she was again compelled to return, was put into dock, her wales, &c. removed, for the purpose of examining the condition of her timbers, and was ultimately found so defective as to render it inexpedient to repair her, and consequently she was sold as she lay, for the purpose of being broken up. The assured claimed for an average, and also for a total loss; the jury negatived the latter, and, as to the former, returned the following verdict:—"Verdict for the plaintiff on the first issue, sufficient not having been paid into court to cover the expense of stripping off and replacing the copper, for all the repairs and charges on both occasions of the return of the vessel to Calcutta actually incurred, and also what would have been necessary for replacing the wales, which we consider was the consequence of the collision":—Held, that the plaintiff was not entitled to recover anything in respect of the replacing of the wales, that expense not having been actually incurred. *Stewart* v. *Steele*, 5 Scott (N.R.) 927.

On Loss of Freight.]—The plaintiffs, shipowners, entered into a charterparty which provided for payment of freight at a specific rate, and that "If any portion of the cargo be delivered sea damaged, the freight on such sea-damaged portion to be two-thirds of the above rate." They effected an insurance with underwriters, "To cover only the one-third loss of freight in consequence of sea damage as per charterparty." Sea damage happened, and one-third of the freight on the sea-damaged portion of the cargo was deducted by the charterers from the total amount of freight:—Held, that the subject-matter of insurance was "the one-third loss of freight in consequence of sea damage," and that the plaintiffs were entitled to recover from each underwriter only such proportion of the amount of the loss as the amount of his subscription bore to the total sum for which the underwriters subscribed the policy. *Griffiths* v. *Bramley-Moore*, 48 L. J., Q. B. 201; 4 Q. B. D. 70; 40 L. T. 149; 27 W. R. 480; 4 Asp. M. C. 66—C. A.

—— **Advances.**]—A policy was effected at and from the river Plate to Canton and back, on specie shipped in the river Plate, and on the returns thereof, in any description of merchandise, with liberty to declare and value thereafter. The assured chartered a vessel on a voyage from Buenos Ayres to Canton and back, and they were to pay for the voyage 10,000 dollars, in manner following: viz. "in China, all the sums that might be necessary for the payment of the port charges, and other incidental expenses, the latter not exceeding 2,000 dollars, and the balance at thirty days after the vessel's return to Buenos Ayres." The underwriters had no notice of the terms of the charterparty. The assured shipped on board this vessel at Buenos Ayres a quantity of specie, consigned to an agent at Canton, who, on the ship's arrival there, advanced to the captain a sum of money, being the amount of the port charges, and a further sum of incidental expenses; and he shipped other goods on board the vessel, on account of his principals, for the homeward voyage. No valuation was ever made in pursuance of the liberty reserved by the policy. The vessel, on her return voyage, was lost:—Held, that the assured were not entitled to recover the two sums paid by their agent at Canton, for port charges and other incidental expenses, as part of the value of the merchandise shipped at Canton, and insured by the policy, inasmuch as the money agreed to be paid there was not properly freight, and had no distinct relation to the goods shipped. *Winter* v. *Haldimand*, 2 B. & Ad. 649.

A. let his ship to freight and charter to B. for a voyage, the probable duration of which was eight months, at 100*l.* per month, and, by the charterparty, B. was to make the advances for

sailing charges, on account of the money payable for the hire of the ship, miscalled freight; B. insured 300*l.* with C., for money advanced on sailing charges, and A., at the same time, insured with C. 400*l.* on freight. Upon a total loss:—Held, that C. was not entitled to consider A.'s policy as effected on gross freight, and that, the amount being 800*l.*, A. was his own insurer for a moiety of the risk. *Etches* v. *Aldan*, 1 M. & Ry. 165; 31 R. R. 309; 6 L. J. (O.S.) K. B. 65.

A ship was chartered to proceed to Cardiff, there load a cargo of coals, and "therewith proceed to San Francisco, and deliver the same on being paid freight at the rate of 4*l.* 10*s.* per ton, the freight to be paid by good and approved bills on London, at six months' date from the date of sailing, less cost of insurance, to be effected by charterer at ship's expense, or in cash, less 800*l.*, which is to be paid on delivery of cargo." The charterer, under the terms of the charterparty, loaded the coals, and gave in payment of freight two bills of exchange. During the voyage the ship sustained damage, for the repair of which expenses were incurred, and these were admitted to be general average charges:—Held, that the freight paid in advance was not recoverable, and that the charterer was liable to contribute general average in respect of it. *Trayes* v. *Worms*, 19 C. B. (N.S.) 159; 34 L. J., C. P. 274; 11 Jur. (N.S.) 639; 12 L. T. 547; 13 W. R. 898. See also *Palmer* v. *Blackburn*, ante, col. 1259.

XI. ABANDONMENT.

1. *Notice.*
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1. NOTICE.

a. Form of.

"Abandon" — Use of Word.]—The word "abandoned" is not necessary in a notice of abandonment; any expressions which inform the underwriters that it is the intention of the assured to give up to them the property insured, on the ground of its having been totally lost, is sufficient. *Currie* v. *Bombay Native Insurance Co.*, 6 Moore, P. C. (N.S.) 302; 39 L. J., P. C. 1; L. R. 3 P. C. 72; 22 L. T. 317; 18 W. R. 296. See also *King* v. *Walker*, post, col. 1279.

Insurance Broker—Notice to Settle for Total Loss.]—If an insurance broker requires the underwriters to settle as for a total loss, and to give directions as to the disposition of the property insured, this does not amount to an abandonment. *Parmeter* v. *Todhunter*, 1 Camp. 541.

Where the goods exist, there must be an abandonment of freight, although the ship is incapable of prosecuting her voyage. *Ibid.*

b. By whom Given.

If one of several, jointly interested in a cargo, effects an insurance for the benefit of all, he may give notice of abandonment for all. *Hunt* v. *Royal Exchange Assurance Co.*, 5 M. & S. 47; 17 R. R. 264.

The deposit of a policy on a ship at sea, which is afterwards injured by perils insured against and condemned, does not invest the depositary with an implied authority to give notice to the underwriter of abandonment as for a total loss. *Jardine* v. *Leathley*, 3 B. & S. 700; 32 L. J., Q. B. 132; 9 Jur. (N.S.) 1035; 7 L. T. 783; 11 W. R. 432.

c. Time for Notice.

Nature of Delay.]—The assured must not delay to give notice of abandonment, but sufficient time must be allowed to enable the assured to exercise their judgment whether the circumstances entitle them to abandon. *Currie* v. *Bombay Native Insurance Co.*, supra.

A ship sailed on its outward voyage to New Zealand. More than a month afterwards the owners chartered it to M. to bring home a cargo from Calcutta. By this charterparty, after discharging at New Zealand, it was to sail to Calcutta, and being there tight, staunch and strong, and every way fitted for the voyage, the charterer bound himself to put on board a specified cargo for England at a stipulated freight. The owners then effected a policy, in the usual form, against perils of the sea, upon the freight to be earned on this homeward voyage. The ship was seriously injured in the outward voyage; it was repaired as well as the master, with insufficient funds, and at a place not capable of making full examination and effecting complete repairs, could get it repaired: and with the ship thus partially repaired he sailed from the place where the ship then was, and arrived at Calcutta, where the fullest examination and the completest repairs could be had. He immediately tendered the ship to the agents of the charterers for the homeward cargo. They, on the ground that the charterer had become bankrupt, refused to load a cargo. The master then had the ship fully examined, and it was found that the injuries on the outward voyage had been such that the complete repair of the ship, to render it fit for the voyage home, would exceed the value of the ship when repaired, and the amount of freight to be earned. The owners, on receiving this intelligence, abandoned:—Held, that this was a loss of freight occasioned by the perils of the sea, that no notice of abandonment to the underwriters on freight was necessary, and that if a notice of abandonment to the underwriters on freight had been necessary, the notice here would not, under the circumstances, have been too late. *Rankin* v. *Potter*, 42 L. J., C. P. 169; L. R. 6 H. L. 83; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.

On the 8th September the master wrote to the owners at Belfast a letter, which they received about the 10th October, giving a detailed account of the damage which his ship had met with, and estimates of the probable expenses of repairing and refitting her. On the 15th the owners wrote a letter to the captain, in which they left him to act as he considered best for the interests of all concerned. On the 8th December the captain wrote a letter to the owners, which they received

on the 9th January, 1860, stating that he had made up his mind to abandon and sell the hull, &c. on account and for the benefit of all concerned. On the 13th December he attended before a notary public, and formally declared that he abandoned the ship to the underwriters. On the 7th January, 1860, the ship was sold by auction under his orders, and was afterwards broken up:—Held, that the notice of abandonment was not in time. *Grainger* v. *Martin*, 4 B. & S. 9; 8 L. T. 96; 11 W. R. 758—Ex. Ch.

Duty of Assured after Information.]—When the assured receives full and reliable information that the subject-matter of the insurance is in imminent danger of becoming a total loss, he is bound, in order to enable him to recover as for a constructive total loss, immediately to give notice of abandonment to the underwriter, and his omission to do so will not be excused because afterwards the subject-matter of the insurance is justifiably sold. *Kaltenbach* v. *Mackenzie*, 48 L. J., C. P. 9; 3 C. P. D. 467; 39 L. T. 215; 26 W. R. 844; 4 Asp. M. C. 39—C. A.

Notice must be given in Reasonable Time.]—A ship, having been ashore, was got off and taken to Dunedin, her port of destination, where she remained from 4th July to the 14th April following. She then sailed for Calcutta to be repaired, and to carry out a charter. On arrival at Calcutta, it was found that it would cost more to repair her than she was worth; and on 2nd August notice of abandonment was given:—Held, that the abandonment was too late, and that the underwriters were liable only for the partial loss by stranding. *Potter* v. *Campbell*, 16 W. R. 401.

Where the captain of a vessel, which had been damaged by stormy weather, arrived in London on the 25th April, where his owners resided; and the latter received the ship's papers on the 3rd May following, and the broker who effected the policy gave verbal notice of abandonment to the underwriters on the 5th:—Held, that such notice was given in due time. *Read* v. *Bonham*, 6 Moore, 397; 3 Br. & B. 147; 23 R. R. 587.

On the 23rd of September, 1859, a ship having been compelled by sea-damage to put into a port near the Cape of Good Hope, the master had her surveyed, and on the 18th of October, 1859, wrote to the ship's husband at Liverpool describing what had happened, and telling him to give the underwriters notice. On the 18th of November he again wrote, describing the damaged state of the ship, and stating that, in the opinion of the surveyors, she could not go home with a partial repair, but that she would not be worth the amount it would take to repair her. This letter was forwarded to the underwriters. On the 24th of November the master executed a notarial act of abandonment, and on the 9th of December sold the ship. On the 20th of December he again wrote to the ship's husband stating that it would be for the interest of all concerned to abandon and sell instead of repair, and that he had accordingly sold the ship, and he requested due notice to be given to the underwriters, who were then informed of the sale. The ship would not in fact have been worth the expense of repair:—Held, that there was sufficient notice of abandonment to make a constructive total loss, and that the notice was in time. *King* v. *Walker*, 3 H. & C. 209; 33 L. J., Ex. 325; 11 Jur. (N.S.) 43; 13 W. R. 232—Ex. Ch.

A ship insured in a valued policy, having sustained damage such as to require repairs, put into Falmouth on the 12th November for that purpose. She was there moored with part of her cargo on board, the residue having been taken on shore. After the repairs were commenced, and before they were completed, she was, on the 2nd December, sunk by a peril of the sea, and lay submerged, with the portion of the cargo on board, until raised by the ship's agents. On the arrival of the ship the master appointed B. her agent, and on the day after she sank A. arrived at Falmouth with full authority from the assured to act for him in all matters concerning the ship as according to the best of his judgment would be best for all concerned. A., having come to the conclusion that it would cost more to raise and repair her than she would be worth when repaired, gave notice of abandonment to B. on the 4th December, and on the same day the captain, by instruction of A., gave notice to the brokers who had effected the policy, who on the 9th December gave notice to the underwriter:—Held, that if this was such a state of things as would constitute a total loss, the notice of abandonment was given in time. *Kemp* v. *Halliday*, 6 B. & S. 723; 35 L. J., Q. B. 156; L. R. 1 Q. B. 520; 12 Jur. (N.S.) 582; 14 L. T. 762; 14 W. R. 697—Ex. Ch.

Upon the first notice of a total loss the assured are bound to abandon; but it must appear that they had notice, or the policy will not be vitiated. *Abel* v. *Potts*, 3 Esp. 242; 6 R. R. 826.

Where the assured receive intelligence of such a loss as entitles them to abandon, they must make their election in the first instance; and if they abandon, they must give the underwriters notice in a reasonable time; otherwise they waive their right to abandon, and can only recover as for an average loss. *Mitchell* v. *Edie* or *Ede*, 1 Term Rep. 608; 11 A. & E. 888; 9 L. J., Q. B. 187; 3 P. & D. 513; 1 R. R. 318.

The assured are bound to give notice of abandonment at the earliest opportunity; notice given five days after they received intelligence of the loss, held too late. *Hunt* v. *Royal Exchange Assurance Co.*, 5 M. & S. 47; 17 R. R. 264.

An insured vessel arrived damaged at Kinsale on November 24th; surveys were held on December 2nd and December 14th, when it was found that repairs would exceed the value of the ship. Notice of abandonment was given in London on January 6th:—Held, the notice was too late. *Aldrich* v. *Bell*, 1 Stark. 498; 18 R. R. 814.

Election.]—The insured is entitled to a reasonable time for examining into the state of a damaged cargo, before he makes his election on the question of abandonment. *Gernon* v. *Royal Exchange Assurance Co.*, 2 Marsh. 88; 6 Taunt. 383; Holt, 49; 16 R. R. 630.

A vessel sailing with corn, insured from Waterford, in Ireland, to Liverpool, by a policy with a memorandum to be free from all but general average, was stranded near Waterford on the 28th of January, and the vessel continued, at high tide, under water for near a month, during which time, from the 31st, the assured, at low water, were employed in saving the cargo, the whole of which was damaged, but the greater part recovered, and kiln-dried; but no notice of abandonment was given to the underwriters in London till the 18th February, though there is a

constant regular intercourse between Waterford and Liverpool, where some of the assured lived; which was holden to be out of time; for, whether or not, upon such a policy, where there was an opportunity of sending on the corn which was saved to the place of its destination within two months after the accident, in another vessel, the assured were entitled to abandon as in case of a total loss; at all events they ought to have made their election to abandon within a reasonable time, and they cannot take the chance of endeavouring first to save and make the best of the cargo on their own account, and afterwards abandon when they find that they cannot turn it to their advantage. *Anderson* v. *Royal Exchange Assurance Co.*, 7 East, 38; 3 Smith, 48; 8 R. R. 589.

When it is uncertain whether the damage done to a cargo by a peril insured against will result in a total or partial loss, the assured is not bound to make his election how to treat it as soon as some incipient damage has occurred; and his right to claim indemnity for a total loss does not mature till the facts constituting such a loss are ascertained. *Browning* v. *Provincial Assurance Co. of Canada*, L. R. 5 P. C. 263; 28 L. T. 853; 21 W. R. 587; 2 Asp. M. C. 35—P. C. See also *Fleming* v. *Smith*, post, col. 1285.

Embargo.]—The blockade of Havre being publicly notified here on the 6th September, and no notice of abandonment given till the 14th October, nor any excuse substantiated for not giving it sooner for want of competent authority before nor any new authority shewn for giving it then:—Held, that the notice was out of time; and this, though the plaintiff's agents in this country had no notice till the 17th October of the decree for restoration of the ship and goods in question, which had been pronounced on the 8th of October. *Barker* v. *Blakes*, 9 East, 283; 9 R. R. 558.

The owner of a cargo of flax-seed, insured "at and from America to Limerick," himself residing at that place, on the 11th February, 1808, received information that the ship, with the flax-seed on board, had been detained at Philadelphia by the American embargo; but did not give notice of abandonment till the 11th June following: the flax-seed was intended for sowing, and might have been employed for that purpose had it arrived before the 10th of May, but afterwards would have been scarcely of any value:—Held, however, that the plaintiff might have waited till the 10th of May before abandoning; but the abandonment on the 11th June was out of time. *Kelly* v. *Walton*, 2 Camp. 155.

The assured of goods having received intelligence on the 8th of January, 1811, that the ship's papers were taken away on the 7th of December preceding, by the Swedish government, within whose port she was, did not give notice of abandonment to the defendant underwriter till the 17th of January; but though such notice was too late, supposing an abandonment to be necessary, yet, as the goods were finally seized, and unladen by orders of that government on the 30th of April following:—Held, that the ineffectual notice of abandonment before given did not preclude the assured from recovering as for a total loss, without any abandonment. *Mellish* v. *Andrews*, 15 East, 13; 13 R. R. 351.

By Scots Law.]—Consideration of the question whether in Scotland constructive total loss is to be taken from the date of notice of abandonment, or from the date of commencement of action. *Shepherd* v. *Henderson*, 7 App. Cas. 49; 9 Ct. of Sess. Cas. (4th ser.) 1—H. L. (Sc.)

d. Acceptance of.

Effect.]—If notice of the abandonment of a ship is given by the insured to the insurers, and the insurers then say and do nothing, the conclusion is that they do not mean to accept the abandonment. But if they, by their agent, take possession of the ship, and then repair it and retain it in their possession for some time without repudiating the notice or informing the insured as to the character in which they are acting, then there is a constructive acceptance of the abandonment by the insurers. *Provincial Insurance Co. of Canada* v. *Leduc*, 43 L. J., P. C. 49; L. R. 6 P. C. 224; 31 L. T. 142; 22 W. R. 929; 2 Asp. M. C. 338.

And a constructive acceptance produces the same effect on the rights of the parties as an express acceptance. *Ib.*

When the agent who took possession of the ship, &c. was instructed to look after the interest of the insurance company, his acts in pursuance of those instructions, coupled with the non-repudiation of the notice of abandonment, having been such as to be evidence from which an acceptance might be inferred, the company was bound by his acts. *Ib.*

After the acceptance by the insurers of the abandonment of a ship, they become liable as for a total loss. *Ib.*

Estoppel.]—Underwriters intending to resist an abandonment are bound to do so within a reasonable time; where, therefore, the assured, four days after a notice of abandonment had been given, called a meeting of the underwriters at Lloyd's, three of whom attended, and authorised the assured to act as if no insurance had been effected (the ship having been wrecked, and three-fourths of her cargo, consisting of wines, either lost or impregnated with salt water), and the damaged wines were accordingly advertised for sale; but, previously to its taking place, some of the underwriters forbade it, and rejected the notice of abandonment, after more than two months had elapsed, during which time they had not interposed:—Held, that their silence for so long a time was such an acquiescence by them as to amount to an acceptance of the abandonment; and that they could not afterwards prevent the sale. *Hudson* v. *Harrison*, 3 Moore, 288; 3 Br. & B. 97; 23 R. R. 575.

Evidence of.] — The question whether the underwriters accept the abandonment or not is a question of fact; but the circumstances of the case may be such that a jury may be told, as a matter of law, that if they think the underwriters have done certain acts which are consistent only with their having accepted the abandonment, then they ought to find that the abandonment has been accepted. *Shepherd* v. *Henderson*, 7 App. Cas. 49—H. L. (Sc.)

When a ship sustains a partial loss, the insured cannot abandon, nor is the answer of the underwriters, desiring them "to do the best they can with the damaged property," evidence of their assent to make it a total loss, *Thellusson* v. *Fletcher*, 1 Esp. 73; 1 Dougl. 315.

Where there was a loss by capture, intelligence

of which was received, and an abandonment made, and a recapture took place before the notice of abandonment was given, but there was no intelligence received of such recapture until after some steps had been taken by the underwriters :—Held, to amount to an acceptance of the abandonment by them. *Smith* v. *Robertson*, 2 Dow, 474 ; 14 R. R. 174.

Acceptance by some Underwriters, Rejection by others—Right to Share of Ship.]—The owners of a ship abandoned her as a constructive total loss, and some of the underwriters paid 500*l.* on that footing. Other underwriters resisted the claim, and were held liable for a partial loss to the extent of 20 per cent. on the ship's value. Some years afterwards the first set of underwriters sued the shipowner for 700*l.*, as the value of their share of the ship, which had been repaired, and for 700*l.* as their share of her earnings :—Held (by the Lord Ordinary), that the pursuers were entitled to 400*l.*, being their share of the ship, less 20 per cent., with interest. The shipowner appealed, tendering a share in the ship on the footing that the underwriters were liable for their share of losses :—Held, that the tender came too late, and that the judgment below must be affirmed. *Whitworth Brothers* v. *Shepherd*, 12 Ct. of Sess. Cas. (4th ser.) 204.

2. In What Cases.

Purpose of Voyage.]—The owner may abandon if the voyage is not worth pursuing. *Hamilton* v. *Mendez* or *Mendes*, 1 W. Bl. 279 ; 2 Burr. 1198.

Insurance on Freight.]—Abandonment is not necessary upon a loss in an insurance on freight. *Mount* v. *Harrison*, 4 Bing. 388 ; 1 M. & P. 14 ; 6 L. J. (o.s.) C. P. 6.

There need be no abandonment of freight, where the goods specifically exist, although the ship is incapable of prosecuting the voyage. *Idle* v. *Royal Exchange Insurance Co.*, 3 Moore, 115 ; 8 Taunt. 755 ; 21 R. R. 538.

Where Unnecessary.]—It is a principle of insurance law that no abandonment is necessary where there is nothing which, on abandonment, can pass to or be of value to the underwriters. *Rankin* v. *Potter*, 42 L. J., C. P. 169 ; L. R. 6 H. L. 83 ; 29 L. T. 142 ; 22 W. R. 1 ; 2 Asp. M. C. 65—H. L. (E.)

When, therefore, there was a policy on ship, and also on charterparty freight (that is, freight to be earned by the carriage homeward of a cargo chartered to be put on board at a distant port), and the ship was so injured on the outward voyage that the shipowner abandoned to the underwriter on ship, there was nothing to pass to the underwriter on charterparty freight, and, consequently, there was no necessity for abandonment to him. *Ib.*

Voluntary Acceptance.]—Where a ship policy contained a provision that the ship should not be within the Gulf of St. Lawrence within a prescribed period, and the ship went into the gulf within the prohibited time and was wrecked ; and notice was given of an abandonment, and was accepted by the insurers, it was contended by them that the ship was not insured when she was lost, as the insurance did not extend to a loss in the gulf within the prohibited time, and that an abandonment can be of no avail where there is no insurance :—Held, that the vessel was in fact insured, that the loss occurred during the time and upon a voyage described in the policy, but there was a breach of one of the warranties ; and if, after a constructive total loss and notice of abandonment, the insurers, with full knowledge of all the facts, accept the notice, they cannot, when called on to pay the amount insured, resile and rely on a breach of warranty. By the voluntary acceptance of the notice of abandonment, an agreement is entered into which closes the whole matter. *Provincial Insurance Co. of Canada* v. *Leduc*, 43 L. J., P. C. 49 ; L. R. 6 P. C. 224 ; 31 L. T. 142 ; 22 W. R. 929 ; 2 Asp. M. C. 338. And see *Cammell* v. *Sewell*, 5 H. & N. 728 ; 29 L. J., Ex. 350.

On Sale of Ship and Cargo.]—A vessel was insured on a voyage from Saigon to Hong Kong. The ship sailed from Saigon on 14th January, 1871, and on the 22nd she struck upon a bank and was damaged. On the 24th she was towed to Saigon and discharged her cargo. She was then surveyed, and the surveyors recommended she should be sold. On 7th February the owners' house at Singapore made up their minds to sell, and wrote to the captain to that effect. On 11th February the ship was condemned, and on the 23rd was sold. On 27th February the Singapore house wrote to their agents in London, stating the survey, and that the ship had been sold, and directing them to inform the underwriters in London. On 11th March the insured firm claimed for a total loss against the underwriters : —Held, that notice of abandonment was necessary, that no such notice was given, and that the assured was consequently not entitled to recover. *Kaltenbach* v. *Mackenzie*, 48 L. J., C. P. 9 ; 3 C. P. D. 467 ; 39 L. T. 215 ; 26 W. R. 844—C. A.

A vessel was stranded and frozen in the St. Lawrence in the beginning of the winter ; and on the breaking up of the ice in the spring, she was found to be in imminent peril ; and after several surveys, both ship and cargo were sold under circumstances which the jury found to constitute a reasonable necessity for an immediate sale, the expense of getting the ship afloat and repairing her, and of forwarding the cargo (timber) to its destination (Liverpool) being greater than their value when so respectively repaired and carried :—Held, that the underwriters on cargo were liable as for a total loss, without notice of abandonment ; the information of the loss and of the sale having both reached the assured at the same time. *Farnworth* v. *Hyde*, L. R. 2 C. P. 204 ; 18 C. B. (N.S.) 835 ; 34 L. J., C. P. 207 ; 11 Jur. (N.S.) 349 ; 12 L. T. 231 ; 13 W. R. 613.

A ship was so much damaged by perils of the sea, that in order to render her seaworthy it would cost more to repair her than she would be afterwards worth, and the captain sold her to a purchaser who partially repaired her, and sent her upon a voyage, which she never completed in consequence of her infirmity :—Held, that the assured was entitled to recover as for total loss without giving notice of abandonment. *Cambridge* v. *Anderton*, 2 B. & C. 691 ; 4 D. & R. 203 ; R. & M. 60 ; 1 Car. & P. 213 ; 2 L. J. (o.s.) K. B. 141 ; 26 R. R. 517.

A vessel was driven into a port where there was no dock to receive her. It appeared that she had suffered so much by sea perils, that, upon examination and survey, it was judged expedient to break her up, and to sell her for

old timber :—Held, that the assured was bound to abandon before he could call upon the underwriters for a total loss; the ship not being a wreck, but, however maimed and damaged, existing in specie as a ship. *Bell* v. *Nixon*, Holt, 423.

—— **Converting Partial into Total Loss.**]—A ship being obliged to put into a place of safety in the course of her voyage, in consequence of damage incurred by a sea peril; if the owner does not abandon, but merely applies to the underwriters for directions how to proceed upon an estimate of the expenses of repair, who decline interfering, he cannot afterwards convert it into a total loss on account of the expenses of the salvage being found in the result to have exceeded the value of the ship, which was ultimately sold in the place into which she had been driven by distress; though the sale was directed by the assured to be made on account of all concerned. *Martin* v. *Crokatt*, 14 East, 465; 13 R. R. 281.

A vessel insured under a time policy, from August, 1841, to August, 1842, encountered very severe weather in the Indian seas, and was compelled in May, 1842, to put into the Mauritius. The master wrote to the owners, telling them of the injuries which the vessel had received, of the necessity to make extensive repairs, of his intention to borrow money on bottomry for that purpose, of the sum required, and of the impossibility of getting the money, except on the undertaking to return direct to England, instead of proceeding to Bombay, as originally intended. He further stated, that on account of the very low state of freights in India, this would be better for their interests, which he said he consulted in everything he did. The agents for Lloyd's at the Mauritius, who were employed by the captain to act for him, wrote letters to the same effect. These letters were received at intervals between September and December, 1842, and in the latter month the owners wrote to the agents, expressing their surprise at the amount required, but saying at the same time that they supposed what was done was the best that could be done under the unfortunate circumstances in which the ship was placed. The owners wrote to the agents in London, apprising them of the expected arrival of the vessel, and directing them to do what was needful. The vessel did arrive on the 27th March, and was at first taken possession of by the agents for the owners. On the 30th March the owners abandoned to the underwriters :—Held, that they were not entitled to recover as for a total loss; for, first, assuming notice of abandonment to be necessary in a case of constructive total loss, the notice here had not been given in time; and, secondly, the conduct of the owners on the receipt of the letters amounted to an election to treat this as a partial loss, and they could not afterwards, on the arrival of the vessel, when they found that the cost of repairs much exceeded the market value of the vessel itself, convert this partial into a total loss. *Fleming* v. *Smith*, 1 H. L. Cas. 513.

Notice of abandonment is necessary in order to convert a constructive into an absolute loss. *Ib.*

—— **Contested Suit—Appeal.**]—A cargo on board a ship bound from Liverpool to Matamoras was insured against the usual perils, including "takings at sea, arrests, restraints and detainments of all kings, princes and people." The policy also contained a suing and labouring clause, by which, in case of misfortune, it was provided that "it shall be lawful to the insured, their factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery of the subject-matter of this insurance, or any part thereof, without prejudice to this insurance, the charges whereof the company will bear in proportion to the sum hereby insured." It was also provided that the "acts of the insurer or insured, in recovering, saving or preserving the property insured, shall not be considered a waiver or an acceptance of abandonment." The ship sailed on her voyage, and being captured by a United States cruiser, was taken into New Orleans, where the captors instituted a suit for her condemnation in the prize court. The insured contested the suit, electing to treat the seizure as a partial loss. They obtained the judgment of the court in their favour. Against this judgment the captors, on the 1st of July, 1864, appealed, and the judgment was suspended. On the 12th of September, the insured gave a formal notice of abandonment, which the insurers refused to accept. They also subsequently informed them that endeavours were being made to sell the ship and cargo, that they were resisting such sale, and they requested them to assist in giving bail to prevent it. They refused to interfere. The sale of the goods could have been prevented by depositing the full value of the goods, or by giving bail for them, and the insurers had opportunity for taking either of such steps but declined to do so. The ship and cargo were then sold by order of the prize court, and the insured gave a fresh notice of abandonment, which was again refused. The insured could not, under the circumstances, by any means which they could reasonably be called upon to adopt, have prevented the sale :—Held, that although the insured had at first elected to treat the loss as a partial one, and although the fact of the appeal against the judgment would not justify them in changing their election, and claiming for a total loss, yet that the sale of the cargo by order of the prize court did amount to such a change of facts as would give them a right, if they chose, to maintain an action upon the policy for a total loss. *Stringer* v. *English and Scottish Marine Insurance Co.*, 10 B. & S. 770; 39 L. J., Q. B. 214; L. R. 5 Q. B. 599; 22 L. T. 802; 18 W. R. 1201—Ex. Ch.

Master electing to Repair.]—A shipowner insured ship and freight. On leaving Pernambuco in June, 1839, the ship struck on a rock and put back. After survey, she was repaired at a cost exceeding the value of ship and freight. The master was compelled to borrow on bottomry of ship, freight and cargo. In December, 1839, the owner, on being shewn a letter addressed to the lenders on bottomry, in which the great expense of the repairs was stated, gave notice to his underwriters of abandonment of ship and freight. The ship arrived, and the freight was paid under an order of the admiralty court to the bottomry bondholders. The owner sued his underwriters on the policy as for a total loss. The jury found that the master acted bonâ fide in repairing the ship :—Held, that the master might have abandoned at Pernambuco, but having elected to repair, he must be taken to have so elected as the owner's agent, and that the owner, being bound by his election, could not recover. *Benson*

v. *Chapman*, 2 H. L. Cas. 696; 8 C. B. 950; 13 Jur. 969—H. L. (E.)

Mutiny—Abandonment.]—Ship insured at and from Liverpool to the coast of Africa, &c. and from thence to the West Indies and America. The crew mutiny, and propose to take the ship to an enemy's port; the boatswain, who is put in charge, against the orders of the mutineers takes the ship to Barbados, where the mutineers are seized and the ship and cargo sold by the government agent for the benefit of all parties:—Held, that the assured was entitled to abandon and recover for a total loss. *Brown* v. *Smith*, 1 Dow, 349; 14 R. R. 78.

Condemnation for Illegal Slave Trade—Reversal of Decree—Abandonment—Total Loss.]—See *Lozano* v. *Janson*, ante, col. 1108.

Of Substituted Vessels.]—In an action upon a policy upon goods from Cadiz to Monte Video and Buenos Ayres, and also "on cash on account of freight, 216*l.*," the declaration alleged the shipment of the goods and the prepayment of the 216*l.* on account of freight; and that, whilst prosecuting the voyage, the vessel encountered a storm, and sustained so much damage that she became and was disabled from proceeding without being repaired, and could not be repaired so as to proceed without incurring an expense greater than her value would have been when repaired, together with the freight which she would have earned on the voyage; that the master was obliged to and did abandon the voyage and the earning of the residue of the freight; that the freighter procured two other vessels to carry the goods on, at a rate of freight exceeding the freight originally payable under the charter-party; and that the sum so paid in cash on account of the freight, by reason of the premises, became and was wholly lost to the plaintiff. That one of the substituted vessels sustained so much damage that she was obliged to put back to Gibraltar and there unload, and the goods were sent on to Monte Video by the other; and that, by reason of the premises, the plaintiff sustained a total loss of the sum so paid in cash on account of the freight, and was put to charges in transhipping the goods:—Held, that the declaration disclosed a sufficient justification for the master's abandoning the voyage, and consequently that the plaintiff was entitled to recover as for a total loss of the prepaid freight. *De Cuadra* v. *Swann*, 16 C. B. (N.S.) 772.

A plea, that the substituted vessel into which the goods were first transhipped, at the time the goods were first at risk on board of her, was not seaworthy, is a bad plea. *Ib.*

Duty of Captain to await Answer of Insurers.]—In an action on a policy on an iron steamer, on which the owners claimed to recover a constructive total loss, by reason of necessary abandonment and sale at a distant port, not a repairing port, but within thirty days' post of London, on account of a hole in one of the plates at the bottom, and also a supposed starting of rivets and plates caused by a strain sustained by the vessel in a severe gale; it being admitted that a mere hole in the bottom may be repaired, and the case therefore turning on the supposed injuries to plates and rivets; the jury was directed to consider whether the ascertained state of the plates and rivets was such as either itself shewed or raised a reasonable presumption and probability that the state of the rivets and plates outside was such as to be unsafe, and their real state could not be ascertained without a heaving down for external examination, which could not be done except in a repairing port; and whether, even if so, the only alternative was abandonment, and whether the captain ought not to have awaited an answer from the underwriters before abandonment. *Lindsay* v. *Leathley*, 3 F. & F. 902; 11 L. T. 194.

Effect of Sale of Cargo.]—In an action against underwriters on a policy upon a cargo of coals to Yokohama, it was proved that the ship received such damage as to render it necessary to put into Hong Kong; and that when there competent persons decided that the cargo should be sold, as there would be great danger of spontaneous combustion if conveyed to its original destination. No notice of the abandonment of the cargo was given to the underwriters until the claim was made for the total loss, but the coals had been publicly sold at Hong Kong. The proceeds of the sale had been handed over to the shipowners, and they had offered them to the charterers, less a considerable sum which they withheld in payment of pro ratâ freight, on condition that they should receive a receipt in full of all demands. This the charterers declined to give. The underwriters refused to pay, upon the ground that the charterers had not abandoned the cargo:—Held, that the public sale, per se, vested the proceeds of the sale in the underwriters, and that the charterers had done nothing subsequently which shewed an election on their part to take the proceeds. *Saunders* v. *Baring*, 34 L. T. 419; 3 Asp. M. C. 133.

Amount Recoverable.]—An insured who abandons can only recover for the actual loss at the time of his abandonment. *Hamilton* v. *Mendez* or *Mendes*, 1 W. Bl. 276; 2 Burr. 1198.

Upon a policy on flax, valued at so much, and warranted free of particular average, if the vessel is wrecked and the assured does not abandon, but labours to save the cargo, and in fact saves a part (one-sixteenth), though much damaged, he is entitled to recover as for a total loss of that part which was in fact totally lost, but not for the rest which was saved to him in specie, though deteriorated. *Davy* v. *Milford*, 15 East, 559. *See* 15 R. R. 279, n. See *Ralli* v. *Janson*, 6 El. & Bl. 422; 25 L. J., Q. B. 300.

Ship and Cargo Sold.]—Notice held to be necessary though the ship and cargo have been sold and converted into money when the notice was received. *Hodgson* v. *Blackiston*, 1 Park. Ins. (8th ed.) 400, n.

3. On Loss by Perils of Sea.

Nature of Loss.]—Owners of ships are not entitled to abandon unless at some period of the voyage there has been a total loss; and where the jury has found only an average loss occasioned by the perils of the sea, the court is precluded from saying there has been a total loss. *Cazalet* v. *St. Barbe*, 1 Term Rep. 187; 1 R. R. 178.

A loss of voyage for the season by perils of the sea is not a ground of abandonment upon a policy on goods, with a clause of warranty, free from average, where the cargo is in safety, and not of such a perishable nature as to make the

loss of voyage a loss of the commodity, although the ship is rendered incapable of proceeding in the voyage. *Hunt* v. *Royal Exchange Assurance Co.*, 5 M. & S. 47 ; 17 R. R. 264.

Where damage to the ship from perils of the sea during the voyage, covered by the policy on ship, was such as to justify abandonment to the underwriter on ship before the cargo was put on board, the insured freight could not be earned : —Held, that there was therefore a total loss on the policy on freight. *Rankin* v. *Potter*, 42 L. J., C. P. 169 ; L. R. 6 H. L. 83 ; 29 L. T. 142 ; 22 W. R. 1 ; 2 Asp. M. C. 65.

Goods Damaged.]—Where a ship was wrecked, but the goods were brought on shore, though in a very damaged state, so that they became unprofitable to the assured :—Held, that the underwriters on the goods, who were freed by the policy from particular average, could not be made liable as for a total loss by a notice of abandonment. *Thompson* v. *Royal Exchange Assurance Co.*, 16 East, 214.

Policy on goods (copper and iron) at and from L. to Q., warranted free of particular average, and the ship, owing to sea damage in the course of her voyage was obliged to run into port and undergo repair, and some part of the goods was damaged, and the repairs detained her so long as to prevent her reaching Q. that season, and no other ship could be procured at that or a neighbouring port to forward the cargo in time, so that the voyage was abandoned, and the ship afterwards sailed on another voyage :—Held, that this was not a total loss of the goods, and that the assured could not abandon. *Anderson* v. *Wallis*, 2 M. & S. 240 ; 3 Camp. 440.

A ship was wrecked on the 21st December, and three-fourths of her cargo, consisting of wines, were either lost or impregnated with salt water ; and the assured gave notice of abandonment as for a total loss on the 23rd (being the day on which they heard of the loss), and before the remains of the cargo were brought on shore :—Held, that it amounted to such a loss as warranted the notice of abandonment. *Hudson* v. *Harrison*, 6 Moore, 288 ; 3 Br. & B. 97 ; 23 R. R. 575.

—— **Desertion by Crew.**]—A ship being deserted at sea by the crew for the preservation of their lives, the assured on goods abandoned. She was afterwards towed into port, but the goods were so much damaged as not to be worth sending to their place of destination :—Held, a total loss. *Parry* v. *Aberdeen*, 4 M. & Ry. 343 ; 9 B. & C. 411 ; 7 L. J. (o.s.) K. B. 260.

4. On Capture.

Total Loss.]—An insured ship being taken, the insured may demand as for a total loss, and abandon to the insurer. *Goss* v. *Withers*, 2 Burr. 683 ; 2 Ld. Ken. 325.

Recapture.]—An abandonment offered to be made by the assured to the underwriter, upon intelligence brought of the capture of the goods insured, which the underwriter refused to accept, does not entitle the assured to recover as for a total loss, where, before action brought, the goods were recaptured, and arrived at the place of destination, by which a partial loss only was sustained ; for the assured can only recover an indemnity for such loss as he has sustained at the time of action. *Patterson* v. *Ritchie*, 4 M. & S. 393 ; 16 R. R. 498.

On an insurance on ship from Rio de Janeiro to Liverpool, she was captured, and afterwards recaptured ; but in the interval, the assured, having received intelligence of the capture, gave notice of abandonment ; and after the recapture the ship arrived at Liverpool, having sustained a partial damage :—Held, that the assured could only recover as for a partial loss. *Brotherston* v. *Barber*, 5 M. & S. 418 ; 17 R. R. 378.

Where there was a loss by capture, intelligence of which was received, and an abandonment made, and a recapture took place before the notice of abandonment was given, but there was no intelligence received of such recapture until after some steps had been taken by the underwriters :—Held, to amount to an acceptance of the abandonment by them. *Smith* v. *Robertson*, 2 Dow, 474 ; 14 R. R. 174. See also *Miller* v. *Fletcher*, *Underwood* v. *Robertson*, post, col. 1301.

—— **Partial or Total Loss.**]—A ship insured from Jamaica to Liverpool was captured in the course of her voyage, and recaptured in a few days ; and the assured having received intelligence of the capture, but not of the recapture, gave notice of abandonment ; and soon after receiving intelligence of the recapture, and that the ship was safe in the possession of the recaptors, in a port in Ireland, but without any further knowledge of her state and condition, he persisted in his notice of abandonment ; but the ship was afterwards restored to his possession without damage, and arrived at Liverpool, and earned her freight ; the salvage and charges of the recapture amounting only to 15*l.* 4*s.* 8*d.* per cent. :—Held, that he was not entitled to abandon ; it appearing in the result, that, at the time when the notice of abandonment was given, it was in fact only a partial and not a total loss, as the assured supposed ; and there being no subsequent circumstances, such as the loss of voyage, high salvage, &c., to continue it a total loss. *Bainbridge* v. *Nielson*, 10 East, 329 ; 1 Camp. 237 ; 10 R. R. 316.

A ship insured under a valued policy was sunk in deep water. On April 15th, the insured gave notice of abandonment, which the insurers declined to accept. In July, the insurers, at great cost, raised the ship. The insured in December sued the insurers for a constructive total loss. The insurers pleaded that the loss was partial only. It was admitted that the ship could not have been raised and refitted at an expense equal to her value when fit for sea ; but it was also admitted that at the date of the action, the expense of fitting her for sea would be less than her value when ready for sea :—Held, that the loss was partial only ; the date of the action being the material time. *Bainbridge* v. *Nielson* (supra) and *Falkner* v. *Ritchie* (2 M. & S. 290) followed. *Blairmore Co.* v. *Macredie*, 24 Ct. of Sess. Cas. (4th ser.) 893.

An assurance was effected at and from Quebec to Teneriffe, on a cargo consisting of wheat, fish, and staves, and there was the usual memorandum in the policy as to "corn and fish being free from average unless general" ; and the ship was captured, and afterwards recaptured, and sent by the recaptors to Bermuda, where a scarcity prevailing, an embargo was laid on the export of provisions ; and the cargo being landed, it was found that a considerable quantity of the wheat was so damaged by sea-water, that it was thrown overboard by order of the magistrates, for the

sake of the public health; and the other part of it, being also damaged, was sold by the captain, as well as the fish, at a profit; and he put up the ship for sale, which he purchased at one-fourth of her value, for the benefit of the owners; and having repaired her, and being refused permission to ship the remaining quantity of wheat to Teneriffe, he directed it to be sold, and bought it for the benefit of those concerned; and by leave of the governor, the embargo being then raised as to the West India Islands, he shipped the same for Madeira, where he arrived and delivered it and took in a cargo of wine for London, with which he arrived:—Held, that the assured, who had abandoned the ship on receiving intelligence of the circumstances which had happened previously to the time of her being permitted to proceed to Madeira, was entitled to recover as for a total loss on the whole of the goods insured. *Cologan* v. *London Assurance Co.* 5 M. & S. 447; 17 R. R. 390.

—— **Expense of Refitting.**]—Insurance on a ship, which, during her voyage, while loading her homeward cargo, was seized by the crew and carried away to a distant country, and the cargo plundered and the ship deserted, but was afterwards retaken by another ship, and was brought, with a small remaining part of her cargo, to an English port (not the port of her destination), and part of her rigging was gone, and she could not be made fit for a voyage again without considerable expense in providing a crew and stores:—Held, that this was not a total loss, so as to entitle the assured to abandon after notice of the recapture. *Falkner* v. *Ritchie*, 2 M. & S. 290; 15 R. R. 253.

—— **Running Blockade.**]—Goods were insured at and from L. to any port in the river P.; the policy was effected, and the ship sailed, after notification that those ports were blockaded: the ship was captured by the blockading squadron in the river P., but was rescued by her own crew, and brought back with the goods undamaged to L.; notice of abandonment was given in the interval between intelligence of the capture and of the rescue; but, after the rescue, in fact, there was no intention to violate the blockade:—Held, that the voyage as insured was not illegal; but that the assured had no right to recover for a total loss by reason of their having offered to abandon, because the abandonment must be viewed with regard to the ultimate state of facts at the time when the offer to abandon was made. *Naylor* v. *Taylor*, 9 B. & C. 718; 4 M. & Ry. 526.

Restitution.]—An abandonment made after capture, under circumstances which would entitle the assured at the time to recover as for a total loss, is not defeated so as to become an average loss only, by the mere restitution and return of the ship's hull, before action brought, if the restitution is under such condition as to make it uncertain whether the assured may not have to pay more than its worth. *M'Iver* v. *Henderson*, 4 M. & S. 576; 16 R. R. 550.

—— **Payment of Ransom by Master.**]—A vessel chartered to Oporto, St. Ubes, and Gottenburg, being taken at Oporto by the enemy, was liberated on payment by the master of a sum of money, and on condition of his bringing home in her to England, English prisoners to be exchanged for an equal number of French: upon the news of the capture, but after the time of the ship's liberation, the owners abandoned the ship to the insurers; upon her arrival at Portsmouth, the captain refused to deliver her, unless on repayment of the ransom, which the owner refused:—Held, that the owner being entitled to retake his ship, which was safe at Portsmouth, the loss of the voyage did not enable him to recover upon a policy on the ship as for a total loss, nor could he recover, as for an average loss, the sum which had been paid by the master for the ship's ransom, and which being an illegal payment, the plaintiff was not bound to repay to the master. *Parsons* v. *Scott*, 2 Taunt. 363; 11 R. R. 610.

Purchase after Sale by Captors.]—Where a ship insured had been captured, and brought into a neutral port, and sold by the captors, and the captain bought her for the benefit of the owners:—Held, that they were only entitled to recover on a policy the sum paid by the captain, and what was expended on her outfit, and could not recover for a total loss. *M'Masters* v. *Shoolbred*, 1 Esp. 237; 5 R. R. 735.

Capture and Recapture—Recovery as for Total Loss—Salvage.]—A ship being insured from London to Carolina, was taken by a Spaniard, and retaken by an English privateer, who carried her into Boston, where no person appearing to give security she was condemned and sold, and, after the recaptors had their moiety, the residue remained in the court of admiralty at Boston. Defendant brought an action at law on the policy and recovered, and plaintiff, by his injunction-bill, insisted, that defendant ought to have recovered no more than a moiety of the loss. The court refused the injunction, for, as defendant had offered to relinquish the salvage, he was entitled to recover the whole money insured. By 13 Geo. 2, c. 4, s. 18, the recapture of a ship is the revesting of the owner's property; so that it is doubtful whether the act can operate when insurances are made, interest or no interest. Salvage must be deducted out of the money recovered by the policy, if come to the hands of the assured. *Pringle* v. *Hartley*, 3 Atk. 195.

—— **Abandonment — Ship Restored before Action Brought.**]—See *Ruys* v. *Royal Exchange Assurance Corporation*, ante, col. 1108.

5. Embargo and Confiscation.

Position of Consignees of Foreigner.]—A foreigner, insuring in this country his ship or goods on a voyage, is not obliged to abandon upon an embargo laid on the property in the ports of his own country, as his assent is virtually implied to every act of his own government, and makes such embargo his own voluntary act; and goods having been consigned by such foreigner on his own account and risk, to British merchants here, who in consequence of such consignment made advances to the foreigner, and made insurance on his account, debiting him with the premiums, the goods were afterwards abandoned in consequence of such embargo:—Held, that, as the foreigner could not recover against the underwriters, his consignees could not recover their advances under a policy made for the benefit of the foreigner, though made in their names, as interest might appear; however,

they might have insured their separate interests by a policy made on their own account. *Conway* v. *Gray*, 10 East, 536, overruled by *Aubert* v. *Gray*, ante, col. 1091. And see *Conway* v. *Forbes*, 10 East, 539; and *Maury* v. *Shedden*, 10 East, 540.

Inability to Discharge.]—If a cargo of a perishable nature is insured from A. to B., with the usual memorandum, and in the course of the voyage information is received by the master that the port of B. is shut against ships of his nation, in consequence of which the commander of the convoy orders the ship to proceed to another port, and the cargo is there sold by orders of the vice-admiralty court for a very small sum of money, the assured cannot abandon as for a total loss. *Hadkinson* v. *Robinson*, 3 Bos. & P. 388; 7 R. R. 786.

In a case of insurance upon goods consigned to a particular port, if, on the arrival of the ship there it is found to be in the hands of an enemy; that circumstance does not warrant the assured to abandon. *Lubbock* v. *Rowcroft*, 5 Esp. 50; 8 R. R. 830.

A party, having shipped goods on an adventure to St. Petersburg on board a vessel chartered for the purpose, made insurance on ship and goods in the common printed form in blank; and by a written memorandum in the policy, the underwriters agreed to pay a total loss in case the ship should not be allowed by the Russian government to discharge her cargo at St. P., on which voyage the vessel had then sailed, chartered by the plaintiff:—Held, that the insured was entitled to recover upon this policy on an allegation that the vessel on her arrival at St. P. was not allowed by the Russian government to discharge her cargo, but was obliged to return back with it, by which the value of the cargo was reduced below the amount of the invoice price, together with the charges paid thereon, and the premiums of insurance. *Puller* v. *Glover*, 12 East, 124.

Where a neutral ship, bound from America to Havre, was detained and brought into a British port, and pending proceedings in the admiralty, the king declared Havre in a state of blockade, by which the further prosecution of the voyage was prohibited:—Held, a total loss of the voyage, which entitled the neutral assured to abandon. *Barker* v. *Blakes*, 9 East, 283. *And see Cases* ante, col. 1239.

Sale—Condemnation Reversed.]—An American, properly licensed to export saltpetre from Calcutta to America, having insured it for the voyage, the ship was seized by the captain of a British ship of war at the Cape of Good Hope, and the cargo condemned, unshipped, and sold by order of the court of admiralty there, whose sentence was afterwards reversed on appeal here, and the property ordered to be restored, or its value paid to the owner, though upon payment of the captor's costs:—Held, that the assured might recover as for a total loss, without notice of abandonment, the thing insured being wholly lost to the owner by the unshipping and sale of the commodity at the Cape, under the order of the court there; and that such loss was recoverable against the underwriters, on a count alleging it to have happened by the unlawful seizure and detention of a British ship of war; however questionable it might have been, if notice of abandonment had been necessary, whether such a notice, not given till after the receipt of a second letter from the Cape, announcing the condemnation, landing, and sale of the goods, was in time, when a prior letter of advice had stated the seizure and detention, on which no notice had been given; and the court of appeal allowing the captor his costs, on the reversal of the sentence of condemnation, did not the less shew the original seizure and detention to be unlawful. *Mullett* v. *Shedden*, 13 East, 304; 12 R. R. 347.

6. On Loss by Other Means.

Desertion by Crew.]—A ship received considerable damage from tempestuous weather, and the crew, completely exhausted, deserted the ship on the high seas for the mere preservation of their lives; and the ship was then taken possession of by a fresh crew, who succeeded in conducting her safely into port. The ship having been sold under the decree of the admiralty court to pay the salvage, and it not appearing that the assured had taken any means to prevent such sale:—Held, that they had no right to abandon, and that there was no more than a partial loss. *Thornely* v. *Hebson*, 2 B. & Ald. 513; 21 R. R. 381.

A ship being deserted at sea by her crew for the preservation of their lives, the assured on goods abandoned. She was afterwards towed into port, but the goods were so much damaged as not to be worth sending to their place of destination:—Held, a total loss. *Parry* v. *Aberdeen*, 4 M. & Ry. 343; 9 B. & C. 411; 7 L. J. (o.s.) K. B. 260.

Barratry.]—Barratry of the master is a ground of abandonment as for a total loss, though the goods ultimately reach their destination through the agency of strangers to the assured. *Dixon* v. *Reid*, 1 D. & R. 207; 5 B. & Ald. 597; 24 R. R. 481.

7. Effect of, on Freight and Cargo.

Charterparty Freight.]—Where there was a policy on ship and also on charterparty freight (that is, freight to be earned by the carriage homeward of a cargo chartered to be put on board at a distant port), and the ship was so injured at the outward port that the shipowner abandoned to the underwriter on ship, there was nothing to pass to the underwriter on charterparty freight, and consequently there was no necessity of abandonment to him. *Rankin* v. *Potter*, 42 L. J., C. P. 169; L. R. 6 H. L. 83; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.

Priorities.]—A shipowner having first insured his ship with A., and his freight with B., for a certain voyage, and having notice of an embargo laid on the ship in a foreign port, abandoned the ship and freight to the respective underwriters, and received from them the whole amount of their subscriptions as for a total loss of both; first undertaking, by a memorandum on the ship policy, to assign to the underwriters thereon his interest in the ship, and to account to them for it; and afterwards undertaking, by a similar memorandum on the freight policy, to assign to those underwriters all right of recovery, compensation, &c. The ship being afterwards liberated, and earning freight, which was received by the assured:—Held, that however

the question of priority as to the title to the freight might have been as between the different sets of underwriters litigating out of the same fund, and however the weight of argument might preponderate in favour of the underwriters on the ship; yet that the assured, who had received the freight from the shippers of goods, was at all events liable on his express undertaking to pay it over to the underwriters on freight; and that, without deducting the expenses of provisions, wages, &c., which were charges on the owner before the abandonment, and on the underwriters on ship afterwards. *Thompson* v. *Rowcroft*, 4 East, 34. S. P., *Leatham* v. *Terry*, 3 Bos. & P. 479.

Freight Earned.]—Upon a hostile embargo in a foreign port the owner, who had separately insured ship and freight, abandoned them to the respective underwriters, which abandonment was accepted by them; after which the embargo was taken off, and the ship completed her voyage and earned freight:—Held, that the assured could not recover as for a total loss of freight, the freight having been in fact earned; or, supposing it to have been in any other sense lost to the assured by the abandonment of the ship to the underwriters thereon, it was so lost, not by any peril insured against, but by the voluntary act of the assured, in making such abandonment. *M'Carthy* v. *Abel*, 5 East, 388; 1 Smith, 524; 7 R. R. 711.

An abandonment to the underwriters on ship transfers freight earned subsequently to such abandonment, as incident to the ship. *Davidson* v. *Case*, 5 Moore, 116; 8 Price, 542; 2 Br. & B. 379; 5 M. & S. 79; 17 R. R. 280.

Ship and freight were insured by separate underwriters. The ship was captured, and ship and freight abandoned to the respective underwriters, who each paid a total loss. The ship was recaptured, performed her voyage and earned freight:—Held, that the underwriters were entitled to the freight. *Ib.*

Captain acting as Agent of Insurers.]—A ship having been chartered to carry troops to Calcutta, by a charterparty, under which a portion of the freight was made payable on the completion of the voyage, when about 700 miles beyond the Mauritius caught fire. The ship put back to the Mauritius, where, being found to be greatly damaged, she was abandoned to the underwriters as totally lost, and the abandonment was accepted. The captain having chartered another ship and forwarded the troops to Calcutta, the freight was received by the shipowners' agents:—Held, that, in forwarding the troops, the captain acted as agent for the owner and not for the underwriters; and that the underwriters, to whom the ship had been abandoned, were not entitled to any benefit from the freight so received. *Hickie* v. *Rodocanachi*, 4 H. & N. 455; 28 L. J., Ex. 273; 5 Jur. (N.S.) 550; 7 W. R. 545.

Compensation.]—Owners of a ship effected policies of insurance on freight and on ship for a voyage from St. John's, New Brunswick, to Liverpool, the goods on board being their property. The ship was stranded off the port of Liverpool, and notice of abandonment was given to the underwriters on the ship: part of the cargo was then brought in lighters to Liverpool, and the ship, having been so lightened, was brought with the remainder to Liverpool: this was done by the owners at their expense: subsequently the abandonment was accepted by the underwriters:—Held, that nothing in the nature of freight for the entire voyage passed to the underwriters on the ship on the abandonment of the ship, but that they were entitled to compensation in the nature of freight from the owners of the ship, as owners of the goods, for so much of the cargo as was brought in it from the place of stranding to Liverpool, and that the principle on which it was to be calculated was the sum for which that part of the cargo might have been forwarded to Liverpool in another ship at the current rate of freight. *Miller* v. *Woodfall*, 8 El. & Bl. 493; 27 L. J., Q. B. 120; 4 Jur. (N.S.) 302. See *Burnand* v. *Rodocanachi*, 51 L. J., Q. B. 548; 7 App. Cas. 333; 47 L. T. 277; 31 W. R. 65; 4 Asp. M. C. 576—H. L. (E.)

Title to Cargo, when Accruing.]—The title of underwriters to a cargo of an abandoned vessel does not date from the acceptance of an abandonment, but has relation back to the time of the loss. *Cammell* v. *Sewell*, 5 H. & N. 728; 29 L. J., Ex. 350; 6 Jur. (N.S.) 916; 2 L. T. 799; 8 W. R. 639—Ex. Ch.

A foreign vessel sailing with a cargo of timber, consigned from a foreign port to Hull, went ashore on the coast of Norway. The captain, without waiting for instructions from the consignee, and without any absolute necessity, made sale by auction of the timber, in the manner prescribed by the law of Norway, and the purchaser consigned the timber to the defendants for sale in his behalf. The agents of the plaintiffs' underwriters, who had received notice of abandonment before, but had accepted it after the sale, in the meantime instituted a suit in the superior diocesan court of Drontheim against the captain and the purchaser to set aside the sale, and to compel the purchaser to deliver up the cargo to the underwriters. That court confirmed the sale. On trover subsequently brought by the plaintiffs against the London consignee of the purchaser for the recovery of the cargo:—Held, that they were entitled to maintain an action for the conversion, but that they were estopped by the judgment of the Norwegian court. *Ib.*

On abandonment, the owner becomes trustee for the underwriters on ship, and is bound to assign. *Scottish Marine Insurance Co.* v. *Turner*, 1 Macq. H. L. 334; 17 Jur. 631; 1 W. R. 527.

Where a ship has received injuries entitling the owner to treat her as totally lost, and where he consequently abandons her to the underwriters on ship, they are entitled to all freight afterwards earned. *Ib.*

Upon such constructive loss and abandonment the freight, if earned, will belong, not to the owners, but to the underwriters on ship. *Ib.*

Freight, while the ship is in the course of earning it, belongs to the underwriters paying for a total loss. *Stewart* v. *Greenock Marine Insurance Co.*, 2 H. L. Cas. 159; 1 Macq. H. L. 382.

Deduction of Expenses.]—While a ship was forcibly detained in a foreign port, the owner abandoned first the ship and then the freight, to the different sets of underwriters thereon, who paid as for a total loss; after which the ship was liberated, reshipped her cargo, which had been taken out, and returned home, earning freight, which was received by the assured. Assuming that the assured after an abandonment of the

ship, might abandon the freight to another set of underwriters, the ship and freight are salvage to the different underwriters after deducting the following expenses, which must be apportioned between them according to their several interest: 1. The expenses of the ship and crew in the foreign port, including port-charges, besides the expense of shipping the cargo, which exclusively belongs to the underwriters on freight: 2. Insurance thereon: 3. Wages and provisions of crew from their liberation in the foreign port till their discharge here: 4. Wages (provisions were supplied by the foreign government) to the crew during their detention. But the assured was not entitled to deduct out of the freight received, payable to the underwriter on freight: 1. Charges paid at the port of discharge on ship and cargo: 2. Insurance on ship: 3. Diminution in value of ship and tackle by wear and tear on the voyage home. *Sharp* v. *Gladstone*, 7 East, 24; 3 Smith, 39; 8 R. R. 583.

XII. SALE, BY MASTER, OF SHIP AND CARGO.

1. *Ship*, 1297.
2. *Cargo*, 1301.

1. SHIP.

When Allowed.]—The master of a vessel has no power to sell her so as to affect the insurers, except under circumstances of stringent necessity: such circumstances as, after sufficient examination of her condition, after every exertion in his power, within the means at his disposal, to extricate her from peril or to raise funds for the repair, leave him no alternative but to sell her as she is. *Cobequid Marine Insurance Co.* v. *Barteaux*, L. R. 6 P. C. 319; 32 L. T. 510; 23 W. R. 892; 2 Asp. M. C. 536—P. C.

In cases of extreme necessity, and where the ship, having got aground, cannot, in the opinion of persons competent to judge, be raised, the captain may sell her for the benefit of the owners; but it can only be in cases of extreme necessity; and the survey, &c. must be made on the best information, and with the most pure good faith. *Hayman* v. *Molton*, 5 Esp. 54; 8 R. R. 837.

A vessel struck upon a rock outside a harbour, and it was necessary to lighten her in order to get her off at the next high tide, and for that purpose her master entered into a contract with one G., who was the only person at the place who had a sufficient number of men to render effectual assistance, to find the labour required for that purpose. G. supplied only a small number of men, who worked very languidly in discharging the cargo for two or three hours, and at the end of that time G. persuaded the master to cancel this contract, and to call a survey of the vessel and sell her. G. and some men he brought accordingly made a survey, and by it found the mainmast raised one inch, the main combings parted, the deck plank opening, and the vessel unseaworthy, and advised that the ship and cargo should be sold for the benefit of all concerned. The master then sold her to G. for a very small sum of money. When the vessel struck on the rock there was a strong breeze blowing, but it afterwards got calmer, and at the time of the sale the weather was good, and the vessel lying on her bilge with no more danger than she had been in from the time she struck, but there was evidence that if the wind veered round to the south or west the sea would have heaved in and the vessel would have broken up in a short time. As a fact, directly after the sale G. brought a number of hands to discharge the cargo, and so got the vessel off and floated her at the next high tide, and he afterwards repaired and made her seaworthy at a trifling expense. In an action against the underwriter on a policy of insurance on the vessel for a constructive total loss, the judge ruled, on the above facts appearing at the end of the plaintiff's case, that there was no evidence upon which the jury could reasonably find the urgent necessity for the sale of the vessel at the time she was sold, and he accordingly withdrew the case from the jury and directed the verdict to be entered for the defendant:—Held, by Lord Coleridge, C.J., that such ruling was right. *Hall* v. *Jupe*, 49 L. J., C. P. 721; 43 L. T. 411; 4 Asp. M. C. 328.

Held, by Grove, J., that it was wrong, and that the case should not have been withdrawn from the jury. *Ib.*

A captain of an insured ship, which has been injured by perils of the sea, is not justified in selling the ship instead of repairing it, unless he either has not the means of getting the repairs done at the place where the vessel is obliged to put in; or cannot get them done except at such an expense as would render it undoubtedly improper to repair, if the ship were not insured; or has not money in his possession sufficient to pay for the repairs, and is not in a situation to raise it by loan or otherwise, except at such an extravagant rate as would prevent a prudent man, in the exercise of a sound and vigorous judgment, from undertaking the repairs under such circumstances. *Somes* v. *Sugrue*, 4 Car. & P. 276, 284.

Where a ship received damage by striking on a rock, which rendered her unsafe for another voyage unless repaired; and she was twice surveyed and condemned by the authorities of the place to which she was insured; and the captain bonâ fide sold her for firewood; and she might have been repaired but for the negligence of the resident agents of the owners:—Held, that the underwriters were not liable for a total loss. *Tanner* v. *Bennett*, R. & M. 182; 27 R. R. 743.

A ship being wrecked, was sold by the owner and master, and soon after got off by the purchaser and repaired, though at a great expense. The owner could not treat this as a total loss, unless the sale at the time, in the exercise of a sound judgment, appeared most beneficial for all parties. *Doyle* v. *Dallas*, 1 M. & Rob. 48.

If the ship was likely to be repairable, so as to come to England with any cargo, which upon her arrival would be worth the sum laid out on her, it cannot be treated as a total loss, though she cannot be made fit to carry the cargo originally intended for her. *Ib.*

Freight was insured from A. to B. The ship sailed, but was obliged to put back from stress of weather, when she was found to be incapable of complete repair, and the cargo was accordingly unloaded and the ship sold. In an action on the policy for a total loss:—Held, that the insured was bound to use all reasonable endeavours to repair the ship, so as to have carried the cargo, or part of it, which would have operated as a salvage. *Green* v. *Royal Exchange Assurance Co.*, 1 Marsh. 447; 6 Taunt. 68; 16 R. R. 571.

Where, by means within the reach of the

master, a ship can be so treated as to retain the character of a ship, he cannot, by selling her even bonâ fide, convert the average into a total loss, but the underwriters are entitled to have those means used on their account. *Gardner* v. *Salvador*, 1 M. & Rob. 116.

Where it was proved that the master sold bonâ fide, and professedly for the benefit of all concerned, yet, since it was not further proved that the sale was absolutely necessary, and really for the benefit of all, the assured were not entitled to recover as for a constructive total loss, without notice of abandonment. *Knight* v. *Faith*, 15 Q. B. 649 : 19 L. J., Q. B. 509 ; 14 Jur. 1114. See *Rosetto* v. *Gurney*, ante, col. 1236.

When Repairs Effected.]—Freight was insured on ship and cargo of timber from Quebec to London, and the ship sailed from Quebec, and on her voyage down the River St. Lawrence sprung a leak, and it became necessary for the preservation of the lives of the master and crew to run her on shore, where she took the ground on the outside of a reef of rocks, and was there fixed, and exposed to the full force of the stream, and in the way of the drift ice then forming and floating down the river. One of the part-owners and agent for the others resided at Quebec, and after two surveys, in which the surveyors stated, as their opinion, that it would be prudent to sell the ship and cargo, the master, under the direction of such part-owner, sold the same; the ship, however, survived ; was repaired by the purchasers, and afterwards brought a full cargo to London. In an action on the policy against the underwriters on freight for a total loss :—Held, that the master was warranted in selling the ship and cargo. *Idle* v. *Royal Exchange Insurance Co.*, 3 Moore, 115 ; 21 R. R. 538.

Where ship, freight, and passage-money where insured for 13,000*l.*, at and from London to the East Indies and back ; and the ship sailed seaworthy from Calcutta on her homeward voyage, and afterwards received considerable damage by stormy weather, so as to render it necessary for the captain to put back there ; and immediately on his arrival, he gave notice of abandonment to the agents for Lloyd's resident there, and desired that their surveyor might be present at the surveys of the ship ; and the agents replied, that they had no authority to accept abandonments ; and after three several surveys of the ship by competent persons, at two of which the surveyor for the agents attended, and it was found that the expense of repairing her would be from 4,000*l.* to 5,000*l.* ; and the captain, having ineffectually attempted to raise money by hypothecation of the ship (having no funds to repair her himself), sold her for 1,200*l.* ; and the jury found that what had been done by him was for the benefit of all concerned, and gave a verdict for the assured as for a total loss :—Held, that the sale was justifiable ; and the court refused a new trial. *Read* v. *Bonham*, 6 Moore, 397 ; 3 Br. & B. 147 ; 23 R. R. 587.

Where a vessel was so much injured by perils of the sea, that, in order to render her seaworthy, it would cost as much to repair her as she was originally worth, or as much as would build a new ship, and the captain sold her to a purchaser, who repaired her and sent her on a voyage, which she never completed in consequence of her infirmity :—Held, that the underwriters were liable as for a total loss, although the vessel remained in specie at the time she was sold. *Cambridge* v. *Anderton*, 4 D. & R. 203 ; 2 B. & C. 691 ; 1 Car. & P. 213 ; R. & M. 60 ; 2 L. J. (o.s.) K. B. 141 ; 26 R. R. 517.

Where a ship was so shattered in a storm, that it was found, on survey, that the expenses of repairing her would far exceed her original value, and the captain sold her bonâ fide for the benefit of all concerned, and the purchaser shortly afterwards broke her up :—Held, that this was such an urgent necessity as justified the sale. *Robertson* v. *Clarke*, 8 Moore, 622 ; 1 Bing. 445 ; 2 L. J. (o.s.) C. P. 71 ; 25 R. R. 676.

If a vessel is so much injured by a storm, that in the opinion of the master, who exercises a fair and honest discretion on the subject, she cannot be repaired but at an expense exceeding the amount of a total loss, and he accordingly sells her, the owner may recover from the insurer as for a total loss, although it eventually turns out that the vessel might possibly have proceeded on her voyage. *Robertson* v. *Caruthers*, 2 Stark. 571 ; 20 R. R. 738.

Where a vessel was driven by tempestuous weather into a foreign port, and in order to defray the expenses of repairing (without which she could not have proceeded on her voyage), the captain was obliged to sell part of the cargo :—Held, that the underwriters on a policy on goods were not liable for a total loss by perils of the sea. *Sarguy* v. *Hobson*, 3 D. & R. 192 ; 2 B. & C. 7 ; 4 Bing. 131 ; 12 Moore, 474 ; 1 Y. & J. 347 ; 1 L. J. (o.s.) K. B. 222 ; 26 R. R. 251. S. P., *Powell* v. *Gudgeon*, 5 M. & S. 431 ; 17 R. R. 385.

Cause of Loss—Stranding.]—A ship insured in 1,000*l.* for a year, ending 23rd September, was stranded, got off, and brought into the harbour of Santa Cruz, on September 16th. She remained there with her crew on board till the middle of October, and during that time was pumped, and her cargo was discharged into other vessels. Being then beached and surveyed, she was found so much damaged by the accident that the necessary repairs could not be done at Santa Cruz, there being no dockyard, workmen, or materials there ; nor could she be taken to any port where she could prudently have been repaired. Afterwards, in October, the master (who was a part owner, and interested in the policy) sold her for the benefit of those whom it might concern, and she fetched 72*l.* No notice of abandonment was given. A special case, in an action against the underwriters, set forth these facts, stating also that the vessel "received her death-blow" by the perils of the sea, on September 16th, but that the damage was not ascertained till the 24th :—Held, that the assured were entitled to recover for partial loss by the stranding before September 23rd, though the loss was not ascertained till after that day ; the proximate cause of loss, the injury by stranding, having taken place during the year covered by the insurance. *Knight* v. *Faith*, 15 Q. B. 649 ; 19 L. J., Q. B. 509 ; 14 Jur. 1114.

Held, also, that the ultimate loss did not prevent such recovery, for that the partial loss by stranding caused an actual prejudice to the assured, which was not merged in the final loss resulting from the sale, even assuming this to have been a total loss necessarily consequent upon the stranding, the loss being one, which, as total, the insurers were not liable to pay for. *Ib.*

A ship and goods being insured for a voyage,

if the ship is taken and recaptured, and, on the recapture, the captain, acting fairly for the benefit of his employers, sells the ship and cargo, and thereby puts an end to the voyage, the insured will recover as for a total loss. *Milles* v. *Fletcher*, 1 Dougl. 231.

Underwriters on goods insured from London to Demerara were held liable for an average loss, where the ship, being captured and recaptured, was sent into St. Thomas's stripped of all her hands, and the captain, not being able on his arrival there to procure a fresh crew, or to raise money to pay the salvage, immediately sold the ship and cargo, and broke up the adventure. *Underwood* v. *Robertson*, 4 Camp. 138; 16 R. R. 760.

Evidence of Condemnation.]—A notarial copy of the condemnation of a ship as not being worth repairing, is only evidence of the fact of her having been condemned, not of the particular defects on which the condemnation was grounded. *Wright* v. *Barnard*, 2 Esp. 700; 5 R. R. 767.

Authority of Vice-Admiralty Court.]—The vice-admiralty courts abroad have no authority, upon the mere petition of the captain of a ship, bound on a foreign voyage, to decree the sale of such ship reported upon survey not to be seaworthy or repairable, so as to carry the cargo to its place of destination, but at an expense exceeding the value of the ship when repaired. *Reid* v. *Darby*, 10 East, 143.

Where the master of a ship on a voyage from Calcutta to London, laden with indigo, was obliged to put into Mauritius from unseaworthiness, and there abandoned ship and cargo, which were bonâ fide sold by public auction, under the orders of the vice-admiralty court:—Held, in an action by the owner against the purchaser of the indigo; 1st, that there being no pressing necessity for the sale, the master could confer no title upon the vendee; 2nd, that a judgment in tort against the owner of the vessel for not delivering the cargo, pursuant to the bill of lading, was no bar to this action; and 3rd, that an unavailing demand of the proceeds in the vice-admiralty court did not prevent the plaintiff from recovering the full value of the indigo from the defendant. *Morris* v. *Robinson*, 5 D. & R. 35; 3 B. & C. 196; 27 R. R. 322. And see *Hunter* v. *Prinsep*, 10 East, 378; 10 R. R. 328.

Unnecessary Sale by Master.]—See *Alcock* v. *Royal Exchange Assurance Corporation*, 13 Q. B. 292; 18 L. J., Q. B. 121; 13 Jur. 445, post, col. 1321.

2. CARGO.

Duty of Master to Communicate.]—A master of a vessel cannot at an intermediate port sell goods which are damaged, and cannot be carried to the port of discharge, without communicating with their owner. *Acatos* v. *Burns*, 47 L. J., Ex. 566; 3 Ex. D. 282; 26 W. R. 624—C. A.

The authority of the master to sell goods of an absent owner is derived from the necessity of the situation in which he is placed; and consequently to justify his selling, he must establish a necessity for the sale, and an inability to communicate with the owner. *Australian Steam Navigation Co.* v. *Morse*, 8 Moore, P. C. (N.S.) 482; L. R. 4 P. C. 222; 27 L. T. 357; 20 W. R. 728.

A captain of a ship is not justified in selling the cargo at a foreign port, although it is impossible to prosecute the original voyage, and although a sale of the goods is the most beneficial course for the owner of them. *Wilson* v. *Millar*, 2 Stark, 1; 19 R. R. 670. S. P., *Joseph* v. *Knox*, 3 Camp. 332.

Liability of Shipowner.]—Although the captain of a ship finds it impossible to reach his port of destination, he has no implied authority to sell, for the benefit of the shippers, the cargo in a foreign port into which he is driven; and if he does so, though acting bonâ fide for the interest of all concerned, this is a tortious conversion for which the shipowner is liable. *Van Omeron* v. *Dowick*, 2 Camp. 42.

Where the captain of a ship, which was in a sinking state from the effects of tempestuous weather, put into a port short of his destination, and believing that the expense of repairs would frustrate the owner's adventure, he sold the cargo under the order of a vice-admiralty court, but it appeared that he might have forwarded it to its port of destination by another vessel, and repaired his own ship at a great expense:—Held, that he ought either to have done the one or the other; and that he had no authority to sell the cargo: and that, consequently, the shipowners were liable to the owners of the cargo for the non-delivery thereof, although the bill of lading merely stipulated for a conveyance, "the dangers and accidents of the seas and of navigation, of what kind soever excepted." *Cannan* v. *Meaburn*, 8 Moore, 127; 1 Bing. 243; 2 L. J. (o.s.) C. P. 60.

The master of a vessel is not justified in selling any part of the cargo for the repairs of the ship in a foreign port, except in the case of urgent necessity. *Campbell* v. *Thompson*, 1 Stark. 490.

A., having shipped goods on board of a vessel which was driven into a foreign port by stress of weather, part of these goods was sold by the captain to defray the expenses of repairing the vessel; A. is entitled to deduct from the demand for the freight the sum for which the goods have been sold; and the circumstances of the shipowners, having, during the voyage, assigned the freight to a third person, makes no difference. *Ib.*

The master of a ship, which is completely wrecked in a foreign port, has no authority to sell goods on freight saved from the wreck, unless there is an absolute necessity for such sale; though he acts bonâ fide, and according to the best of his judgment; and where the goods are sold by public auction, such sale is, at all events, not binding on the owner of the goods, where the conduct of the vendee imports knowledge of the weakness of the captain's title to sell. *Freeman* v. *East India Co.*, 1 D. & R. 234; 5 B. & Ald. 617; 24 R. R. 497.

Sale of Part.]—Where a vessel, having sailed from her port of lading, with a cargo of goods, was obliged to put back in consequence of a peril of the sea, and it being discovered that part of the cargo which was taken out was damaged by sea-water, and could not be re-shipped without a delay of six weeks, the captain, in the exercise of a sound discretion, sold the damaged goods, sailed with the remainder, and arrived in safety:—Held, that the underwriters were not liable pro tanto for the loss of the freight of the goods sold. *Mordy* v. *Jones*, 6 D. & R. 479; 4 B. & C. 394; 3 L. J. (o.s.) K. B. 250; 28 R. R. 305.

Consignee or Purchaser.]—Where a captain without absolute necessity or authority sold a cargo, and the sale was confirmed by a foreign court, on a suit by the underwriters to set aside the same:—Held, that though the underwriters might otherwise have been entitled to maintain an action for conversion, they were estopped by the judgment of the foreign court. *Cammell* v. *Sewell*, ante, col. 1296.

XIII. PREMIUMS.

1. *Return of.*
a. Policy Void, 1303.
b. Voyage Illegal, 1303.
c. Risk not Commenced or Incomplete, 1305.
d. Ship in Safety, 1306.
e. Other Matters, 1308.
2. *Payment—Action for*, 1309.

1. RETURN OF.

a. Policy Void.

If a policy is avoided by misrepresentation without fraud, the assured is entitled to a return of the premium. *Feise* v. *Parkinson*, 4 Taunt. 640; 13 R. R. 710.

Where a policy contained a warranty that the ship was in port on a previous day, and it was held to mean the port whence she departed, and not any port, and the ship was on that day safe in another port:—Held, that the insured was entitled to a return of the premium. *Colby* v. *Hunter*, M. & M. 81; 3 Car. & P. 7.

To an action on a policy, a plea that the insurer was induced to enter into the policy by a false representation of a material fact made by the assured and their agent, such misrepresentation being, at the time it was made, false, to the knowledge of the insured and their agent, is supported by proof, either of concealment or of misrepresentation, not fraudulent. *Anderson* v. *Thornton*, 8 Ex. 425.

Where a policy is avoided by concealment or by misrepresentation, not fraudulent, the assured is entitled to a return of the premium, and the policy is conclusive evidence of the receipt of the premium by the insurer. *Ib.*

B. effected a policy in the name of M. There being no goods of M. on board, and the policy therefore void, M. may sue to recover the premium. *Martin* v. *Sitwell*, Show. 156.

Policy entered into by Fraud.]—Policy entered into by fraud of assured; premium returned. *Wilson* v. *Ducket*, 3 Burr. 1361. Aliter, now. *Tyler* v. *Horne*, 2 Marsh. Ins. 661, infra; *Chapman* v. *Fraser*, ibid.

Insurance after Loss known.] — Where the assured had heard of the loss before the order to insure was given:—Held, that the premium should be returned. *Tyler* v. *Horne*, 1 Park, Ins. (8th ed.) 455.

Non-communication of Accident by Master.]—See *Gladstone* v. *King*, ante, col. 1186.

b. Voyage Illegal.

Cannot be Recovered.]—The premium paid on an illegal insurance to cover a trading with an enemy, cannot be recovered back, though the underwriter cannot be compelled to make good the loss. *Vandyck* v. *Hewitt*, 1 East, 96; 5 R. R. 516.

A foreigner cannot recover back the premium paid by him upon a policy, if the voyage is in contravention of the British laws. *March* v. *Abel*, 3 Bos. & P. 35.

Prize taken before Declaration of War.]—After a proclamation by the king in council to detain and bring into port all Danish vessels, a hired armed ship of his majesty took and carried into Lisbon a Danish vessel, and sold her cargo there towards defraying in part the expense of necessary repairs, but without the authority of a court of admiralty; and afterwards took in a cargo on freight for England, and sailed on the 3rd November for Lisbon, on which day hostilities were declared against Denmark, by another proclamation of the king in council; after which an assurance was made on the ship and freight by order and on account of the captors:—Held, that a statement in a case reserved, that the insurance was on account of the captors, precluded the consideration whether a count in the declaration could be sustained, averring the interest to be in the crown, and the insurance to be made on account of his majesty; and that the captors had no insurable interest, as they could claim nothing of right, but only ex gratiâ of the crown, the "Dane" having been seized and detained before any declaration of war against Denmark, and the captors having no claims to prize under the prize acts. But as there was no fraud in the captors in effecting the policy, nor anything illegal in the voyage or insurance:—Held, that the assured were entitled to recover back the premium, which had not been paid into court. *Routh* v. *Thompson*, 11 East, 428; 10 R. R. 539.

Agent Paying in Ignorance.]—An insurance having been made on goods at and from a port in Russia to London, by an agent residing here, for a Russian subject abroad, which insurance was in fact made after the commencement of hostilities by Russia against this country, but before the knowledge of it here, and after the ship had sailed and been seized and confiscated:—Held, that the policy was void in its inception; but that the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of such hostilities. *Oom* v. *Bruce*, 12 East, 225; 11 R. R. 367.

Delay in obtaining Licence.]—Where a licence was obtained and insurance effected from Riga to Hull, on goods the produce of Russia, on board a Swedish ship, but the ship sailed three days before the letter directing the licence to be obtained reached the agent; the letter having been delayed by contrary winds beyond the usual time, the licence was obtained two days afterwards, and the insurance effected subsequently to that:—Held, that though the voyage was in its inception illegal, being contrary to 12 Car. 2, c. 18, s. 8, nevertheless the assured might recover back the premium. *Hentig* v. *Staniforth*, 5 M. & S. 122; 17 R. R. 293.

Renunciation.]—An assured, upon a policy effected in terms sufficiently large to comprehend an illegal adventure, and who intends thereby to cover an illegal adventure, cannot recover back the premium without some formal renunciation of the contract made known to the underwriter before the bringing the action, although the adventure is never entered upon. *Palyart* v. *Leckie*, 6 M. & S. 290; 18 R. R. 381.

Navigation Laws.]—A policy upon ship and cargo for a voyage illegal under the navigation laws held void; and the premium cannot be recovered back. *Lubbock* v. *Potts*, 7 East, 449.

Licence to Trade—Retrospective Operation.] Policy on a ship at and from a place within the limits of the South Sea Company's charter, the ship not having a licence from the company to trade at the date of the policy or up to her loss. The assured not being aware that she had no licence, procured a licence before they knew of the loss and as soon as they could, the licence purporting to apply to a time before the loss:—Held, that the licence could not operate retrospectively, and that, the ship being forfeited, the premium was not returnable. *Cowie* v. *Barber*, 4 M. & S. 163; 16 R. R. 368.

Insurance Illegal as to Part of the Goods.]—A policy was made upon the supposed efficacy of a licence granted contrary to the navigation laws covering British and enemy's goods. As to the former the licence was good, as to the latter void:—Held (the assured not resisting the claim to that amount), that the premiums in respect of the British interest insured should be paid to the underwriter. *Shiffner* v. *Gordon*, 12 East, 296.

c. Risk not Commenced or Incomplete.

Risk not Begun.]—Where the risk has not begun, to whatsoever cause it may be owing, the premium must be returned; but wherever it has once begun, although it ceases immediately, there will be no apportionment in return of premium. Upon a policy at and from London to Halifax, warranted to depart with convoy from Portsmouth, the contract and risk are divisible at Portsmouth, as two independent contracts and risks. *Tyrie* v. *Fletcher*, Cowp. 668.

Upon a policy "at and from such a port to any other port or place whatsoever, for twelve months, at 9*l.* per cent., warranted free from capture," the risk is entire; and therefore, if once begun, there can be no return of premium. *Ib.*

If a risk is not run, the insurer shall return only a proportionate part of the premium. *Stevenson* v. *Snow*, 3 Burr. 1237; 1 W. Bl. 315, 318.

If an insurance is made on two distinct risks, and one of them is not run, the insurer refunds a ratable part of the premium. *Ib.*

Where the captors of a ship insure their interest therein, they are not entitled to a return of premium, though afterwards adjudged to be no prize, and restitution is awarded. *Boehm* v. *Bell*, 8 Term Rep. 154; 4 R. R. 620.

Warranty not Complied with.]—If a ship, seaworthy to lie in port, sails without being rendered seaworthy for the voyage, upon a policy "at and from," there can be no return of premium. *Annen* v. *Woodman*, 3 Taunt. 299; 12 R. R. 663.

In an insurance on a ship at and from Hull to Bilboa, warranted to depart from England with convoy, the voyages from Hull to Portmouth, where she meets the convoy, and thence to Bilboa, may be considered as distinct; and in case of a loss between the two latter places, an apportionment and a return of premium may be demanded. *Rothwell* v. *Cooke*, 1 Bos. & P. 172.

Whether Entire Contract.]—An insurance on a ship and goods at and from A. to B., during her stay and trade there, at and from her port or ports of discharge in C., and at and from thence back to A., is an entire contract; and if the loss happens at any time after the commencement of the risk, there shall be no return of premium. *Bernson* v. *Woodbridge*, 2 Dougl. 781.

By a policy on a ship for a year, the underwriter stipulated to return a part of the premium if sold or laid up for every uncommenced month:—Held, that the words "lying up" meant a lying up for the season without being employed for the current year, and therefore, that where a vessel, insured for one year had been laid up for several months during the year, but was employed again within the year, that was not such lying up as entitled the assured to a return of the premium. *Hunter* v. *Wright*, 10 B. & C. 714; 8 L. J. (o.s.) K. B. 259.

Premium for Convoy.]—Where a total loss is recovered, there cannot also be a return of premium for convoy, because the total loss includes the entire premium added to the invoice price. *Langhorn* v. *Allnutt*, 4 Taunt. 511; 13 R. R. 663.

Return of Premium—Average Loss.]—Insurance on goods to be shipped on board a certain ship, part of the premium to be returned "if she sails with convoy and arrives":—Held, that the whole of the specified part of the premium was to be returned if the ship arrived, though there was an average loss on the goods. *Simond* v. *Boydell*, 1 Dougl. 268.

—— **If Ship Arrives—Capture and Recapture—Salvage.**]—The insurer on freight agreed to return part of the premium "if the ship sailed with convoy and arrived":—Held, that the assured were entitled to that return, the ship having sailed with convoy and arrived, though she had been captured and recaptured and the assured had had to pay salvage. *Aguilar* v. *Rodgers*, 7 Term Rep. 421; 4 R. R. 478.

—— **Arrival, where.**]—"To return 5 per cent. if the ship sails with convoy for Gottenburg and arrives, and 5 per cent. more if she sails for her port of delivery and arrives":—Semble, a return of premium may be due for her arrival at Gottenburg although she never arrives at her port of delivery. *Leevin* v. *Cormac*, 4 Taunt. 483, n.; 13 R. R. 654.

—— **Risk not Divisible.**]—Policy of insurance "at and from Jamaica to Liverpool; warranted to sail before the 1st August." The ship did not sail before the 1st August:—Held, that the risk was not divisible and that the assured was not entitled to a return of any part of the premium. *Meyer* v. *Gregson*, 3 Dougl. 402.

d. Ship in Safety.

No Interest.]—An insurance being made without interest, and the premium paid, the insured cannot recover back the premium after the ship has arrived safe. *Lowry* v. *Bourdieu*, 2 Dougl. 468.

Where there is an insurance on ship and freight, and the ship arrives in safety, and earns freight, the assured cannot afterwards claim a return of premium on the ground that he had no insurable interest on account of a defect in his title to the ship. *M'Culloch* v. *Royal Exchange Assurance Co.*, 3 Camp. 406; 14 R. R. 765.

Over Insurance.]—An insurance was effected on the 12th April on a cargo of cotton, then at sea, by five several policies at the rate of fifty guineas per cent.; and on the 13th, news of the vessel's safety having arrived, a further insurance was bonâ fide effected by six different policies, at ten and five guineas per cent. The latter insurance, added to the former, exceeded in amount the value of the subject-matter insured, but the former of itself did not:—Held, that the assured were entitled to a return of premium on the amount of the over-insurance, to which the underwriters who subscribed the policies of the 13th April were to contribute ratably, in proportion to the sums insured by them respectively (the amount of over-insurance to be ascertained by taking into account all the policies), but that no return of premium was to be made in respect of the policies effected on the 12th. *Fisk* v. *Masterman*, 8 M. & W. 165; 10 L. J., Ex. 306.

Short Interest.]—Where there is an insurance on freight, if the ship is chartered for the voyage and is guilty of a deviation after sailing upon it and before any goods are loaded, the assured are not entitled to any return of premium for short interest. *Moses* v. *Pratt*, 4 Camp. 297; 16 R. R. 794.

Where a ship is insured for twelve months, at the rate of so much per month, though the risk ceases at the end of two months, there will be no apportionment nor return of premium. *Loraine* v. *Tomlinson*, 2 Dougl. 585.

"Arrival."]—A clause in a ship policy at and from Lisbon to Cadiz, and at and from thence to Flushing, at a premium of 20*l.* per cent., to return 8*l.* per cent. if the ship insured sailed with convoy from Cadiz for England, and 2*l.* per cent. more for convoy from England to Flushing, or 10*l.* per cent. if with convoy for the voyage, and arrived, does not entitle the assured to a return of premium of 8*l.* per cent. in consequence of the ship's arrival merely in England with convoy from Cadiz, she being afterwards captured before the arrival at Flushing, for "arrived" means at the ultimate port of destination. *Kellner* v. *Le Mesurier*, 4 East, 396; 1 Smith, 72; 7 R. R. 581.

Under a policy on goods from London to any ports or places in the Baltic, backwards and forwards, with leave to touch, stay and trade at all places, for all purposes, and to take in and discharge goods wheresoever the ship might touch at; and in case it should be found dangerous to enter such ports and places, or the captain was not allowed to discharge the cargo, with leave to return, until he found a port which he could enter with safety; the insurance to continue until the ship and goods arrived at as above; upon the ship until moored at anchor twenty-four hours in safety, and upon the goods until the same should be there discharged and safely landed, at a premium of fourteen guineas, to return 7*l.* per cent. for arrival; with warranty of the goods free from capture or seizure in the ship's port or ports of discharge:—Held, that the assured were entitled to a return of 7*l.* per cent. premium "for arrival," under circumstances which discharged the underwriters from any loss. *Dalgleish* v. *Brooke*, 15 East, 295; 13 R. R. 476.

Re-Insurance.]—The defendant, who had insured a cargo by a certain vessel lost or not lost for a certain voyage, believing such vessel to be overdue, effected a policy of reinsurance with the plaintiff on the same cargo and risk. Before effecting the policy of reinsurance, the vessel and cargo had in fact arrived safely at the port of destination; but this was not known to either the plaintiff or defendant at the time the policy was effected:—Held, that the policy had attached, and that therefore the plaintiff was entitled to the premium at which it had been effected. *Bradford* v. *Symondson*, 50 L. J., Q. B. 582; 7 Q. B. D. 456; 45 L. T. 364; 30 W. R. 27—C. A.

After Receipt.]—Where the assured claims and receives the return premium due upon the arrival of the vessel, and the policy is adjusted upon that footing, he cannot, without an express stipulation, resort again to the underwriter in any contingency of the adventure. *May* v. *Christie*, Holt, 67; 17 R. R. 608.

Return of Premium—Policy Effected after Ship's Arrival.]—Action by insurance brokers to recover the premium in respect of a war risk, policy effected after the arrival of the ship at her destination, both parties being ignorant of the fact:—Held, that the premium was not returnable. *Natusch* v. *Symondson*, 7 Q. B. D. 460, n.

e. Other Matters.

Winding up—Set off—Claims on Policies and unpaid Premiums.]—The official liquidators of an assurance company admitted that a certain amount was due from the company on a claim made before the winding-up order, upon the loss of a ship insured:—Held, that the policy-holder was entitled to set off against the amount sums due from him for unpaid premiums. *Bates & Co., Ex parte, Progress Assurance Co., In re*, 39 L. J., Ch. 496; 18 W. R. 722.

Evidence of Receipt—Policy.]—In an action by the assured against an underwriter for a return of premium, the policy is conclusive evidence of the receipt of the premium by him. *Dalzell* v. *Mair*, 1 Camp. 532. And see *De Gaminde* v. *Pigou*, 4 Taunt. 246.

Return of Premium under Mistake—Recovery on Policy.]—See *Reyner* v. *Hall*, 4 Taunt. 725; 14 R. R. 650, ante, col. 1263.

—— Action for—At Law or in Chancery.]—On the 16th of September, A. (since dead) insured a cargo of wheat at Lloyd's in 5,400*l.*, at the rate of 60*s.* per cent., which policy was duly subscribed by the agent of the defendant for 100*l.* A. forged bills of lading for the cargo, and on the 5th of October obtained an advance of 5,000*l.* from the plaintiff's agents on the security of the bills. On the 28th of October the plaintiff discovered the forgery, and subsequently applied to the defendant and the other underwriters for repayment of the premiums on the policy, on the ground of no interest having attached, but repayment was refused. After the death of A. (whose representatives could not be found) the plaintiff filed a bill, praying that it might be declared that he was entitled to be repaid the 60*s.*:—Held, that a court of law was the proper tribunal to decide the question as to whether the defendant was liable to repay the premium, as the fact of a person being only the equitable assignee of a legal demand was not a ground for changing the forum. *Hoskins* v. *Holland*, 44 L. J., Ch. 273; 23 W. R. 477.

Custom as to Order of Liability of Underwriters.]—Plea and proof of a custom that underwriters shall be liable in the order in which they subscribe the policy for the amount of the loss, and that subsequent underwriters shall return the premium, less ½ per cent., and bear none of the loss. *African Co.* v. *Bull*, 1 Show. 132

Policy Assigned—Assignor Bankrupt.]—Right to sue for return of premium. See *Castelli* v. *Boddington*, 1 El. & Bl. 66, 879; 22 L. J., Q. B. 5, post, col. 1313.

2. PAYMENT—ACTION FOR.

Credit given for Receipt.]—Although generally an underwriter, having subscribed a policy, and thereby confessed the receipt of the premium, is estopped from afterwards claiming the premium against the assured, yet, where by the fraud of the assured the underwriter is induced to give credit for the premiums to the broker, and the broker to give credit to the assured, the underwriter is entitled to receive the premiums from the assured. *Foy* v. *Bell*, 3 Taunt. 493; 12 R. R. 691.

An underwriter, after executing a policy, and giving credit to the broker for the premium, may recover the premium, if it appears that the assured (to cover a balance due from the broker to himself) procured him to effect the insurance, debiting the assured in account with the premiums, and lodging the policies in the hands of the assured, to enable him to receive the losses. *Mavor* v. *Simeon*, 3 Taunt. 479, n.

The broker effecting the policy, being the common agent of the assured and of the underwriter, while the premium remains in his hands for the one party, and the policy for the other, and having received notice of events which entitled the assured to a return of premium before action by the underwriter to recover the full premium, is authorised to deduct such return, and only to pay over the difference to the underwriter. *Shee* v. *Clarkson*, 12 East, 507; 11 R. R. 473.

On Bankruptcy—Deductions by Brokers.]—In an action by assignees of a bankrupt underwriter against the defendants, insurance brokers, for the balance of an adjusted account between the bankrupt and the defendants, and also for premiums of insurance on policies underwritten by the bankrupt with them as brokers, before the bankruptcy, the brokers are not entitled to deduct for returns of premium due on policies, the premiums of which policies formed a part of the adjusted account, except where the events entitling them to such returns were not known till after such adjustment; nor can they deduct for returns of premium on some of the policies, for the premiums of which the action is brought, the events entitling them to such returns having happened before the bankruptcy, though the returns were not adjusted; nor can they deduct for returns on other policies for the premiums of which the action is brought, the events entitling them to such returns having happened since the bankruptcy, but before the commencement of the action; the brokers not having a commission del credere, nor being personally interested in any of the insurances. *Parker* v. *Smith*, 16 East, 382; 14 R. R. 366.

Action on a policy on goods, alleging an average loss. By the policy, a portion of the premium was to be returned if the risk ended in England. Pleas, set-off, and bankruptcy of the plaintiff. Replication, that before the bankruptcy the plaintiff transferred the goods and the policy, and his right to recover for the loss to F. Rejoinder, that before the bankruptcy the risk had ended in England, whereby the plaintiff became entitled, under the policy, to a return of the premium:—Held, first, that the first plea was bad, as the action was for unliquidated damages. *Boddington* v. *Castelli*, 1 El. & Bl. 879; 1 C. L. R. 281; 23 L. J., Q. B. 31; 17 Jur. 781; 1 W. R. 359—Ex. Ch.

Held, secondly, that the rejoinder to the replication was no answer to the second plea, because, although the beneficial interest under the policy, so far as related to the return of the premiums, passed to the assignees, and though there was only one contract, yet that the bankrupt was entitled to sue on the policy as a trustee for F., to recover for the loss, as two separate actions on the policy were maintainable, one for the return of the premium and another for the loss. *Ib.*

—— **Order and Disposition.**]—A. and B. were members of a partnership; A. died, and B. became bankrupt:—Held, that premiums due on policies effected in A.'s name during his lifetime were not in the order and disposition of B. *Brett* v. *Beckwith*, 26 L. J., Ch. 130; 3 Jur. (N.S.) 31; 5 W. R. 112.

Held, also, that the joint creditors of A. and B. were entitled to have the separate estate of the deceased partner administered, and to an account of the joint estate in the hands of the executors of A. and the assignees of B. *Ib.*

Description "as Agents."]—Insurance brokers who, without a del credere commission, effected policies in their own names, in which they were described "as agents," cannot, in an action for premiums by the assignees of a bankrupt underwriter, who had subscribed these policies, set off a total loss which had happened before the bankruptcy, but which had not been adjusted, although the policies had always remained in their hands, and they had actually paid the amount of the loss to their principal. *Baker* v. *Langhorn*, 4 Camp. 396; 2 Marsh. 215; 6 Taunt. 519; 16 R. R. 662.

In an action by assignees of a bankrupt underwriter against brokers for premiums due to the bankrupt, the brokers may set off, under 12 & 13 Vict. c. 106, s. 171, a loss which occurred before the bankruptcy, on a policy underwritten by the bankrupt, and effected by them in their own names, "$\frac{\text{and}}{\text{or}}$ as agents" for a principal for whom they were acting on a del credere commission, without the bankrupt's knowledge. *Lee* v. *Bullen*, 8 El. & Bl. 692, n.; 27 L. J., Q. B. 161; 4 Jur. (N.S.) 557.

When Insurance Illegal].—Where credit was given by insurance brokers, in an account delivered in by them to an underwriter for the premiums of reassurances declared illegal by 19 Geo. 2, c. 37, after which the assured gave notice to the brokers not to pay the money over to the underwriter, and indemnified them for withholding it:—Held, that the underwriter could not maintain an action against the brokers to recover such premiums as for money had and received by them to his use, the transaction being illegal, and the money not having been

actually paid, but only credit given for it on account. *Edgar* v. *Fowler*, 3 East, 222; 7 R. R. 433.

Set-off—On Death of Underwriter.]—In an action by the executors of an underwriter against a broker, for premiums due on policies, subscribed by the testator, the broker cannot set off returns of premium, which returns became due after the testator's death. *Houstoun* v. *Robertson*, 2 Marsh. 138; 6 Taunt. 448; 4 Camp. 342; Holt, 88; 16 R. R. 655.

Even when the policies were effected under a commission del credere. *Houstoun* v. *Bordenave*, 2 Marsh. 141; 6 Taunt. 451; 16 R. R. 657.

Express Promise by Assured to pay Premiums—Liability of Broker—Custom.]—The rule of law based upon the recognised custom in the ordinary course of business of marine insurance, by which the broker and not the assured is held liable to the underwriter for payment of the premiums upon a policy of marine insurance, is not rendered inapplicable by the fact that the policy contains an express promise by the assured to pay the premiums to the underwriter. *Universo Insurance Co. of Milan* v. *Merchants Marine Insurance Co.*, 66 L. J., Q. B. 564; [1897] 2 Q. B. 93; 76 L. T. 748; 45 W. R. 625—C. A.

XIV. ASSIGNMENT OF POLICY.

After Interest Ceased.]—When the interest of the insured has ceased before loss, a subsequent assignment of the policy is ineffectual. *North of England Pure Oilcake Co.* v. *Archangel Maritime Bank and Insurance Co.*, 44 L. J., Q. B. 121; L. R. 10 Q. B. 249; 32 L. T. 561; 24 W. R. 162; 2 Asp. M. C. 571.

The plaintiffs purchased linseed, to be delivered at a destined port in the United Kingdom, and paid for in fourteen days from being ready for delivery by cash, less discount, or at seller's option (which was not exercised) on handing shipping documents less interest. The sellers, before the sale to the plaintiffs, by policy made with the defendants, insured the linseed, including all risk of craft and boats to and from the ship or vessel, and also any special lighterage, each lighter or craft being considered as if separately insured. The vessel containing the linseed arrived at a port in the United Kingdom, and the cargo was landed by means of public lighters employed by the plaintiff, one of which was sunk when loaded, and the linseed on it partly lost and partly damaged. This loss, which was within the terms of the policy, occurred before delivery of the cargo had been completed, and before the plaintiffs had paid the price. After the cargo had been completely delivered, the sellers assigned the policy to the plaintiffs, who sued the defendants in respect of the loss above mentioned:—Held, that as there was no express contract that the policy should pass to the purchaser on the sale of the linseed, and as none could be implied from the terms of the sold note, the interest under the policy remained in the sellers until delivery; and as on delivery on board the lighter the plaintiff's interest ceased and the policy lapsed, no interest under it could pass to a subsequent assignee. *Ib.*

After Loss.]—A policy of marine insurance can be assigned, under 31 & 32 Vict. c. 86, s. 1, after loss, so as to entitle the assignee to sue upon it in his own name. *Lloyd* v. *Fleming*, 41 L. J., Q. B. 93; L. R. 7 Q. B. 299; 25 L. T. 824; 20 W. R. 296; 1 Asp. M. C. 192.

In an action upon a policy of marine insurance by the executors of E., deceased, against an underwriter, the declaration alleged that a policy on goods in a ship was underwritten by the defendant, that the goods were lost by the perils insured against, and that after the loss, "the policy of insurance, together with all rights accrued under and by virtue thereof," was, by the assured, for good consideration, duly assigned to E. in his lifetime:—Held, that although the assignment was made after loss of the goods, yet as the policy, "together with all rights accrued under it," had been duly assigned to E., he became "entitled to the property thereby insured," within the terms of 31 & 32 Vict. c. 86, s. 1, and was entitled to sue upon the policy in his own name, and that the declaration was good. *Ib.*

Set-off.]—The assured had, subsequently to the date of a policy of insurance on goods executed a deed of inspectorship under the Bankruptcy Act (24 & 25 Vict. c. 134), s. 192, and was suing on behalf of third persons who had made advances upon the shipping documents:—Held, that he was entitled to recover, and that the underwriters were not entitled to set off the amount of a debt due from the assured to them, under the mutual credit clause of 12 & 13 Vict. c. 106, s. 171. *De Mattos* v. *Saunders*, L. R. 7 C. P. 570; 27 L. T. 120; 20 W. R. 801; 1 Asp. M. C. 377. See *Boddington* v. *Castelli*, 1 El. & Bl. 879; 1 C. L. R. 281; 23 L. J., Q. B. 31; 17 Jur. 781; 1 W. R. 359—Ex. Ch., infra, col. 1313.

In an action by the assignee of a policy of marine insurance, the insurers are not entitled to set off a debt incurred with them by the assured for premiums on policies effected with them by the assured after the date of the assignment; for the claim under a policy for a loss is for unliquidated damages to which no set-off could be pleaded at law, under the statutes of set-off in an action by the assured, nor in equity in a suit by the assignee, and therefore the debt incurred by the assured is not a "defence" open to the insurers under 31 & 32 Vict. c. 86, s. 1, that statute being intended merely to amend procedure and not to alter the rights of the parties to the policy; nor is the debt incurred by the assured the subject of "set-off" or "counter-claim" within the meaning of the rules of the supreme court, Ord. XIX. r. 3. *Pellas* v. *Neptune Marine Insurance Co.*, 49 L. J., C. P. 153; 5 C. P. D. 34; 42 L. T. 35; 28 W. R. 405; 4 Asp. M. C. 213—C. A.

Who Entitled to Policy Moneys.]—A cargo of wheat, fully insured, having fallen in value, was sold, including the freight and the full insurance at a reduced price, to be paid in cash, in exchange for the bills of lading and policies effected with approved underwriters. The policies were transferred to the purchaser, but with an indorsement limiting the transfer to an amount sufficient only to cover the price at which the cargo was sold. The cargo having suffered a total loss, Wood, V.-C., held that the sellers were entitled, as against the purchaser, to the balance of the insurance moneys in excess of the amount for which the policy was transferred. But upon an

appeal:—Held, that the purchaser was entitled to the whole proceeds of the policy. *Ralli* v. *Universal Marine Insurance Co.*, 4 De G. F. & J. 1; 31 L. J., Ch. 313; 8 Jur. (N.S.) 495; 6 L. T. 34; 10 W. R. 278.

Sale on London Floating Conditions—Sufficiency of Policy Delivered.]—Upon the sale of a floating cargo upon London floating conditions, the question whether the policy assigned is sufficient in amount is for the jury. *Tamvaco* v. *Lucas*, 3 B. & S. 89; 31 L. J., Q. B. 296; 6 L. T. 697; 10 W. R. 733—Ex. Ch.

Goods sold at Sea—Policy Assigned—Recovery on Policy by Assignor.]—Goods were insured from H. to a market in Europe, part of premium to be returned if risk ended in United Kingdom. The assured sold the goods at sea, and assigned the policy. An average loss occurred, and the goods were delivered in England. The assignor afterwards became bankrupt:—Held, that he could nevertheless sue upon the policy for the average loss as trustee for the purchaser, although the right to sue for return of premium had vested in the assignees in bankruptcy. *Castelli* v. *Boddington*, 1 El. & Bl. 879; 1 C. L. R. 281; 23 L. J., Q. B. 31; 17 Jur. 781; 1 W. R. 359—Ex. Ch.

Sale — Interest of Third Parties — Policy Moneys.]—A. sold minerals to B. at 40*s.* per ton, B. agreeing to resell at the best price, and in case the selling price exceeded 50*s.* per ton, to pay half of the difference between that price and 40*s.* to A. B. insured the minerals for 100,000*l.* A part of the minerals was consumed by fire, and B. agreed with the insurance company to abandon to them the entire heap (about 10,000 tons, less the part consumed), the insurers paying B. 58*s.* per ton for the whole, the market price being then higher:—Held, that A. was entitled to recover from B. half the sum received from the insurers in excess of 50*s.* per ton. *Gillespie* v. *Miller*, 1 Ct. of Sess. Cas. (4th ser.) 423.

Agreement to Insure—War Risk.]—See *Birkett* v. *Engholm*, ante, col. 546.

XV. SUBROGATION.

Subrogation of Assurer to Rights of Assured.]—The insurer, after payment to the assured of the money due under his policy, stands in the place of the assured in respect of the property in and rights to the ship or goods insured; but the owners, and not the insurers, must take proceedings for restitution before commissioners for prizes. *Randal* v. *Cockran*, 1 Ves. Sen. 98.

—— So he is entitled to freight earned by the abandoned ship. *Stewart* v. *Greenock Marine Insurance Co.*, 2 H. L. Cas. 159. S. P., *Case* v. *Davidson*, 8 Price, 542; 5 Moore, 116; 2 Br. & B. 379; 17 R. R. 280. Affirming, 5 M. & S. 79.

As to the right of the underwriter to recover damages payable by the owner of a ship that has damaged the insured ship in collision, see *Sea Insurance Co.* v. *Hadden*, 53 L. J., Q. B. 252; 13 Q. B. D. 706; 50 L. T. 657; 32 W. R. 841; 5 Asp. M. C. 230, post, col. 1332; *Yates* v. *Whyte*, 4 Bing. (N.C.) 272; 5 Scott, 640; 7 L. J., C. P. 116, ante, col. 729; *North of England Iron Steamship Insurance Co.* v. *Armstrong*, 39 L. J., Q. B. 81; L. R. 5 Q. B. 244; 21 L. T. 822; 18 W. R. 520, ante, col. 1141; *Simpson* v. *Thompson*, 3 App. Cas. 279; 38 L. T. 1; 3 Asp. M. C. 567, ante, col. 725.

—— **Right to Salvage and Compensation.**]—Satisfaction having been made under a royal commission for distribution of prizes to the insured, such of the insurers as had paid held entitled to restitution, though foreigners; but not those who had compounded and renounced salvage. *Blaauwpot* v. *Da Costa*, 1 Eden, 130.

Advances to Master at Port of Loading—Constructive Total Loss—Freight collected at Port of Discharge—Deductions—Advanced Freight.]—By charterparty it was provided that "sufficient cash for ship's ordinary disbursements at port of loading to be advanced to the master by charterers or their agents . . . ship paying 2½ per cent. including insurance. Master to give his draft on owners or consignees as required and customary to cover same, which shall be paid out of the first freight collected." Advances were made and the ship proceeded on her voyage, but became a constructive total loss when close to her port of destination. She was subsequently brought to her port of destination, where she discharged her cargo. The master's draft for advances ultimately came into the hands of the consignees. The freight was collected by the shipowners. In an action by the underwriters on hull and machinery against the shipowners to recover the whole of the freight so collected:—Held, that the shipowners were entitled to deduct the sum advanced at the port of loading from the freight collected by them, inasmuch as the underwriters were only entitled to the charterparty freight earned from the use of the ship after abandonment. *The Red Sea*, 65 L. J., Adm. 9; [1896] P. 20; 73 L. T. 462; 44 W. R. 306; 8 Asp. M. C. 102—C. A.

And see infra, cols. 1331, seq., XVI. ACTION ON POLICY; 2. RIGHTS OF UNDERWRITERS.

XVI. ACTION ON POLICY.

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1. GENERALLY.

a. Parties.

Contract by Agent.]—L., an agent of B., insured goods belonging to B. that were being sent by ship from Montreal to St. John's, Newfoundland. The insurance company's agent issued to L. a "certificate of insurance," which stated that L. had insured the goods. It was the custom of the company to issue subsequently a policy stating that "X. Y., as well in his own name as in the name of every person to whom the same shall appertain," had insured the goods. On a loss occurring:—Held, that the omission in the certificate of the words "as well as in his own name," &c., did not, either by the Canadian or by the English law, preclude B. from suing the insurance company in his own name. *Brown* v. *Provincial Insurance Co. of Canada*, L. R. 5

P. C. 263; 28 L. T. 853; 21 W. R. 587; 2 Asp. M. C. 338.

An agent, who insures for another with his authority, may sue for the insurance money in his own name. *Provincial Insurance Co. of Canada* v. *Leduc*, 43 L. J., P. C. 49; L. R. 6 P. C. 224; 31 L. T. 142; 22 W. R. 929. See also *Sunderland Marine Insurance* v. *Kearney*, post, col. 1327.

Pledgee of Bill of Lading.]—Where a consignee of goods pledges the bill of lading with another person, as a security for advances made by him, and upon an agreement that the consignee shall effect an insurance on the goods for the benefit of the pledgee, and deposit the policy with him, the pledgee may sue on the policy in his own name. *Sutherland* or *Sunderland* v. *Pratt*, 12 M. & W. 16; 13 L. J., Ex. 246.

Assignee.]—A person who assigns away his interest in a ship or goods, after effecting a policy upon them, and before the loss, cannot sue upon the policy, except as a trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit. *Powles* v. *Innes*, 11 M. & W. 10; 12 L. J., Ex. 163.

Indorsee of General Policy.]—S., a shipbroker, was directed by the plaintiff, a shipowner, who was liable for loss by jettison, to take out an open policy against jettison on deck goods, and S. shortly afterwards received from the plaintiff a notice declaring the shipment to be on deck per "La Plata," from Grimsby to Ostend, of certain specified goods. S. not being able to effect such a policy as the plaintiff required, caused a declaration as to the risk insured against, similar to the notice which he had so received from the plaintiff to be indorsed on a general policy, which had been effected a month previously by S.'s agents in their own names, and in that of any other person to whom it might appertain, from any port on the east coast of Great Britain to any port on the continent between Hamburg and Havre, upon any kind of goods, "to be valued and declared as interest might appear." The defendant underwrote this policy, and also put his initials to such declaration. There were other goods in other vessels belonging to other persons, in which the plaintiff had no interest, also declared by indorsement on the policy. The plaintiff was duly informed by S. that the risk by the "La Plata" had been covered not upon the plaintiff's own policy, but on S.'s general one:—Held, that the plaintiff could not sue the defendant on such policy, as it had never been made with the plaintiff, nor with any one on his behalf, nor had it ever been ratified by him. *Watson* v. *Swann*, 11 C. B. (N.S.) 756; 31 L. J., C. P. 210.

Third Parties—Claim for Indemnity—Underwriters—Suing and Labouring Clause.]—The defendant insured his ship under a policy containing the usual suing and labouring clause. In an action to recover for work alleged to have been done and expenses incurred by the plaintiffs for the defendant, at his request, in respect of attempting to save the ship during the continuance of the policy:—Held, that the defendant was not entitled to bring in the underwriters as third parties under Ord. XVI. r. 48, because they did not, by the suing and labouring clause, contract to indemnify the defendant in respect of any contract made by him with the plaintiffs. *Johnston* v. *Salvage Association*, 19 Q. B. D. 458; 57 L. T. 218; 36 W. R. 56; 6 Asp. M. C. 167—C. A.

Service of Writ out of the Jurisdiction—Underwriters Resident Abroad.]—The plaintiff brought an action in England on a policy of insurance against several underwriters. Having served his writ of summons on two of the underwriters who were within the jurisdiction, he obtained leave under Ord. XI. r. 1 (g) to serve his writ on the other defendants who were residing out of the jurisdiction. *Thanemore Steamship Co.* v. *Thompson*, 52 L. T. 552; 5 Asp. M. C. 398.

Plaintiff Bankrupt.]—The assured sold the goods at sea and assigned the policy; afterwards an average loss took place, and the assured became bankrupt. Held, that he could sue on the policy as trustee for the purchaser. *Castelli* v. *Boddington*, 1 El. & Bl. 879; 1 C. L. R. 281; 23 L. J., Q. B. 31; 17 Jur. 781; 1 W. R. 359—Ex. Ch.

Bankruptcy of Insured—Subsequent Loss—Right of Assignees.]—The benefit of a policy of insurance, previous to the bankruptcy of the insured, upon a loss after it passes; and gives a right of action to the assignees, not capable of set-off against a debt from the bankrupt. *Blagden, Ex parte*, 19 Ves. 466; 2 Rose, 249.

Policy Moneys in hands of Stakeholder.]—Money alleged to be payable under a policy was by consent of assurer and assured handed to a third person to hold as trustee for the person entitled. The person so entitled can recover from the stakeholder only and not from the original debtor. *Ker* v. *Osborne*, 9 East, 378.

Tug and Tow.—Contract by tug owner to insure against collision and indemnify tow; who must sue underwriters. See *The Lord of the Isles*, supra, col. 681.

Mutual Insurance Society—Some Members sued on behalf of all.]—A member of a mutual shipping insurance club, whose members are numerous, and whose affairs are managed by the members generally, assisted by the treasurer and secretary, may maintain a suit in equity against some of the members, as representing the whole, to recover, by contribution among the members, the amount of his loss. The treasurer and secretary of such a club are properly made co-defendants, there being no committee of management, and they being the acting managers of the association. *Bromley* v. *Williams*, 1 N. R. 413; 8 Jur. (N.S.) 240; 8 L. T. 78; 11 W. R. 392.

Subscription by Syndicate — Partnership—Joint or Several Liability.]—The defendants, the "Shipowners' Syndicate," a group of underwriters not members of Lloyd's, authorised their manager to underwrite policies of marine insurance on account of the several persons forming the syndicate. The plaintiffs, who were underwriters at Lloyd's, effected a policy of re-insurance with the manager. The policy was in the ordinary form of a Lloyd's policy, except that it contained the following special clause: "It is specially agreed that the assured are hereby entitled, by way of further security for the performance of the obligations of the subscribing underwriters and of each and every of them, to the benefit by way of first charge of the policies

of reinsurance effected, or to be effected, and all moneys received thereunder." The subscription was as follows: "The Shipowners' Syndicate (Reassured)." Then followed the names of the members of the syndicate, of whom the manager was one, with the respective proportions underwritten by them set against each name, and it concluded in the following terms: "of 79,300*l.*, seventy-nine thousand three hundred pounds, 4th March, 1895. The Shipowners' Syndicate, Reassured. John M. Corderoy, Manager":—Held, that the liability of the members of the syndicate on the policy was several only and not joint. *Tyser* v. *Shipowners' Syndicate*, 65 L. J., Q. B. 238; [1896] 1 Q. B. 135; 73 L. T. 605; 44 W. R. 207; 8 Asp. M. C. 81.

b. Time for.

Delay.]—When goods are insured for a voyage, the time of the loss occurring is not necessarily the time when the peril is encountered and the vessel driven ashore. *Browning* v. *Provincial Insurance Co. of Canada*, L. R. 5 P. C. 263; 28 L. T. 853; 21 W. R. 587; 2 Asp. M. C. 35.

A ship, with flour as part of her cargo, was seen in the Gulf of St. Lawrence on the 22nd of November, 1867, and nothing more was heard of her until May, 1868, when she was found ashore at Anticosti, all hands having been lost. On the 29th November, 1867, a violent storm had commenced in the Gulf, and there was a strong probability that the ship was capsized and driven ashore in that gale. Part of the flour insured was subsequently saved and sold by an agent of the insurance company. The action to recover on the policy was not brought until March, 1869. The policy containing a proviso that no action should be brought on it unless within a year after the loss was incurred, the insurance company contended that the assured was too late to bring an action:—Held, that the loss was not in its inception total, and only became so when it was found that it was impossible to carry the flour to its destination, and that it was necessary to sell it. Consequently the assured was not precluded by lapse of time from bringing his action. *Ib.*

c. Evidence.

Discovery of Ship's Papers in Actions on Policy.]—In an action against an underwriter of a policy of marine insurance for his proportion of the amount insured, he applied for a stay of proceedings till discovery of ship's papers should be made by a person on whose behalf the policy had been effected, but who had ceased to be interested in it, and was not under the control of the plaintiffs, real or nominal, and was out of the jurisdiction of the court:—Held, that as the person from whom discovery was required was not interested in the action, and the persons by and for whom respectively the action was brought had no power over him, the defendant was not entitled to the order. *Fraser* v. *Burrows*, 46 L. J., Q. B. 501; 2 Q. B. D. 624.

An action having been brought on a policy of marine insurance by the mortgagees of thirty-two sixty-fourths of the ship, and it appearing that the plaintiffs had no ship's papers, but that the ship had been sailed by the mortgagor, who was the managing owner, and who had since died, the defendants applied for an order that not only the plaintiffs, but the mortgagor or his representatives, and also all persons interested in the proceedings and in the insurance on the ship, should produce upon oath the ship's papers, and that in the meantime all the proceedings should be stayed:—Held, that the old practice had not been superseded by the Judicature Act, 1875, Ord. XXXI. rr. 11—18, and that the defendants were entitled to the order, which must remain in force, until, at all events, the plaintiffs had satisfied the court that they had applied to the mortgagor and done all in their power to produce the ship's papers. *West of England and South Wales District Bank* v. *Canton Insurance Co.*, 2 Ex. D. 472.

Risk not wholly Marine.]—In an action upon a policy of insurance, in which the risk was of a mixed nature, the transit being partly by sea and partly by land, and in which perils of "transit or conveyance" had been substituted for "of the seas," the defendants had, before delivering their defence, applied for the usual order for discovery of "ship's papers" under the old practice:—Held, that the peculiar practice of granting discovery of ship's papers was applicable to actions brought upon marine policies alone, and could not be extended. *Henderson* v. *Underwriting Association*, 60 L. J., Q. B. 406; [1891] 1 Q. B. 557; 64 L. T. 774; 39 W. R. 528.

Letters between Assured and Master.]—In an action on a policy, the defendant is entitled to inspection of all papers in possession of the plaintiff, relative to the issue, including letters between the plaintiff and the master. *Rayner* v. *Ritson*, 6 B. & S. 888; 35 L. J., Q. B. 59; 14 W. R. 81.

Ship's Log.]—Log of ship insured ordered to be produced for inspection in an action upon the policy. *Kellock* v. *Home and Colonial Insurance Co.*, 12 Jur. (N.S.) 653.

Log Book of Man-of-War Convoying.]—Action on policy, to prove the time of sailing of a ship under convoy, the log book of the man-of-war which convoyed the fleet is evidence. *D'Israeli* v. *Jowett*, 1 Esp. 427.

"All Persons Interested"—Form of Order for Discovery.]—In an action on a policy of marine insurance to recover the amount of a particular average loss, the defendant is entitled, without an affidavit, and under the old practice, which has not been affected by the Judicature Act, to an order staying proceedings until the ship's papers and other documents have been produced by the plaintiff and all persons interested in the proceedings and in the insurance, the subject-matter of the action. *China Transpacific Steamship Co.* v. *Commercial Union Assurance Co.*, 51 L. J., Q. B. 132; 8 Q. B. D. 142; 45 L. T. 647; 30 W. R. 224—C. A.

Usage.]—In an action on a policy in the usual form on ship, boat, &c., evidence of usage that the underwriters never pay for the loss of boats on the outside of a ship, slung upon the quarter, is inadmissible. *Blackett* v. *Royal Exchange Assurance Co.*, 2 C. & J. 244; 2 Tyr. 266; 1 L. J., Ex. 101.*

Usage is admissible in evidence to explain the construction of a policy in the parts written by the parties as well as in the printed form. *Preston* v. *Greenwood*, 4 Dougl. 28.

Action on a policy on fish, by the ship "Duchess of Gordon," at and from Newfound-

land to a port in Portugal; the ship carried out a cargo of salt from Lisbon, with which she arrived at Newfoundland on the 21st July. As soon as she was unloaded she proceeded in ballast to Sydney, where she arrived on the 25th August, and took in a cargo of coals. This she carried back to Newfoundland, and delivered there in the beginning of October. Between the 21st of that month and 8th November, she was loaded with a cargo of fish, which was the subject of the insurance, and soon after sailed with convoy for Oporto, but was totally lost:—Held, that evidence of the usage of the trade was admissible to show that the risk began from the loading of the ship with fish, and not from the loading of the first cargo. *Ongier* v. *Jennings*, 1 Camp. 505, n.

A custom of Liverpool that underwriters are not liable, under the ordinary form of policy, for general average in respect of the jettison of goods stowed on deck is a valid custom, and in an action upon a policy in the ordinary form, the defendants pleaded the custom above as to so much of the declaration as related to the jettison of the goods:—Held, that the custom might be imported into the contract, and that the underwriters were not liable. *Miller* v. *Titherington*, 7 H. & N. 954; 31 L. J., Ex. 363; 8 Jur. (N.S.) 1039; 9 L. T. 231; 10 W. R. 356—Ex. Ch.

Nature of Risk—Amount of Premium.]—If the question is whether the addition of a place, by name, in a policy, would have varied the risk, or whether, on the other hand, such place was implied in the words actually used, it is material evidence, in favour of the latter construction, that the premium in either case would have been the same. *Preston* v. *Greenwood*, 4 Dougl. 28.

Lloyd's Lists.]—In an action on a policy, Lloyd's shipping list is admissible against the underwriter, without proof of his having seen it, and is primâ facie evidence of the time of sailing. But where there was a concealment by the insurer of material facts, and an allegation of facts, which were untrue, viz. as to the time of sailing, and the underwriter had acted thereon, without, in fact, seeing the list at Lloyd's:—Held, that the underwriter was not bound thereby, and that the judge ought to point out to the jury, as material, such concealment and misrepresentation. *Mackintosh* v. *Marshall*, 11 M. & W. 116; 12 L. J., Ex. 337.

Lloyd's register of shipping is not admissible to show that a vessel is considered as copper-fastened. *Freeman* v. *Baker*, 5 Car. & P. 475.

In an action on a policy of insurance, Lloyd's list is evidence against the assured, it being shown that the broker had read it before the policy was effected. *Bain* v. *Case*, 3 Car. & P. 496.

Lloyd's books are evidence of a capture; but not of notice of a loss to any person in particular; but, coupled with other evidence, they may go to the jury. *Abel* v. *Potts*, 3 Esp. 242; 6 R. R. 826.

Evidence of Interest.]—*See* ante, col. 1145.

—— **Of Loss.**]—*See* ante, col. 1087.

—— **Of Seaworthiness.**]—*See* ante, cols. 1159, 1087.

—— **Of Receipt of Premium.**]—See *Dalzell* v. *Mair*, ante, col. 1308.

Signature of Policy.]—Proof of signature of the policy by an authorised agent satisfies an allegation of signature by the defendant. *Nicholson* v. *Croft*, 2 Burr. 1188.

Contemporaneous Agreement.]—In an action on a policy on a ship, alleging a loss by capture, it is competent to the defendant to show, under the general issue, that, by a written agreement entered into by the parties contemporaneously with the policy, the risk was to be confined to a capture in time of war. *Heath* v. *Durrant*, 1 D. & L. 571; 12 M. & W. 438; 13 L. J., Ex. 95; 8 Jur. 131.

—— **Parol Evidence.**]—Parol evidence of what passed at the time of effecting a policy is not admissible to restrain the effect of the policy. *Weston* v. *Emes*, 1 Taunt. 115.

Slip.]—The slip on which underwriters take down the risks they insure is not evidence of insurance. *Rogers* v. *M'Carthy*, 3 Esp. 107. *And see cases*, ante, col. 1032.

Of Agency.]—In an action on a policy subscribed by the defendant's agent, under a power of attorney, it is sufficient proof of the agency that the defendant is in the habit of paying losses upon policies so subscribed by the agent in his name, without producing the power of attorney. *Haughton* v. *Ewbank*, 4 Camp. 88.

An admission of the subscription of the underwriter to a policy does not dispense with proof of the agency of the party effecting the insurance. *Palmer* v. *Marshall*, 1 M. & Scott, 161; 8 Bing. 79; 1 L. J., C. P. 19.

Evidence that one who signed the policy was accustomed to sign policies for the insurer:—Held, not sufficient proof of agency. *Courteen* v. *Touse*, 1 Camp. 43; 10 R. R. 627.

Injunction to Stay — Commission to West Indies.]—Injunction to stay proceedings at law on policy, and commission for examining witnesses in the West Indies, granted, as the voyage was at and from Carthagena to Porto Bello, and the facts must necessarily arise in the West Indies. *Chitty* v. *Selwyn*, 2 Atk. 359.

Certificate of Lloyd's Agent.]—A certificate as to damage of goods insured made by a Lloyd's agent abroad is not admissible in evidence as proof of damage in an action by the assured against the underwriter, a member of Lloyd's. *Drake* v. *Marryat*, 1 B. & C. 473; 1 L. J. (O.S.) K. B. 161; 25 R. R. 464.

Proof of Ownership.]—Ownership in an action on a policy may be proved by parol evidence. *Robertson* v. *French*, 4 East, 130; 7 R. R. 535.

In an action upon a policy, ownership of the vessel proved by evidence that A. had ordered and paid for stores for her. *Thomas* v. *Fogle*, 5 Esp. 88.

Plaintiff, in an action for loss of goods on a policy, produced a bill of parcels receipted by one Gardiner, of Petersburgh, and proved his handwriting:—Held, that this was admissible against the underwriters. *Russell* v. *Boheme*, 2 Str. 1127.

Discontinuance — Costs — Examination of Witnesses before Master.]—In an action on a policy, owing to the plaintiff's delay in producing papers ordered to be produced, the defendant did not plead until a year after declaration.

Meanwhile, to save expense, the defendant examined witnesses before the master, under 1 Will. 4, c. 23, s. 4. The defendant pleaded unseaworthiness, &c., and paid 25*l.* into court on the money counts for the premium. The plaintiff took the money out of court and joined issue on the other pleas, but afterwards discontinued:—Held, that the defendant was entitled to the costs of the witnesses examined as incurred before instructions for plea, within Reg.-Gen., H. T., 1853, r. 12. *Previte* v. *Adelaide Fire and Marine Insurance Co.*, 32 L. T. 768; 2 Asp. M. C. 577.

Unnecessary Sale by Master — Evidence of Drunkenness.]—On an issue between a shipowner and the insurers whether the ship has been totally lost, it appeared that she had gone ashore, and when on shore had been sold by the captain to a person who succeeded in getting her afloat. The defendant's case being that, if proper judgment had been exercised, a total loss might have been avoided:—Held, that he might give evidence of habitual drunkenness on the part of the captain, shortly before he sailed. *Alcock* v. *Royal Exchange Assurance Corporation*, 13 Q. B. 292.

Perils of the Sea—Salvage not by reason of Perils Insured against — Judgment in rem, effect of.]—The master of a steamship that had run short of coal employed another to tow her to her destination. The owner of the latter recovered salvage against the former in admiralty. In an action by the owner of the salved vessel against an underwriter, who had insured against perils of the sea, to recover the money paid for salvage:—Held, that the defendant was not concluded by the admiralty judgment from showing that the loss did not arise from perils insured against. *Ballantyne* v. *Mackinnon*, 65 L. J., Q. B. 616; [1896] 2 Q. B. 455; 75 L. T. 95; 45 W. R. 70; 8 Asp. M. C. 173—C. A.

d. Consolidation.

Opening Rule.]—Where several underwriters entered into a consolidation rule, to abide by the determination of the court on a point reserved for their consideration at the trial of a cause, viz. as to whether a notice of abandonment had been given in due time, the court would not allow such rule to be opened, on an affidavit stating that the owner had received letters from the captain abroad, informing him of the loss and sale of the ship before the arrival of the latter in London: as notice should have been given to the plaintiff to produce such letters at the trial; or they should, at all events, have been adverted to by affidavit, when the motion was made to the court on the point reserved. *Read* v. *Isaacs*, 6 Moore, 437. See also *Foster* v. *Alcez*, 3 Bing. (N.C.) 892; 4 Scott, 535, ante, col. 1161.

Reference to Arbitrator.] — Where several underwriters entered into a consolidation rule, by which they undertook to abide the event of the verdict, and the cause was referred by consent before trial, and the arbitrator awarded the aggregate sum due to the assured from the underwriters at large—the court would not order it to be referred back to the arbitrator to insert the amount of the sum due and payable from each underwriter individually, without the consent of such underwriters. *Kynaston* v. *Liddell*, 8 Moore, 223.

Actions having been brought against eight persons upon mutual insurance policies, the court, at their instance, granted a rule for consolidating them, upon the terms that they should admit the amounts for which they were respectively liable, in case their liability should be established, and should consent, if necessary, to an order, referring it to the master to settle the same. *Lewis* v. *Burkes* or *Banks*, 4 C. B. (N.S.) 330; 27 L. J., C. P. 247; 4 Jur. (N.S.) 663; 6 W. R. 652.

—— **Compulsory.**]—Two actions having been brought by the same plaintiff against different defendants, on the same policy, the court consolidated them, after a declaration had been delivered in one, and an appearance entered in the other, at the instance of the defendant in the latter action, though the plaintiff objected. *Hollingworth* or *Hollingsworth* v. *Broderick*, 4 A. & E. 646; 6 N. & M. 240; 1 H. & W. 691.

Where a plaintiff brings several actions upon the same policy against several underwriters, the court will not, without his consent, make a consolidation rule upon the terms of both plaintiff and defendants being bound in all the actions by the event of one. *Doyle* v. *Anderson*, 1 A. & E. 635; 4 N. & M. 873.

Where two actions were brought by the same plaintiffs against different defendants, on different policies on the same ship, the court refused, at the instance of the defendants, to compel the plaintiffs to consolidate, and to be bound by one of the actions, without their consent. *M'Gregor* v. *Horsfall*, 3 M. & W. 320; 6 D. P. C. 338; 7 L. J., Ex. 71; 2 Jur. 257.

Where upwards of forty actions were brought against underwriters of the policies of insurance, one of which had been assigned by memorandum of transfer signed by some of them, before the bankruptcy of the assured, the court made an order for consolidation, the general principle laid down being, that all actions should be stayed except such as might be really necessary to determine the liability of distinct defendants in each class of cases, the defendants to be bound by the result, but not the plaintiffs. *Syers* v. *Pickersgill*, 27 L. J., Ex. 5; 6 W. R. 16.

The court ultimately settled that there were two classes of cases, and that two actions should be allowed to proceed. *Ib.*

Actions against separate underwriters of the same policy were usually consolidated—per Tindal, C.J. *Sharp* v. *Lethbridge*, 4 Man. & G. 37; 4 Scott (N.S.) 722; 11 L. J., C. P. 189.

Restraining Second Action.]—Where actions against underwriters have been consolidated by rule, and the defendant has obtained a verdict in one, the court will not restrain the plaintiff from trying a second cause, included in the rule, till the costs of the first are paid. *Doyle* v. *Douglass*, 4 B. & Ad. 544.

Payment into Court.]—Where sixty actions were pending on a policy on a ship, which had been insured to a very large amount, and a consolidation rule had been entered into, in which the plaintiff and the other defendants agreed to be bound by the decision in this action; the plaintiff having recovered a verdict, on which a rule nisi had been obtained for a new trial, the court refused to order the defendant to pay the amount recovered against him into court, or to invest the same upon the ground that the great

arrear of causes on the new trial paper would prevent the rule nisi coming on for argument for a long time, and that the losses and risk of the plaintiff were thereby greatly increased. *Ohrly* v. *Dunbar*, 1 N. & P. 244 ; 5 A. & E. 824 ; 2 H. & W. 454 ; 6 L. J., K. B. 15.

e. Payment into Court.

Effect of.]—In an action on a policy, with a count for money had and received, if the defendant pays no money into court, but establishes as a defence that the risk never commenced, the plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his counsel in opening the case. *Penson* v. *Lee*, 2 Bos. & P. 330 ; 5 R. R. 614.

Payment of money into court in an action on a policy admits that the ship was seaworthy. *Harrison* v. *Douglas*, 6 N. & M. 180 ; 3 A. & E. 396 ; 1 H. & W. 380.

Where, by the term of a policy in a mutual insurance club, the amount of the loss is not to be drawn before a specified day, the defendant, by paying money into court, precludes himself from objecting that the action is brought too soon. *Ib.*

A plaintiff, having declared on a policy, with a count for money had and received, the defendant paid the amount of the premiums into court on that count, pleading to the count on the policy so as to raise that of unseaworthiness. The plaintiff took the money out of court in satisfaction of the claim under the count for money had and received. At the trial, the defence of unseaworthiness having been given up, a special case was stated for the opinion of the court, which was afterwards taken to the exchequer chamber, and in both courts it was held that the plaintiff was entitled to recover as for an average loss. The amount of the average loss was referred to, and ascertained by, average-staters, but this not being done before the argument of the case, a nominal judgment for 3,500*l.* was entered up for the purpose of taking the case into error :—Held, that the plaintiff was not entitled to enter judgment and take out execution for the entire amount of the average loss, without giving credit to the defendant for the amount paid into court, and taken out by the plaintiff. *Carr* v. *Royal Exchange Assurance Corporation*, 5 B. & S. 941 ; 34 L. J., Q. B. 21 ; 11 Jur. (N.S.) 265 ; 11 L. T. 595 ; 13 W. R. 204.

Payment of money into court to the amount of a valued policy is not an admission of a total loss. *Rucker* v. *Palsgrave*, 1 Taunt. 419 ; 1 Camp. 557.

In an action on a valued policy, the payment of money into court upon a count for a total loss is not an admission of such total loss by capture. *Ib.*

But it admits the interests of the plaintiff as averred. *Bell* v. *Ansley*, 16 East, 146 ; 14 R. R. 322.

After Consolidation.]—See *Ohrly* v. *Dunbar*, supra.

f. Arbitration.

Condition precedent.]—A. effected in a mutual insurance company a policy on ship, one of the conditions of which was, that the sum to be paid to any insurer for loss should, in the first instance, be ascertained by the committee ; but if a difference should arrive between the insurer and the committee, "relative to the settling of any loss, or to a claim for average, or any other matter relating to the insurance," the difference was to be referred to arbitration, in a way pointed out in the conditions :—"provided always, that no insurer who refuses to accept the amount settled by the committee shall be entitled to maintain any action at law or suit in equity on his policy," until the matter has been decided by the arbitrators, and "then only for such sum as they shall award" ; and the obtaining the decision of the arbitrators was declared a condition precedent to the maintaining of an action :—Held, that these conditions were lawful, and that (even should the difference relate to other matters than those of mere amount) till award made no action was maintainable. *Scott* v. *Avery*, 5 H. L. Cas. 811 ; 25 L. J., Ex. 308 ; 2 Jur. (N.S.) 815 ; 4 W. R. 746.

A policy was subject to the following rule :—"All average claims and claims of abandonment shall be adjusted and settled, conformably to the custom of Lloyds' or the Royal Exchange, by a professional average-stater ; but should the committee or the assured be dissatisfied with the adjustment, they may refer the same to two professional average-staters, or to other competent persons, with power to such two persons to appoint an umpire, and the award of such two persons shall be final ; and all other cases of dispute, of whatever nature, shall be referred in like manner ; but the committee or assured by mutual consent may refer all such adjustments or disputes to one person only, whose award shall also be final ; and no action at law shall be brought until the arbitrators have given their decision" :—Held, that no action could be maintained on the policy for a total loss until the claim had been adjusted and settled by arbitration in pursuance of the rule. *Tredwen* v. *Holman*, 1 H. & C. 72 ; 31 L. J., Ex. 398 ; 8 Jur. (N.S.) 1080 ; 6 L. T. 127 ; 10 W. R. 652.

Bar to Action.]—A mutual insurance society, registered pursuant to 25 & 26 Vict. c. 89, issued to one of its members a policy of insurance on his ship "Hermione," which was afterwards lost. The policy referred to the articles of the association, the 39th of which provided that the directors should have full power to decide and determine all disputes, &c., arising between the society and its members concerning insurances, &c., and the decision of the directors should be final and conclusive, and no member of the society should be allowed to bring any action, &c., except as was provided, &c., and the directors might, if they thought fit cause any claim or demand to be submitted to an average-adjuster, "and in every such case the decision or award of such average-adjuster shall be final and conclusive on the society and claimant, and every person interested in such claim, and no appeal shall be allowed therefrom." By the 84th article, a means was provided by which any member who was dissatisfied with the decision of the directors might obtain a reconsideration of his claim. The "Hermione" having been lost the assured made a claim, but the directors decided that he had no claim upon the society. He then brought an action :—Held, that the decision of the claim by the directors, subject to the right of obtaining a reconsideration, under the 84th article, was not binding, and that the action was maintainable. *Edwards* v. *Aberayron Mutual Ship Insurance Co.*, 1 Q. B. D. 563 ; 34 L. T. 457 ; 3 Asp. M. C. 154—Ex. Ch. Reversing 44 L. J., Q. B. 67 ; 23 W. R. 304.

Arbitration Clause—Jurisdiction of Court.]—A clause in a policy that in case of dispute the matter shall go to arbitration does not oust the jurisdiction of the courts. *Kill* v. *Hollister*, 1 Wils. 129.

g. Pleading.

Claims—Voyage.]—On a policy at and from Pernambuco, or any other port or ports in the Brazils to London, "beginning the adventure from the loading the goods on board the ship on the termination of her cruise, and preparing for her voyage to London." The ship, on the termination of her cruise, touched at Pernambuco; but failing to procure a cargo there she proceeded for St. Salvador, and was lost on her voyage thither. The voyage is well described in a declaration on the policy as from Pernambuco to London. *Lambert* v. *Liddard*, 1 Marsh. 149; 5 Taunt. 480; 15 R. R. 557.

In an action on a policy, the declaration stated that after the making of the policy the ship sailed; the evidence was, that she sailed before: —Held, that the variance was immaterial. *Peppin* v. *Solomons*, 5 Term Rep. 496.

Goods were insured at and from Mogadore to London; the declaration averred "that after the loading of the goods the ship departed on her intended voyage, and while in the course of her voyage was lost by perils of the sea": —Held, that this was a material allegation, and therefore the ship having been lost while at her moorings, and before the cargo was completed, the insured could not recover. *Abitol* v. *Bristow*, 2 Marsh. 157; 6 Taunt. 464.

—— **Losses.**]—Where a declaration states a total loss occasioned by the sale of the ship in a port of refuge, to which she had been driven through injuries by storms, and at which port the captain sold her, because he had no sufficient funds to repair her:— Held, that the declaration was good as sufficiently stating a loss by perils of the sea; and that the plaintiff, the insured, might recover for a partial loss on such a declaration. *Devaux* v. *Astell*, 4 Jur. 1135.

In an action on a policy, the court refused to allow a count on a loss by perils of the sea together with a count on a loss by barratry, or to restrain the defendant from setting up, as a defence to the former count, that the loss was occasioned by barratry. *Blyth* v. *Shepherd*, 1 D. (N.S.) 880; 9 M. & W. 763; 11 L. J., Ex. 293; 6 Jur. 489.

A partial loss of freight may be recovered upon a declaration alleging a total loss. *Benson* v. *Chapman*, 8 C. B. 950; 2 H. L. Cas. 696; 13 Jur. 969.

In an action against an insurer for a total loss of the ship, the plaintiff may recover for a partial loss. *Gardiner* v. *Crossdale*, 1 W. Bl. 128; 9 Burr. 904.

A declaration on a policy stated that the defendants were assurers of ships, and "thereupon the plaintiffs by certain persons, using and carrying on business and in the policy designated by the names, style and firm of Dewar & Culliford, the agents of the plaintiffs in that behalf," made with the defendants a policy purporting that the persons so using, and in the policy designated and described by the name, style and firm of Dewar & Culliford, as agents, as well in their own names as for others, so did make assurance. The declaration then stated that the ship was stranded, that the waters flowed over the corn, goods, &c., which became thereby wetted, damaged and spoiled, whereby the plaintiffs sustained an average loss on the corn to a large amount, and thereby the corn, &c., became of no use and value to the plaintiffs:— Held, that it was not bad on the ground that it did not show the amount that the defendants became liable to pay by reason of the average loss, nor on the ground of its not stating, with certainty, whether the plaintiffs meant a total or only a partial loss. *Sturge* v. *Hahn*, 4 Ex. 646; 19 L. J., Ex. 119.

Traverse in Conjunction.]—Assumpsit upon a policy of insurance wherein the defendant assured, lost or not lost, from London to the Mediterranean and back to London upon the "M." and her tackle, &c., valued at 300*l.* The declaration averred that the said ship, tackle, apparel, ordnance munition, artillery boat, and other furniture were by perils of the sea, sunk and destroyed. The defendant pleaded in bar that the ship and her apparel arrived, and traversed without this, that the said ship, tackle, &c. were sunk and destroyed. The plaintiff demurred in law, on the ground that the traverse was in the conjunctive, that the said ship and &c., was sunk and destroyed. Judgment for the plaintiff. *Goram* v. *Sweeting*, 2 Wms. Saund. 202, 205.

—— **Conditions precedent.**]—K. and N. declared in an action against a company for insurance on the freight of goods to be carried in a ship, on a deed-poll, sealed with the seal of the company; which deed recited that K. had represented to the company that he was interested in or authorised as owner, agent or otherwise, to make the assurance after mentioned with the company, and had covenated to pay 12*l.* 12*s.* to them as a premium at four per cent. for the assurance; and it was agreed that in consideration of the 12*l.* 12*s.* the capital stock and funds of the company should, according to the provisions of the deed of settlement of the company, be liable to make good and be applied to pay all such losses and damages thereinafter described, as might happen to the subject-matter of the policy in respect of the sum of 300*l.*; and it was declared that touching the adventures and perils which the capital stock and funds of the company were made liable to by the assurance, they were of the sea, &c.; and the capital stock and funds of the company should bear the charges of assurance in proportion to the sum assured, and that the interest of the assured was on freight; provided, nevertheless, that the capital stock and the funds of the company should alone be liable according to the provisions of the deed of settlement, to answer and make good all claims and demands whatsoever under or by virtue of the policy, and that no shareholder of the company, his or her heirs, executors or administrators, should be in anywise subject or liable to any claims or demands, or be in anywise charged by reason of the policy, beyond the amount of his or her shares in the capital stock of the company; it being one of the original and fundamental principles of the company, that the responsibility of the individual proprietors should in all cases be limited to their shares in the capital stock. That thereupon the company became insurers to the plaintiffs for 300*l.* on the freight to the amount of all the money insured; and that the vessel with the goods on board was wholly lost by perils of the sea; and the

plaintiffs thereby lost the freight of the goods. Judgment was entered for 300*l.* in their favour: —Held, first, that the declaration was not deficient for omitting to allege that the company had funds; for that (1), it appearing that defendants were a corporation, the remedy against them would only be upon the corporate funds, and the proviso made no difference in this respect, but the action lay whether there were funds or not. And (2), if the existence of the funds had been a condition necessary to the maintenance of the action, it lay upon the company to deny, and not upon the plaintiffs to assert, the existence of the funds, which, in default of denial, would be presumed to exist. *Sunderland Marine Insurance Co.* v. *Kearney*, 16 Q. B. 925; 20 L. J., Q. B. 417; 15 Jur. 1006; —Ex. Ch.

Held, secondly, that it was not a valid objection that the contract appeared to be collateral, and the demand not liquidated, and an action of debt therefore not maintainable; for that (1), the liability of the action was direct, and not merely contingent on the existence or non-existence of the funds; and (2), the declaration claiming 300*l.* for a total loss, which after verdict must be assumed as a fact, the claim was for the liquidated sum of 300*l.* *Ib.*

Held, thirdly, that the action was maintainable by K. and N. jointly, because the deed poll enured to the benefit of all interested in the assurance, and the declaration showed the interest to be in K. and N. jointly. *Ib.*

The rules of a society established for mutual assurance of traders against bad debts, after stipulating for the payment of premiums, provided that, "if the premiums on any policy should not be paid within fifteen days after the same should fall due, the directors might with the approbation of the council, either declare such policy void, or enforce the payment of the premiums." In a declaration on a policy, the plaintiff averred that he had done all things necessary on his part, and had been ready and willing to do all things according to the policy, rules and regulations, which it was necessary that he should be ready and willing to do, and that all things had happened which it was necessary should happen, to entitle him to be paid by the society the loss after mentioned, and that a reasonable time for payment thereof had elapsed. It then went on to aver that a loss had been incurred, and that the society had refused to pay:—Held, that this general averment was sufficient, without showing the various steps required by the rules of the society to entitle the assured to recover. *Bamberger* v. *Commercial Credit Mutual Assurance Co. or Society*, 14 C. B. 676; 3 C. L. R. 568; 24 L. J., C. P. 115; 1 Jur. (N.S.) 500.

The society pleaded, that after the making of the policy and more than fifteen days before action, a premium became payable by the plaintiff and was not duly paid, whereupon the directors of the society, with the approbation of the council, cancelled the policy and declared the same void, whereof the plaintiff had notice: —Held, that the plea disclosed a sufficient answer to the claim. *Ib.*

The defendant, and four others, were jointly sued upon a policy upon a ship and cargo for a total loss. The declaration was in the usual form, and alleged an agreement between the plaintiff and the insurers, "that the capital stock and funds of the company should alone be liable to answer and make good all claims and demands whatsoever under or by virtue of the policy;" and that no proprietor of the company should in anywise be liable, or charged, by reason of the policy, beyond the amount of his shares in the capital stock of the company. There was an express averment that sufficient capital, stock and funds of the company existed to pay the amount of the policy:—Held, that notwithstanding the above stipulation, the declaration showed that the policy had been properly declared upon as a joint contract. *Dowdall* v. *Hallett*, 18 Q. B. 2; 21 L. J., Q. B. 98; 16 Jur. 462—Ex. Ch.

Partial Loss—Unliquidated Damages.]—An action for a partial loss under a policy of insurance, even after adjustment, is an action for unliquidated damages, so that set-off cannot be pleaded. *Castelli* v. *Boddington*, 1 El. & Bl. 66; 22 L. J., Q. B. 5; 17 Jur. 457; 1 W. R. 20. Affirmed on other points, 1 E. & B. 879; 23 L. J., Q. B. 31; 1 C. L. R. 281; 17 Jur. 781; 1 W. R. 359—Ex. Ch.

Semble, unliquidated losses on a policy of insurance cannot be made the subject of set off. *Thompson* v. *Redman*, 11 M. & W. 487; 2 D. (N.S.) 1028; 12 L. J., Ex. 310.

Policy under Seal—Simple Contract.]—Declaration on a policy sealed with the insuring company's seal as upon a simple contract. Semble, the declaration is good. See *Roper* v. *English and Scottish Marine Insurance Co.*, cited, 1 Arn. Insurance (6th ed.) 157, n.

Evidence of Cost of Salvage.]—Although it is not particularly laid in the declaration, the expense of salvage may be given in evidence in an action on the policy. *Cary* v. *King*, see Ca. t. Hard. 304.

Averment of Order to Effect Policy—Proof.]—Plaintiffs declared on a policy averring that they were persons resident in Great Britain who received the order for and effected the insurance; this held to be a material averment and not sustained by a letter received by them after the policy was effected, directing them to insure; although the policy was originally on goods on board the "Ann," or ships, or by whatsoever other name the ship should be named; and the plaintiffs upon receipt of the letter procured a memorandum to be made on the policy signed by the defendant, declaring the interest to be on board the "Herald," the ship mentioned in the letter. *Bell* v. *Janson*, 1 M. & Sel. 203.

Insurance by Agent—Declaration.]—Action on policy by plaintiff as agent for owner of cargo insured; there being an indorsement that the policy was effected in trust for the cargo owner:—Held, that a declaration on the policy generally, without setting out the agency, could be proved by evidence of the above facts. *Peron* v. *Frone*, 2 Barnard. 304.

Pleading—Release.]—Declaration on a policy on board a ship at the suit of D., W. and A.; W. alleged that the policy was made by them as well in their own names, as for and in the name of every other person to whom the same did appertain; and it was averred that one T. L., and the plaintiff A. W., or one of them, were or

was then and from thenceforth until the loss interested in the goods. Defendant pleaded a release by D. W. for himself and his partner A. W. The plaintiffs replied setting out on oyer the deed of release, by which it appeared that the intention of the parties was to release only the sums set opposite to their names, and the declaration averred that such moneys were due upon other contracts. Semble, that the replication was bad as argumentative. Held, also, that the plea was good. *Wilkinson* v. *Lindo*, 7 M. & W. 81.

Defences.] — A declaration stated that the plaintiff made a policy with an assurance company, upon the goods, body, tackle, apparel, &c., of a ship valued at 5,000*l.*; that the ship and freight were warranted free from average, under 3*l.* per cent., unless general, or the ship was stranded; that the capital stock and funds of the company should alone be liable to make good all claims and demands under that policy, and that no proprietor of the company should be charged by reason of that policy beyond the amount of his share in the stock of the company; that the company became insurers to the plaintiff for 1,500*l.*, and the policy was signed by the defendants as directors of the company, and in consideration of the payment of the premium, at their request, the defendants undertook that the company should perform all things contained in the policy to be performed by them; the declaration alleged that the ship ran aground, that it was necessary for her safety to let go the larboard bower anchor and kedge anchor, and to cut away the cables from the anchors; that the anchors and cables were left in the sea, and lost to the plaintiff; that afterwards the ship was further strained, damaged and broken, whereby the plaintiff sustained a general average loss. Second breach, that the ship being stranded and damaged, the plaintiff sustained an average loss on the ship, her masts, ropes and cables, to a larger amount than 3*l.* per cent. on all the moneys insured thereon, to wit, to the amount of 50*l.* by the hundred for each and every hundred insured thereon, whereby the company became liable to pay to the plaintiff a certain sum of money, to wit, 200*l.*, being their proportion of the average loss in respect of the 1,500*l.*, and that though the funds of the company were sufficient, the defendants had not paid the losses. The defendants pleaded that the anchors and cables were not left in the sea, and lost; also that the plaintiff had not suffered an average loss on the ship or vessel, her masts, ropes and cables, to the amount of 3*l.* per cent. on all the moneys issued thereon: —Held, first, that the pleas were bad, the traverses being too large. *Dawson* v. *Wrench*, 3 Ex. 359; 6 D. & L. 474; 18 L. J., Ex. 229.

Held, secondly, that the stipulation that the ship and freight should be free from average under 3*l.* per cent. was not a proviso which required to be pleaded, and that the second breach was bad, as it did not distinctly aver that the loss was more than 3*l.* per cent. on the value of the ship. *Ib.*

Held, thirdly, that the defendants were entitled to judgment on the second breach, notwithstanding the plea was bad. *Ib.*

Held, lastly, that the defendants were personally responsible, it being averred that the funds were sufficient, and that it was not necessary to allege notice to them of the loss. *Ib.*

To a declaration on a valued time policy, averring a total loss, the defendant pleaded only a plea of fraudulent concealment:—Held, that a total loss was not admitted; for if that allegation had been traversed the plaintiff might have recovered as for a partial loss. *King* v. *Walker*, 3 H. & C. 209; 33 L. J., Ex. 325; 11 Jur. (N.S.) 43; 13 W. R. 232—Ex. Ch.

To a declaration on a policy alleging that the insurance was made by A., as agent for the plaintiff, and on his account, and for his use and benefit, and that A. received the order for and effected the insurance as such agent, the defendant pleaded the policy was not made by A. as agent for the plaintiff, or on his account, or for his use and benefit, and that A. did not receive the order for or effect the insurance as such agent: — Held, bad, on special demurrer, as amounting to non assumpsit. *Redmond* v. *Smith*, 7 Man. & G. 457; 2 D. & L. 280; 8 Scott (N.R.) 250; 13 L. J., C. P. 159; 8 Jur. 711.

The two companies, incorporated pursuant to 6 Geo. 1, c. 18, for the purpose of granting marine insurances, are empowered by 11 Geo. 1, c. 30, s. 43, in all actions of covenant, on any policy of assurance under their common seal, to plead generally that they have not broken the covenants of the policy:—Held, that this right of pleading was not taken away by 5 & 6 Vict. c. 97, s. 3, which repeals so much of any act, commonly called public, local and personal, or of any act of a local or personal nature, whereby a party is enabled to plead the general issue, and give any special matter in evidence. *Carr* v. *Royal Exchange Assurance Corporation*, 1 B. & S. 956; 31 L. J., Q. B. 93; 8 Jur. (N.S.) 384; 6 L. T. 105; 10 W. R. 352.

In an action on a policy, with the common memorandum, on a share in the Atlantic Telegraph Company, alleging a total loss of the cable by perils of the seas, the defendant pleaded that the subject-matter of the insurance was not, nor was any part thereof, during the continuance of the risk covered by the policy, lost by the perils insured against or any of them. Issue having been joined on this plea, the plaintiff recovered in respect of a small portion of the cable only, the rest not having been lost by the perils insured against, the damages on the portion recovered exceeding 3*l.* per cent. on the value of the policy: —Held, that the plea might be taken distributively, and that the verdict should accordingly be entered for the defendant as to all the claim, except so far as related to the loss of the portion of the cable on which the plaintiff succeeded. *Paterson* v. *Harris*, 2 B. & S. 814; 9 Jur. (N.S.) 173.

Replications.]—A declaration stated that S., before his bankruptcy, made a policy on the ship "Defiance," that the ship and goods should be valued at 2,500*l.*, and averred a loss and non-payment by the defendant of the sum insured. Plea, that the official assignee of S. made another policy upon the ship and goods, valued at 2,500*l.*, in case of loss on average, the adjustment to be made irrespective of any other assurance, and averring the identity of the ship, the interest, the risk, the amount of the interest and loss and that the insurers had paid the plaintiffs, who had accepted 2,500*l.*, as the agreed indemnity for the loss, and which was a full indemnity. Replication, de injuriâ:—Held, that the replication was bad, as the plea amounted to a discharge, and not to an excuse. *Morgan* v. *Price*, 4 Ex. 615; 19 L. J., Ex. 201.

2. RIGHTS OF INSURERS.

Action by Assignee of Policy—Set-off by Insurers of Claims against Assured.]—In an action by the assignee of a policy of marine insurance, the insurers are not entitled to set off a debt incurred with them by the assured for premiums on policies effected with them by the assured after the date of the assignment; for the claim under a policy for a loss is for unliquidated damages to which no set-off could be pleaded at law under the statutes of set-off in an action by the assured, nor in equity in a suit by the assignee, and therefore the debt incurred by the assured is not a "defence" open to the insurers under 31 & 32 Vict. c. 86, s. 1, that statute being intended merely to amend procedure and not to alter the rights of the parties to the policy; nor is the debt incurred by the assured the subject of "set-off" or "counter-claim" within the meaning of the Rules of the Supreme Court, 1876, Ord. XIX. r. 3. *Pellas* v. *The Neptune Marine Insurance Co.*, 49 L. J., C. P. 153; 5 C. P. D. 34; 28 W. R. 405; 4 Asp. M. C. 215—C. A.

Cancellation of Policy.]—Two actions were brought by the same plaintiff against an insurance company upon two marine insurance policies. After issue had been joined, an order was made staying one action until the other had been tried, on the terms of the defendants being bound in both by the result of the one which should be tried. But the plaintiff was not to be bound. The company, who resisted payment upon the allegation that the policies had been obtained by fraud, afterwards filed a bill in equity to restrain the actions, and to have the policies delivered up and cancelled. No injunction was moved for. An order was made in the suit staying the proceedings until after the decision of the action. Ultimately the action which was tried was decided in favour of the company, on the ground that the policy had been obtained by fraud. The plaintiff at law then delivered up both policies to the company. Upon the suit coming on for hearing:—Held, that a decree must be made for cancellation of both policies; and that the defendant must pay the costs of the suit. *London and Provincial Insurance Co.* v. *Seymour*, 43 L. J., Ch. 120; L. R. 17 Eq. 88; 29 L. T. 641; 22 W. R. 201; 2 Asp. M. C. 169.

After Payment of Valued Policy.]—Compensation paid aliunde to the assured, in respect of a loss not covered by a valued policy, cannot be recovered by an underwriter who has paid as for a total loss; since the loss insured against is not diminished by the compensation, and the assured is not estopped from alleging that there was an excess in value above the amount agreed in the policy. *Burnand* v. *Rodocanachi*, 51 L. J., Q. B. 548; 7 App. Cas. 333; 47 L. T. 277; 31 W. R. 65; 4 Asp. M. C. 576—H. L. (E.) And see *Blaauwpot* v. *Da Costa*, 1 Eden, 130.

Insurer, after satisfaction, stands in place of the assured as to the goods, salvage and restitution in proportion for what he paid. *Randal* v. *Cockran*, 1 Ves. 98.

And see XI. ABANDONMENT, supra, cols. 1294 seq., XV. SUBROGATION, supra, col. 1313.

Salvage.]—A ship being insured from London to Carolina, was taken by a Spaniard, and retaken by an English privateer, who carried her into Boston, where no person appearing to give security, she was condemned and sold, and after the recaptors had their moiety, the residue remained in the court of admiralty at Boston. Defendant brought an action at law on the policy and recovered; and plaintiff by his injunction bill insisted that defendant ought to have recovered no more than a moiety of the loss. The court refused the injunction, for as defendant had offered to relinquish the salvage, he was entitled to recover the whole money insured. By 13 Geo. 2, c. 4, s. 18, the recapture of a ship is the revesting of the owner's property, so that it is doubtful whether the act can operate, when insurances are made, interest or no interest. Salvage must be deducted out of the money recovered by the policy, if come to the hands of the assured. *Pringle* v. *Hartley*, 3 Atk. 195.

Separate Policies on Ship and Freight—Payment for Total Loss on Ship—Right of Underwriters on Ship to Damages recovered by Assured for Unearned Freight.]—The defendants effected a policy of insurance on their ship for 1,000*l.* with the plaintiffs; but insured the freight with other underwriters. The ship, while proceeding to her port of loading under a charterparty, was run into and damaged by another ship. The defendants abandoned her to the plaintiffs, who settled with them as for a total loss. The defendants afterwards recovered in the admiralty division against the owner of the other ship, damages in respect of the loss of the ship, and also of the freight which had not been earned:—Held, that the plaintiffs were not entitled to recover the damages recovered in respect of the loss of freight, such damages being in the nature of salvage on freight; for freight which has not been earned is not an incident of the ownership of the ship, and does not therefore pass to the underwriters, who have paid as for a total loss on the ship. *Sea Insurance Co.* v. *Hadden* or *Hodden*, 53 L. J., Q. B. 252; 13 Q. B. D. 706; 50 L. T. 657; 32 W. R. 841; 5 Asp. M. C. 230—C. A.

Underwriter after Payment under Policy entitled to Damages for Collision recovered by Assured.]—A.'s ship damaged B.'s. B., after he had received a sum of money under a policy which he had effected on his ship, brought an action against A., and recovered damages for the injury done to his ship:—Held, that the underwriter was entitled to the amount recovered for the sum paid on the policy. *White* v. *Dobinson*, 14 Sim. 273.

Ships of same Owner in Collision—Right of Action in own Name.]—There is no independent right in underwriters to maintain in their own name, and without reference to the person insured, an action for damage to the thing insured. *Simson* v. *Thomson*, 3 App. Cas. 279; 38 L. T. 1; 3 Asp. M. C. 567.

Although the underwriters have paid for a total loss, and are entitled to all the rights in the injured ship which belong to its owner, yet if that owner cannot assert a right for damages against the wrongdoer, neither can the underwriters. *Ib.*

Two ships, the property of the same owner, collided; the underwriters paid the insurance effected on the lost ship, and then claimed to rank pari passu with the owners of cargo

destroyed, in the distribution of the fund lodged in court by the owner as proprietor of the ship which did the damage:—Held, that the underwriters had no such right under the circumstances of the case. *Ib.*

The underwriters' right must be asserted in the name of the person insured, but if he is the person who has caused the damage, the right cannot be maintained against himself—Per Lord Cairns. *Ib.*

The underwriters of the lost ship have no right of action against the owner of the ship that did the mischief, as he himself had no such right, inasmuch as, being the owner of both vessels, any right of action he had must be a right of action against himself, which is an absurdity, and a thing unknown to the law—Per Lord Penzance. *Ib.*

Damages.]—Underwriters have been held to be entitled to the damages recovered from a colliding vessel in case of a valued policy, though the amount insured is less than the actual value of the vessel insured. *North of England Iron Steamship Insurance Co.* v. *Armstrong*, 39 L. J., Q. B. 81; L. R. 5 Q. B. 81; 21 L. T. 822; 18 W. R. 520.

Interest Vesting in.]—In all cases of insurance upon a ship, in which the subject is not totally annihilated, the assured claiming for a total loss, must give up to the underwriters all the remains of the property recovered, together with all the benefit or advantage incident to it; or rather such property vests in the underwriters. *Stewart* v. *Greenock Marine Insurance Co.*, 2 H. L. Cas. 159; 1 Macq. H. L. 382.

Defence of Suit in Admiralty.]—Insurers admitted to defend a suit in admiralty, in default of appearance by the master or owners. *The Regina del Mare*, Br. & Lush. 315.

Policy set aside for Fraud — First Underwriter signing as Decoy Duck.]—Where the first underwriter signs the policy as a decoy duck, under an agreement between himself and the assured that he shall not be called upon to pay in case of loss, the policy will be set aside for fraud. *Wilson* v. *Ducket*, 3 Burr. 1361.

Action by Underwriters to restrain Holders from Proceeding on Policy.]—If a policy is liable to be completely avoided, as on the ground of fraud or misrepresentation, a court of equity has jurisdiction to direct its delivery up and cancellation, but it has no jurisdiction to direct the cancellation of a policy to any claim on which there is a good legal defence, or to declare that there is no liability upon it. If there is danger of the evidence for the defence being lost, the remedy is, not an action for cancellation, but an action to perpetuate testimony. *Brooking* v. *Maudslay*, 57 L. J., Ch. 1001; 38 Ch. D. 636; 58 L. T. 852; 36 W. R. 664; 6 Asp. M. C. 296.

Contribution between Insurers—Wharfingers' and Merchants' Policies.]—See *North British and Mercantile Insurance Co.* v. *London, Liverpool and Globe Insurance Co.*, 46 L. J., Ch. 537; 5 Ch. D. 569; 36 L. T. 629—C. A.

Assignment of Right of Action—Use of Name—Subrogation.]—A payment honestly made by insurers in satisfaction of a claim by the insured under a policy granted by the insurers is such a settlement of a claim made under the policy as entitles the insurers to the remedies available to the insured. And when the insured have given a formal assignment of all their rights and causes of action in respect of the property insured, with the stipulation that the assignment shall not authorise the use of the name of the insured, such an assignment is a legal chose in action under the Queensland Judicature Act (40 Vict. c. 86), which follows the English Judicature Act, 1873, s. 25, sub-s. 6. *King* v. *Victoria Insurance Co.*, 65 L. J., P. C. 38; [1896] A. C. 250; 74 L. T. 206; 44 W. R. 592—P. C.

The respondents paid a claim in respect of a loss occasioned by the negligence of the government, represented by the appellant. The insured assigned to them, on receiving the amount of the claim, an assignment of all rights of action against the government, subject to the stipulation that the assignment should not authorise the use of the insured's name in legal proceedings:—Held, that there had been a valid assignment of a legal chose in action, and that it was not competent for the appellant to plead that the loss was not within the risks covered by the policy. *Ib.*

3. Bankruptcy.

Proof of debts arising upon insurance of ships must be against the separate, not joint estate. *Angerstein, Ex parte*, 1 Bro. C. C. 399. S. P., *Lee, Ex parte*, 1 Bro. C. C. 400.

Upon separate commission of bankruptcy the benefit of an insurance effected by bankrupt on his own account on joint property is not liable to joint creditors. *Browne, Ex parte*, 6 Ves. 136.

Upon a separate commission of bankruptcy, the benefit of an insurance effected by the bankrupt upon his own account on a ship of which he was joint owner is not liable to the joint creditors. *Parry, Ex parte*, 5 Ves. 575.

4. Interest Recoverable.

Before 3 & 4 Will. 4, c. 42, s. 29, an underwriter on a policy was not liable to pay interest on the amount of his subscription, although he had no colourable ground for refusing to pay the loss, unless a distinct demand of the money had been made at an earlier period for that purpose. *Bain* v. *Case*, M. & M. 262; 3 Car. & P. 496. S. P., *Kingston* v. *McIntosh*, 1 Camp. 518.

5. Chancery Jurisdiction.

Action on Policy—Jurisdiction in Chancery—Demurrer.]—To a bill brought to recover a sum due upon a policy of insurance the defendants demurred, because the plaintiff's remedy was at law. Demurrer allowed. *De Ghetoff* v. *London Assurance Co.*, 4 Bro. P. C. 436.

Chancery Jurisdiction.]—A bill was filed by the underwriter of a policy of insurance on a ship, to have the policy delivered up, on the ground of deviation and unseaworthiness, but only deviation being proved, the bill was dismissed. *Thornton* v. *Knight*, 16 Sim. 509; 13 Jur. 180.

In Case of Fraud.]—See *Wilson* v. *Ducket*, ante, col. 1333.

6. Early Actions on Policies.

Early Actions on Policies of Assurance.]—*Luster* v. *Cowell*, 2 Keb. 430. *Goram* v. *Fouke*, 2 Keb. 722.

Mayor's Court of Bristol—Custom—Trial by Tales Jury.]—Action on policy in mayor's court of Bristol. There being a deficiency of jurymen, a tales was awarded and verdict for the plaintiff :—Held, in error, that the custom alleged as to trial by tales was not good. *Paul* v. *Knight*, 2 Keb. 222.

Court of Policies of Assurance.]—Prohibition refused where the defendant had appeared in the court of policies of assurance. *Oyles* v. *Marshall*, Style, 418.

Rule nisi for prohibition to court of assurances. *Delbye* v. *Proudfoot*, 1 Show. 396.

Plea of action brought for same cause in the court of assurances :—Held, no bar to an action at common law. *Came* v. *Moy*, 2 Sid. 121.

XVII. INSURANCE BROKERS AND AGENTS.

1. *Retainer and Employment*, 1335.
2. *Duty and Liability*, 1336.
3. *Authority to Pay and Receive Losses*, 1340.
4. *Set-Off*, 1342.
5. *Liability for Policy Moneys*, 1344.
6. *Remuneration*, 1344.
7. *Lien*, 1346.

1. Retainer and Employment.

Joint and Several.]—Where a power of attorney, signed by the defendant, was given to fifteen persons by name, "jointly or separately, to sign and underwrite all such policies of assurance as they or any of them should jointly or separately think proper" :—Held, that this was to be construed as a joint and several authority ; and that the plaintiff might maintain an action on a policy underwritten by four of the persons therein named. *Guthrie* v. *Armstrong*, 1 D. & R. 248 ; 5 B. & Ald. 628.

Delegation.]—Semble, that under a power of attorney by A. to B. "to underwrite any policy of insurance not exceeding 100*l*., and to subscribe to the same his (A.'s) name, and to settle and adjust losses," although B. cannot delegate his whole authority to another, yet, having signed a slip for the policy, the signature of his clerk for him, and in his absence, to a policy made in pursuance thereof, is a good execution of the power, that being only a ministerial act, which he might authorise another to do for him, but he must himself execute the power in all matters in which his judgment and discretion are requisite. In the present case, the policy, after it was so executed by the clerk of B., having been shown to A., who then offered terms of settlement :—Held, that A. had adopted the act of B. *Mason* v. *Joseph*, 1 Smith, 406.

Where a party gave an order to a firm, consisting of several persons, to effect an insurance :—Held, that he was bound by an insurance effected by another firm, where both firms had several partners in common. *Dickson* v. *Lodge*, 1 Stark. 226 ; 18 R. R. 764.

Nature of Authority.]—A person, who has several times allowed an agent to subscribe policies in his name, is bound by such signature ; and evidence of his so having allowed it to be done, is sufficient without producing a power of attorney. *Neal* v. *Erving*, 1 Esp. 61 ; 5 R. R. 720.

The authority of a broker employed to effect a policy may be revoked after the underwriters have signed the slip, till such time as they have actually subscribed the policy ; and if the broker, having procured a slip to be written, on terms within the scope of his original authority receives an intimation from his principals, that they will not submit to these terms, and afterwards effects the policy, and pays the premiums to the underwriters, he can maintain no action against his principals for commission or for money paid. *Warwick* v. *Slade*, 3 Camp. 127 ; 13 R. R. 772.

A broker at Liverpool was authorised by his principal in London to underwrite in the name of the latter policies of marine insurance not exceeding 100*l*. on any one vessel. The broker underwrote a policy for 150*l*. It is well known in Liverpool that the amount for which a broker can underwrite the name of his principal is limited, but the limit is not disclosed. In an action on the policy :—Held, that the broker having exceeded his authority, and the contract being indivisible, the policy was void. *Baines* v. *Ewing*, 4 H. & C. 511 ; 35 L. J., Ex. 194 ; L. R. 1 Ex. 320 ; 14 L. T. 733 ; 14 W. R. 732.

—— **To Cancel.**]—The authority given to a broker, when he is to effect a policy, does not extend to warrant him in cancelling it. *Xenos* v. *Wickham*, 36 L. J., C. P. 313 ; L. R. 2 H. L. 296 ; 16 L. T. 800 ; 16 W. R. 38.

After the broker had prepared a slip, and the proposed insurer had accepted it, and had prepared a policy in accordance with it, a desire was expressed by him and assented to by the underwriter, that the policy should be cancelled, on which a cancellation was in form effected :—Held, that this was not effectual as to the assured, who had not, in fact, given the broker any authority to cancel the policy. *Ib.*

Usage as to Cancelling—Written Contract excludes.]—The usage of insurance brokers at Liverpool is that if, on the occasion of a policy for time being cancelled before the expiration of the time, the premium, or a part of it, is to be returned ; the return made only in respect of unbroken months ; but a contract made by a proposal in these terms : "We will thank you to render us a credit note for unexpired term, say from the 12th instant to the date of the expiration of the policy," and an acceptance in these : "Please to hand bearer stamped policies, &c., to put forward terms for cancelling," must be construed as having been made irrespective of and excluding the usage. *Baines* v. *Woodfall*, 6 C. B. (N.S.) 657 ; 28 L. J., C. P. 338 ; 6 Jur. (N.S.) 19.

2. Duty and Liability.

Negligence in Effecting.]—A broker who has neglected to insure the premium according to the directions of his principal, cannot set up as a defence, that he was directed also to insure against British capture ; for that is not a crime so as to render the whole insurance illegal, though it would be void pro tanto. *Glaser* v. *Cowie*, 1 M. & S. 52.

An agent who acts bonâ fide in effecting an insurance for his principal is not liable to be

called upon by him because the insurance might possibly have been effected on better terms. *Moore* v. *Mourgue*, Cowp. 479.

It is gross negligence in an insurance broker employed to insure goods from a certain point in their voyage home, to effect a policy "at and from" that point, "beginning the adventure from the loading thereof on board." *Park* v. *Hammond*, 6 Taunt. 495; 2 Marsh. 189; 4 Camp. 344; Holt, 80; 16 R. R. 658.

Insurance brokers were ordered to effect a policy "at and from Teneriffe to London":—Held, that they were liable for not inserting in it a liberty "to touch and stay at all or any of the Canary Islands," that being usually inserted in policies from Teneriffe. *Mallough* v. *Barber*, 4 Camp. 150.

It is the duty of a broker, under an undertaking to effect a particular insurance, to give notice to his principal of his inability to effect it. *Callander* v. *Oelrichs*, 6 Scott, 761; 5 Bing. (N.C.) 58; 8 L. J., C. P. 25.

A broker, in pursuance of instructions previously received from Sunderland, effected a policy at Lloyd's at a time when a letter lay on his table at the coal exchange unopened, announcing the ship's loss:—Held, that the jury was warranted in finding that this was no such want of diligence as avoided the policy. *Wake* v. *Atty*, 4 Taunt. 493; 13 R. R. 660.

A broker effecting an insurance, omitted to communicate a material letter, by reason whereof the assured failed in actions against some underwriters, and offered the broker the defence of others; and on his refusal, without further consulting him, made restitution to others who had paid the losses without suit:—Held, that the assured might recover against the broker as well the amount of these losses so unpaid, as of the others. *Maydew* v. *Forrester*, 5 Taunt. 615; 15 R. R. 597.

If a merchant orders an insurance broker to effect a policy for time, on a cargo of corn, without giving any direction as to those with whom the policy is to be effected, and the insurance broker effects the policy with one of the chartered companies, by whose policies corn is warranted against partial losses, although the ship is stranded; upon a large partial loss happening upon this cargo after a stranding of the ship, the merchant cannot maintain an action against the insurance broker for not effecting the policy with private underwriters, who, by the common form of a policy, would have been liable for this partial loss. *Comber* v. *Anderson*, 1 Camp. 523.

Merchants in London receive from a stranger living abroad a bill of lading and letter requesting them to insure the goods. They decline to receive the goods or to do business for the consignor, but acting bonâ fide with a view to his interest indorse the bill to a friend of his, who afterwards fails with the proceeds in his hands:—Held, that the merchants were liable to the consignor for the amount. *Corlett* v. *Gordon*, 3 Camp. 472; 14 R. R. 813.

Indorsing Memoranda—Alteration of Voyage.]—An insurance broker had been employed by a merchant to procure policies to be underwritten upon a ship and cargo from L. to St. T., with leave to call at M. and T. On the arrival of the ship at M., the supercargo advised the merchant of an alteration in the course of the voyage. The merchant put the letter containing the information into the hands of the broker, with instructions to do the needful with it. The broker accordingly procured memorandums to be indorsed on the policies, containing permission to call at certain places not mentioned in the policies. The vessel was lost at a place not covered by the memorandums. In an action against the broker for negligence in not having procured alterations conformable with the instructions contained in the letter:—Held, that the evidence of insurance brokers and underwriters as to what alterations of the policies a skilful insurance broker ought, in their judgment, to have procured, having in his possession the policies, the invoices of the goods, and the bills of lading, and also the letter of the supercargo, and being instructed to do the needful, was admissible. *Chapman* v. *Walton*, 3 M. & Scott, 389; 10 Bing. 57; 2 L. J., P. C. 210.

Negligence in not Effecting—Measure of Damages.]—A., a merchant at Seville, wrote to B., his agent at Liverpool, desiring him to insure a cargo of fruit to that place. B., acting bonâ fide, instructed one C., a person who had occasionally acted as A.'s agent in London, to get a policy effected there. C. for that purpose employed one D., an insurance broker, who effected the insurance in his own name, and afterwards received the amount of a loss from the underwriters, but retained it, claiming a lien for a debt due to him from C. in respect of premiums and commission on former transactions. In an action by A. against B. for negligently omitting to effect a good and available insurance upon the cargo, and neglecting to take steps to get the money, the judge, treating it as immaterial whether the letter of instructions from B. to C. had been shown to D. or not, ruled that B. had violated his duty as agent, by employing another agent in London instead of effecting the policy himself, and that he was responsible for the whole amount received from the underwriters by D.:—Held, that this was not the true measure of damages; for that if B.'s letter of instructions had been shown to D. at the time he was employed to effect the policy, he could acquire no lien upon the proceeds for the debt due to him from C., and his unlawful detention of the money could not give A. a right of action against B. for the whole amount so received by D., though B. might be liable for some nominal damages in respect of the breach of his duty as agent, and therefore that fact ought to have been ascertained. *Cahill* v. *Dawson*, 3 C. B. (N.S.) 106; 26 L. J., C. P. 253; 3 Jur. (N.S.) 1128.

Question for Jury—Time for Effecting.]—In an action against an insurance broker for not effecting an insurance pursuant to his retainer, the declaration, after stating his employment to cause an insurance to be made on the plaintiff's ship tackle, &c., and his acceptance of such employment, alleged, by way of breach, that, although a reasonable time had elapsed, and before the loss of the ship, yet he did not nor would within such time cause to be made, according to the custom of merchants, insurance upon the ship, tackle, &c.; nor cause the same to be insured; nor a policy of insurance to be made, subscribed, and underwritten thereon from and against the perils of the sea and other risks usually borne by underwriters; nor did nor would cause the plaintiff to be insured in respect of the

ship, tackle, &c., from and against such perils; nor did nor would cause to be made thereon any insurance or policies of insurance subscribed or underwritten; but he so to do, wrongfully and in breach of his duty and retainer, wholly neglected and refused. It appeared that the broker had, shortly after he had been so employed, contracted with the Newcastle Commercial Insurance Company for an insurance on the plaintiff's ship, &c., and shortly afterwards obtained from the secretary of the company what purported to be copies of the policies. Stamped policies were afterwards subscribed, but not given out, it being the practice of the company to retain them in their possession until wanted in consequence of a loss. There was no precise evidence as to the time when the stamped policies were actually executed; the evidence being, that it was usual to execute them very shortly after the order. To a demand for the policies on the part of the plaintiff after the loss of the vessel, the broker sent an evasive reply. It was left to the jury to say, whether or not the broker had procured the policies to be executed within a reasonable time. The jury having found for the plaintiff, and the judge being satisfied with the verdict, the court refused to grant a new trial. *Turpin* v. *Bilton*, 6 Scott (N.R.) 447; 5 Man. & G. 455; 12 L. J., C. P. 167; 7 Jur. 950.

Agents.]—An agent employed to ship and insure goods having wilfully omitted to insure them is liable to the same extent as an underwriter would have been had he insured. *Smith* v. *Price*, 2 F. & F. 748.

The owners of the goods having, after a partial loss, agreed with the agent to sell to him the goods at a price less than the invoice price, asserting that they were worth the invoice price, and also that the loss was total:—Held, that as these were matters rather of opinion than of fact, the statements would not, even if untrue, amount to fraud, which would avoid the agreement. *Ib.*

—— **Nature of Authority.**]—On the employment of any mercantile or commercial agent, it is for the jury, in the absence of any express evidence of the nature of his duties on such employment, to judge, from their own knowledge, what those duties are; and thus, on the employment of an insurance agent to effect an insurance, or get it effected, it is for the jury, in the absence of any express evidence, to judge whether he was employed to get the insurance effected, or only to place the business in the hands of brokers to effect it; and whether he is responsible for their neglect or default, especially in not getting it effected with responsible insurers, and in not informing his employer, the insured, who they are, in order to enable him to sue them. *Hurrell* v. *Bullard*, 3 F. & F. 445.

Correspondents.]—A merchant abroad, having effects in the hands of his correspondent here, may compel him to procure an insurance for him. *Smith* v. *Lascelles*, 2 Term Rep. 187; 1 R. R. 457. And see *Wallace* v. *Tollfair*, 2 Term Rep. 188, n.; and *Smith* v. *Colligan*, 2 Term Rep. 288, n.

If a merchant here has been accustomed to procure insurances for his correspondent abroad in the usual course of trade, the latter has a right to expect an insurance at the hands of the former, unless some previous notice is given to the contrary. *Ib.*

If a merchant abroad sends bills of lading to his correspondent here, and at the same time gives directions to procure an insurance, the latter cannot accept the bills of lading without obeying the orders to insure. *Ib.*

If a merchant abroad, interested in goods and the freight of a cargo, mortgages them to his creditor here, for payment of money at a certain day, and by letter, inclosing the bills of lading, directs him to insure; the latter will be liable to an action for not insuring, notwithstanding the mortgage has become absolute before the letter is received. *Ib.* See also as to neglect in reinsuring, *Great Western Insurance Co. of New York* v. *Cunliffe*, post, col. 1345.

Liability of Broker for Premiums—Promise by Assured to Pay].—See *Universe Insurance Co. of Milan* v. *Merchants Marine Insurance Co.*, ante, col. 1311.

3. Authority to Pay and Receive Losses.

To Pay—Not Implied.]—An insurance broker has no implied authority to pay the assured losses, either total or partial, for the underwriter who employs him. *Bell* v. *Auldjo*, 4 Dougl. 48.

If an insurance broker, when a loss happens upon a policy which he has effected, pays the assured the full amount of the money subscribed, he cannot recover back any part of it, upon the ground that, before the loss happened, one of the underwriters upon the policy had become insolvent, and that he was not aware of the fact when he paid the money. *Edgar* v. *Bumstead*, 1 Camp. 411; 10 R. R. 713.

If an insurance broker, living at a distance from his principal, upon a loss happening, gives him credit in account for the money due from the underwriters, he cannot a considerable time after make a demand upon him for the amount of the sums subscribed by several of the underwriters who have become insolvent without paying. *Jameson* v. *Swainstone*, 2 Camp. 546, n.; 11 R. R. 794, n.

The plaintiff instructed a broker to insure his ship; the broker signed a policy on behalf of the defendant, an underwriter. The ship was lost, and the plaintiff received from the defendant a credit note for payment in respect of the loss. Credit notes are usually paid within a month from their date. At the time of signing the policy, and also of the adjustment, the broker had money of the defendant sufficient to pay the loss. Nearly three months after the credit note was given the broker stopped payment. The plaintiff then applied to the defendant for the amount of the loss:—Held, that the plaintiff had not induced the defendant to believe that he looked to the broker for payment, and that the defendant was liable. *Macfarlane* v. *Giannacopolo*, 3 H. & N. 860; *and see* X. Losses, ante, cols. 1266 seq.

—— **Notice on whose behalf Policy Effected—Overplus.**]—Insurance brokers who have effected a policy, without notice that it is not on account of the person from whom they receive the order, have no right to pay the overplus of the policy moneys remaining after deduction of their balance to the agent, and if they do so the amount may still be recovered by the principal. *Mann* v. *Forrester*, 4 Camp. 60; 15 R. R. 724.

—— **Policy Money paid by Mistake—Recovery from Agent of Assured.**]—Action by underwriter

against agent of insured for money had and received, being money paid to the agent by underwriters for a loss, which afterwards was ascertained to be a foul loss. The money had been passed in account to the principal, but no bills accepted or new credit given in respect of it:—Held, that the plaintiff could recover. *Buller* v. *Harrison*, 2 Cowp. 565.

To Receive.]—An action is maintainable by an assured part owner of a vessel, against an insurance broker, who has received from the underwriters the full amount of the sums subscribed on a total loss, although there are several other persons interested as part owners, and who had given the broker notice of their interest, where the plaintiff insured on the whole ship generally, by means of his captain, who gave the order for effecting the insurance. *Roberts* v. *Ogilby*, 9 Price, 269; 23 R. R. 761.

Where a person employed by shipowners, as their agent, effected a policy, and represented himself as the principal to the brokers, who cause such insurance to be effected:—Held, that where the brokers received the amount of the loss from the underwriters, and paid it over to the agent, they were not liable to the owners for money had and received, although part of the money was paid to the agent after they were informed of his having acted in that capacity. *Bell* v. *Jutting*, 1 Moore, C. P. 155; 19 R. R. 533.

Where a broker in whose name a policy under seal was effected, brought an action thereon, and the defendants pleaded payment to the plaintiff, according to the tenor and effect of the policy, and the proof was, that, after the loss happened, the assurers paid the amount to the broker by allowing him credit for premiums due from him to them:—Held, that, although that was no payment as between the assured and assurers, it was a good payment as between the plaintiff on the record and the defendants; and, therefore, an answer to the action. *Gibson* v. *Winter*, 5 B. & Ad. 96; 2 N. & M. 737.

—— **Authority to take Payment by Bill.**]—An insurance broker, who is authorised to receive payments from underwriters on behalf of his principal, has no authority to receive a three months' bill in payment of a loss. A bill given under such circumstances then and forthwith discounted by the agents and honoured at maturity, is not good payment to the principal. *The Nether Holme, Hine* v. *Steamship Insurance Syndicate*, 11 R. 777; 72 L. T. 79; 7 Asp. M. C. 558—C. A.

—— **Custom.**—The plaintiff, a shipbuilder, in London, employed W., an insurance broker, to effect a policy upon a ship at Lloyd's, and after the happening of a loss, gave W. the ship's papers, for the purpose of enabling him to adjust the loss with the underwriters. The policy was effected in W.'s name, and he retained possession of it. An adjustment having taken place, the loss was settled, in accordance with a usage prevailing at Lloyd's, which was found to be generally known to merchants and shipowners, but which the jury found was not known to the plaintiff, who had merely left the policy in W.'s hands for safe custody, by the underwriter setting off the amount payable by him upon the policy against the balance due to him from the broker, for premiums on other policies effected by him:—Held, that although the plaintiff was estopped from denying that the broker had authority to receive the amount due from the underwriter on the policy in money, he was not bound by the usage, and consequently that he was entitled to recover the amount of the policy against the underwriter, notwithstanding such settlement. *Sweeting* v. *Pearce*, 9 C. B. (N.S.) 534; 30 L. J., C. P. 109; 7 Jur. (N.S.) 806; 5 L. T. 79; 9 W. R. 343—Ex. Ch.

Collecting Policy Moneys.]—If a broker keeps the policy in his possession he is presumed to have promised to collect, and he is bound to use diligence in collecting the policy moneys upon the happening of a loss. *Bousfield* v. *Cresswell*, 2 Camp. 545; 11 R. R. 794.

4. Set-Off.

Bankruptcy.]—Where defendants, insurance brokers, effected policies, some in the name and on account of their own firm, others in the name of their own firm but on account of principals, and others in the name and on account of principals, for whom they acted under a del credere commission without the knowledge of the underwriters:—Held, in an action brought against them for premiums by assignees of one of the underwriters who had become bankrupt, that the defendants might set off losses and returns upon all such of the policies as were effected in the name of their own firm, but not upon the others; such losses and returns having become due before the bankrupt stopped payment, though they had never been adjusted by the bankrupt, but only by the other underwriters between the time of his stopping payment and committing the act of bankruptcy, on which adjustment the defendants had given their principals credit for the amount. *Koster* v. *Eason*, 2 M. & S. 117; 14 R. R. 603.

Where brokers effected in their own names policies on goods on account of principals, and accepted bills drawn on them on account of the goods which were consigned to them and lost before arrival:—Held, that they might set off such losses in an action brought by the assignees of the underwriter, since a bankrupt, for premiums, although they had no del credere commission, and the losses were not adjusted. *Parker* v. *Beasley*, 2 M. & S. 423; 15 R. R. 299.

Where a broker, indebted for premiums on policies subscribed by an underwriter, since bankrupt, had a del credere commission on one of the policies effected in the name of the assured, and expressed in the body thereof, whereon a loss happened before the bankruptcy, the broker being entrusted with the policy, though the broker paid the loss to the assured before the commission:—Held, that he could not set off that loss against premiums due to the assignees of the bankrupt. *Peele* v. *Northcote*, 7 Taunt. 478; 16 R. R. 655.

A commission del credere is an absolute engagement to the principal from the broker, and makes him liable in the first instance. A broker with such a commission may, under the general issue, set off a loss upon a policy happening before a bankruptcy, to an action by the assignees of the bankrupt for premiums upon various policies underwritten by him, and for which he had debited the broker; but such a loss cannot be proved under a notice of set-off. *Grove* v. *Dubois*, 1 Term Rep. 112; 16 R. R. 664, n.

A broker who is indebted to the assignees of a bankrupt for premiums due to them upon policies subscribed by the bankrupt before his bankruptcy

is not entitled to set off returns of premium due upon the arrival of ships which have arrived since the bankruptcy. *Goldschmidt* v. *Lyon*, 4 Taunt. 534 ; 13 R. R. 670.

Where a bankrupt has underwritten a policy to a broker acting under a del credere commission, and a loss upon the policy happens before, but is not adjusted until after the bankruptcy, the broker may deduct the amount of the loss from his debt to the bankrupt's estate. *Bize* v. *Dickenson*, 1 Term Rep. 285.

—— **Return of Premium.**]—An insurance broker who is indebted to the assignees of a bankrupt cannot, without special authority, set off against that debt sums due from the underwriter for returns of premium, whether due before or after the bankruptcy. *Minett* v. *Forrester*, 4 Taunt. 541, n. ; 13 R. R. 676.

A., as agent for various persons, not under a del credere commission, effected policies with B. for his principals, upon which various losses and returns of premium were due. B. having become bankrupt :—Held, that in an action by his assignees against A. for the amount of the premiums, A. could set off the amounts of losses, or the returns of premium. *Wilson* v. *Creighton*, 3 Dougl. 132 ; cited, 1 Term Rep. 113.

Salvage Received—Losses on Other Policies.]—An underwriter at Lloyd's having become bankrupt, the assignee of the trustee in the bankruptcy sought to recover from the defendants, a firm of insurance brokers who had effected policies with the underwriter, moneys received by them as salvage in respect of losses paid in account by the underwriter before his bankruptcy. The defendants sought to set off a sum due to them from the underwriter for losses after the bankruptcy on other policies effected with him, which they had been compelled to pay to their principals, to whom they had guaranteed his solvency :—Held, that the plaintiff was entitled to recover the amount of the salvage as being part of the estate of the bankrupt, and that the defendants had no right of set-off in respect of the amount of the losses paid by them. *Elgood* v. *Harris*, 66 L. J., Q. B. 53 ; [1896] 2 Q. B. 491 ; 75 L. T. 419 ; 45 W. R. 158 ; 3 Manson, 332 ; 8 Asp. M. C. 206.

Liability for Premiums on Policy Subscribed by Plaintiff.]—Defendant, an insurance broker, being sued for premiums received by him on policies subscribed by the plaintiff, was allowed to set off a loss on one of those policies effected in the name of the defendant at the request of T. on goods in which T. was interested, but on which the defendant had a lien to a greater amount than the set-off claimed. *Davies* v. *Wilkinson*, 4 Bing. 573 ; 1 M. & P. 502 ; 6 L. J. (o.s.) C. P. 121 ; 29 R. R. 634.

Advances by Shipowner—Receipt of Policy Money—Passage Money—Freight.]—B., the owner of the ship in which A. was a passenger and owner of cargo, advanced 250*l.* to B. and took his receipt for the same. The ship was lost, and B. received from underwriters on A.'s cargo, 429*l.* A. sued B. for the same, and B. claimed to set off 95*l.* for A.'s passage money, 10*l.* for freight on the goods, and commission on the 250*l.* :—Held, that he could set-off the 95*l.* which had been paid by B. to the captain, unless it was proved to belong to B., but not the 10*l.* or commission. *Leman* v. *Gordon*, 8 Car. & P. 392.

5. Liability for Policy Moneys.

Liability to pay Policy Moneys—Credit in account with Underwriter.]—As soon as an insurance broker has received credit in account with an underwriter for a loss upon a policy, his principal may maintain money had and received against him to recover the amount ; and in such action if the underwriter's name is erased from the policy, the defendant can neither dispute the liability of the underwriter for the loss, nor his own receipt of the sum subscribed. *Andrew* v. *Robinson*, 3 Campb. 199 ; 13 R. R. 788.

If an insurance broker debit the underwriter with a loss, and take his acceptance for the balances of account between broker and underwriter, payable at a later date, then the loss would be payable in cash, the assured may sue the broker for money had and received, although the acceptance was dishonoured and the broker never received the money. *Wilkinson* v. *Clay*, 6 Taunt. 110 ; 4 Camp. 171 ; 10 R. R. 591.

Insurance by Mortgagee of Ship—Agent for Owners—Liability.]—A ship originally belonged to one of two partners and had been conveyed to B. for securing a debt, and B. became the sole registered owner of the ship, and afterwards as agent for both partners, insured the ship and freight, and charged them with the premiums ; and on a loss happening received the money from the underwriters :—Held, that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner. *Dixon* v. *Hamond*, 2 B. & Ald. 310.

Illegal Insurance—Moneys received by Brokers.]—A broker having received the moneys payable under an illegal policy effected by him on behalf of his principal shall not be allowed to set up the illegality of the contract as a defence to an action for money had and received brought against him by his principal. *Tenant* v. *Elliott*, 1 Bos. & P. 3 ; 4 R. R. 526.

Bankruptcy—Mutual credit—Broker's lien.]—A. employed B., a broker, to effect insurances and to sell goods, and left the policies in his hands. A. being indebted to B. for premiums and having obtained an advance upon goods in B.'s hands for sale, and also upon his general credit, became bankrupt. Afterwards a loss happened and B. received the amount from the underwriter :—Held, that this was a mutual credit within 30 Geo. 2, c. 5, and that B. might retain the sum in liquidation of his advances as well as of the balance due for premiums. *Olive* v. *Smith*, 5 Taunt. 56.

6. Remuneration.

Commission—Usage.]—An insurance broker is not entitled, upon the ground of any usage of trade, to a commission of 12*l.* per cent. on the balance which he pays over to the underwriters who employ him. Such allowance, however general it has been, is a gratuity merely, and not a demand of right. *Levi* v. *Barnes*, Holt, 412.

In an action by insurance brokers to recover their commission, evidence was admitted of a custom for the broker to be allowed discount by

the underwriters, and to retain it as against their employers, the insurers. *Rucker* v. *Lunt*, 3 F. & F. 959.

—— **Neglect to Re-insure.**]—A marine insurance company in New York appointed a firm of merchants in London their agents for settling claims in England and for effecting re-insurances. For settling the claims the agents were to receive a fixed percentage, but nothing was provided as to remuneration for re-insuring. According to the custom as between underwriters and brokers, the agents were allowed by the underwriters 5 per cent. on each re-insurance; and also at the end of the year, on the general balance between the underwriter and the broker, 12 per cent. on the profits of the year, if there were profits. The firm in London was in the habit of receiving both these percentages, but only the 5 per cent. was mentioned in their accounts sent to the insurance company. The company discovered this in 1866, but made no objection to it until 1868. In 1869 the company filed a bill against the firm in London for an account in which the 12 per cent. should be accounted for; claiming also repayment of certain sums at interest; and praying that the firm in London might in the account be held liable for neglect in not re-insuring a certain vessel:—Held, that under the circumstances the firm in London was entitled to retain the 12 per cent. received by them as remuneration; and was also entitled to the interest charged by them. *Great Western Insurance Co. of New York* v. *Cunliffe*, 43 L. J., Ch. 741; L. R. 9 Ch. 525; 30 L. T. 661.

Held, also, that the loss sustained by the alleged neglect of the firm in London could only be recovered at law, and that the bill must therefore be dismissed. *Ib.*

—— **Del credere.**]—Indebitatus assumpsit lies to recover del credere commissions for guaranteeing sums insured upon policies, such commissions being due upon entering into the contract of guarantee; and after judgment by default, the defendants cannot be allowed, on a writ of inquiry, to set off, in reduction of damages, the amount of losses not indemnified. *Caruthers* v. *Graham*, 14 East, 578.

Discount on Premiums.]—A shipowner had for several years employed merchants as his general agents at a remuneration, and they had effected insurances on his ships. In their accounts they charged him with the full insurance premiums, although they were allowed by the underwriters to retain out of the premiums 5 per cent. brokerage, and 10 per cent. discount for ready money, in accordance with the custom of the trade:—Held, that as these allowances were usually made, and as the shipowner had for years assented to them, he could not object to allow them to retain these allowances on taking the accounts in a suit with regard to a mortgage on certain ships of his. *Baring* v. *Stanton*, 3 Ch. D. 502; 35 L. T. 652; 25 W. R. 237; 3 Asp. M. C. 294—C. A.

On Bankruptcy.]—In an action by assignees of a bankrupt, the declaration stated that the defendants were indebted to the bankrupt before his bankruptcy for work and labour as an insurance broker, and for divers premiums of insurance due and payable from the defendants to the bankrupt, for and in respect of his having underwritten and subscribed, and caused and procured to be underwritten and subscribed, divers policies for the defendants, at their request. The plaintiffs, by their particulars of demand, claimed to recover for insurance. The company would have allowed the broker, when he paid the premiums, to deduct 31*l.* 1*s.* as commission:—Held, that his assignees were entitled to recover that sum under the words in the declaration, "work and labour done" by the broker, and under the word "insurance" in the particulars of demand. *Power* v. *Butcher*, 10 B. & C. 329.

Held, also, that the assignees were entitled to recover the amount of the premiums which the bankrupt had become liable to pay to the company under that part of the count which charged that the defendants were indebted to the plaintiffs for premiums due to the bankrupt for and in respect of his having caused and procured to be underwritten divers policies, but that the plaintiffs were not entitled to recover such sums under the count for money paid, because the broker had not actually paid the sums, nor done any thing which was equivalent to payment. *Ib.*

Claim for Premiums.]—By the custom of Lloyd's, premiums of insurance are matters of account between the underwriter and the broker, and between the broker and the assured, without any privity between the assured and the underwriter. The broker has therefore a claim upon the assured for the amount of the premium, as the policy is effected whether he has paid the underwriter or not, and whether the underwriter has, by the policy, confirmed the premium to be paid, or has taken the covenant of the broker to pay it. *Power* v. *Butcher*, 5 M. & Ry. 327.

If a plaintiff agrees to effect an insurance on the goods of a defendant, with such names as may be to the defendant's satisfaction, the defendant cannot refuse to reimburse the premium, on the ground that the names of the underwriters had not been previously submitted to him for his approval. *Dixon* v. *Horill*, 1 M. & P. 656; 4 Bing. 665; 6 L. J. (o.s.) C. P. 155; 29 R. R. 680.

7. Lien.

Of Broker or Sub-Agent for Premiums.]—The lien which an insurance broker has on a policy for the amount of the premium paid by him extends to a sub-agent. *Fisher* v. *Smith*, 48 L. J., Ex. 411; 4 App. Cas. 1; 39 L. T. 430; 27 W. R. 113—H. L. (E.)

Where the course of business was to make out monthly accounts, and to settle the amounts of the following month, the broker meanwhile retaining the policy:—Held, that this course of business was not inconsistent with the retention of his lien by the sub-agent, even though the intermediary had been paid by the principal. *Ib.*

The plaintiff, a shipowner, who had on several occasions during three years previously employed S. & Co. as insurance brokers to effect marine insurances for him, authorised them to effect an insurance for him on a cargo by a ship of his, which they accordingly did through the sub-agency of the defendant, also an insurance broker, who paid the premiums on the policies, and who had on previous occasions, by the instructions of S. & Co., effected policies for the plaintiff and other persons. The defendant had notice through-

out that S. & Co. were acting as brokers, and that the plaintiff was their principal; but the plaintiff did not know until after the policies had been effected that they had been effected through the defendant, or by any other person than S. & Co. The plaintiff, who had monthly accounts with S. & Co. in such matters, paid them in due and usual course of business between them their monthly accounts, in which, in usual course, they debited him with the amount of the premiums on the policies in question, but he neither asked for nor received the policies at that time. The defendant, who was aware of the course of dealing between the plaintiff and S. & Co., paid the premiums in usual course to the underwriters on effecting the policies, and, in accordance with the usual course of business between him and S. & Co., sent a debit note of such premiums to S. & Co., with whom he had monthly accounts for insurances effected by him under their instructions for the plaintiff and other persons; but he kept the policies in his own hands, as was his usual practice, until the premiums should be repaid him by S. & Co. He subsequently delivered his monthly account to S. & Co., which included, among other items, the premiums on the policies in question, but S. & Co. never settled such account, nor repaid him the premiums paid by him as above mentioned. A loss having occurred, the plaintiff brought an action of detinue for the policies against the defendant, who, in answer, set up a lien on the policies for the premiums paid by him upon them:—Held, that the defendant had such a lien. *Ib.* And see *Bosanquet, Ex parte*, 1 De G. 432.

If an agent employed to effect an insurance on goods represents himself as the owner of the goods to another person, whom he employs to effect the policy, the latter has not a general lien on the policy for the balance due to him from the agent. *Lanyon* v. *Blanchard*, 2 Camp. 597; 11 R. R. 808.

So where A., a merchant, at different times employed C., an insurance broker, to effect policies for him. C., without A.'s concurrence, employed B., another insurance broker, to effect these policies, informing him that they were for a correspondent in the country; B. got the policies effected in A.'s name, and delivered them all except one to C.; C. became bankrupt, without having paid B. any part of the premiums, A. being indebted to his estate beyond the amount:—Held, that B. had not a lien on the policy he detained for the general balance due to him from C. *Snook* v. *Davidson*, 2 Camp. 218; 11 R. R. 696.

Obtaining Policy again.]—Although a broker may have parted with the possession of a policy, still, if he becomes repossessed of it, he has a lien on it for the premiums which may be unpaid. *Levy* v. *Barnard*, 2 Moore, C. P. 34; 8 Taunt. 149; 19 R. R. 484.

Evidence as to Interest of Employer.]—Where an English subject, in time of war, who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker in his own name, but informing him at the same time that the property was neutral:—Held, to be a sufficient indication to the broker that the party acted as agent, and not on his own account; and, therefore, the broker had no lien on the policy so effected, for his general balance against such agent, as between such broker and the principal. *Maanss* v. *Henderson*, 1 East, 335.

Where the plaintiff being resident abroad, ordered B. & Co., in London, to effect an insurance on his account; who, not being in the habit of effecting their own insurances, or those of their correspondents, delivered the order to the defendant, being their broker, who accordingly effected it in their names, when he handed over the policy and debited them with the premiums: the plaintiff paid the amount of those premiums to B. & Co., without the defendant's knowledge; a loss being subsequently claimed by the plaintiff, the policy was redelivered by B. & Co. to the defendant for the purpose of his procuring an adjustment. There was an open account between the defendant and B. & Co., and in 1813 they were indebted to him in 21,000*l.* in such open account, including the premiums in question, and in 1814 they paid him 33,000*l.*, on account of losses and returns on insurances effected for them; and in the latter part of that year the defendant was a considerable creditor on such account:—Held, that under these circumstances, the defendant had not a lien on the policy, either for premiums or his general balance. *Levy* v. *Barnard*, 2 Moore, 34; 8 Taunt. 149; 19 R. R. 484.

Where no Notice of Agency.]—Insurance brokers who have effected a policy, without notice that it is not on account of the person from whom they receive the order, have a lien upon it for their general balance due from him, and have a right to apply in satisfaction of that balance money received upon the policy, as well after as before notice that it belongs to a third person. *Mann* v. *Forrester*, 4 Camp. 60; 15 R. R. 724.

A broker having effected an insurance in his own name on behalf of his principal, had the policy left in his hands for the purpose of his receiving the proceeds; and, having, upon advice of the loss, pledged the policy with another broker, obtained an advance thereon, received as on account of the loss:—Held, that the latter might retain the amount so advanced, and that the principal could not recover it from him, but must resort to his own broker for it. *Callow* v. *Kelson*, 10 W. R. 193.

The owner of six ships by a deed to which he and two trustees alone were parties, and which was duly registered, assigned them to two trustees for securing sums of money expressed to be lent to him by them (but which in fact had been lent by the plaintiffs), and covenanted to insure each vessel in 1,500*l.* at the least, and on request to assign the policies to the trustees. He did insure the ships in his own name through the agency, and in the name of a broker who had notice of the mortgage, but who had been informed by the owner that the insurances had been effected by the trustees in respect of their interest, and who trusted him in the belief that the insurances were on the owner's own account in respect of his interest as mortgagee. One of the ships insured for 1,000*l.* was lost. The owner subsequently became bankrupt. The broker was a creditor of the owner for premiums on the insurance policies and for 1,000*l.* cash advanced after the policies had been effected, and he brought an action against the underwriters for the moneys secured by the policies:—Held, that the broker was not entitled to a general lien for the whole balance due to him from the bankrupt,

but only on each policy for the sums paid in respect of that policy. *Ladbroke* v. *Lee*, 4 De G. & S. 106.

B. effected an insurance for A., not knowing it was in fact for the plaintiff:—Held, that B. had a lien on the policy for a balance due to him by A. *Westwood* v. *Bell*, 4 Camp. 349; 16 R. R. 800.

As against Assignee.] — The assignee of a policy on goods, who became such by the indorsement to him of the bill of lading of the goods by the consignor, after he had directed his correspondent to make the insurance, takes it subject to the lien of the correspondent of the consignor for his general balance; and can only claim, subject to that lien, the money received on such policy by the broker in whose hands it was deposited for that purpose by the correspondent. But the broker has no sub-lien on the policy for the general balance of his own account with such correspondent, if he knew at the time that the policy was effected for another person. *Mann* v. *Shiffner*, 2 East, 523.

Policy left for Safe Custody.]—If a policy is left in the hands of an agent for safe custody only, although he advances money to the assured, without any other security than the policy, the agent acquires no general lien on the instrument for such advances; but it is otherwise if it was left with him as a security generally. *Muir* v. *Fleming*, D. & R., N. P. C. 29; 25 R. R. 775.

Pleading—Trover for a Policy of Insurance.] —Defendant, after stating the existence of mutual accounts between him and the assured, pleaded a lien for a general balance due to him as an insurance broker; the plaintiff replied, a bill of exchange taken as payment for this balance, and not due at the time of the conversion. Upon demurrer:—Held, that the defendant could not, without pleading it as a defence, rely also on the mutual credit between the parties to justify his detention of the policy. *Hewison* v. *Guthrie*, 2 Bing. (N.C.) 755; 3 Scott, 298; 5 L. J., C. P. 283.

Broker's Lien on Policies—Promise to clear Lien — Statute of Frauds.] — The plaintiff, a broker, having a lien on certain policies effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of these acceptances as they became due, if the plaintiff would give him up the policies, in order that he might collect for his principal the moneys due from the underwriters; which accordingly was done, and the money was afterwards received by the defendant:—Held, that this was not a promise for the debt or default of another within the Statute of Frauds; and that the plaintiff might recover against the defendant as well for the breach of agreement in not providing for payment of the acceptances, as also upon a count for money had and received. *Castling* v. *Aubert*, 2 East, 325.

Factors' Lien on Policy.]—A. & Co., who carried on business at Hull as merchants, factors, ship and insurance brokers, and general agents, had had various dealings as factors with B. & Co. of London. In the course of these dealings B. & Co. wrote to A. & Co. requesting them to insure the ship "E." for a voyage from the Downs to South America and the West Indies. A. & Co. did so, and B. & Co. remitted the premiums to them. The policy remained with A. & Co.:—Held, that A. & Co. were entitled to hold the policy as a lien for the general balance due to them as factors from B. & Co. *Dixon* v. *Stansfeld*, 10 C. B. 413.

An assurance made by a factor, who has a lien upon the goods of his principal, does not pass by a consignment of the goods insured to a third person by the principal. *Goding* v. *London Assurance Co.*, 1 Burr. 489; 1 Ld. Ken. 254; 1 W. Bl. 103.

XVIII. INSURANCE COMPANIES AND MUTUAL MARINE INSURANCE ASSOCIATIONS.

1. *Legality*, 1350.
2. *Actions for Contribution*, 1352.
3. *Rules*, 1357.
4. *Winding-up*, 1363.

1. LEGALITY.

Under 6 Geo. 1, c. 18.]—The 6 Geo. 1, c. 18 (under which no company or partnership but the two thereby authorised (the Royal Exchange and the London Assurance Companies) could insure ships or lend money on bottomry) did not extend to Scotland. *Pattison* v. *Mills*, 2 Bligh (N.S.) 519; 1 Dow & Clark, 342; 31 R. R. 49.

Nor prevent partners from lending money on respondentia. *Gore* v. *Wynne*, M. & M. 393.

Where one of two partners underwrote policies upon ships, in his own name, but upon their joint account, contrary to 6 Geo. 1, c. 18, s. 12, no action could be maintained to recover the premiums upon such policies from the assured. *Branton* v. *Tuddy*, 1 Taunt. 6.

Nor, where the brokers received the premiums, could the partners in whose name the insurances were effected recover them from such brokers. *Booth* v. *Hodgson*, 6 Term Rep. 405.

A policy of insurance on a bottomry bond, made to two persons in partnership, was void, by 6 Geo. 1, c. 18, as well as the bond. *Excreth* v. *Blackburn*, 6 M. & S. 152; 2 Stark, 66.

Unregistered Company—Illegality—Companies Act, 1862, s. 4.]—A mutual marine insurance association, consisting of more than twenty members being unregistered, is illegal under the Companies Act, 1862, s. 4. An order for its winding up discharged. *Padstow Total Loss and Collision Association, In re*, 51 L. J., Ch. 344; 20 Ch. D. 137; 45 L. T. 774; 30 W. R. 326.

Registration.]—By the rules of a mutual marine insurance association formed in 1867, the members severally and respectively agreed to insure each other's ships for a year from the day named as the commencement of the risk. The two managers were to sign the policies, and their signatures were to bind the members as if each member had signed. The premiums were to be paid in advance, losses were to be paid out of the reserve fund thus created, and if it proved insufficient, the members were to contribute the deficiency pro ratâ according to the amounts for which they were insured. The managers were authorised to issue policies to members for periods less than a year, or for special risks either in time or voyage policies at special rates of premium, to which the reserve fund should in no way apply. The association was not registered or incorporated, and persons became members by effecting a mutual policy. Its policies

were signed only by the managers "per procuration of the several members of the Arthur Average Association for insuring each other's ships." The managers issued special rate policies to a large amount to persons who had not taken mutual policies. In 1870 an order was made for winding up the association. H. & Co., who were holders of special rate policies, but had not taken out any mutual policies, were found creditors to a large amount on the present special rate policies. On an application by a contributory to vary the certificate by expunging their debt:—Held, that the association came within the Companies Act, 1862, s. 4, and ought to have been registered; that it was therefore an illegal company, and that an order for winding it up ought not to have been made, but that this objection could not be entertained on the present application. *Arthur Average Association, In re, Cory, Ex parte*, 44 L. J., Ch. 509; L. R. 10 Ch. 542; 32 L. T. 713; 23 W. R. 939; 2 Asp. M. C. 570—C. A.

Policies Void or Valid.]—Held, secondly, that the policies of H. & Co. were void under 30 Vict. c. 23, s. 7, because they did not specify the name of the subscribers or underwriters. *Ib.*

Held, thirdly, that those policies were also void as being ultra vires, for that the rules only authorised the managers to issue special rate policies to persons who were already members by having taken out policies of mutual insurance. *Ib.*

Policy incorporating Rules.] — Where the policy incorporates the rules of an association so as to be a sufficient compliance with the Stamp Act, 1867, s. 7, see *Edwards* v. *Aberayron Mutual Ship Insurance Society*, 1 Q. B. D. 563; 34 L. T. 457; 3 Asp. M. C. 154—C. A.

Clubs or Associations.]—A company of shipowners engaged to insure each other's ships, and covenanted severally, and not jointly, to pay a certain sum in case of loss, in proportion to their respective shares, but in case of the insolvency of any one of the members all the others were to be responsible:—Held, that this contract was void by 6 Geo. 1, c. 18, s. 12 (repealed by 5 Geo. 4, c. 114). *Lees* v. *Smith*, 7 Term Rep. 338.

Since the 5 Geo. 4, c. 114, where a marine insurance is effected by an insurance company, it is necessary that the name of each member of the company should be expressed in the policy. *Reid* v. *Allan*, 4 Ex. 326; 19 L. J., Ex. 39; 13 Jur. 1082. S. P., *Dowdall* v. *Clark*, 19 L. J., Q. B. 41; 14 Jur. 31. *Hallett* v. *Dowdall*, 18 Q. B. 2; 21 L. J., Q. B. 98; 16 Jur. 462.

A secret partnership between A. and B. to underwrite policies in their separate names on their joint account is not void, as against the insured, under 35 Geo. 3, c. 63, s. 11. *Brett* v. *Beckwith*, 26 L. J., Ch. 130; 3 Jur. (N.S.) 31; 5 W. R. 112.

An association formed of a number of persons for the mutual insurance of their ships against loss, and for mutual contribution in the event of such loss, is not an illegal association, within 35 Geo. 3, c. 63, s. 11, although no policies are issued by such association. *Bromley* v. *Williams*, 32 Beav. 177; 32 L. J., Ch. 716; 9 Jur. (N.S.) 240; 8 L. T. 78; 11 W. R. 392.

An association of shipowners for the mutual insurance of each other's ships, in which each member was only liable to the extent of his subscription, was not illegal under 6 Geo. 1, c. 18. *Strong* v. *Harvey*, 3 Bing. 304; 11 Moore, C. P. 72; 4 L. J. (O.S.) C. P. 57.

So, if a number of shipowners subscribe a joint fund, proportioned to their property, and underwrite each other's property respectively, and are only liable to losses in their proportions of the fund, the insurance is not illegal. *Harrison* v. *Millar*, 2 Esp. 513; 7 Term Rep. 340, n.

A policy in the common form by an insurance club, where the members are not responsible for the solvency of each other, is valid, although the sums which they respectively insure are not specified on the face of the policy. *Dowell* v. *Moon*, 4 Camp. 166.

Life Insurance Company—Marine Insurance Policies—Ultra Vires.]—A company was formed to carry on life insurance business. Afterwards, at an extraordinary general meeting, resolutions were passed to enable it to carry on marine insurance business. A deed extending the purposes of the company was executed by some of the shareholders, and notices were sent to all upon winding up of the company:—Held, that there had been no such acquiescence by shareholders as would entitle holders of marine policies to prove in respect of them. *Phœnix Life Assurance Co., In re, Burges and Stock's Case*, 2 J. & H. 441; 31 L. J., Ch. 749; 10 W. R. 816.

A life insurance company cannot by a resolution at extraordinary general meeting enable itself to issue marine policies. *Hambro'* v. *Hull and London Fire Assurance Co.*, 3 H. & N. 789; 28 L. J., Ex. 62. See also *Phœnix Life Assurance Co., In re*, supra.

2. Actions for Contribution.

Manager cannot maintain Action.]—An association of shipowners was formed for the mutual assurance of ships belonging to its members. The regulations, subject to which the policies were effected, provided for the creation of a general fund by payment of premiums by the several members, and when these should be found insufficient, by payment of contributions in the shape of a percentage on the sums insured, and a manager (not a member of the association) was appointed by a power of attorney which authorised him to sign policies for and in the names of the members of the association, and, "in their several and respective names," to demand and sue for all sums which should become due and payable for premiums and contributions from them:—Held, that the manager could not maintain an action against a member for premiums due from such member, or for moneys paid by the manager out of the funds of the association in respect of such member's share of losses due to other members. *Gray* v. *Pearson*, L. R. 5 C. P. 568; 23 L. T. 416.

The manager of a mutual insurance association cannot maintain an action for contributions due under the rules from any member, although those rules have been agreed to by the member and profess to give such a power. *Evans* v. *Hooper*, 45 L. J., Q. B. 206; 1 Q. B. D. 45; 33 L. T. 374; 24 W. R. 226—C. A.

Jurisdiction of Court of Chancery.]—In a mutual marine insurance company, where the members are numerous, a court of equity has jurisdiction, on a loss, to enforce contribution and payment of it, either where the amount has

already been ascertained, under the rules, by arbitration, or where it has not been so ascertained. *Taylor* v. *Dean*, 22 Beav. 429.

Where the rules of a mutual insurance company provide that a member making default in payment of contributions shall forfeit all claims for losses or average under his policies, but shall remain liable for contributions, a member making default cannot in an action for contributions counterclaim for losses and averages sustained by him. *Marine Mutual Insurance Co.* v. *Young*, 43 L. T. 441 ; 4 Asp. M. C. 357.

The policy coupled with the rules and articles of the company constituted a contract between the defendants and the company, and not only with the members mentioned in the policy. *Ib.*

Condition Precedent.]—A policy with a mutual association contained a regulation providing that, if a ship insured in the association should be mortgaged for any debt, the owner, being a member of the association, should not have any claim by virtue of the policy, nor should any assignee of such policy have any claim for any loss, unless previously to such loss such member should have delivered to the secretary an undertaking in writing of the mortgagee or assignee to pay all sums which might thereafter become due from such member in respect of such ship. In an action upon the policy for a total loss, the defendant pleaded that the ship was mortgaged, and that the plaintiff did not, previously to the happening of the loss, deliver to the secretary an undertaking of the mortgagees to pay all moneys which might thereafter become due from the plaintiff in respect of the ship. The plaintiff replied that the defendant had notice of the mortgage, and afterwards, without requiring the undertaking, from time to time demanded and received from the mortgagees all sums which became due from the plaintiff in respect of the ship, and the contributions for which the plaintiff, as a member of the association, became liable :—Held, that the replication was no answer to the plea, the giving of the undertaking required by the regulation being a condition precedent. *Hughes* v. *Tindall*, 18 C. B. 98.

Neglect to Adjust.]—The rules of a mutual shipping assurance association provided that "in case of its becoming necessary to make any payment in respect of any loss or damage happening to any ship insured, the amount to be borne and paid by each member of the association should, upon each and every such occasion, be assessed and apportioned by the committee, upon and amongst the members of the association liable to contribute thereto." In an action for loss the declaration set out the policy and this rule, and alleged that the plaintiff had always been ready and willing that the amount to be borne and paid by each member of the association in respect of the loss should be assessed and apportioned by the committee of the association according to the regulations of the policy, and that the plaintiff had requested the defendant and the committee to assess and apportion the same, but they had neglected and refused so to do, although a reasonable time for that purpose had long since elapsed, and alleged as a breach the nonpayment by the defendant of his proportion of the sum insured :—Held, that the declaration did not shew any liability on his part. *Wright* v. *Ward*, 24 L. T. 439 ; 20 W. R. 21 ; 1 Asp. M. C. 25.

Adjustment—When a Condition Precedent to Action.]—To this declaration the defendant pleaded, first, that by the regulations annexed to the policy it was declared that a committee should be appointed, who should meet quarterly, at the discretion of the managers, to audit the accounts, settle claims, and order payment of the same by the managers' draft ; and that the managers should have full power to settle all claims on policies ; and that the claim of the plaintiff had not been settled in manner provided, nor had payment of the same by the managers' draft been ordered ; and, secondly, that by the regulations it was declared that all average claims should be adjusted by a professional average-stater, according to the usage of Lloyd's ; and that the only claim of the plaintiff was an average claim within the meaning of the regulation, and that it had never been adjusted as provided for, and the plaintiff had never been ready and willing to have the same adjusted :—Held, that the pleas were good. *Ib.*

Pleading—Setting out Regulations.]—Where the regulations of an association of shipowners, combined for the mutual assurance of each other's ships, were indorsed on the back, and were declared to form part of a policy, to which the shipowners were subscribers :—Held, that the declaration in an action for a loss under the policy ought to set out the regulations as well as the policy. *Strong* v. *Rule*, 3 Bing. 315 ; 11 Moore, 86 ; 4 L. J. (o.s.) C. P. 73.

Member of Society by Estoppel.]—E. had an equitable interest in a ship, and afterwards received a transfer of the legal interest from the registered owner, who was a member of an insurance society. The owner insured the ship with the society in E.'s name by a policy incorporating the rules of the society, and providing among other things that every insurance effected should be valid and binding from noon on that day until noon of the 1st January then next following. By the rules persons became members only by signing the articles, and none but members could insure their ships. The rules also required certain notice upon sale of a ship or shares thereof. E. had never signed the articles nor given notice of the transfer to him of the legal interest, but had paid contributions claimed from him as owner by the society. It was also provided by the rules that the directors should decide claims and disputes of members, and that aggrieved members might appeal for reconsideration of decisions, first to the directors themselves, and then to the whole society ; and also that no member should be allowed to bring or have any action, suit, or proceeding, or other remedy against the society for any claims or demands upon or in respect of the society or the members, except as therein provided. Upon loss of the ship, E. was refused his claim upon this policy by the directors twice, but made no appeal to the whole society :—Held, that the society was estopped from disputing E.'s interest in the policy, and his right as member to claim upon it. *Edwards* v. *Aberayron Mutual Ship Insurance Society*, 1 Q. B. D. 563 ; 34 L. T. 457 ; 3 Asp. M. C. 154.

Articles of Association forming part of Policy—Amount Insured not to exceed Four-fifths of declared Value—Vessel of greater Value than declared.]—A policy issued by the respondents,

a mutual marine insurance corporation, stipulated that the provisions contained in the articles of association should be deemed part of the policy. Among the provisions, purporting to be articles, indorsed on the policy was the following :—"The sum insured on any one steamer shall . . . in no case exceed four-fifths of the value of such steamer . . . and it shall be a condition of this insurance that the assured shall keep one-fifth uninsured." This was part of an article, which had been registered, but which, for want of compliance with the formalities of the Companies Act, was invalid. The respondents cancelled the policy because the appellant had insured his steamer with them and another insurance company to a greater amount than four-fifths of her value as declared in their policy. The vessel was lost. In an action on the policy : —Held, that the meaning of the policy was that the insurer should be his own insurer to the extent of one-fifth :—That the condition was binding as a contract, notwithstanding the invalidity of the article on which it was founded :—That it was not open to the appellant to show that the vessel was worth more than the value declared by the policy. *Muirhead* v. *Forth and North Sea Steamboat Mutual Insurance Assn.*, [1894] A. C. 72 ; 6 R. 59—H. L. (Sc.)

Action against Association by Person not a Member.]—By a policy of marine insurance in the form of a deed-poll, the defendants, a mutual insurance association, covenanted to pay losses upon a steamship with a firm described in the deed as "a member." Under the policy members having ships entered were to make good losses on the ship, according to the provisions of the articles of association and the rules. One rule was an arbitration clause, by which the sum to be paid by the association upon any claim was to be settled by the committee ; and if the member agreed to accept the sum so settled, he was entitled to be paid in the mode of payment customary to the association ; and in case of difference the matter was to be decided by arbitrators, to be appointed by the committee and the member, the obtaining of a decision from whom was to be a condition precedent to the right of the member to maintain an action on the policy. The memorandum of association set out that the association was established for the "insurance of ships of members, and of ships which the members may be authorised to assure in their own names." It was provided by the articles of association that "every person who, on behalf of himself or any other person, insures for the protection of any ship . . . shall, as from the date of the commencement of such insurance or protection, be deemed to be a member of the association " ; and, further, that " all claims in respect of insurance or protection shall be made and enforced against the association itself, and not against any member thereof ; but the association shall not be liable to any member or other person for the amount of any loss, claim or demand except to the extent to which the association is able to recover from the members or persons liable for the same." The plaintiffs were part owners of the ship insured in question, and brought, in their own names, an action on the policy against the defendants to recover a loss on the ship :—Held, that this action could not be maintained, since, under the policy, the defendants were expressly excluded from liability to any other person than the firm therein described as a "member." *Montgomerie* v. *United Kingdom Mutual Steamship Assurance Assn.*, 60 L. J., Q. B. 429 ; [1891] 1 Q. B. 370 ; 64 L. T. 323 ; 39 W. R. 351 ; 7 Asp. M. C. 19.

Liability to Member who has Sold his Ship.]—Agreement between shipowners for mutual assurance of each other's ships ; a withdrawing member to give six months' notice ; action against one for a loss. Plea, that the plaintiff had parted with his interest in the ship before the loss. Replication, that the plaintiff by agreement with the purchaser had agreed to pay him 500*l.* if the ship was lost within three months : —Held, that as the plaintiff remained contributory, the other members were liable for his loss. *Reed* v. *Cole*, 3 Burr. 1512.

Action for Contributions—Managing Owner—Principal and Agent.]—The managing and part owner of a steamship became a member of a mutual insurance association, and took out a policy on behalf of himself and his co-owners in respect of the ship. By the articles of association every person was deemed to be a member "who in his own name, or in his name as agent, insures any ship in pursuance of the regulations of the company," and they also provided that the funds required for the payment of claims should "be raised by contributions from all the members." By the policy it was agreed between the assured and the company, "that without prejudice to the rights and remedies of the company against the said person or persons effecting this insurance, as a member or members of the company, in respect of this insurance, the assured shall pay to the company, in lieu of premiums, all the sums and contributions which the company are entitled to call upon the said person or persons effecting this insurance, as a member or members of the company, to pay to the company in respect of this insurance according to the articles of association of the company, and that the provisions contained in the said articles of association shall be deemed and considered part of this policy, and shall, so far as regards this insurance, be as binding upon the assured as upon the said person or persons effecting this insurance." Certain contributions having, in accordance with the articles of association, become payable by the managing owner in respect of the ship, and the managing owner being bankrupt, the association sued the other owners to recover the contributions :—Held, that, under the terms of the policy, they were liable, although the policy was effected by the managing owner alone. *Ocean Iron Steamship Insurance Association* v. *Leslie*, 22 Q. B. D. 722 ; 57 L. T. 722 ; 6 Asp. M. C. 226.

Insurance by Managing Owner—Liability of other Owners for Contribution.]—H. and G., the managing owners of a steamship, insured her in a mutual assurance association in their own names, and the policy was expressed to be "as well in his or their own names as for and in the name or names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in all subject to the provisions hereinafter contained." The consideration stated in the policy was the contributions to be paid from time to time by the assured for losses and averages on other steamships. Such contributions having become payable, the association sued the part owners other than H. and G. to recover the same :—Held, that these part owners

were liable, because the policy was made on their behalf, and they were "assured" within the meaning of the policy, and were expressly bound by the consideration clause to pay these contributions. Quære, whether they became members of the association. *Great Britain* 100 *A* 1 *Steamship Insurance Association* v. *Wyllie*, 58 L. J., Q. B. 614; 22 Q. B. D. 710; 60 L. T. 916; 37 W. R. 407; 6 Asp. M. C. 398—C. A.

Claims against Association—Enforcement in Equity—No Policy.]—A. effected an insurance on a ship with an association by executing the deed of settlement in conformity with the rules, but did not obtain a policy:—Held, that his remedy against the association for the amount due upon the insurance was not by action, but by a bill in equity, to obtain a declaration of his right to specific performance of the engagement by the committee to pay. *Harvey* v. *Beckwith*, 2 H. & M. 429; 10 L. T. 632; 12 W. R. 896.

Undisclosed Principal not Member of Association.]—T., the manager and part owner of a ship, became a member of a mutual insurance association, and took out a policy with such association in respect of the ship. The articles of association gave power to the committee, in order to provide funds for the business of the association, from time to time to direct sums to be paid by the members ratably. By the policy, which was made by the association under their seal, the association agreed with T. that the members thereof should according to the articles of association pay and make good losses and damages to the ship occasioned by the risks insured against, subject to a proviso that the association should be liable only to the extent of so much of the funds as they were able to recover from the members liable for the same, and which were applicable for the purpose of paying claims under the policy. Certain contributions to the funds of the association having, in accordance with the articles, become payable by T. in respect of the ship, and T. being bankrupt, the association sued N., another part owner of the ship, for such contributions as an undisclosed principal of T.:—Held, that the effect of the articles of association and the policy being that the liability for such contributions was imposed on members only, and N. not being a member of the association, he could not be sued for such contributions as an undisclosed principal of T. *United Kingdom Mutual Steamship Assurance Association* v. *Nevill*, 56 L. J., Q. B. 522; 19 Q. B. D. 110; 35 W. R. 746; 6 Asp. M. C. 226, n.—C. A.

Ship Insured without Stamped Policy.]—See *Barrow Mutual Ship Insurance Co.* v. *Ashburner*, ante, col. 1030.

And see 3, RULES, infra.

3. RULES.

Mortgages by Members.]—A rule of a mutual marine insurance association provided that in case of a mortgage or an assignment of any vessel insured in the association, the mortgagee must make himself personally liable to pay premiums:—Held, that the rule was applicable to a depositee who was assignee of the policy within the meaning of the rule. *Alexander* v. *Campbell*, 41 L. J., Ch. 478; 27 L. T. 462; 1 Asp. M. C. 447—C. A.

The rule was not set up as a defence by answer:—Held, that at the hearing a certificate of the ship's register could not be produced to shew that there was a mortgage of the ship itself. *Ib.*

A shipowner entered into an agreement through an agent with an association for the insurance of his ship, and by the agreement, signed by himself, he agreed to abide by the rules and regulations of the association, a copy of which rules was not sent to him. One of these rules was that no member, whose share in a ship insured in the association should be mortgaged, should have any claim to insurance, unless previously to loss such member or mortgagor should have delivered to the manager of the association a deed with a covenant as therein mentioned. The ship was lost at sea, no such delivery of a deed, as required by the stipulation, had taken place, and it was not until the shipowner sent in his claim for insurance that he had actual knowledge of the rule:—Held, that the owner must have imputed to him a knowledge of the rules of the company and the onus was therefore upon him to apply to the mortgagees for the guarantee; and as there was no time fixed for the performance of that duty, there was no waiver by the company of the rule. *Turnbull* v. *Woolfe*, 9 Jur. (N.S.) 57; 7 L. T. 483; 11 W. R. 55.

One of the rules of a mutual marine assurance society provided that "no vessel which is mortgaged shall be insured, unless the mortgagee give a written guarantee to the satisfaction of the committee for payment of all demands on the vessel":—Held, that this applied only to a ship mortgaged at the time of effecting the insurance, and that it did not render a guarantee necessary when a ship was mortgaged after having been insured. *Hutchinson* v. *Wright*, 25 Beav. 444; 27 L. J., Ch. 834; 4 Jur. (N.S.) 749; 6 W. R. 475.

Double Insurance—Mortgage on Ship, Notice of by Member—Estoppel.]—By one of the rules of a mutual marine insurance society it was provided that vessels of a certain class should not be insured for more than three-fourths of their value, and that "if any member insure or attempt to insure elsewhere any ship share or shares in any ship already insured in this society, he shall be liable to immediate expulsion and to forfeiture of any claim or demand he may have against the society." By another rule it was provided as follows: "If it comes to the notice of any member that any vessel or share of a vessel insured by the society is mortgaged, he shall immediately give notice in writing of the name and address of the mortgagee. The board of directors may then require the mortgagee to give such security as they deem necessary for the payment to them of all sums which are or may become due on account of such insurance. If such notice is not given, or if the mortgagee refuse to give such security as the society requires, the member in whose name the insurance is registered shall during the existence of such mortgage forfeit all claims upon the society in respect of such vessel or share to the extent of such mortgage thereon." P., on behalf of the owner of the ship "Bolina," insured her in the defendant society for 600*l.* P. was entered in the society's books as the policy-holder, and the policy was issued to him. The "Bolina" was at the time when the insurance was effected insured in another society for 300*l.*, of which insurance the defendants had knowledge, and the sum of 300*l.* together with the 600*l.* above-mentioned amounted to more than

three-fourths. but less than the whole amount at which the directors of the defendant society valued her. During the subsistence of the policy P. became aware that the "Bolina" had been mortgaged by the owner for 300*l*., but no notice of the mortgage was ever given to the society. In an action by the representatives of the owner: —Held, that the society, after issuing the policy of insurance on the "Bolina" with the knowledge that she was insured elsewhere, was estopped from relying on the rule as to double insurance; but that as P., who was a member of the society, had not given notice of the mortgage of which he had knowledge, the amount of that mortgage must be deducted from the sum payable under the policy. *Jones* v. *Bangor Mutual Shipping Insurance Society*, 61 L. T. 727; 6 Asp. M. C. 450.

Expulsion of Member.]—A member received notice of expulsion from this society upon the ground that his conduct was suspicious without having an opportunity of meeting any charge brought against him. The committee who sent the notice, had power to expel any member whose conduct they deemed to be suspicious. The member brought an action for damages against the members of the committee, alleging that he had thereby lost the benefit of his insurance and had suffered other damages:—Held, by Kelly, C.B., Pollock and Amphlett, BB., that the declaration shewed no cause of action on the ground that the expulsion was void, if the allegations were true; by Cleasby and Pollock, BB., on the ground that the declaration did not sufficiently charge mala fides. *Wood* v. *Woad*, 43 L. J., Ex. 153; L. R. 9 Ex. 190; 30 L. T. 815; 22 W. R. 709; 2 Asp. M. C. 289.

Notice.]—By the rule of a mutual assurance society, the insured was bound to give notice to the directors of any change of the captain of his vessel, and, in case of default, the society was not to be liable for any subsequent loss. By another rule, notices to members sent by post were to be effectual, though not actually received: —Held, that the directors of the society were members within the latter rule, and that a notice of a change of captain sent to them by post was valid, though not actually received by them. *Brandford* v. *Howard*, 35 Beav. 613.

Contribution by Members.]—A mutual insurance association, by which the members were to insure each other's ships, and to bear the loss in proportion to the premiums charged against each member, and by which the manager was authorised by power of attorney to recover the premiums, to settle all losses, and to draw on members for their several proportions of such losses, issued to its members a policy, in the ordinary form of a Lloyd's policy, with the rules of the association indorsed on and incorporated with the policy. There were printed in the policy, in a line by themselves, the words "twenty pounds per centum" immediately after the acknowledgment "confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of." The rules indorsed contained nothing to limit the liability of the members to 20*l*. per cent.:—Held, that notwithstanding those words in the policy, the liability of members to contribute the payment of losses was not limited to 20*l*. per cent. *Gray* v. *Gibson*, 36 L. J., C. P. 99; L. R. 2 C. P. 120; 15 W. R. 70.

A. and B. were members of a mutual insurance society, and B., with the other members of the society, was insured to A. upon his ship in a sum specified in a policy, subscribed by B. and the other members of the society. Annexed to the policy, and forming part of it, were the following rules:—The members of this association shall severally, and not jointly or in partnership, or the one for the other of them, but each only in his own name, insure each other's ships from the date of entry of each until noon of the 20th of February then next, and from that time until noon of the 20th of February in the next succeeding year, and so on from year to year, against all losses. In order more readily to provide for the payment of claims, the managers are empowered to levy contribution of one-fourth part of the fixed annual premium, which shall be drawn for in a prescribed manner. Provided always, that if the gross amount of losses and expenses during the year shall happen to exceed the amount of the premiums so realised, the deficiency shall be made good by an additional percentage which the members, during the year, shall be bound to contribute and pay to the managers; but should the premiums so realised exceed the losses, then the surplus shall be returned in proportion to the amount of premium respectively contributed by them. The managers' drafts on the members of the association for their proportion of the annual fixed premium, and for any additional percentage, shall be duly accepted, and punctually paid when due; and if any member shall neglect to accept any such drafts, or to pay his contributions, on receiving notice from the managers, his respective ship or ships shall immediately cease to be insured in this association, and he shall thenceforth forfeit all claims in respect of any loss, under his policy; but he shall still remain liable to contribute to all losses and averages which may occur during the period for which any such policy was originally granted, and the amount due from any defaulting member shall be considered as a debt due to the managers, and shall be recoverable by them at law:—Held, that, on the true construction of the rules and under the circumstances as they appeared on the record, B. was not individually liable. *Redway* v. *Sweeting*, 36 L. J., Ex. 185; L. R. 2 Ex. 400; 16 L. T. 495; 15 W. R. 908.

S. made an application in writing to become a member of a mutual assurance association in respect of an insurance for 300*l*. upon his ship; the ship was accepted and an unstamped copy of a policy returned to him. By the regulations of the association he would have to contribute to losses upon the ships of other members. No stamped policy was ever executed by him. He contributed to losses upon some ships of various members. His own ship sustained an injury, but before the amount of the loss could be estimated, the association was ordered to be wound up:—Held, that he was not a contributory, as the unstamped policy could not, under 35 Geo. 3, c. 63, be received in evidence of his agreement to become a member. *London Marine Insurance Association, In re, Smith, Ex parte*, 38 L. J., Ch. 681; L. R. 4 Ch. 611; 21 L. T. 97; 17 W. R. 941.

Repayment of Premiums.]—An association was not registered under the companies acts. Persons became members by effecting mutual policies; members were empowered also to effect "special rate policies." The applicants were not

members, but had taken out a "special rate policy," signed per procuration by J. and S., the managers, who gave and accepted on their personal liability a bill of exchange for the amount assured. In a similar case, the amount assured had been disallowed by the appeal court as a claim made on the association. J. and S. became insolvent, and their acceptance was dishonoured. De W. & Co. claimed that the amount of the premiums should be repaid them by the members of the association:—Held, that they were not entitled to have the premiums repaid, because, first, as they well knew, J. and S. had no power, as agents, to grant such a policy to non-members; and secondly, there was no failure of consideration, as J. and S. had made themselves personally liable. *Arthur Average Association, In re, De Winton's Case*, 34 L. T. 942; 3 Asp. M. C. 245.

Arbitration — Proper Hearing.] — In an action for collision, it appeared that the plaintiff's vessel and the defendant's vessel were insured in a mutual insurance company, by the rules of which it was provided that, in the event of a collision occurring between two vessels insured in the company, &c., the owners of such vessels should immediately submit a statement of the whole circumstances of the collision . . . and the directors, after receiving such statement, should have power to arbitrate on the matter, and their decision should be final. The plaintiff gave notice of the collision to the secretary of the company. The secretary obtained statements as to the collision from the master of the plaintiff's vessel, and from the master of the defendant's vessel. A meeting of directors was held, at which the defendant's master was present, but no one on behalf of the plaintiff, and a resolution was passed that the defendant's vessel had not been in collision with that of the plaintiff:—Held, that there had never been a proper hearing of the case by the directors; that the resolution passed by them was therefore not an arbitration within the meaning of the rule, and that the plaintiff was not estopped by it from bringing an action for damage. Semble, that the rule must be taken to mean that it should be a condition precedent to an arbitration that both parties had agreed as to the fact of a collision having taken place. *The Warwick*, 15 P. D. 189; 63 L. T. 561; 6 Asp. M. C. 545.

—— **Estoppel — Condition Precedent.**] — A. effected in a mutual insurance company a policy of insurance on ship, one of the conditions of which was, that the sum to be paid to any insurer for loss should, in the first instance, be ascertained by the committee; but if a difference should arise between the insurer and the committee, "relative to the settling of any loss, or to a claim for average, or any other matter relating to the insurance," the difference was to be referred to arbitration, in a way pointed out in the conditions: "provided always, that no insurer who refuses to accept the amount settled by the committee shall be entitled to maintain any action at law or suit in equity on his policy," until the matter has been decided by the arbitrators, and "then only for such sum as they shall award"; and the obtaining the decision of the arbitrators was declared a condition precedent to the maintaining of an action:—Held, that these conditions were lawful, and that (even should the difference relate to other matters than those of mere amount) till award made no action was maintainable. *Scott* v. *Avery*, 5 H. L. Cas. 811; 25 L. J., Ex. 308; 2 Jur. (N.S.) 815; 4 W. R. 746. But see as to fraud on questions of law. *Alexander* v. *Campbell*, 41 L. J., Ch. 478; 27 L. T. 25; 1 Asp. M. C. 373, 447.

Limited by Guarantee—Limitation of Liability — Members having Twofold Liability.] — A mutual marine insurance association was incorporated, under the Companies Act, 1862, as an association limited by guarantee. The memorandum of association declared that every member undertook to contribute to the assets of the association, in the event of its being wound up, a sum not exceeding 5*l.* for the payment of the debts and liabilities of the association, and the costs, charges and expenses of winding it up, and for the adjustment of the rights of contributories amongst themselves. The defendant entered his ship to be insured in the association, and by the rules of the association he, by so doing, also became an insurer of the ships of other members of the association who entered their ships in the same class. While the defendant continued to be a member the association was wound up. In an action brought, pursuant to the rules of the association, to recover from the defendant a sum of 35*l.* as contribution towards losses incurred by other members insured in the same class as that in which he had entered his ship, the defendant contended that his liability was limited by the memorandum of association to a sum of 5*l.*:—Held, that the limit of 5*l.* only applied to the liabilities incurred by the defendant as a member of the association to the association, and that his liability as an insurer towards the other members of the association who entered their ships in the association was not limited to that amount. *Lion Mutual Marine Insurance Association* v. *Tucker*, 53 L. J., Q. B. 185; 12 Q. B. D. 176; 49 L. T. 764; 32 W. R. 546—C. A.

Annual Policies—Forfeiture for Nonpayment of Contribution—Set-off of Contribution against Loss.]—By the rules of a marine insurance association the members insured each other's ships from noon of February 20 in any year, or from the date of entry of a vessel until noon of February 20 in the succeeding year; and the managers were empowered to levy contributions of one-fourth part of the estimated annual premium quarterly in each year, such premiums of insurance to form a fund for the payment of claims, and if any member should refuse to pay his contributions thereto, his ship should cease to be insured, and he should thenceforth forfeit all claims in respect of any loss. On the 5th April, 1881, a loss, incurred in the year 1880-1 upon a ship belonging to the plaintiff, and insured in the association, was fixed by an average-adjuster at 180*l.* A call of 41*l.* 10*s.*, made on the plaintiff on the 5th May, 1881, for the second quarter of 1881-2, was by mutual consent set off against the loss. On the 13th May, 1881, the association paid the plaintiff 100*l.* on further account of the loss. On the 23rd June, 1881, a call was made on the plaintiff of 52*l.* 16*s.* 8*d.*, and on the 5th July, 1881, another call of 31*l.* 4*s.* The plaintiff having tendered the balance due from him, the association refused to accept it, and during the pendency of an action to recover

the full amount of the two calls one of the plaintiff's ships insured in the association was wholly lost:—Held, on case stated, that the plaintiff's ship did not cease to be insured, and that he had not forfeited his claim in respect of the loss. *Williams* v. *British Marine Mutual Insurance Association*, 57 L. T. 27; 6 Asp. M. C. 134. *And see* 1, ACTIONS FOR CONTRIBUTION, supra.

4. WINDING-UP.

Claim by Creditor—Admission in Books.]—A. insured a ship in a mutual insurance association in 1863, and the policy, which was not stamped, was annually renewed up to the year ending March, 1868. In February, 1868, the ship, with A. on board, was lost at sea. The loss of the ship was reported to the association, and from entries in the minute books the money due upon the policy was raised by order of the committee, but retained by the secretary until a personal representative to A. had been appointed. The company was ordered to be wound up in January, 1870, and A.'s widow obtained letters of administration to him in December, 1871. Upon a claim by the widow under the winding-up for the amount secured by the policy:—Held, that there was a sufficient admission of liability in the books of the company to enable the widow to recover as a creditor for the amount secured by the policy, although, from the absence of a stamp, the policy itself, upon which the claim arose, could not be given in evidence. *Teignmouth and General Mutual Shipping Association, In re, Martin's Claim*, 41 L. J., Ch. 679; L. R. 14 Eq. 148; 26 L. T. 684; 1 Asp. M. C. 325.

Contributories—Evidence.]—B. & Co., by letter, authorised the managers of a mutual marine insurance association to insure a ship with the association, and undertook to abide by the rules and regulations thereof. By the rules, each insurer became liable to contribute to the losses of any other insurer in certain proportions. In pursuance of the authority given by B. & Co., a duly stamped policy was issued to them, which, however, contained no reference to the rules:—Held, that the letter, although not stamped, was admissible in evidence, and that B. & Co. were contributories. *Albert Average Association, In re, Blyth's Case*, L. R. 13 Eq. 529; 20 W. R. 504.

Removal of Contributory.]—An unregistered mutual marine assurance association was ordered to be wound up in 1870. A rule of the association provided that any policy-holder should cease to be a member forty-eight hours after the loss of his ship. A. had ceased to be a member under this rule in 1867, but a part of the sum insured by his policy was still due at the date of the winding-up. A. proved his debt in the winding-up, was put upon the list of contributories, and paid a call. In 1875 all the policies were held to be illegal, and all the debts of the company were consequently expunged, except 42*l.* due to outside creditors. On an application by A. to have his name removed from the list of contributories:—Held, that it could not be so removed, and that he was liable to contribute to the costs of the winding-up. *Queen's Average Association, In re, Lynes, Ex parte*, 38 L. T. 90; 26 W. R. 432; 3 Asp. M. C. 576.

Mutual Marine Insurance Association—Rights of Creditors and Contributories inter se.]—Order made for winding up an unregistered mutual marine insurance association:—Held, that the order did not affect the contract made between the parties; that the liability of each member extended only to the payment of such proportions as the rules prescribed of the various losses that occurred during the subsistence of his policy; that payment to the secretary discharged each member to the extent of such payment; that outside creditors were creditors, not of the association or of the members collectively, but of the persons who ordered goods or services; that the costs of winding-up were to be borne by payers and receivers ratably according to the amounts paid or received by them respectively. *London Marine Assurance Association, In re, Andrew's and Alexander's Case, Chatt's Case, Cook's Case, Crew's Case*, L. R. 8 Eq. 176; 20 L. T. 943; 17 W. R. 784.

And see *Arthur Average Association*, 45 L. J., Ch. 346; 3 Ch. D. 522; 34 L. T. 388; 24 W. R. 514; supra, col. 1035.

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SHORT CAUSE.

See PRACTICE.

SHORTHAND NOTES.

See APPEAL—COSTS.

SIERRA LEONE.

See COLONY.

SIGNATURE.

See DEED AND BOND—PRACTICE (PLEADING).

SIMONY.

See ECCLESIASTICAL LAW.

SLANDER.

See DEFAMATION.

SLANDER OF TITLE.

Malice Necessary to maintain Action.]—There must be malice, either express or implied, to maintain an action for slander of title. *Hargrave* v. *Le Breton*, 4 Burr. 2422.

—— **Statement by Lessor that Covenants of Lease Broken.**]—The defendant, who was the ground landlord and remainderman of a lease of premises of which the plaintiff was assignee,

stated at an auction where the lease and assignment were put up for sale, that all the covenants of the lease had been broken, that he had served a notice in ejectment, and that the premises would cost 70*l.* to repair. Some of the covenants had been broken and others not. The effect of the statement was that the lease and assignment were sold for a lower price than they otherwise would have produced. In an action for slander of title the judge directed the jury that the only question was, whether the defendant had said anything untrue about the lease, and that if he had made misrepresentations, the plaintiff was entitled to recover :—Held, that this was a misdirection, the proper question being whether that part of the defendant's statement which was false was also malicious and productive of damage to the plaintiff. *Brook* v. *Rawl*, 4 Ex. 521 ; 19 L. J., Ex. 114.

—— **Claim under Bill of Sale.**]—A. died possessed of furniture in a beershop. His widow, without taking out administration, continued in possession of the beershop for three or four years and then died, having whilst so in possession conveyed all the furniture by a bill of sale to her landlords by way of security for a debt she had contracted with them. After the widow's death the plaintiff took out letters of administration to her husband's estate, and informed the defendant, the landlord's agent, that the bill of sale was invalid, as the widow had no title to the furniture. Subsequently the plaintiff was about to sell the furniture by auction, when the defendant interposed to forbid the sale, and said that he claimed the goods for his principals under a bill of sale. On proof of these facts in an action for slander of title the plaintiff was nonsuited :—Held, that the mere fact of the defendant having been told before the sale that the bill of sale was invalid, was no evidence of malice to be left to the jury, and that the plaintiff was therefore properly nonsuited. *Steward* v. *Young*, 39 L. J., C. P. 85 ; L. R. 5 C. P. 122 ; 22 L. T. 168 ; 18 W. R. 492.

—— **Not implied from Mistake of Law.**]—In an action for slander of title, where it is necessary for the plaintiff to prove malice, the court will not infer malice from the defendant having put a wrong construction on a complicated act of parliament. *Pater* v. *Baker*, 3 C. B. 831 ; 16 L. J., C. P. 124 ; 11 Jur. 370.

Action applies in case of both Real and Personal Property.]—The action for slander of title applies not only to cases where the false and malicious assertion relates to real property, but where it relates to personal chattels. *Wren* v. *Weild*, 10 B. & S. 51 ; 38 L. J., Q. B. 327 ; L. R. 4 Q. B. 731 ; 20 L. T. 1007.

Bonâ-fide Claim of Title not Actionable—Notice of Infringement of Patent.]—When a person claims a right in himself, which he intends to enforce against a purchaser, he is entitled, and in common fairness bound, to give the intended purchaser warning of his intention, and no action lies for giving such preliminary warning, unless it can be shown, either that the threat was made malâ fide, only with the intent to injure the vendor, and without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful. *Ib.*

The plaintiffs alleged in their declaration that the defendant falsely and maliciously wrote to and told persons, who had bought certain machines of the plaintiffs, that the machines were infringements of the defendant's patents, and that the defendant claimed royalties for the use of the machines, and that if they used the machines without paying royalties, he should take legal proceedings. The plaintiffs offered to prove various specifications and machines, existing before the date of the defendant's patent, to shew that his specification claimed matters that were not new, and also that the defendant had used them. The judge ruled that, as the defendant's patent was still subsisting, and not set aside, on scire facias or otherwise, the evidence was immaterial, and directed a nonsuit :—Held, that the ruling of the judge was right. *Ib.*

The holder of a patent, the validity of which is not impeached, who issues notices against purchasing certain articles, alleging that they are infringements of his patent and threatening legal proceedings against those who purchase them, is not liable to an action for damages by the vendor of those articles for the injury done to the vendor's trade by his issuing them, provided they are issued bonâ fide in the belief that the articles complained of are infringements of his patent. Nor is he liable to be restrained by injunction from continuing to issue them until it is proved that they are untrue, so that his further issuing them would not be bonâ fide. *Halsey* v. *Brotherhood*, 51 L. J., Ch. 233 ; 19 Ch. D. 386 ; 45 L. T. 640 ; 30 W. R. 279—C. A.

—— **Statement as to Breach of Covenant in Lease.**]—A lease, in which was a proviso for re-entry if the rent was in arrear twenty-eight days, being exposed to sale by the assignee, and rent being then in arrear, the lessor announced at the sale, that the vendors could not make a title, in consequence of which, bidders who came to buy went away ; he afterwards offered 100*l.* for the lease, but subsequently recovered the premises in ejectment :—Held, that no action for slander of title lay against him. *Smith* v. *Spooner*, 3 Taunt. 246 ; 12 R. R. 645.

The defendant may give evidence under the general issue, that he spoke the words claiming title in himself. *Ib.*

—— **By Agent of Claimant.**]—An attorney of a party claiming title to premises put up to sale is not liable in an action of slander of title, if he bonâ fide, though without authority, makes such objections to the other's title as his principal would have been authorised in making. *Watson* v. *Reynolds*, M. & M. 1 ; 31 R. R. 706.

Bonâ-fide Statement by Person Interested—Imputing Insanity to Person from whom Vendor Bought.]—In an action for slander of title, conveyed in a letter to a person about to purchase an estate of the plaintiff, imputing insanity to Y., from whom the plaintiff purchased it, and that the title would therefore be disputed, per quod, the person refused to complete the purchase :—Held, that the defendant, who had married the sister of Y., who was heir-at-law to her brother, in the event of his dying without issue, was not to be considered as a mere stranger ; and that the question for the jury was not whether they were satisfied, as men of good sense and good understanding, that Y. was insane, or that the defendant entertained a persuasion that he was insane, upon

such grounds as would have persuaded a man of sound sense and knowledge of business, but whether he acted bonâ fide in the communication which he made, believing it to be true, as he judged according to his own understanding, and under such impressions as his situation and character were likely to beget. *Pitt* v. *Donovan*, 1 M. & S. 639 ; 14 R. R. 535.

Statement in Excess of Occasion—Sale of Disputed Bond.]—The plaintiff having advertised for sale a bond executed to him by the defendant as a surety, the payment of which had been resisted in a long course of litigation, in which the validity of the bond had been disputed ; the defendant, pending a suit in error, published among the persons assembled to bid for the bond at an auction a statement of all the circumstances under which the bond was given, and, alluding to the plaintiff, concluded, "His object is either to extract money from the pocket of an unwary purchaser, or, what is more likely, by his threat of publication, to extort money from me" :—Held, that this exceeded the latitude allowed for privileged communications or observations on titles by a party interested, and that it was a libel, although no express malice was proved. *Robertson* v. *M'Dougall*, 4 Bing. 670 ; 1 M. & P. 692 ; 3 Car. & P. 259 ; 6 L. J. (O.S.) C. P. 171.

Advertisement for Non-existing Will—Question of Bona Fides.]—In an action for slander of title, the defendant having issued an advertisement offering a reward for the production of a will of a deceased person, whose property the plaintiff was about to sell, as administrator, after having been told by the attorney for the deceased that there was no will :—Held, that the question was whether, after this, he had an honest and reasonable belief that there was a will. *Atkins* v. *Perrin*, 3 F. & F. 179.

Shares in Mine.]—The plaintiff being possessed of shares in a silver mine, the defendant published that the "petition in a bill filed in the court of chancery against the plaintiff and certain other persons, as shareholders in the mine, for an account and injunction had been granted by the vice-chancellor, and that persons duly authorised had arrived on the workings" : —Held, that the publication was not a libel on the plaintiff or on his business, but a mere slander of his title to the shares. *Malachy* v. *Soper*, 3 Bing. (N.C.) 371 ; 3 Scott, 725 ; 2 Hodges, 217 ; 6 L. J., C. P. 32.

Copyright—Songs.]—The plaintiffs, vocalists, advertised in a theatrical newspaper as follows : —"The sisters Hartridge have great pleasure in thanking Messrs. Chappell & Co., Messrs. Metzler & Co." (music publishers) "and others, for their kind, unhesitating permission to sing any morceaux from their musical publications." The defendant, who was interested as agent for the proprietors for the stage-right of certain songs published by the firms mentioned, wrote to the proprietors of two music-halls at which the plaintiffs were engaged to sing, to the effect that the advertisement, if relied upon in every particular, was calculated to lead them to incur penalties under the Copyright Act, inasmuch as the publishers named had, in some instances, no power to give the alleged permission, and insinuating that music-hall singing was not calculated to create a demand for their musical publications :—Held, that, inasmuch as the letters were reasonably susceptible of a construction which would make them libellous, the opinion of the jury ought to have been taken upon their meaning. *Hart* v. *Wall*, 46 L. J., C. P. 227 ; 2 C. P. D. 146 ; 25 W. R. 373.

—— **Wool Pattern taken from Engraving.**]—D., the proprietor of a periodical, published with his Christmas number a pattern for wool-work, consisting of the figures in Millais' picture, "The Huguenot," with a different background. The pattern appeared not to have been taken from the original picture, but to have been made by means of a fine engraving published in 1857. The pattern, as usual in patterns of this kind, was a mosaic, built up of small coloured squares. B., who was the owner of the copyright in the engraving, but was not owner of the picture, issued a circular : "We give you notice that if you sell, &c., any copy of our subject, 'The Huguenot,' without the stamp or imprint of our firm, in whom the sole subsisting copyright exists, that all such unstamped copies are imitations and unlawfully made." D. therefore brought an action against B. for damages, and an injunction in respect of the alleged slander of his title ; B., by counterclaim, claimed an injunction against the sale of the pattern, and penalties in respect of the infringement of his copyright : —Held, by Bacon, V.-C., that the pattern was an infringement of B.'s copyright, and that he was entitled to the statutory penalty of 5*s.* for every copy sold by D. But held, on appeal, that a pattern of this description was not a copy of the engraving within the meaning of 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57, as it did not copy or imitate anything which constituted the work of the engraver ; and that the counter-claim ought therefore to have been dismissed. *Dicks* v. *Brooks*, 49 L. J., Ch. 812 ; 15 Ch. D. 22 ; 43 L. T. 71 ; 29 W. R. 87.

Disparagement of Trade Goods.]—To publish of a tradesman falsely and without lawful occasion that the goods in which he trades are inferior in quality to similar goods in which his rivals trade, is actionable if special damage results. *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*, 43 L. J., Ex. 171 ; L. R. 9 Ex. 218 ; 23 W. R. 5.

Joseph Thorley died in 1876, having for years carried on the manufacture of a condiment well known as "Thorley's Food for Cattle." His executors continued his business. In 1877 a company was formed for manufacturing the same article, and employed a brother of Joseph Thorley who was acquainted with the secret of the manufacture. The executors published in the newspapers an advertisement warning the public that any food purporting to be Thorley's food for cattle, and not signed "Joseph Thorley," was not the manufacture of the establishment carrying on business as Joseph Thorley, the proprietors of which were alone possessed of the secret for compounding the food. The executors also issued a circular to their customers warning them against the course pursued by the company "in seeking to foist upon the public an article which they pretend is the same as that manufactured by the late Joseph Thorley." The court came to the conclusion that there was no substantial difference between the food sold by the executors and that sold by the company :—

Held, that the advertisement and circular contained untrue representations calculated to injure the company in their trade, and that the issuing of them ought to be restrained by injunction. *Thorley's Cattle Food Co.* v. *Massam*, 14 Ch. D. 763; 42 L. T. 851; 28 W. R. 966—C. A.

An action will not lie for a false statement disparaging a trader's goods where no special damage is proved. The appellant sold the respondent's "infants' food," affixing to the respondent's wrappers a label stating that the appellant's "food for infants and invalids" was far more nutritious and healthful than any other. It was not proved that the statement was untrue, or that it had caused any damage to the plaintiff:—Held, that no action would lie. *White* v. *Mellin*, 64 L. J., Ch. 308; [1895] A. C. 154; 11 R. 141; 72 L. T. 334; 43 W. R. 353; 59 J. P. 628—H. L. (E.)

See also *Evans* v. *Harlow*, D. & M. 507; 13 L. J., Q. B. 130; 5 Q. B. 624; 8 Jur. 571.

Restraining by Injunction.]—The court has now jurisdiction to restrain by injunction the publication of a libel injurious to trade. *Thomas* v. *Williams*, 49 L. J., Ch. 605; 44 Ch. D. 861; 43 L. T. 91; 28 W. R. 983.

Where an action will not lie for defamation an injunction will not be granted. *White* v. *Mellin*, ubi supra.

In a case of trade libel, whether the remedy sought be injunction or damages, special damages must be proved. *Ib.*

—— **Burden of Proof of Falsity of Statement and Mala Fides on Plaintiff.**]—Where a plaintiff brings an action to restrain a defendant from issuing notices to the plaintiff's customers that the plaintiff in selling goods is infringing the defendant's patent rights, it is for the plaintiff to prove that the defendant's statements are false; and if no mala fides is proved, and no damages could be obtained, the court will not grant the injunction. If in a judicial proceeding the statements are proved to be false in fact, an injunction would be granted against continuing them, as that would be acting mala fides. *Burnett* v. *Tuk*, 45 L. T. 743.

—— **Interlocutory Injunction.**]—To obtain an interlocutory injunction restraining the defendant from issuing circulars, &c., stating the wrongful user by the plaintiff upon his manufactured articles of labels claimed by the defendant, and from threatening the plaintiff's customers with legal proceedings for selling his articles bearing the labels in question, the plaintiff must satisfy the court that the statements in the circulars, &c., complained of are in fact untrue. The fact that the defendant, having commenced actions against the plaintiff and his customers for injunctions restraining the wrongful user of the labels in question, had not thought fit to move for interlocutory injunctions, held to be no ground by itself for granting the plaintiff the injunction sought for. *Anderson* v. *Liebig's Extract of Meat Co.*, 45 L. T. 757.

See also Cases, ante, Vol. V., cols. 663–666.

J. S.

SLAUGHTER-HOUSE.

See METROPOLIS.

SLAVERY AND SLAVE TRADE.

Status and Condition of Slaves.]—Slavery is of such a nature that it is incapable of being introduced into this country, on any reasons, moral or political, and can be no farther considered in this country than as is supported by positive law. *Somerset* v. *Stewart*, Lofft, 1.

Where negroes in a state of slavery in a colony of Spain escaped from their master's plantation, and took refuge and were received on board a British ship of war, whilst she was stationed at an island captured by his majesty's arms from the United States, in time of war; and after notice given to the officers commanding on the station, that they were runaway slaves, the officers carried them to and left them at a British colony:—Held, that an action would not lie in this country by a British subject, who claimed the slaves as his property, against the officers for harbouring and detaining such negroes; although, by the lex loci whence they escaped, slavery was permitted and tolerated. *Forbes* v. *Cochrane*, 3 D. & R. 679; 2 B. & C. 448; 2 L. J. (O.S.) K. B. 67; 26 R. R. 402.

Action by.]—No action lies by a slave, coming to this country and continuing his service, for wages on an implied contract. *Alfred* v. *Fitzjames* (*Marquis*), 3 Esp. 3.

Contract by.]—An infant slave in the West Indies executed an indenture, by which he covenanted to serve B. for a certain term of years as his servant, and B. covenanted to do certain things on his part; B. then came to England with the slave; in an action against A., who had seduced him from the service of B., A. was not permitted to allege that the contract was void as being made by an infant and a slave, for the court held that the effect of such a contract might be the manumission of the slave; and, consequently, that it was for his own benefit; and being for his own benefit, that it was, at most, only voidable by the infant himself. *Keane* v. *Boycott*, 2 H. Bl. 511; 3 R. R. 494.

Right of Property in.]—Slaves in Antigua could not be equitably mortgaged by a deposit of a registered title-deed, containing a schedule of slaves, if the memorandum accompanying the deposit, which is registered, do not contain a list of the slaves. *Borrodaile, Ex parte*, 2 Mont. & Ayr. 398. Reversing *S. C.*, sub nom. *Rucker, Ex parte*, 1 Mont. & Ayr. 481; 3 Deac. & C. 704.

By the laws of Antigua, slaves were declared to be inheritance and affixed to the inheritance; and by 59 Geo. 3, c. 120, s. 9, no deed or instrument conveying any interest in slaves was valid, unless the registered names and descriptions of the slaves were set forth in the instrument or in some schedule thereof. The bankrupts deposited with R. & Co., as security for a loan of money, a deed of conveyance to the bankrupts of a plantation and slaves in Antigua, with a written memorandum accompanying the deposit. The deed contained a schedule of the registered names and descriptions of the slaves, but they were wholly omitted in the memorandum of the deposit:—Held, that this was not a good equitable mortgage of the slaves mentioned in the deed; and, secondly, that the slaves, being real property in the island of Antigua, could not be considered as

within the order and disposition of the bankrupts at the time of their bankruptcy. *Ib.*

A testator resident in Jamaica devised the rents, issues and profits of his estate, called Islington and Cove's Pen, in that island, to A. and B.:—Held, that the estate and the slaves, mules, cattle and machinery thereon, passed under this devise. *Stewart* v. *Garnett*, 3 Sim. 398.

The compulsory manumission or sale of slaves effected by the Abolition of Slavery Act (3 & 4 Will. 4, c. 73), so impressed slaves with the character of personal estate from the passing of the act, that the compensation money for slaves passed under the will of a testator, made after the passing of the act, and who died before the period of manumission had arrived, although the will was not attested so as to pass real estate. *Richards* v. *Att.-Gen. for Jamaica*, 6 Moore, P. C. 381; 13 Jur. 197.

In estimating the compensation due for the loss of sugar estates unduly held under sequestration for a number of years, and of the actual produce of which during that time there was no evidence:—Held, that the allowance of 10*l.* per annum for each negro on the estate is not a right principle to proceed upon. Semble, that the proper principle to proceed on, under such circumstances, would be to ascertain the average number of hogsheads of sugar such estates usually produced, and to award compensation for the value of that number in each year, after deducting a proper sum for the expenses of cultivation. A country reconquered from an enemy reverts to the same state that it was in before its conquest. The British inhabitants of a part of the French dominions which was conquered by the Dutch, and afterwards reconquered by the French, ought therefore to have had, after its reconquest, the same protection that they were entitled to under the treaty of commerce of 1786; and were awarded compensation in respect of losses, after the reconquest, by sequestration of their property, in contravention of that treaty by the French government. *Gumbes's Case*, 2 Knapp, 369.

Compensation under Slavery Abolition Act.]—The consignee of a West India estate, even though appointed by the court, is not entitled, during the continuance of his office, to be paid the balance due to him out of the compensation money awarded under the act for the abolition of slavery. *Farquharson* v. *Balfour*, 8 Sim. 210.

The consignee of a West India estate, who had, out of his own moneys, made payments on account of an annuity charged on the estate, was held entitled to be reimbursed such payments out of compensation money, which had been awarded under the act for the abolition of slavery. *Shaw* v. *Simpson*, 1 Y. & Coll. C. C. 732.

Quære, whether such a consignee has a lien on the corpus of the estate for moneys expended by him in its cultivation. *Ib.*

Lessee of slaves held entitled to a portion of the money awarded under the West India Compensation Act, notwithstanding a covenant in the lease to refer to arbitration in case of loss by abridgment of the labour of slaves, or diminution of the returns, by means of any act of parliament or regulation of the colonial legislature; the act for the total abolition of slavery not having been contemplated by the parties. *Gordon* v. *Bruce*, 2 Moore, P. C. 261.

Trading and Trafficking in.]—A foreigner who is not prohibited from carrying on the slave trade by the laws of his own country, may, in an English court of judicature, recover damages which may have been sustained by him in respect of a wrongful seizure by a British subject of a cargo of slaves on board a ship employed by him in carrying on the African slave trade. *Madrazo* v. *Willes*, 3 B. & Ald. 353; 22 R. R. 422. See *Farmer* v. *Legg*, 7 Term Rep. 186.

An American ship was fitted out in the port of Liverpool, and sent to the coast of Africa, in 1806, on a joint adventure for trafficking in slaves. An English ship was sent at the same time, by the same parties, with arms and ammunition, to be at the disposal of the supercargo of the American ship; security having been given to the admiralty that they were to be expended on trade on the coast of Africa. On the arrival of the two ships in the River Congo, the arms and ammunition were transhipped on board the American ship, which was thereupon seized by a British privateer, and ultimately condemned as contraband:—Held, that the whole transaction was illegal, and that no action for contribution or account, in regard thereto, could be maintained by any of the parties concerned against the other. *Stewart* v. *Gibson*, 7 Cl. & F. 707.

British subjects, domiciled in Great Britain, being possessed of slaves in the Brazils, where the purchase and holding of slaves are lawful, contracted with a Brazilian subject domiciled in the Brazils, to sell them to him, to be used and employed there. Some of the slaves had been purchased by the English subjects in the Brazils, after 5 Geo. 4, c. 113, but before 6 & 7 Vict. c. 98, for the purpose of being employed; and these were employed in the working of mines there, of which they were the proprietors; the rest of the slaves were the offspring of those first mentioned, and were in their possession before the passing of the last act:—Held, that the contract might be enforced here, there being nothing in the statutes to prohibit a contract by a British subject for the sale of slaves lawfully held by him in a foreign country, where the possession and sale of slaves are lawful. *Santos* v. *Illidge*, 8 C. B. (N.S.) 861; 29 L. J., C. P. 348; 6 Jur. (N.S.) 1348; 3 L. T. 154; 8 W. R. 705—Ex. Ch.

A naval commander, stationed on the coast of Africa, with instructions to suppress the slave trade, was requested by the governors of Sierra Leone to obtain the liberation of two British subjects, detained as slaves at the Gallinas by the son of the king of that country, and in effecting the object to use force, if necessary. He accordingly proceeded to the Gallinas with an armed force, and having landed at Dombocorro, took military possession of a barracoon belonging to the plaintiff, who was a Spaniard, carrying on the slave trade at the Gallinas. He then communicated with the king of the country, and the two British subjects having been released, the commander concluded a treaty for the abolition of the slave trade in that country. In execution of this treaty, he fired the barracoons of the plaintiff, and carried away his slaves to Sierra Leone, where they were liberated. Some of the plaintiff's goods used in the slave trade were claimed by the king as forfeited, and delivered up to him; other goods were destroyed. These proceedings having been communicated to the lords of the admiralty, and the secretaries of state for the foreign and colonial departments, they respectively, by letter, adopted and ratified the

act of the commander :—Held, first, that the plaintiff had a property in his slaves, and might maintain trespass for their seizure, the slave trade not being piratical by the law of nations, and it not appearing that Spain had passed any law abolishing the slave trade, pursuant to the treaty embodied in 6 & 7 Will. 4, c. 6. *Buron* v. *Denman*, 2 Ex. 167.

Held, secondly, that the ratification of the commander's act by the ministers of state was equivalent to a prior command, and rendered it an act of state, for which the crown was alone responsible. *Ib.*

The provisions of the 5 Geo. 4, c. 113, are not confined to acts done by British subjects in furtherance of the slave trade in England or the British colonies, but apply to acts done by British subjects in furtherance of that trade in places not part of the British dominions. *Reg.* v. *Zulueta*, 1 Car. & K. 215.

A declaration upon a contract, dated 25th September, 1834, whereby the plaintiff, in consideration of a sum of money, sold and transferred all right, title and interest in and to the services and labour of 153 apprenticed labourers, to the defendant on behalf and to the use of his plantations, with a warranty of quiet possession of the services of such apprenticed labourers, according to law; and defendant engaged to pay to the plaintiff the money by instalments, with interest; and in case of failure in payment of any of the instalments, the plaintiff should be entitled to reclaim, and the services of the apprenticed labourers should revert to the plaintiff, the defendant remaining liable for the payment of such sums as should be due for the value or hire of the labour during such period as he should have received the services of the apprenticed labourers. Breach, nonpayment of two instalments. Plea, that while the apprenticed labourers were in the service of the defendant, under the terms of the sale and agreement, an ordinance was made by the governor of the colony, by which it was enacted, that all persons who, on the 1st August, 1838, should be holden within British Guiana as prædial apprenticed labourers, should, after that date, be discharged from the remaining term of their apprenticeship; and that during the time that their services could by law be had and received, defendant paid all instalments :—Held, that the declaration was good, and that it was not to be intended that the contract upon which it was founded was made concerning apprentices in England. *Mittelholzer* v. *Fullarton*, 6 Q. B. 989; 9 Jur. 334—Ex. Ch.

—— **Desertion by Sailor—Defence that Captain threatened to sell him as a Slave.**]—To an action for work as a seaman, a plea, that the work was done after the passing of the 7 & 8 Vict. c. 112, in respect of a voyage from San Francisco to this kingdom; and that he, before the time of doing the work, had engaged himself to serve as a seaman on board a British merchant ship, for a voyage which, during the doing of the work, was continuing, and the plaintiff whilst such seaman, deserted. Replication, that the plaintiff was a negro; that negroes are bought and sold as slaves in divers states of the United States; that whilst the plaintiff was serving on board the captain threatened to sell him as a slave to citizens of the United States; that San Francisco is situated in one of the United States, to wit, California; and that the plaintiff had just and reasonable grounds for believing, and did believe, that the captain, on the arrival of the ship at San Francisco, meant to carry his threat into execution; and, in order to prevent the captain from selling him as a slave, he deserted :—Held, bad. *Edward* v. *Trevellick*, 4 El. & Bl. 59; 24 L. J., Q. B. 9; 2 C. L. R. 1605; 1 Jur. (N.S.) 110; 2 W. R. 586.

—— **Evidence as to.**]—In order to convict a party who is charged with having employed and loaded a vessel for the purpose of slave trading, it is not necessary to shew that the vessel which carried out the goods was intended to be used for bringing back slaves in return; but it will be sufficient if there was a slave adventure, and the vessel was in any way engaged in the advancement of the adventure. *Reg.* v. *Zulueta*, 1 Car. & K. 215.

Where a party living in London was charged with having chartered a vessel and loaded goods on board for the purpose of slave trading :—Held, that slave trading papers found on board the vessel when she was seized in foreign parts, but not traced in any way to the knowledge of such party, were not admissible against him. *Ib.*

As proceedings under the laws for the suppression of the slave trade are penal, the offence charged being a criminal offence, the onus probandi is upon the seizors to establish that the law has been infringed. *The Laura*, 2 Moore, P. C. (N.S.) 181; 6 N. R. 321; 13 L. T. 133.

Offences against the slave trade acts, may be established by circumstantial evidence; but the circumstances must be such as to satisfy a reasonable mind that the suspicion as to the character of the vessel is well founded. *Ib.*

Where articles of merchandise usually employed for the purpose of the slave trade, but capable of being employed for lawful commerce, are found on board a vessel seized on suspicion of being so employed, it is not sufficient to consider merely of what the cargo of the vessel accused of being implicated in the unlawful trade consists, but all the circumstances of the case and more especially the locality in which the vessel may be found, must be taken into consideration. *Ib.*

Condemnation of Ships for Trafficking.]—It is necessary, to justify a condemnation imposing forfeiture and penalties for a breach of the 5 Geo. 4, c. 113, that it be shewn as regards the ship, that she was employed in contravention of the object of that act, and that she was employed with the knowledge of the owner, and as to the shippers, that the goods had been shipped by them wilfully and knowingly for the purpose of being employed in the slave trade. *The Newport*, Swabey, 317; 11 Moore, P. C. 155; 6 W. R. 310.

An Italian merchant ship was seized by an officer (acting unofficially) in the harbour of Sierra Leone, under the impression that she was a slaver, and had violated the provisions of the 5 Geo. 4, c. 113. The master applied to the vice-admiralty court of Sierra Leone for the release of his ship, and for damages and costs for its detention :—Held, that the seizure of the vessel was quite unjustifiable, and that the master ought to recover damages and costs for its detention. *The Ricardo Schmidt*, 36 L. J., P. C. 3; L. R. 1 P. C. 268; 12 Jur. (N.S.) 895; 15 W. R. 236; 4 Moore, P. C. (N.S.) 121.

A native of the Ionian Islands purchased an

American ship, and, upon a declaration that he was a British subject, obtained from the British consul at Cuba a provisional registry of the ship as British. The ship was afterwards seized and condemned for a breach of the slave trade acts. Upon a preliminary objection taken on appeal to the jurisdiction of the court below, on the ground of the national character of the owner of the ship and cargo :—Held, first, that the registry, flag and pass of a ship carry with them the presumption that they are true and correct, and that the owner was estopped from proving that he was not a British subject, and consequently that the registry of the ship was void. *The Laura*, 2 Moore, P. C. (N.S.) 181; 12 L. T. 685; 13 W. R. 369.

Held, secondly, that even if he could have established that the registry was void, and the ship not entitled to claim the protection of any flag or nation, yet that the ship was, by 2 & 3 Vict. c. 73, liable to be adjudicated upon by a vice-admiralty court for a violation of the slave trade acts. *Ib.*

Proceedings taken against a vessel seized under the 2 & 3 Vict. c. 73, are to be according to the rules and regulations established under the 2 & 3 Will. 4, c. 51, and not according to the forms of the civil law. *Guimaraens* v. *Preston*, 4 Moore, P. C. 167.

—— **Condemnation of Seizor in Costs.**]—The "O.," a Portuguese vessel, was seized on the 5th December, 1876, whilst lying at anchor in the harbour and port of F., in Sierra Leone, as liable to be forfeited for offences committed against the provisions of 5 Geo. 4, c. 113, and 36 & 37 Vict. c. 88 (the Slave Trade Act, 1873), but was subsequently released by the court on it appearing that she was not engaged in the slave trade, but was chartered and intended to carry free immigrants :—Held, on appeal, that the seizor was rightly condemned in costs and damages. Although certain articles on board (shackles, an extraordinary number of empty casks, an extraordinary quantity of rice and mats) are included among the equipments which are declared to be primâ facie evidence of a vessel being engaged in the slave trade, both by the treaty between England and Portugal, carried into effect by 6 & 7 Vict. c. 53, and by the Slave Trade Act, 1873; yet the seizor having had the means from the surrounding circumstances and from the ship's papers of informing himself of the true character of the vessel, and the true condition of the men on board who were alleged to be slaves, had no reasonable grounds for the suspicion that the vessel was engaged in or fitted out for the purpose of the slave trade. *Reg.* v. *Casaca*, 49 L. J., P. C. 41; 5 App. Cas. 548; 43 L. T. 290—P. C.

—— **Obligation of Seizor to justify his Acts.**]—The obligation upon a seizor to justify the seizure under the slave trade acts of a vessel plainly engaged in bonâ fide trade within a harbour is a very strict obligation. *The Ricardo Schmidt*, supra, approved. *Ib.*

—— **What is Justification.**]—A reasonable suspicion that the alleged slaves had been kidnapped on board with the object of carrying them as free labourers, and not of consigning them to slavery, would not have justified the seizure and detention of the vessel. *Ib.*

—— **Treaty with Portugal, Effect of.**]—According to the true construction of the Portuguese treaties, the consent on the part of Portugal that certain articles mentioned in the first schedule to the Slave Trade Act, 1873, when found on board a Portuguese vessel, shall be considered as primâ facie evidence of her being engaged in the slave trade relates only to vessels on the high seas, and does not extend to vessels in a foreign port or foreign territorial waters. The 4th section, therefore, of the act cannot be extended to a Portuguese vessel lying in British waters. *Ib.*

—— **Kidnapping Act — Liability of Naval Officer for Seizure of Vessel.**]—By the Kidnapping Act, 1872, s. 3, vessels carrying native labourers of the South Sea Islands, not being part of the crew, must have a licence; by s. 6, vessels carrying native labourers without a licence are subject to the provisions of s. 16; by s. 9, to detain or confine a native for the purpose of removing him from one place to another is declared to be felony; by s. 16, any vessel suspected upon reasonable grounds of committing an offence against the 9th section may be detained; by s. 20, no damages shall be payable and no officer shall be responsible for the detention or seizure of a vessel in pursuance of the act. Before the passing of the Kidnapping Act, 1872, the plaintiff's vessel sailed on a voyage to the South Sea Islands for the purpose of fishing; her master hired native labourers, and after the fishing was over the vessel was engaged in carrying the natives home when she was seized by a man-of-war, of which the defendant was commander. At the time of the seizure the defendant bonâ fide believed that there was reasonable ground for suspecting that an offence had been committed against the act :—Held, no action would lie against the defendant. *Burns* v. *Nowell*, 49 L. J., Q. B. 468; 5 Q. B. D. 444; 43 L. T. 342; 29 W. R. 39; 44 J. P. 828—C. A.

Bounties.]—The governor of a colony is the person to whom the general management of the colony is intrusted, and therefore is the person entitled to the bounties which are payable in respect of a seizure of slaves, even though he is absent from the colony at a time when the seizure is made. *Bounties for Seizure of Slaves, In re*, 32 L. J., Adm. 189; 9 Jur. (N.S.) 1254.

A queen's ship, which is authorised to capture slave ships, being in sight during the chase and capture by another ship of a war vessel equipped for the slave trade, is entitled to share as joint captor in the tonnage bounties awarded under 1 & 2 Vict. c. 47, unless the animus capiendi is clearly rebutted. *Anon.*, Br. & Lush. 370.

J. M.

SMOKE AND NOXIOUS VAPOURS.

See NUISANCE.

SMUGGLING.

See REVENUE.

SOCIETY.

Building.]—*See* BUILDING SOCIETY.

Friendly.]—*See* FRIENDLY SOCIETY.

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Land.]—*See* LAND SOCIETY.

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SODOMY.

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SOLICITOR.

[BY JOHN MEWS.]

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A. ARTICLED CLERKS.

I. PERSONS CONTRACTING.

Who may take an Articled Clerk.]—An attorney whose name is on the 1*s.* roll of one of the superior courts of Westminster pursuant to 11 Geo. 4 & 1 Will. 4, c. 70, s. 16, is a practising attorney in Wales under 6 & 7 Vict. c. 73, s. 3, and may take an articled clerk, and make the affidavit required by s. 8. *Davies* or *Davis, Ex parte*, D. & M. 463; 1 D. & L. 892; 5 Q. B. 564; 13 L. J., Q. B. 146; 8 Jur. 288.

—— **More than One Member of Firm.**]—A clerk may be articled to more than one member of a firm. *Holland, In re*, 41 L. J., Q. B. 141; L. R. 7 Q. B. 297; 26 L. T. 289; 20 W. R. 756.

Who may be Clerks.]—A person who holds a situation, and receives a salary from government, as surveyor of assessed taxes, is not sui juris to enter into a contract for service as an articled clerk; and where a person so situated was articled to an attorney, and nominally served him for five years, retaining his situation under government all the time, and then commenced practising as an attorney, the court ordered him to be struck off the rolls. *Taylor, In re*, 6 D. & R. 428; 4 B. & C. 341; 3 L. J. (o.s.) K. B. 242.

An attorney having, by mere collusion, and with intent to secure the business arising from the prisoners, taken one of the turnkeys of the king's bench prison for his articled clerk, the articles were cancelled in court. *Fraser's Case*, 1 Burr. 291.

Service by a barrister under articles is not available, though he never during the service practised as a barrister, and it was wholly from inadvertence that he did not apply to be disbarred before entering into the articles of clerkship. *Bateman, In re*, 2 D. & L. 725; 14 L. J., Q. B. 89.

Neither the humbleness of the origin of the applicant, nor his having filled the office of a process server of civil bill process, nor his having been dismissed from that office for having violated a rule of the assistant barrister's court, under the belief that it did not apply to him, nor his having on a particular occasion acted as a bailiff in the execution of a fi. fa., will disqualify him from becoming apprentice to an attorney, his character and conduct being in other respects unimpeached. *M'Colgan, In re*, 6 Ir. Eq. R. 207.

Liability of, on Guarantee.]—An articled clerk held liable on a guarantee given on behalf of his principal. *Whitfield* v. *Moojen*, 1 F. & F. 290.

II. SERVICE UNDER ARTICLES.

From what Date Reckoned.]—The service is reckoned as from the date of the execution, and not from the day of the date of the articles; consequently the clerk cannot be admitted till he has served five years from the day of the execution. *Angel, Ex parte*, 4 Jur. 656.

A clerk and M.A. was articled on the 8th of May, 1858, for three years "from the date thereof":—Held, that such service was not completed until after the 8th of May, 1861. *Articled Clerk, In re*, 9 W. R. 639.

Service for twenty terms (less than five years) is not sufficient; the five years must be years of service not years of learning. *Mackay, In re*, 18 L. T. 371.

Service must be under Written Articles.]—An articled clerk must not only be bound for five years, and serve five years, but the service itself must be under written articles. *Adams, Ex parte*, 46 L. J., Ch. 42; 4 Ch. D. 39; 35 L. T. 751; 25 W. R. 54.

The court will not swear in an apprentice who had been in attorney's office for five years, where for part of the time he had been upon trial, and was not articled until afterwards. *Kirwan, In re*, Hay. & J. 726.

Supervision of Master—What Sufficient.]—In deciding whether the service of an articled clerk has been sufficiently subject to the supervision of the master, the court will not lay down any general rule, but take into consideration the peculiar circumstances of each particular case. *Duncan, In re*, 5 B. & S. 341; 33 L. J., Q. B. 190; 10 Jur. (N.S.) 939; 10 L. T. 337; 12 W. R. 752.

A clerk, having been a managing clerk for several years previously to entering into articles, and also a person of mature age, renders the control and supervision of his master less necessary than in the case of a young man just entering on the profession. *Ib.*

A clerk, having a connection of his own, derived from a former master, articled himself to a solicitor, and managed the business introduced by him under an arrangement with the solicitor that he should draw 150*l.* a year out of the profits, and the rest be retained to form the solicitor's share of the capital of a partnership which was to be entered into between them upon the clerk's becoming admitted. On an application by the clerk to be admitted to the final examination:—Held, that he had so far complied with the requirements of the statute as to service, as to be entitled to present himself for examination. *Joyce, Ex parte*, 46 L. J., Ch. 295; 4 Ch. D. 596; 25 W. R. 340.

Service with Whom.]—Under 2 Geo. 2, c. 23, the clerk must have actually served the five years; and the statute was not complied with by the clerk serving part of the time with another attorney with his master's consent, and the rest of the time with his master. *Hill, Ex parte*, 7 Term Rep. 456; 4 R. R. 492.

Where a clerk has been articled to one of the members of a firm, and he covenanted to serve him, a service with a partner, for three months after the decease of the master, before an assignment was effected, is not service under the articles, although the partner was a party to the articles, and such months will not count. *Dalton, Ex parte*, 9 D. P. C. 110; 4 Jur. 1187.

Where Different Periods of Service may be Coupled.]—An articled clerk to an attorney served under the articles for two years and seven months, and afterwards, with the assent of the attorney, left the service, with the intention of serving the rest of his time under assignment to another firm. This arrangement was not carried out, and after an absence of about six years, the clerk went into fresh articles with the original attorney, and served for a period which, with the former service, amounted to more than five years:—Held, that his service under the first articles could not be coupled with his service under the second articles, and that he was not entitled to go up for examination. *Austin, Ex parte*, 28 L. T. 121; 21 W. R. 390.

A gentleman who had taken the degree of bachelor of arts at Cambridge articled himself to an attorney for three years, but served only two months, and abandoned the contract. After the expiration of the three years mentioned in the original articles, he was assigned to another attorney, with whom he served two years and ten months:—Held, that as the original articles had expired previously to the assignment, the service under the assignment was not a service within the terms of 1 & 2 Geo. 4, c. 48, s. 1. *Unthank, Ex parte*, 2 M. & P. 453; 30 R. R. 750.

When a clerk had served two years under his articles, and then ceased to serve any longer, and the articles expired, and he then desired to enter into fresh articles, and obtain the previous consent of the court to such two years' service being computed in the period of service under such new articles; the court refused such consent, leaving it open, however, to him to apply to have such period computed when he should have served a sufficient time under the new articles. *Trenchard, Ex parte*, 21 L. T. 638.

In October, 1856, a son was articled to his father, an attorney, and duly served for two years; when, becoming out of health, he was recommended by his medical attendants to follow some more active occupation, and his father obtained him a commission in the army in June, 1859. In 1870, his health being re-established, he sold out of the army, and entered into fresh articles with his father early in 1871, and duly served up to May, 1874. An application was then made that the two years under the original articles might be allowed to be reckoned as part of the five years' service under the fresh articles:—Held, that the facts amounted to a virtual cancellation by mutual consent of the first articles; and the case therefore came within 6 & 7 Vict. c. 73, s. 13, and that the application might be granted. *Trenchard, Ex parte*, L. R. 9 Q. B. 406.

An articled clerk was at his own request assigned, during the articles, to an attorney for fifteen months, at the expiration of which time he returned to his original master, and continued to serve him up to the end of the term:—Held, that such period of fifteen months could not be reckoned as a portion of the five years required by 6 & 7 Vict. c. 73, ss. 6, 12. *Adams, Ex parte*, 44 L. J., Q. B. 102; L. R. 10 Q. B. 227; 32 L. T. 454; 23 W. R. 594.

W. was articled in 1861 to R., a solicitor, for five years, but left him after two years' service, the articles with R.'s consent being considered as cancelled. In 1864, he was re-articled to R. for the remaining three years, and under these new articles he continued in his service for two years, when he left on account of ill-health and under medical advice. In 1869, he was assigned and re-articled by R. to, and served with, L. for the remaining one year. An application by him that the several periods of service under the three articles might be reckoned as constituting the full five years' service, was granted, it being held that both the first and second articles had been cancelled by mutual consent, within s. 13

of 6 & 7 Vict. c. 73. *Williamson, Ex parte*, 46 L. J., Ch. 624 ; 4 Ch. D. 581 ; 35 L. T. 695.

An articled clerk having during his articles lost a great portion of his time by service to other attorneys not under articles, allowed after the expiration to enter into fresh articles for such period as would make up the time lost. *Hayward, In re*, 11 W. R. 67.

A clerk served his articles for four years six months and twenty-four days. He was then absent, either serving in the militia or holding the appointment of a supernumerary surveyor of taxes until after the expiration of his articles, when he returned to the attorney to whom he had been articled, and served for five months and six days, but not under a contract in writing :—Held, that the service for the latter period was insufficient ; but he was allowed to enter into fresh articles to complete the five years. *Smith, Ex parte*, 1 El. & El. 928 ; 28 L. J., Q. B. 263 ; 5 Jur. (N.S.) 515 ; 7 W. R. 451.

But where the time of the articles had expired, and the service under them had not been complete, the court refused an application for leave to enter into fresh articles and to serve under them to complete the service under the original articles ; overruling thus far, *Smith, Ex parte*, supra. *Keddle, Ex parte*, 4 B. & S. 993 ; 34 L. J., Q. B. 136 ; 11 Jur. (N.S.) 503 ; 11 L. T. 625 ; 13 W. R. 290.

Where a clerk had been articled to his father, an attorney, for three years, and was afterwards assigned to A., and served under the articles and assignment for two years one month and twenty-three days, and then went to America, where he remained for nearly four years, when he returned and resumed service with A., the court allowed him to enter into fresh articles with A. for the remainder of the term of three years, the service under the whole articles and assignment to count. *Thomas, In re*, 11 W. R. 341.

During more than three of the five years for which he was bound, the service of a clerk had been given to the attorney to whom he was articled, and he afterwards bound himself to another attorney and served him for two years :—Held, that his service under the first articles could not be coupled with his service under the second. *Taylor, In re*, 4 B. & C. 341 ; 6 D. & R. 428 ; 3 L. J. (O.S.) K. B. 242.

Service to a solicitor to whom the articled clerk believed himself to be bound cannot be made available on the mistake being discovered. *Sindy's Case*, 1 L. J. (O.S.) K. B. 152.

Absence of Clerk—Consent.]—If, during the five years, an articled clerk has been absent two months, by consent of his master, at his father's house, and at the end of the five years has served two additional months, he will be entitled to admission. *Hubbard, Ex parte*, 1 D. P. C. 438. S. P., *Frost, Ex parte*, 3 D. P. C. 322 ; 1 H. & W. 111.

—— **Caused by Illness.**]—A clerk whose service was interrupted by illness, and who was absent for a period of two years on account of his health, was nevertheless allowed to be considered as having sufficiently served under his articles. *Anon.*, 9 L. T. 324. S. P., *Beddoe, Ex parte*, 12 L. T. 711 ; 13 W. R. 871 ; *Matthews, Ex parte*, 1 B. & Ad. 160.

Where the time of the articles had not expired, and there had been a suspension of service under them by reason of illness, the court discharged them and allowed the clerk to enter into fresh articles with the same master for the residue of the time necessary to complete the five years' service. *De Fivas, Ex parte*, 4 B. & S. 992 ; 34 L. J., Q. B. 7 ; 11 Jur. (N.S.) 13.

A clerk having served a part of his time, was compelled by illness to relinquish service for upwards of a year, at the end of which period, having recovered, he resumed service, and moved the court that the period of his illness should be reckoned as actual service. At the time of the application, the full period of five years from the date of the articles had not expired. The court refused the application, as being premature. *Rogers, Ex parte*, 34 L. J., Q. B. 136 ; 11 Jur. (N.S.) 504.

When a clerk who had articled himself for three years was absent by reason of illness for sixteen months, and afterwards served thirteen months :—Held, that he could not be examined, and must enter into fresh articles for six months. *Digby, Ex parte*, 45 L. J., Ch. 692.

A clerk was articled to his father in April, 1872, for the term of five years, and attended the office regularly for that time ; but from Michaelmas, 1875, to Michaelmas, 1876, his father was absent from ill-health, and business was practically suspended, although the office remained open :—Held, that he might be allowed to go in for his final examination in 1877, but must enter into fresh articles for a year, and serve under them before he could be admitted. *Fereday, Ex parte*, 46 L. J., Ch. 504.

Where an articled clerk, serving with a practising barrister under 1 & 2 Geo. 4, c. 48, s. 2, had been unable to serve the last nine days of his time, owing to dangerous illness, but after his recovery had served more than the nine days with the same barrister, he was allowed to be examined for his admission. *Vaughan, Ex parte*, W. W. & D. 46 ; 1 Jur. 21.

An articled clerk who had served under articles for five years, all but five months, was then absent for five months and seventeen days on account of ill-health. On his return at the end of the five months he passed his final examination and applied for his certificate, but was required to enter into fresh articles for five months :—Held, that an order for his admission as if he had served the full period of five years could not be made, nor a prospective order for his admission after service for the remaining period without entering into fresh articles. *Marshall, Ex parte*, 22 W. R. 754.

An articled clerk, who has served under his articles for three of the term of five years, was then absent from illness for eleven months, but on his return served to the end of the term of his articles, and passed his final examination :—Held, that an application for his admission as though he had served the full term of five years, could not be granted, but that he might be allowed to complete his term by serving for a further period of eleven months. *Moses, Ex parte*, 43 L. J., Q. B. 13 ; L. R. 9 Q. B. 1 ; 29 L. T. 420 ; 22 W. R. 57.

The court will not exercise its discretion in relaxing the rule prescribed by the statute concerning the period of an attorney's apprenticeship, when the apprentice had been incapacitated by illness from serving five of the twenty terms, though it was sworn that he had attended his master's office for three years before he was bound, and his master had consented to his being now sworn. *Dease, In re*, 1 Longf. & T. 654.

Semble. The court will not take notice, in

such cases, of the applicant's family affairs, except where a father has been an attorney, and there is danger of the business of the office being lost to the family. *Ib.*

Where an applicant to be admitted an attorney while under articles, by medical advice and with the consent of his master, went to sea, and after a lapse of five months, entered as a student at Harvard University, in the United States, where he diligently pursued the study of the law for seven months, and then returned to the completion of his articles, but he served only five years, including the period of his absence, the court allowed him to be examined, in order to be admitted an attorney. *Cross, Ex parte*, 2 D. (N.S.) 692; 12 L. J., Q. B. 138; 7 Jur. 67.

Agreement to Assign—Not Executed.]—An articled clerk, upon an agreement that an assignment should be executed, left his master's service, and went into that of his own father, who was also an attorney. The assignment was not executed for six months, but during the whole period he was employed bonâ fide as clerk by his father:—Held, that the service under the agreement for the assignment was a service within 6 & 7 Vict. c. 73, s. 3, and that, having duly served the residue of the term, he was entitled to admission. *Brutton, Ex parte*, 23 L. J., Q. B. 290; 18 Jur. 580; 2 W. R. 456.

A clerk, duly articled, served a portion of his time with his master; it was then agreed that he should be assigned to another attorney for the residue of his term. On this understanding the clerk left his first master, and went into the service of the second master. From circumstances over which the clerk had no control, the assignment to the second master was not executed for about eight weeks after his entering the second master's service. The clerk served under the assignment for the residue of the term:—Held, that the interval between entering the second master's service and the execution of the assignment could not be reckoned as service under the articles within 6 & 7 Vict. c. 73, s. 12. *Harrison, Ex parte*, 44 L. J., Q. B. 103; 23 W. R. 635.

Effect of Death of Master.]—An attorney, dying pending the service, the clerk continued to attend regularly at the office, and conducted the business until its transfer to a successor, to whom also the articles were assigned:—Held, that the period which intervened between the death of the first master and the assignment of the articles to the second, was not to be reckoned in the computation of the five years' service required by 6 & 7 Vict. c. 73, s. 12. *Wallis, Ex parte*, 2 B. & S. 416; 31 L. J., Q. B. 176; 8 Jur. (N.S.) 913; 6 L. T. 242; 10 W. R. 524.

Where a clerk, on the death of his master, continued with the surviving partner for the residue of the five years, and also for nine months in addition; but an interval of nine months had elapsed between the death and the assignment of his articles by the executors, the court allowed him to be examined. *Johnson, Ex parte*, 1 W. W. & H. 404; 2 Jur. 966.

Where a clerk, in consequence of his master's death, had not served during a certain period of five years, but after the expiration of the five years served an additional time equal to the period of his non-service, the court allowed him to be examined. *Tomkins, Ex parte*, 6 D. P. C. 3; W. W. & D. 569.

The examiners of attorneys rejected a candidate, on the ground of insufficient service, it appearing that while articled, he had acted as agent to an insurance office, and that the attorney to whom he was articled was himself acting as clerk to another attorney. The latter fact was disputed. The court refused the motion by the candidate to refer the examination to a judge, that he might decide upon the qualification, the jurisdiction, on an appeal of this kind, being vested in all the judges. *Carr, Ex parte*, 3 Q. B. 447.

But the attorney under whom the former service took place having since died, the court ordered that the clerk should be articled to another attorney for the residue of his term of service, without assignment. *Ib.*

Where an apprentice to an attorney upon the death of his master entered the office of another attorney for the purpose of completing his apprenticeship, but before his indentures were assigned, a term elapsed; he was, under the circumstances, allowed credit for the term which had so elapsed before the assignment of the indentures, and having served twenty clear terms inclusive of that term, was admitted an attorney of this court. *O'Brien, In re*, 1 Ir. Eq. R. 480.

Graduates of Universities.] — In order to enable a graduate of the universities named in s. 7 of 6 & 7 Vict. c. 73, to be admitted an attorney after three years' service, he must have taken his degree before being bound by articles. *Bradford, Ex parte*, 1 El. & El. 417; 28 L. J., Q. B. 138; 5 Jur. (N.S.) 648; 7 W. R. 188. See *S. C.*, 1 L. T. 61.

A clerk after four years' service went to the university, and remained until he had obtained the degree of B.A. In the meantime his articles expired, but on application to the court he was allowed to enter into fresh articles, quantum valeat. *Gardner, Ex parte*, 8 L. T. 315.

A member of the university of Edinburgh, who has not taken the degree of M.A., but has been enrolled on the general council by virtue of 21 & 22 Vict. c. 83, s. 6, is not entitled to be admitted an attorney after three years' service under articles. *Stewart, Ex parte*, 41 L. J., Ex. 76; L. R. 7 Ex. 202; 20 W. R. 493.

A clerk, having taken a B.A. degree, was articled for three years, two of which he served with his master, eight months with the London agent, and four months with a special pleader; he then passed his examination:—Held, that he might be admitted after serving four months with an attorney, and receiving a certificate of his examination, the examiners to be at liberty to sign the certificate at once, such certificate to be stayed until the service was completed. *Earle, Ex parte*, 1 B. C. C. 180; 17 Jur. 440.

A person who was a student of college at the time he was bound apprentice to an attorney for five years, subsequently graduated, and served for three years after he had taken his degree, but without being bound de novo:—Held, that under the 1 & 2 Geo. 4, c. 48, he might (with his master's consent) be admitted an attorney, although the original term of his apprenticeship had not been completed. *Collum, In re*, 1 Ir. Eq. R. 278.

Ten Years' Service.]—The ten years' service as a clerk need not be continuous so as to entitle the clerk to the privileges of s. 4 of 23 & 24 Vict. c. 127. *Milliken, In re*, 18 W. R. 809.

A clerk who, having served ten years, enters into articles for three years, under 23 & 24 Vict. c. 127, s. 4, is entitled to the privileges afforded by that section, notwithstanding there may have been an unemployed interval between the termination of his former service and the date of his articles; and the court directed the examination of an articled clerk, although seven years had elapsed between the two services. *Vosper, Ex parte*, 4 B. & S. 901; 33 L. J., Q. B. 113; 10 Jur. (N.S.) 724; 9 L. T. 719; 12 W. R. 374.

It is not necessary that a clerk applying to be admitted under 23 & 24 Vict. c. 127, s. 4, should produce a certificate from his master that he has served faithfully, honestly and diligently during the ten years. If the master refuses the certificate, such service may be proved by other means. *Rigby, Ex parte*, 11 L. T. 671.

—— **Age at Commencement.**]—A clerk, before the expiration of ten years' service, entered into articles for five years, under which, after the expiration of the ten years, he served for a period of three years:—Held, that he was entitled to be examined and admitted under 23 & 24 Vict. c. 127, s. 4, although he was only fifteen years of age when he entered the service of the attorney. *Sherry, Ex parte*, 9 B. & S. 115; 37 L. J., Q. B. 82; L. R. 3 Q. B. 164; 17 L. T. 471; 16 W. R. 340.

A solicitor's clerk, claiming the right under s. 4 of 23 & 24 Vict. c. 127, to go up for his intermediate examination after having served as general clerk in a solicitor's office for ten years, and as an articled clerk for a year and a half, stated, in answer to questions put to him by the examiners of the Incorporated Law Society, that he had commenced such antecedent service at the age of thirteen. The examiners decided that service at such age was not bonâ fide an active employment in the business of a solicitor's office, and refused to admit him to the examination. On an application to the high court to overrule this decision:—Held, that no appeal would lie. *James, In re*, 33 W. R. 654.

Vote—Absence of Articled Clerk during Service—Not Constructive Residence.]—By 2 & 3 Will. 4, c. 45, s. 31, which makes provision for freeholders voting for a city being a county of itself, no freeholder shall be registered in any year, "unless he shall have resided for six calendar months next previous" to a certain day in such year within such city. During part of the prescribed period of six months, a freeholder who had a bedroom kept for his exclusive use in his father's house within such a city was absent, serving under articles to a solicitor in London:—Held, that, being bound by the articles, he could not be deemed to have had either the liberty or intention to return to the room whenever he liked, and therefore had not "resided" within the city for the required time within the meaning of the act. *Ford* v. *Drew*, 49 L. J., C. P. 172; 5 C. P. D. 59; 41 L. T. 478; 28 W. R. 137; 1 Colt. 1; 44 J. P. 58.

Gaining a Settlement.]—An articled clerk to an attorney may, by being bound and inhabiting in a parish, gain a settlement therein as an apprentice under 3 Will. & M. c. 11, s. 8. *Clapham* v. *St. Pancras*, 2 El. & El. 742; 29 L. J., M. C. 141; 6 Jur. (N.S.) 700; 8 W. R. 493.

Not an "Apprentice."]—An articled clerk to an attorney and solicitor is not an apprentice within the meaning of the 49th section of the Bankrupt Act, 6 Geo. 4, c. 16. *Prideaux, Ex parte, Bush, In re*, 3 Myl. & C. 327; 7 L. J., Ch. 202; 2 Jur. 366.

Service without passing Preliminary or other Examination.]—A gentleman had successfully passed the middle-class examinations of Oxford and Cambridge, which, however, were not included in the regulations of the judges, and he was thereupon articled for a term of four years, which term he duly served:—Held, that the articles were invalid; and the court refused to permit him upon entering into fresh articles to have the advantage of his four years' previous service under the former articles. *Jones, Ex parte*, 22 L. T. 300.

Period of Pupilage to Conveyancer.]—On an application by an articled clerk to be admitted as an attorney it appeared that, upon the execution of the articles and without any service under them, he became pupil to a conveyancer and continued so for more than a year. Upon the expiration of his pupilage the articles were assigned to another attorney, and he served under that and subsequent assignments for more than four years:—Held, that a year of the pupilage was equivalent to a year's service under the articles, and that he was entitled to admission. *Anon.*, 25 L. T. 161; 19 W. R. 780.

Clerk cannot Perform any other Work.]—An articled clerk cannot perform any office or employment whatever during the terms of service under 23 & 24 Vict. c. 127, s. 10, even when such employment is in no way inconsistent with and in no respect interferes with the service under his articles, and where the services are performed at night or by deputy. *Greville, Ex parte*, 43 L. J., C. P. 58; L. R. 9 C. P. 13; 29 L. T. 542; 22 W. R. 160.

An articled clerk held during the term of his articles the office of vestry clerk. It was shown that the duties of the office had not interfered with the due performance of his duties under his articles or with his legal studies:—Held, nevertheless, that he had contravened the provisions of 23 & 24 Vict. c. 127, s. 10, by holding an office or an employment other than that of clerk to the attorney to whom he was articled. *Ib.*

—— **Except out of Office Hours.**]—An articled clerk performing all his master's business may at leisure hours, work for wages with another attorney. *Blunt, Ex parte*, 2 W. Bl. 764. See *Hill, Ex parte*, 2 W. Bl. 957.

So where an applicant, while under articles discharged the duties of auditor of a poor-law union, which occupied him for a very inconsiderable period of time, and to which he never gave any attention until after the usual office hours of his master:—Held, that that occupation did not render the service insufficient. *Llewellyn, Ex parte*, 2 D. (N.S.) 701; 12 L. J., Q. B. 138; 7 Jur. 377.

—— **Or under Peculiar Circumstances.**]—The 23 & 24 Vict. c. 127, s. 10, prohibits an articled clerk during his term of service, from holding any office or engaging in any employment whatsoever other than the employment of clerk to the attorney with whom he is articled. P., during his articles, was appointed steward of a manor by his mother, who had a life interest in the property, which at her death would be divisible between him and his sisters. He at once

appointed a deputy to discharge the duties; but on three occasions he attended, with his principal's consent, courts of the manor to admit tenants and take surrenders, with the view of becoming acquainted with the duties of steward of the manor in which he and his family were interested:—Held, that the service was, under these peculiar circumstances, sufficient. *Peppercorn, Ex parte*, 1 H. & R. 487; 35 L. J., C. P. 239; L. R. 1 C. P. 473; 12 Jur. (N.S.) 761; 14 L. T. 252; 14 W. R. 693.

An apprentice to an attorney who, during the period of his apprenticeship, filled the office of a salaried clerk in the office of one of the six clerks of the court of chancery:—Held, notwithstanding, to be entitled to be admitted a solicitor of the court. *Lyons, In re*, 1 Dr. & Wal. 327; 1 Ir. Eq. R. 267.

III. STAMPING ARTICLES.

Service under Unstamped Articles — When Computed from.]—Where articles have not been stamped within the required time, and are stamped afterwards, on payment of the penalty, the court, both for the purpose of protecting the revenue, and for ensuring the respectability of those who are to become attorneys, should, before the service under the unstamped articles is allowed to reckon, be satisfied that the circumstances are such as to account for the omission to pay the duty and inrol the articles in due time. *Wilson, Ex parte*, 4 B. & S. 889; 33 L. J., Q. B. 89; 10 Jur. (N.S.) 469; 9 L. T. 758; 12 W. R. 341. S. P., *Belk. Ex parte*, 2 H. & C. 737; 33 L. J., Ex. 73; 10 Jur. (N.S.) 348; 9 L. T. 516; 12 W. R. 316.

As a general rule, from which there will be no deviation, unless under peculiar circumstances, the court in computing the period of apprenticeship to an attorney, will not allow credit for time elapsed before the payment of the stamp duty upon the indentures. *Sterne, Ex parte*, 2 Ir. Eq. R. 378.

—— **Where Clerk has not been Guilty of Negligence.**]—When articles have not been stamped within six months from their execution, but have been subsequently stamped under 19 & 20 Vict. c. 81, s. 3, and the clerk has served under them from their execution, the court will allow a subsequent inrolment of them, to count from the date of the execution, provided there has been no negligence or default on the part of the clerk. *Norton, Ex parte*, 26 L. J., Q. B. 24; 5 W. R. 6. S. P., *Welch, In re*, 5 W. R. 505.

A clerk in 1848 entered into articles, not in the usual form, with 1*l.* stamp duty only thereon. The court allowed the articles to be inrolled, and the service to count from the date of the articles, as there did not appear to be any speculation on the part of the clerk, and the omission arose from circumstances over which he had no control. *Forrest, Ex parte*, 35 L. J., Q. B. 131; 12 Jur. (N.S.) 499; 14 L. T. 285; 14 W. R. 607.

A clerk had been articled to his father, and served the five years, without his knowledge that the articles were not stamped. An affidavit of the father stated, that having before the articles been subject to much pecuniary loss and pressing expenses, and a diminution of professional income, on account of the changes in the law and personal and family affliction, he was, at the time of the articles without the means to pay the stamp duty; and that he had not articled his son speculatively, but with the intention of ultimately stamping and inrolling the articles. The treasury having directed the commissioners of inland revenue to stamp the articles upon payment of the duty and penalty, and the articles having been stamped accordingly:—Held, that they might be inrolled, and the service under them computed from the date of their execution. *Herbert, Ex parte*, 1 B. & S. 825; 31 L. J., Q. B. 33; 8 Jur. (N.S.) 615; 5 L. T. 579; 10 W. R. 211.

—— **Accident — Unforeseen Occurrence.**] — Where the delay had been caused by some accidental omission, and by the closing of the office on a holiday, the court allowed the time to run from the day of execution. *Appleton, In re*, 11 W. R. 35.

The court will only permit articles of clerkship to be inrolled nunc pro tunc, and the service thereunder to be computed from the date of their execution (the duty and penalty under 19 & 20 Vict. c. 81, s. 3, being paid), where the omission to stamp them at the proper time has been the result of some accident or unforeseen circumstance. The mere disappointment of some vague hope or expectation of obtaining the means of paying the duty in time will not be received as an excuse for a con-compliance with the statute. *Darville, Ex parte*, 36 L. J., C. P. 133; L. R. 2 C. P. 244; 15 L. T. 537; 15 W. R. 352.

The court will only allow articles to be enrolled nunc pro tunc, and the service under them to be reckoned as from their date when the omission to stamp has been the result of some unforeseen and special occurrence. But the mere promise of a brother to pay the stamp duty out of a legacy is insufficient. *Bryan, Ex parte*, 32 L. T. 568.

The mere failure to obtain payment of a debt due to the clerk at the time of his entering into articles, so as to enable him to pay the stamp duty and inrol the articles and affidavit within the time limited by the statute, is not such a disappointment of a reasonable expectation that he would be prepared with the money in the time as will induce the court to allow the articles to be inrolled nunc pro tunc. *Banyard, Ex parte*, 44 L. J., C. P. 305; L. R. 10 C. P. 638; 32 L. T. 729.

The court will allow the service under articles to be computed from their date, notwithstanding the stamp duty thereon has not been paid within the proper period, provided the failure to pay it has arisen from some unforeseen circumstance over which the clerk had no control. Therefore, where the failure has arisen from the non-payment of a debt due to the clerk, which he had a reasonable expectation to obtain in time, the excuse was held sufficient. *Sayer, In re*, 44 L. J., C. P. 307, n.; L. R. 10 C. P. 569; 32 L. T. 728. But see *S. C.*, 32 L. T. 560; 23 W. R. 595.

The court will not allow articles to be inrolled nunc pro tunc, and the service under them to be reckoned as from their date, where there has been an omission to cause them to be stamped within the time required by law—even though the treasury has accepted the stamp duty with a penalty, unless it is shown that the omission has been the result of some unforeseen emergency, or of the failure of some just expectation. The mere disappointment of a vague hope will not suffice. *Jones, Ex parte*, 14 C. B. (N.S.) 301.

The court will permit the service under un-

stamped articles of clerkship to be reckoned from their date, where the omission to pay the duty at the proper time was the result of an emergency which may be justly inferred to have been unforeseen by the party. *Breden, In re*, 12 C. B. (N.S.) 351; 31 L. J., C. P. 321; 9 Jur. (N.S.) 176; 6 L. T. 494; contra, in Q. B., 2 B. & S. 649; 31 L. J., Q. B. 184; 8 Jur. (N.S.) 937; 6 L. T. 455.

—— **Mistake in the Law.**]—An articled clerk applied to stamp his articles within six months of execution, being misled by the words of the Stamp Act, 1870, s. 43, but the inland revenue board refused to affix the stamp except upon payment of a penalty. The clerk subsequently paid the penalty and the duty, but, in consequence of his mistake in the law, he was prevented from inrolling the articles within the requisite time. The court allowed the service to be reckoned from the date of the articles instead of from the day of filing the affidavit required with the inrolment. *Hayward, Ex parte*, 29 L. T. 422.

—— **Delay of Court.**]—Where the delay in stamping and inrolling articles was accounted for by the necessity of applying to the court of chancery for increased funds out of a lunatic's estate, the court allowed the service to be reckoned from the date of the articles and not from the period of inrolment. *Tayleure, Ex parte*, 3 L. T. 267.

—— **When Delay is Intentional.**]—Where the stamping had been intentionally delayed in order to ascertain whether the clerk's health will allow him to follow the profession, the court refused to interfere and allow the service to be computed from the date of the articles, although there did not appear to be any improper motive for the delay. *Welch, Ex parte*, 27 L. J., Q. B. 213; 3 Jur. (N.S.) 1218; 6 W. R. 64.

—— **Absence of Means.**] — R. entered into articles on the 10th January, 1871. His father, being advised that the articles could be stamped and inrolled within six months from their execution, did not pay the stamp duty immediately. Before the end of the six months he suffered heavy losses in his business and became unable to pay the stamp duty till January, 1874, when they were stamped. The clerk had served the whole time and had no means of his own to pay the stamp. An application to allow, under these circumstances, the articles to count from the date of their execution was refused. *Roth, Ex parte*, 29 L. T. 885; 22 W. R. 329.

Articles, the service under which has been fully completed, but where payment of the stamp duty was not made at the date of the execution, nor at any time afterwards during the service, such nonpayment clearly to the satisfaction of the court, arising, not from a preconceived plan to wait and see how the clerk articled might turn out, but from the absence of means to defray the expense of duty, may be made valid, and the service reckoned from the date of the execution, on payment of the stamp duty and penalty. *Bishop, Ex parte*, 9 C. B. (N.S.) 150; 30 L. J., C. P. 48; 7 Jur. (N.S.) 243; 3 L. T. 323. See *Darville, Ex parte*, and other cases, supra.

—— **Delay must be Accounted for.**]—The court will not order articles to be inrolled and the service to count from the time of the execution, where the articles have been stamped after the six months on payment of a penalty, unless the delay in payment of the duty is satisfactorily accounted for. *Edwards, Ex parte*, 32 L. J., C. P. 213; 10 Jur. (N.S.) 17; 8 L. T. 360; 11 W. R. 754.

Articles Stamped for County Palatine of Lancaster.]—The court will (in the absence of special reasons to the contrary) allow service under articles stamped for the county palatine of Lancaster to count as service, if the articles are afterwards stamped for service here. *Hogg, Ex parte*, 11 L. T. 598; 13 W. R. 315.

Stamping a Condition precedent to applying for Inrolment nunc pro tunc.]—To entitle a clerk, whose articles, through excusable omission, have not been inrolled, to apply to the court to have them inrolled nunc pro tunc, he must have had them properly stamped and have paid the penalty (if any), and until this is done the court will not make any order upon the subject. *Sewell, Ex parte*, 8 L. T. 331; 11 W. R. 673. S. P., *Williams, Ex parte*, 26 L. J., Q. B. 167; 3 Jur. (N.S.) 160; 5 W. R. 376.

—— **Notice to Incorporated Law Society.**]—Before granting an application that the service of a clerk under unstamped articles may be computed from their date, and not from the time of inrolment, the court will require notice of the application to be given to the Incorporated Law Society, in order that an opportunity may be afforded of investigating the truth of the statements upon which the application is founded. *Blades, Ex parte*, 44 L. J., C. P. 115; 32 L. T. 33; 23 W. R. 312.

IV. INROLMENT AND REGISTRATION OF ARTICLES.

Duty of Solicitor.]—Under the Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, s. 8, it is the duty of an attorney to inrol the articles of his articled clerk, and where he had omitted to do so the court dismissed a claim to foreclose a mortgage, given to secure the premium. *Dufaur* v. *Sigel*, 4 De G. M. & G. 20; 22 L. J., Ch. 678.

Nunc pro tunc—No Default on Part of Applicant.]—Where, through the neglect of a clerk of an agent, explained and accounted for, no neglect for default being imputable to the applicant, the articles were not filed at the time of execution, the court allowed them to take effect from their date. *Harris, In re*, 11 W. R. 36.

So, where articles were, by a mere slip, not filed within six months, the court relieved the clerk from the effect of the error. *Follett, In re*, 30 Beav. 629.

The affidavit of the due execution of articles was filed within six months of their execution by the clerk, but not within six months of their execution by his master:—Held, that it was filed within due time. *Legett, Ex parte*, 3 Jur. (N.S.) 1219.

A. was articled to an attorney, and served two years, when he was assigned over to his own father, an attorney. His father's memory became impaired, and he died within six months of the assignment, never having made the affidavit. The court permitted the assignment to be inrolled, upon satisfactory evidence being given

of the facts which should have been contained in the affidavit. *Lee, Ex parte*, 8 W. R. 541.

Articles allowed to be enrolled nunc pro tunc when the delay arose from an irregularity in the affidavit for which the clerk was not responsible. *Lee, Ex parte*, 5 W. R. 20.

Or where the delay arose from the act of the court in not answering an application. *Williams, Ex parte*, 5 W. R. 559.

Or where the clerk was ignorant of the fact that the articles had not been stamped. *Hand, Ex parte*, 5 W. R. 687. *Ib.* 622. S. P., *Fenton, Ex parte*, 7 W. R. 160.

—— **Inadvertence of Clerk.**]—Where an assignment of articles had not been registered within the prescribed time, the court refused permission to register such assignment nunc pro tunc, although it was sworn that the omission had occurred through inadvertence, and that the last indemnity act omitted the provision in former acts curing such omissions. *Cunningham, Ex parte*, 8 Jur. 405. *See* 7 & 8 Vict. c. 86, ss. 1, 2.

A clerk having inadvertently omitted to inrol the assignment of his articles within the period prescribed, the court directed the service under the assignment to be computed from the date of its execution, instead of the period of its inrolment. *Cunningham, Ex parte*, 9 Jur. 109.

An articled clerk had neglected to file the necessary affidavit within six months; but the omission had arisen from inadvertence only:—Held, that this was not a sufficient ground for relieving him. *Benson, In re*, 10 Beav. 435.

Service allowed to be reckoned from the date of the articles where, by mistake as to the date of the articles, the affidavit was filed too late. *Ellis, Ex parte*, 3 L. T. 268. S. P., *Pettit, In re*, 2 W. R. 417.

Inrolment nunc pro tunc not allowed when the clerk finding after three years' service that the articles had not been stamped, was called to the bar and applied forty years after the execution of the articles. *Parker, Ex parte*, 8 W. R. 460.

Delay caused by Articles being sent to India to be Executed.]—Articles were sent to Bombay to be executed by the father of the clerk; the father executed the deed on the 1st of January, 1853, and put in the date. The articles were sent to England, and on the 16th of February, 1853, executed by the clerk and the attorney:—Held, that the date from which the time of making and filing the affidavit was to count was from the 16th of February, 1853. *Anon.*, 27 L. J., Q. B. 184.

Application on Affidavit.]—Applications for service to be reckoned from the date of the articles must be on affidavit. *Williams, Ex parte*, 6 W. R. 254.

When Articles Lost, Stolen or Destroyed (*see* **2 & 3 Vict. c. 33, s. 9**).]—The court will allow a copy of articles to be inrolled where the original articles are lost. *Chapman, Ex parte*, 3 D. P. C. 562. S. P., *Bechenden, Ex parte*, 1 H. & W. 193; *Clarke, Ex parte*, 3 B. & Ald. 610.

The court allowed a copy to be inrolled nunc pro tunc, upon an affidavit that the indenture had been stolen (with other property) from the house of the person in whose hands it was deposited. *Nash, Ex parte*, 6 Scott (N.R.) 695; 5 Man. & G. 696.

So, where articles had been destroyed by fire, the court allowed a verified copy to be inrolled and an affidavit of execution to be filed, although more than the time allowed had elapsed since execution. *Briggs, Ex parte*, 1 D. & L. 94.

A counterpart of articles was not allowed to be registered nunc pro tunc, though it appeared from an entry in the handwriting of a person who had left England that he had attended the inrolment of the articles and had paid the fee, there being no such entry of the inrolment in the books of the proper officer. *Pilgrim, Ex parte*, 1 B. & C. 264; 2 D. & R. 429; 1 L. J. (O.S.) K. B. 114.

Searching Books of Inrolment.]—A person has no right to search the book of affidavits, kept in pursuance of 6 & 7 Vict. c. 73, s. 11, more than once in a day without fee; and for taking copies of entries therein, a fee of 6*d.* is due. *Heming, Ex parte*, 9 Jur. 900.

Unstamped Articles.]—*See* ante, col. 1389.

V. ASSIGNMENT AND DISCHARGE.

Where Master Absconds, or is Convicted of Felony.]—Where an attorney has absconded, his clerk may obtain a discharge from his articles, and further articles may be inrolled without an assignment of the original articles. *Hancock, Ex parte*, 2 D. (N.S.) 54; 6 Jur. 949; *Cartmel, Ex parte*, 6 Jur. 950.

So, where a party was articled to an attorney, who was subsequently convicted of forgery and sentenced to transportation for life, the court granted a rule absolute in the first instance to discharge the clerk from his articles. *Anon.*, 8 Jur. 848.

Where a clerk is articled to a master who absconds and sails for America, previously making an assignment of his property, and of the articles of the applicant to another attorney, his town agent, the court, though it will grant a rule to show cause why the applicant should not be discharged from his articles, yet will not make it a part of the rule that 40*l.* paid to his first master should be paid over to the applicant by such town agent. *Cartley, Ex parte*, 2 D. (N.S.) 945; 12 L. J., Q. B. 98; 7 Jur. 767.

Where a solicitor becomes bankrupt, gives a power of attorney authorising the assignment of articles, and absconds, the court ordered the assignment to be made under s. 5 of 6 & 7 Vict. c. 73. *Ellis, Ex parte*, 7 W. R. 61.

—— **Or becomes Insane.**]—The father of a clerk having become, from mental alienation, incapable of instructing his son, and of continuing his practice, the court directed the articles to be discharged, and allowed the applicant to be articled to another attorney. *Allen, Ex parte*, 8 Jur. 1169. S. P., *Darbell, Ex parte*, 6 D. P. C. 505; 1 W. W. & H. 174. *Turner, Ex parte*, 10 L. J., Q. B. 356.

—— **Or Dies.**]—An articled clerk was assigned to an attorney who died intestate, and no administrator had been appointed; the court granted a rule to enable the clerk to assign himself to another attorney for the residue of his term. *Lewis, Ex parte*, 2 D. & L. 130; 13 L. J., Q. B. 261; 8 Jur. 539.

By Mutual Consent.]—Where an articled clerk, under age, obtains a writership in India, and his

father, as well as the attorney, joins with him in an application to vacate the articles, the court will grant the motion. *Anon.*, 3 Jur. 652.

VI. PREMIUM—PAYMENT AND RETURN OF.

Refusal of Solicitor to take back Runaway Clerk.]—The court ordered an attorney, who had refused to take back an apprentice who had run away from his service, on the ground of misconduct, and with whom a premium had been given, to return to the parents of such apprentice a part of such premium. *Prankerd, Ex parte*, 3 B. & Ald. 257.

Death of Clerk.]—The court refused to order an attorney to repay any portion of a premium of 200 guineas received by him with an articled clerk, who died within a month after he was articled. *Thompson, In re*, 1 Ex. 864.

Death of Partner—Clerk Articled to Firm.]—A party was articled to one of two attorneys in partnership, and paid a premium, and acted as clerk to the two partners for two months, when the attorney to whom he had been articled died; the court ordered the surviving partner to refund a portion of the premium. *Bayley, Ex parte*, 9 B. & C. 691; 4 M. & Ry. 603. S. P., *Haden, Ex parte*, 1 W. W. & H. 321; 2 Jur. 873; *Bennett, Ex parte*, W. W. & D. 210.

Death of Solicitor.]—An attorney to whom a clerk had been articled died before the articles expired:—Held, that a court of equity had jurisdiction to entertain a claim for the return of a part of the premium, and that such claim constituted a debt payable out of the assets of the attorney, in an administration suit. *Hirst* v. *Tolson*, 2 Mac. & G. 134; 2 Hall & T. 359; 19 L. J., Ch. 441; 14 Jur. 559.

A., an attorney, being confined of an illness whereof he died, takes B. as his clerk, and receives with him 120*l.*, and by articles agrees with the father of B. to return 60*l.* of the money if A. died within the year; A. died within three weeks. A.'s executor decreed to pay back 100*l.* *Newton* v. *Rowse*, 1 Vern. 460.

A solicitor who had received a premium on taking an articled clerk, died during the term of the articles:—Held, that his estate was not liable for the return of any part of the premium. *Ferns* v. *Carr*, 54 L. J., Ch. 478; 28 Ch. D. 409; 52 L. T. 348; 33 W. R. 363; 49 J. P. 503.

Ward of Court desiring to change his Profession.]—A ward was articled to a solicitor under the direction of the court of chancery, and a premium of 300 guineas was paid. Subsequently the ward desired to change his profession, and proposals were accordingly, with that object, brought before the judge in chambers. The solicitor was served with notice of the proceedings, and attended. An order was made, by which the articles were ordered to be cancelled, and 100*l.*, part of the premium, directed to be returned by the solicitor. There was no allegation of misconduct on the part of the solicitor:—Held, that the court had no power to direct the return of any part of the premium. *Craven* v. *Stubbins*, 34 L. J., Ch. 126; 10 Jur. (N.S.) 1189; 11 L. T. 402; 13 W. R. 208.

Promissory Note for Premium not to be Negotiated.]—Where an attorney received a promissory note from the father of a clerk articled to him, as his fee for taking him, on an undertaking that the note should not be negotiated until the expiration of a certain period, and he negotiated it contrary to his undertaking, the court compelled him to take it up. *Gardner, Ex parte*, 2 D. P. C. 520.

Advance to Son.]—A premium paid on the occasion of a son being articled to an attorney and solicitor is an advance to the son, within the meaning of the statute of distributions. *Boyd* v. *Boyd*, 36 L. J., Ch. 877; L. R. 4 Eq. 305; 16 L. T. 660; 15 W. R. 1071.

Mortgage to Secure.]—It is the duty of an attorney to inrol the articles of his clerk, and where he had omitted to do so the court dismissed a claim to foreclose a mortgage given to secure the premium. *Dufaur* v. *Sigel*, 4 De G. M. & G. 20; 22 L. J., Ch. 678.

VII. RESTRAINING COMPETITION WITH MASTERS.

Contract—Money Penalty.]—A., on being articled to B., covenanted not to be concerned for any of B.'s clients, and to forfeit 100*l.* for any such breach. A., after being admitted, acted in contravention of this covenant. He was restrained by injunction. *Nicholls* v. *Stretton*, 7 Beav. 42. And see *S. C.*, 10 Q. B. 346.

A solicitor and his clerk executed a bond, conditioned that if the clerk should carry on the business of a solicitor within the prescribed distance, then, provided he paid 1,000*l.* as liquidated damages, the bond should be void. The clerk commenced business as a solicitor within the prohibited limit:—Held, that the solicitor was entitled to an injunction. *Howard* v. *Woodward*, 5 N. R. 8; 34 L. J., Ch. 47; 10 Jur. (N.S.) 1123; 11 L. T. 414; 13 W. R. 132.

——**Validity of.**]—The defendant bound himself to a London solicitor by articles for a term, and covenanted that he would not at the expiration of the term, or at any time thereafter, either solely, or jointly with, or as agent for, any other person or persons, directly or indirectly practise the business of an attorney or solicitor within the city of London, or the counties of Middlesex or Essex, nor directly or indirectly act as such attorney or solicitor for any client or clients of the plaintiff, or any partner or partners of the plaintiff, or for any person or persons who should have been a client or clients of the plaintiff, or any partner or partners of the plaintiff, at any time during the term. At the expiration of the term the defendant having commenced business on his own account in Southwark:—Held, that the restriction was not unreasonable, and that the defendant's acting for a petitioner in the London court of bankruptcy was a breach of the covenant. *May* v. *O'Neill*, 44 L. J., Ch. 660.

P., a solicitor, having accepted the situation of clerk to E., a solicitor practising at N., entered into a bond with him, which, after reciting that P. had been appointed agent to O., was conditioned to be void if P. should abstain from practising as a solicitor at N., or within thirty miles thereof, without the consent of E., and should not act as O.'s legal adviser, except as E.'s clerk,

and should not accept or undertake any other agency or appointment (except such as he then held) without E.'s consent; and, in case the engagement with him should be put an end to or determined, should not continue to act as agent to O. E. afterwards gave P. three months' notice to leave his office, and thus put an end to his engagement. At the expiration of that time P. resigned his appointment as agent to O., but he subsequently resumed it, and he obtained the office of clerk to the magistrates, and other offices. On motion on behalf of E., the court granted an injunction to restrain P. from acting as agent to O., as clerk to the magistrates, and from otherwise violating the stipulations of the bond. *Edmonds* v. *Plews*, 6 Jur. (N.S.) 1091; 3 L. T. 145.

—— **Construction—"Client"—Country Solicitor and London Agent.**]—A country solicitor is the "client" of his London agent within the meaning of a covenant not to transact business with any person who has been a client of the London agent. *Reid* v. *Burrows*, 61 L. J., Ch. 448; [1892] 2 Ch. 413; 67 L. T. 183; 40 W. R. 620.

No Contract.]—A clerk to a solicitor, commencing practice for himself, not to be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having in his former service acquired information likely to be prejudicial to the clients of his master. *Bricheno* v. *Thorp*, Jac. 300; 23 R. R. 69.

A solicitor's clerk, employed at a yearly salary, and who was allowed at the same time to keep his name up at a separate house in the same town as his employer and to practise for himself, having had disputes with his employer, suddenly left him without notice, and set up entirely for himself at the house he had been in the habit of using as his office. A motion to restrain him from so practising was, under the circumstances, refused. *Shepherd* v. *Neve*, 22 W. R. 725.

Articles under which A. had served his clerkship to an attorney, contained a proviso that A. should not practise within a certain district; and also a covenant on the part of his father, that A. should, within a month after he came of age, execute a bond in a specified penalty, to secure his fulfilment of the proviso. A., who was an infant at the time of the execution of the articles, served under them for three years after he attained his full age, but was never called on to execute any bonds; and with a knowledge of the purport of the articles completed his clerkship, and afterwards began to practise as an attorney within the district from which the articles purported to exclude him. A motion for an injunction to restrain him from practising within the district was refused with costs. *Capes* v. *Hutton*, 2 Russ. 357; 26 R. R. 102.

B. ADMISSION.

Notices — Change of Name.] — A person assuming a new name after his service under articles was complete should put up notices in his former and his new name. *Ridley, In re*, 4 A. & E. 780; 6 N. & M. 436; 6 L. J., K. B. 258.

—— **Amendment—Inaccuracy as to Name.**]—Where a second christian-name of both master and clerk was omitted in the articles of clerkship, and the notice of intention to apply for admission described the parties by such second christian-name, the court allowed the admission, on having an affidavit of the identity of the parties. *Crofts, Ex parte*, 5 N. & M. 58; 1 Har. & W. 375; 4 L. J., K. B. 204.

So where the clerk's christian-name has been incorrectly stated, the court will allow the notice to be corrected. *Dukes, Ex parte*, 7 D. P. C. 605; 2 W. W. & H. 44.

Where the notice of admission was given with a view to admission in Easter term, but by mistake the name of the person with whom he resided was inserted instead of the name of the party to whom he was articled, the court, on an affidavit of the mistake, and denying any intention to evade the inquiry, allowed him to be admitted on the same notice on the last day of Trinity term. *Clarke, In re*, 4 N. & M. 709; 3 A. & E. 72; 1 H. & W. 141; 4 L. J., K. B. 155.

—— **As to Service of Articles.**]—A notice erroneously stated that the clerk had served his time with B., when in fact he had been originally articled to B.'s partner, with whom he served three years, and on whose death he was assigned to B.:—The court allowed an amendment. *Collins, Ex parte*, 6 D. P. C. 495; 1 W. W. & H. 173; 2 Jur. 842.

—— **As to Place of Residence.**]—An amendment allowed in a notice for admission of an attorney by inserting his place of residence. *Jones, Ex parte*, 3 A. & E. 74.

Intentional Omission of Notice.]—If an articled clerk intentionally omits to give the notice and cause the entries to be made as required by Reg. Gen. H. T. 1853, r. 5, for the proper period before the term in which he proposes to be admitted, the court will not assist him by allowing such notice to be given and entries made subsequently. *Cumberland, Ex parte*, 44 L. J., Q. B. 73; L. R. 10 Q. B. 138; 23 W. R. 180.

When Rule as to Notice will be Relaxed.]—Under special circumstances the court allowed an articled clerk, who had passed his examination, to give his notices at the end of the term preceeding that in which he might be admitted an attorney, instead of giving the notices three days before its commencement as required by Reg. Gen. H. T. 1853, r. 5. *Taylor, Ex parte*, 44 L. J., C. P. 65; 31 L. T. 883.

A party who has been prevented by illness from being admitted as an attorney on the last day of a term, pursuant to the notices, will be allowed to be admitted the next term. *Thompson, Ex parte*, 1 W. W. & H. 33; 2 Jur. 34.

But a person who cannot be admitted in the term for which he has given notice, on account of being obliged to leave London by the sudden death of a relative, cannot be admitted the next term, but may give fresh notices for the following term. *Gwynne, Ex parte*, 2 W. W. & H. 45; 3 Jur. 199.

The court allowed an attorney to be admitted without a full term's notice, where all the other requisites had been complied with, and it appeared to be essential to his interests in his profession that he should sail for India before the regular time of notice should expire. *Hancock, In re*, 4 A. & E. 779; 2 H. & W. 99.

Where a party had given regular notice of his intention to apply to be admitted as an attorney on the first day of Hilary term, and it appeared

that, on the second day of Michaelmas term, an offer of partnership from the London agents of the firm to which he was articled had been made, provided he could get admitted by the last day of that term, the court, on motion on the fourth day of Michaelmas term, ordered that, on his giving fresh notices, referring to the former notices and the present rule, he should be examined, and, if of ability, admitted the last day of that term. *Cunliffe, Ex parte*, 3 D. & L. 548; 15 L. J., Q. B. 41; 9 Jur. 942.

The court allowed an attorney to be admitted without a term's notice, when it was sworn that he had, since the time at which such notice could have been given, received an advantageous offer of partnership, which he would be unable to accept, unless the application should be granted. *Estcourt, In re*, 8 Jur. 985.

Where it appeared that an articled clerk gave, three days before Easter term, the requisite notices for admission in Trinity term; that he was examined in Trinity term; then obtained a certificate of fitness, and immediately afterwards accepted the situation of a clerk to a firm of attorneys; and believing that he might be admitted in the ensuing Michaelmas term without fresh notices, failed to be admitted in Trinity term, the court, on a motion being made early in Michaelmas term, allowed him to give the requisite notices for admission on the last day of Michaelmas term. *Udall, In re*, 8 Jur. 1007.

Where an applicant had been examined in Michaelmas term, 1840, and obtained his certificate, and before the expiration of that term was entered of the Middle Temple as a law student, and with a view of being called to the bar, and immediately afterwards became the pupil of a conveyancer, with whom he remained twelve months, and subsequently of an equity draughtsman, with whom he remained eighteen months; and a proposition was then made to him to enter a London firm of attorneys as junior partner from the 1st of January, 1844; the court under the circumstances, and as there had been a continued application to legal studies, allowed the applicant, on the 20th of November, to give notice of his intention to apply for admission on the first day of Hilary term. *Guteris, Ex parte*, 7 Jur. 1039.

Renewal of Notice.]—An articled clerk gave the proper notices for examination and admission as an attorney in Easter term. He passed his examination in that term, but did not apply for admission, nor did he renew his notices pursuant to the rule of Hilary term, 1853:—Held, upon an application in Trinity term to be allowed to renew the notices, so that he might be admitted during that term, that the rule was positive, and that the court would not dispense with it. *Hay, Ex parte*, 41 L. J., Q. B. 375; L. R. 7 Q. B. 587.

A clerk, who, as his articles expired on the 23rd of August, 1863, was entitled to be examined in Trinity term, erroneously construed 23 & 24 Vict. c. 127, in connection with the rules, as entitling him to be admitted during Trinity term; and, as required by the rules, three days at least before Easter term, gave and entered the notices required for that purpose. Having, during Trinity term, been examined and obtained his certificate, and discovered that he was not entitled to be admitted till Michaelmas term, as it was too late for him to give and enter fresh notices, an application by him to have the notices already given amended and treated as fresh notices, in order for his admission in Michaelmas term, was granted. *Saffery, In re*, 11 W. R. 779.

Certificate of Fitness.]—Where an articled clerk had been examined, and had obtained his certificate of fitness from the examiners in Trinity term, 1841, and did not take any further steps to procure his admission as an attorney, and did not, within the next term, apply for an extension of the time during which his certificate should run, the court, in Michaelmas term, 1842, held that the operation of the certificate had ceased and refused to make an order for its renewal. *Bromley, Ex parte*, 2 D. (N.S.) 388; 12 L. J., Q. B. 98; 6 Jur. 995.

The court has not power to extend the time during which the certificate of examination for admission to practise as an attorney should be in force; the extension must be by order of a judge. *Younge, Ex parte*, 13 Q. B. 663.

Where a party applied to the court for such extension after the time had expired, alleging that he had two years ago given the usual notices for admission and passed his examination, but had then gone abroad on account of ill-health; that the time had elapsed while he was abroad and detained by continued illness; that, before leaving England, he had been unacquainted with the necessity for enlarging the time, and, therefore, made no application for the purpose; and that he was negotiating for reception into a partnership, but the negotiation might be frustrated if his admission were delayed; the court, on the last day of term, allowed him to give notice and be examined for the purpose of admission during the next term. *Ib.*

Although a person desirous of being admitted an attorney has already passed one examination, but failed to obtain his certificate from the examiners, he must give a fresh term's notice to the examiners if he intends to apply again to be examined. *Henry, Ex parte*, 1 P. & D. 71; 8 A. & E. 745; 1 W. W. & H. 585; 8 L. J., Q. B. 12; 2 Jur. 920.

Deposit of Articles.] — Where the original deed of assignment of articles of clerkship had been in mistake annexed to, and filed with, the affidavit of such assignment, the court permitted the examiners to receive an office copy of the assignment, and to proceed to the examination of the applicant as if the original had been produced to them; and directed also that the certificate of the master of the court, that the original assignment was so filed, should be deemed sufficient on granting the judge's fiat for the admission of the applicant as an attorney. *Buckle, Ex parte*, 2 D. (N.S.) 476; 7 Jur. 558.

So where, in consequence of his master absconding, the clerk was unable to procure his articles, he was admitted without their production. *Nicholls, Ex parte*, 2 D. (N.S.) 423.

Where articles expired on the 1st of June, and the time at which they ought to have been deposited at the hall of the Law Society had ended on the 30th of May, and the day of examination was the 5th of June, the court, on the 2nd of June, ordered the articles to be received. *Cooper, Ex parte*, 5 D. P. C. 703; W. W. & D. 348.

Sending Answers to Questions.]—Where the delay on the part of a clerk, in sending in the answers, has been caused by the unexpected absence of the attorney, with whom the articles were served, the court will allow them to be sent in nunc pro tunc. *Lyons, Ex parte*, 6 D. P. C. 517; 1 W. W. & H. 174.

Where a clerk had omitted to send in his answers to the questions within the time limited by the examiners, in consequence of his agent omitting to transmit them in sufficient time, the court allowed him to send in the answers subsequently, the agent paying the costs of the application. *Holland, Ex parte*, 5 D. P. C. 681; W. W. & D. 349; 1 Jur. 432.

Where an attorney to whom an articled clerk has served part of his time has absconded, the court will allow him to be examined without producing the usual testimonials from him as to service. *Carr, Ex parte*, 1 D. (N.S.) 565; 6 Jur. 194.

When Clerks will be admitted for Examination.]—The court will, under special circumstances where a clerk proposes to practise abroad only, allow him to be examined before the expiration of his articles. *Twynam, Ex parte*, 8 D. P. C. 293; 3 Jur. 1124. S. P., *Fulcher, Ex parte*, 8 D. P. C. 614; 4 Jur. 435.

The examiners ought not to refuse to examine a clerk on the ground that there is a doubt as to the validity of his service under his articles. *Masterman, Ex parte*, 6 Scott, 782; 7 D. P. C. 156; 5 Bing. (N.C.) 70; 8 L. J., C. P. 24. S. P., *Smithers, In re*, 1 Arn. 423; *Bebb, In re*, 3 Jur. 24.

The Law Society has been in the habit of examining articled clerks in the term in which their articles expire, even though they expire on a day subsequent to that on which the examination is held. A. entered into articles of clerkship, which expired two days after the last day of term. On an application for a rule directing the examiners to admit him to be examined, on the ground that the attorney to whom he was articled was compelled by ill-health to take a partner at once, and was desirous of taking A. into partnership, the court directed him to be examined de bene esse. *Thomas, Ex parte*, 2 L. T. 352; 8 W. R. 522.

Service entitling Clerk to be Examined.]—*See* ante, col. 1384.

Admission of Infants.]—The court will not admit an infant as an attorney. *Evans, Ex parte*, 1 W. W. & H. 34; 2 Jur. 47. S. P., *Cragg, Ex parte*, 6 D. P. C. 256.

Except perhaps in very urgent circumstances. *Steele, Ex parte*, 33 L. J., Q. B. 326; 10 Jur. (N.S.) 1254; 12 W. R. 956.

But where he has served the full period of five years, and he will become of age a few days after the term, he may be examined for the purpose of being admitted the following term. *Tebbs, Ex parte*, 9 D. P. C. 151; 1 W. P. C. 16; 4 Jur. 1014. S. P., *Bousfield, Ex parte*, 9 D. P. C. 616; 10 L. J., Q. B. 361; 5 Jur. 772.

Period of Clerkship expiring in Vacation.]—Where a clerk was articled on the 31st January, 1857, to serve "for five years next ensuing the date thereof":—Held, that he could not be admitted on the 31st January, 1862, but might be (under s. 12 of 23 & 24 Vict. c. 127) by a judge on the following day. *Ellis, In re*, 5 L. T. 686.

Semble, that a judge has not power out of term to admit an attorney, except where such power is expressly given by statute. *Steele, Ex parte*, 33 L. J., Q. B. 326; 10 Jur. (N.S.) 1254; 12 W. R. 956.

Oaths on Admission.]—An attorney may be admitted on taking the oath of allegiance and the oath to demean himself truly and honestly under 6 & 7 Vict. c. 73, ss. 18, 19. *Cornwodan Tyahjee, In re*, 28 L. J., Q. B. 22; 4 Jur. (N.S.) 1108.

But he cannot practise in England without taking the oath substituted for the oaths of allegiance, supremacy and abjuration, by 21 & 22 Vict. c. 48. s. 1. *Ib.*

An attorney, unable from bodily infirmity to attend to be sworn in, was allowed to be admitted in the court of review on an affidavit sworn before a master in chancery. *Swain, Ex parte*, 1 Deac. & C. 15.

In Inferior Courts.]—Attorneys of the superior courts are entitled, by virtue of 6 & 7 Vict. c. 73, s. 27, to be admitted to inferior courts of law. *London (Mayor)* v. *Reg.*, 13 Q. B. 1; 17 L. J., Q. B. 330; 13 Jur. 33—Ex. Ch.

In Counties Palatine.]—An application to admit and inrol an attorney of the courts of the county palatine of Durham, under 6 & 7 Vict. c. 73, s. 45, as an attorney of the superior courts at Westminster, may be made in court. *Patrick, Ex parte*, 1 D. & L. 696; 13 L. J., Q. B. 90; 7 Jur. 993.

Articles entered into with an attorney of the common pleas of the duchy of Lancaster, who was also an attorney of the queen's bench, and which were inadvertently stamped with the 60*l.* stamp required in order to entitle an attorney to practise in the common pleas of the duchy of Lancaster, instead of the 80*l.* stamp required to entitle him to admission to practise in the courts of Westminster Hall, were allowed to be inrolled on payment of the extra 20*l.*, on an affidavit that the omission was not made with the intention of evading the extra duty. *Watson, In re*, 11 W. R. 730.

A person admitted an attorney of the court of the county palatine of Durham before 23 & 24 Vict. c. 127, was entitled to be admitted an attorney of the queen's bench without giving a term's notice. *Watson, Ex parte*, 30 L. J., Q. B. 1; 6 Jur. (N.S.) 1077; 3 L. T. 267; 9 W. R. 13.

Where a clerk entered into articles for the purpose of being admitted in the common pleas of the county palatine of Lancaster, and before those articles expired resolved to be admitted an attorney of the court of queen's bench, and thereupon paid the higher duty; the court, upon being satisfied that he had acted bonâ fide, permitted his service under his original articles to be computed. *Hogg, Ex parte*, 11 L. T. 598; 13 W. R. 315.

Changing Name on Roll after Admission.]—Upon the application of a solicitor who had assumed the name of Chamberlain in addition to his own, the court, being satisfied with the reasons, ordered an entry of the change of name to be made upon the roll of solicitors. *Matthews, Ex parte*, 16 Beav. 245; 22 L. J., Ch. 22; 17 Jur. 29; 1 W. R. 44.

Where an attorney had changed his name by royal licence, the court allowed the roll to be amended by substituting the new name for the

old. *Benthall, Ex parte*, 6 Man. & G. 722; 7 Scott (N.R.) 407; 1 D. & L. 747. Contra, *Hayward, Ex parte*, 5 Scott, 712.

Where an attorney made an affidavit that for family reasons, and no other, he was desirous of changing his name, the court directed the master to indorse the proposed alteration on the roll of attorneys, although no royal licence had been obtained for the purpose. *Gimlet, In re*, 7 L. T. 562; 11 W. R. 210.

So where an attorney has signed the roll, if he afterwards alters his name, and is desirous of being recognised by such altered name, the court, on being satisfied that the application is bonâ fide, will allow the entry of such change to be made on the roll. *Daggett, Ex parte*, 1 L. M. & P. 1. S. P., *Moses, Ex parte*, 19 L. J., Q. B. 345; 15 Jur. 153; *Bryan, Ex parte*, 1 W. R. 436; *De Medewe, Ex parte*, 3 W. R. 181.

The court permitted an attorney, admitted in the queen's bench and exchequer by the name of "Thomas James Moses," to sign the roll of the common pleas by the name of "Thomas James" on the production of his admission in the queen's bench, upon an affidavit of the circumstances under which he had changed his name, and that the queen's bench and exchequer had permitted the entry of his name in their rolls to be so altered. *James, Ex parte*, 9 C. B. 221; 1 L. M. & P. 4. *S. C.*, 5 Ex. 310; 19 L. J., Ex. 272.

On an application of an attorney to be allowed to substitute the name of "J. Heaton D." on the roll in the place of "J. D.," the court refused to alter the roll, but directed the master to make a memorandum on the roll opposite his name, stating that he was known by the name of "J. Heaton D.," and that the memorandum was made by rule of court. *Dearden, In re*, 5 Ex. 740; 1 L. M. & P. 666; 20 L. J., Ex. 80.

An attorney who desires to change his name should apply to the court, and not to a judge at chambers. *An Attorney, Ex parte*, 11 W. R. 780.

C. READMISSION.

When Struck off at his own Request.]—It is a matter of course to restore to the roll an attorney who has been struck off at his own request, if no opposition is made by the Law Society after notice served on it. *Walsh, In re*, Ir. R. 10 C. L. 165.

An attorney, who had been struck off the roll by his own desire, was readmitted at the expiration of fifteen years, without paying any fine or arrears of duty. *Calland, Ex parte*, 2 B. & Ald. 315. *See* 51 & 52 Vict. c. 65, s. 16.

Where an attorney, struck off the roll on his own application, was afterwards called to the bar, the court refused to give him leave to be again put upon the roll. *Cole, Ex parte*, 1 Dougl. 114.

The same honour and the same integrity which are essential to the character and position of a barrister are also necessary to the character and position of an attorney. *Pyke, In re*, 6 B. & S. 703; 34 L. J., Q. B. 121; 11 Jur. (N.S.) 504.

An attorney, whose name was struck off the roll at his own request, was called to the bar, and afterwards disbarred on the charges of participating by previous agreement in the profits of an attorney, and in one particular case of having acted both as counsel and attorney. After a lapse of twenty years he applied for leave to be readmitted an attorney. The court refused, unless he could satisfy the court by the testimony of trustworthy persons (especially members of the profession) that his conduct and character had been unimpeached and unimpeachable in the meantime; but afterwards dispensed with this requirement on his showing that he could not obtain such testimony in consequence of his having lived during that period in complete retirement. *Ib.*

—— **Practice on—Affidavits.**]—Afterwards, upon renewal of the application, supported by affidavits that he had lived a secluded life with his family since he was disbarred, and was, therefore, unable to furnish the required affidavits, but furnished a list of his different abodes, and the dates of his residence at each (such affidavits being filed two months previously to the renewed application), the court ordered his readmission without examination. *Pyke, In re*, 34 L. J., Q. B. 220; 11 Jur. (N.S.) 860.

When Examination will be Required.]—A solicitor who did not take out a certificate for eleven years on account of ill health, but kept up his legal studies and pursuits, was allowed to renew his certificate without examination. *Elton, In re*, 37 L. J., Ch. 482; 17 L. T. 487; 16 W. R. 323.

Where an attorney, admitted in 1823, had ceased in 1832 to take out his certificate in consequence of his becoming a farmer and grazier, the court would not allow him to be readmitted in 1844 without an examination. *Bray, Ex parte*, 2 D. & L. 9; 13 L. J., Q. B. 240; 8 Jur. 875.

An attorney had been admitted thirty-nine years ago, but had not practised, and had, in the intermediate time, and till the period of the application, acted as a magistrate and commissioner. The court refused to readmit him, but allowed him to be re-examined, and to give his notices for the term next ensuing. *Robinson, Ex parte*, 2 D. & L. 9; 13 L. J., Q. B. 240; 8 Jur. 621.

A solicitor, who had ceased to take out his certificate in 1853, with the intention of being called to the bar, which he had abandoned, was allowed to renew his certificate without undergoing an examination in 1863. *Sewell, In re*, 32 Beav. 475.

An attorney who has ceased to practise for twelve years must pass his examination in the regular way before he will be permitted to renew his certificate. *Anon.*, 16 Jur. 222.

An attorney struck off the rolls at his own request ten years before, and from that time living on his property, was not readmitted without examination. *Rising, Ex parte*, 4 W. R. 559.

Readmission of applicant who had been struck off the rolls two years before at his own request for the purpose of studying for the bar, but whom the benchers had refused to call on account of his holding the office of county court bailiff, granted. *Anon.*, 3 L. T. 737.

But under similar circumstances the court refused to readmit at once when the applicant could not in the ordinary course be readmitted until the following term. *Longbourne, Ex parte*, 4 L. T. 210.

An attorney who had practised for twenty-seven years, but had ceased to practise for eighteen years, not readmitted without examination. *Leith, Ex parte*, 7 W. R. 579.

A person who has ceased to practise as a

solicitor for thirty-nine years will not be re-admitted without re-examination, though for the last seventeen years he has acted as a magistrate and commissioner of taxes. *Robinson, Ex parte*, 2 D. & L. 9 ; 13 L. J., Q. B. 240.

The court will not readmit an attorney who has discontinued practice for thirty years. *Billings, Ex parte*, 5 D. P. C. 395; 2 H. & W. 327.

Where an attorney had practised seven years, and had been off the rolls twenty-seven years, during which time he had not been engaged in the law, but then became a managing clerk in the office of an attorney, who answered to his capacity as a lawyer, the court allowed him to be readmitted. *Brabant, Ex parte*, 7 D. P. C. 622 ; 2 W. W. & H. 46 ; 3 Jur. 1152.

The court will not readmit an attorney who has discontinued practice for forty years, even though he has been employed occasionally as writing clerk in the office of various attorneys, generally as agent and rent-collector, in the intermediate time between the period of his ceasing to practise and the application to be readmitted. *Rudge, Ex parte*, 2 D. (N.S.) 682 ; 12 L. J., Q. B. 186 ; 7 Jur. 581.

After being Struck off for Misconduct.]—The court has power, even when it is proved that a conviction for an offence against the criminal law has taken place, but where the atonement of a long period of good conduct has been offered, to restore a solicitor to the roll. *Brandreth, In re*, 60 L. J., Q. B. 501 ; 64 L. T. 739 ; 39 W. R. 687.

Although, upon an application to strike a solicitor off the rolls for an offence under s. 32 of the Solicitors Act, 1843, such as allowing an unqualified person to practise in his name, the court may have a discretionary power to inflict a punishment short of striking him off the rolls, yet, if the court does make an order striking him off, it has no power afterwards to reinstate him, the direction in the section being absolute that, as the consequence of such an order, he shall for ever thereafter be disabled from practising as a solicitor. *Lamb, In re*, 58 L. J., Q. B. 450 ; 23 Q. B. D. 477 ; 61 L. T. 374 ; 37 W. R. 665—C. A.

A person convicted of a conspiracy to extort money by means of a libel is not a fit person to be on the rolls of the court as an attorney ; and the court will not entertain a motion for his readmission. *Hawden* or *Hawdone, In re*, 9 D. P. C. 970 ; 5 Jur. 508.

In 1847, A. was found guilty of forgery, but judgment was respited, on the ground that the judge had received evidence which was inadmissible ; viz. admissions which A. had been compelled to make when under examination as a witness in an action ; and he in consequence received a free pardon. In 1849 he was struck off the roll for perjury made in an affidavit of increase. The court refused, in 1856, to readmit him, although he produced very strong affidavits and testimonials as to his conduct since 1849. *Garbett, In re*, 18 C. B. 403.

An attorney having been struck off the roll in 1859, for misappropriating to his own use money received from a client for a particular purpose, the court, in 1865, allowed his name to be restored to the roll on affidavits of numerous attorneys as to his good character and conduct during the interval. *Robins, In re*, 34 L. J., Q. B. 121 ; 11 Jur. (N.S.) 504.

When an attorney has been struck off the roll for a fraudulent misappropriation of moneys of a client intrusted to him for investment, it is a condition precedent to his being restored that he should have made full restitution, or, at least, all the restitution in his power. *Poole. In re*, 38 L. J., C. P. 216 ; L. R. 4 C. P. 350 ; 17 W. R. 735.

An attorney who has been struck off the roll may be readmitted. *Rex* v. *Greenwood*, 1 W. Bl. 222.

A solicitor who has been struck off the rolls for misconduct restored after a lapse of ten years, during which, amidst great privation and suffering, he had maintained an irreproachable character, the application being supported by a memorial signed by a very large number of solicitors, and not opposed by the Law Institution, though opposed by one individual solicitor only. *Anon.*, 17 Beav. 475.

Renewal of Certificate.]—*See next sub-heading.*

D. CERTIFICATE.

Stamp—Attendance of Country Solicitor at a Taxation in London—"Practising."]—By 33 & 34 Vict. c. 97, the duty on the certificate, if a person "practises or carries on his business" within ten miles from the general post office of the city of London, is of a certain amount ; and if he practises or carries on his business beyond the above-mentioned limits, is of a less amount. A solicitor, with a country certificate, and whose offices were at Birmingham, came up on a retainer and attended the taxation of a bill of costs within the ten-mile radius :—Held, that he did not, by this one transaction, act or practise in London within the meaning of the statute. *Horton, In re*, 51 L. J., Q. B. 309 ; 8 Q. B. D. 434 ; 45 L. T. 451 ; 30 W. R. 102 ; 46 J. P. 293.

—— **Country Solicitor—Practising in Dublin.**]—Where an application was made on behalf of a plaintiff to stay the taxation of the defendant's costs, in an action tried in Dublin, in 1863, on the ground that M., the defendant's attorney, had taken out a certificate to enable him to practise as a country attorney, for 1863, for which he paid 6*l.*, being the amount required to be paid by a country practitioner not ordinarily carrying on his business in the city of Dublin for more than forty days in the year, and where it appeared that though M. lived altogether in the country in the year, yet that his entire business was carried on in the superior courts, and attended to by a town agent in Dublin :—Held, that an attorney living in the country, whose ordinary business was transacted in Dublin, should pay a city licence. *Keegan* v. *Mowlds*, 10 L. T. 822.

Evidence—"Law List."]—The "Law List" is primâ facie evidence that a person has taken out his certificate for the then current year ; if a solicitor's name does not appear thereon, the onus of proving that he is a solicitor lies upon him. *Reg.* v. *Wenham*, 10 Cox, C. C. 222.

Renewal.]—Where a solicitor has neglected for a whole year to renew his certificate, the master of the rolls only has power to order the registrar of certificates (the Incorporated Law Society) to grant him a certificate for the current year. The right of a solicitor who has neglected to renew his certificate to apply for a fresh one is not a "right acquired or accrued" within 40 & 41 Vict. c. 25, s. 23, Proviso (B). *Chaffers, In re, Incorporated Law Society, Ex parte*, 15 Q. B. D. 467.

Where an attorney, who had ceased to practise and renew his certificate for several years, gave the notices provided for by the rules, whereby he would have been at liberty to have renewed his certificate in vacation, and applied to the court to be permitted to renew his certificate at once, on the ground (explained) that it was of great importance to him to be at once so permitted: the court refused the application, as the permission sought would entirely defeat the object of the rule. *Barnes, Ex parte*, 2 B. C. Rep. 156; 5 D. & L. 294.

The court will, in urgent cases, dispense with the rule, provided it appears that there has been no neglect in the applicant to give as long notices as were in his power, and that the notices so given afforded a reasonable time for inquiry into his conduct since his admission. *Webb, Ex parte*, 4 D. & L. 641. S. P., *Weymouth, Ex parte*, 5 D. & L. 60; 2 B. C. Rep. 102.

The court will make an order authorising the registrar to issue a certificate to an attorney, whose London agent had omitted to take it out for the last and present year (the money and instructions having been forwarded to him for that purpose), on payment of the arrears of duty, without obliging him to give any notices. *Gude, Ex parte*, 1 D. & L. 675; 7 Jur. 1016. *See also* supra, READMISSION.

—— **Where Applicant has been Guilty of Misconduct.**]—But the court refused to allow an attorney to take out his certificate, where he had been found guilty on an indictment for a conspiracy, and had been sentenced to and had undergone eighteen months' imprisonment, although the motion was unopposed, and the fact appeared only on his own affidavit, and he swore he was not guilty of the offence, and it had occurred eighteen years back, since which time he had been engaged as law clerk in the offices of several attorneys. *Grey or Gray, Ex parte*, 5 D. & L. 275; 12 Jur. 119.

An attorney, whilst uncertificated, had placed his name upon briefs for counsel at quarter sessions, and upon his showing that he had on those occasions acted gratuitously, and from motives of kindness, was allowed to renew his certificate upon payment of three years' back duty and a fine. *Taylor, In re*, 16 Jur. 728. S. P., *Carpenter, In re*, 18 W. R. 382.

—— **Non-production of, under 23 & 24 Vict. c. 127, s. 21.**]—A solicitor who, by a slip, neglected to produce his certificate to the registrar within a month, as required by 23 & 24 Vict. c. 127, s. 21, was relieved from the consequences, and it was ordered that the certificate should take effect from the time of stamping the same. *Smith, In re*, 33 Beav. 248.

E. ARTICLES OF PARTNERSHIP.

See PARTNERSHIP.

F. GOODWILL OF BUSINESS.

See GOODWILL.

G. PRIVILEGE.

I. PERSONAL TO SOLICITOR.

Acting as Advocate.]—Where, at a trial before an under-sheriff, an attorney opened the case as an advocate for the plaintiff, cross-examined the defendant's witnesses, and addressed the jury in reply, and then tendered himself and was admitted as a witness to disprove the defendant's case, a verdict so obtained for the plaintiff was set aside. *Stones* v. *Byron*, 4 D. & L. 393; 1 B. C. Rep. 248; 16 L. J., Q. B. 32; 11 Jur. 44. *But see* contra, *Cobbett* v. *Hudson*, 1 El. & Bl. 11; 22 L. J., Q. B. 11; 17 Jur. 488; 1 W. R. 54.

A commissioner in bankruptcy is not bound to hear a person who, although a duly admitted solicitor of the court, does not appear as the solicitor of the party for whom he appears, but only as the clerk of such solicitor. *Broadhouse, Ex parte* and *In re*, 36 L. J., Bk. 29; L. R. 2 Ch. 655; 17 L. T. 126; 15 W. R. 126.

A solicitor has no right to insist upon taking part as an advocate upon proceedings before justices under a penal statute, where it is the practice of that court not to allow persons to practise as solicitors or advocates. *Collier* v. *Hicks*, 2 B. & Ad. 663; 9 L. J. (O.S.) M. C. 138.

—— **In Court of Arches.**]—A respondent in a cause of appeal in the arches court could not before 39 & 40 Vict. c. 66, appear by a solicitor of the supreme court of judicature who was not also a proctor of the arches, duly qualified and admitted according to the practice of that court. *Crisp* v. *Martin*, 1 P. D. 302.

—— **Solicitor in Permanent and Exclusive Employment of another Solicitor — "Acting generally in the Action or Matter."**]—A solicitor, whose position is merely that of clerk to another solicitor, although he is in the latter's permanent and exclusive employment, and, in the course of his duty, has had the management of the business of a client of his employer who is a party to an action or matter, and has advised him thereon, is not "a solicitor acting generally in the action or matter" so as to be entitled as of right to audience in a county court on behalf of such party. *Reg.* v. *Snagge*, 63 L. J., Q. B. 689; [1894] 2 Q. B. 440; 10 R. 381; 70 L. T. 874; 42 W. R. 603; 58 J. P. 752.

Bankruptcy—Sale of Books and Papers.]—The sale of the books of a solicitor who had been adjudicated a bankrupt is not authorised by the Bankruptcy Act, 1861, s. 137, and, therefore, where a sale by auction of the book debts and books of a firm of solicitors had been directed by the assignees:—Held, to be improper, on the ground that the affairs of the clients of the bankrupts might be made public. *Roberts, Ex parte, Holden, In re*, 33 L. J., Bk. 8; 10 Jur. (N.S.) 28; 9 L. T. 469; 12 W. R. 183.

Privilege from Arrest.]—An attorney's clerk is not privileged from arrest whilst going to the judges' chambers for the purpose of there conducting his master's business. *Phillips* v. *Pound*, 7 Ex. 881; 21 L. J., Ex. 277; 16 Jur. 645. *See also* SHERIFF.

Visiting Clients in Prison.]—Attorneys are entitled to be admitted to the interior of the K. B. prison when they have occasion to go there for the benefit of clients confined in the prison, or when they are sent for by such clients. *Jones, In re*, 1 N. & M. 128. *S. C.*, nom. *Matanle, Ex parte*, 4 B. & Ad. 365.

Action commenced in High Court—Costs—County Courts Act, 1867, s. 5.]—Sect. 5 of the County Courts Act, 1867, which deprives plaintiffs in actions commenced in the high court of costs if less than 20*l.* in contract, or 10*l.* in tort, is recovered, applies to an action in which a solicitor is plaintiff. *Blair* v. *Eisler*, 57 L. J., Q. B. 512; 21 Q. B. D. 185; 59 L. T. 337; 36 W. R. 767.

As to Venue—When Suing.]—The privilege of an attorney suing in person, to lay and retain the venue in Middlesex is not affected by the Common Law Procedure Act of 1852, or Reg. Gen., H. T. 1852, r. 18; and consequently, the defendant cannot, under any circumstances, change the venue in such an action. *Grace* v. *Wilmer*, 6 El. & Bl. 982; 26 L. J., Q. B. 1; 3 Jur. (N.S.) 64; 5 W. R. 47.

An attorney, when plaintiff, may lay and retain the venue in Middlesex. *Pye* v. *Leigh*, 2 W. Bl. 1065.

But he has no privilege of laying and retaining the venue in London. *Bradshaw* v. *Barton*, 7 D. P. C. 329; 1 W. W. & H. 417; 2 Jur. 990.

An attorney appearing by another loses his privilege. *Harrington* v. *Page*, 2 D. P. C. 164. S. P., *Dowless* v. *Timms*, 3 D. P. C. 707.

In order to retain the venue in Middlesex, it is not necessary that he should state in the declaration that he sues as an attorney. *Cutts* v. *Surridge*, 4 D. & L. 373; 16 L. J., Q. B. 2. S. P., *Williams* v. *Powell*, 10 Jur. 966.

Where an attorney, by the mistake of his agent, laid the venue in the country, instead of Middlesex, the court refused to amend by changing it to Middlesex. *Lewis* v. *Shelley*, 2 Marsh. 426; 7 Taunt. 146.

An attorney is entitled to retain his venue in Middlesex, notwithstanding his not having entered his certificate. *Partington* v. *Woodcock*, 2 D. P. C. 550.

In the case of an issue directed by the court, it is no objection to an application to change the venue from Middlesex to Sussex, that the plaintiff is an attorney of the court. *Robertson* v. *Hayne*, 16 C. B. 560.

—— **When Sued.**]—When a defendant, he has no privilege with respect to the venue whatever. *Yeardley* v. *Roe*, 3 Term Rep. 573. S. P., *Pope* v. *Redfearne*, 4 Burr. 2027.

A solicitor is equally liable to be sued in an action in the mayor's court as in the superior court. *Day* v. *Ward*, 55 L. J., Q. B. 494; 17 Q. B. D. 703; 55 L. T. 518; 35 W. R. 59.

When an attorney files a bill in chancery without authority, and the plaintiff is obliged to pay the costs of the bill being dismissed he may lay the venue either in the county where the court of chancery is held, or in the county where he actually paid the money. *Lyde* v. *Rodd*, 1 Bro. P. C. 65.

In Actions of Libel and Slander.]—*See* DEFAMATION.

II. IN RELATION TO CLIENTS.

See DISCOVERY—EVIDENCE.

H. DUTY AND AUTHORITY OF.

I. RETAINER.

Written or Verbal.]—Though not absolutely necessary, yet in common practice, an attorney ought, before commencing an action, to take a written direction from his client for so doing. *Owen* v. *Ord*, 3 Car. & P. 349. S. P., *Lord* v. *Kellett*, 2 Myl. & K. 1.

The retainer of a solicitor need not be in writing, but if he neglects taking the precaution, and, his retainer being afterwards questioned, there is nothing but assertion against assertion, he must bear the costs of the risk he thus undertakes. *Wiggins* v. *Peppin*, 2 Beav. 403; 3 Jur. 721.

Although an authority may be given to file a bill by parol, yet the solicitor must abide by the consequence if he omit to take a written authority; and where there was assertion against assertion, an order was made to take the bill off the file, and that the solicitor should pay the costs. *Martindale* v. *Lawson*, C. P. Cooper 83.

Implies promise to pay Costs.]—A retainer implies a promise to pay all costs rightly and properly incurred upon the retainer. *Bolden* v. *Nicholay*, 3 Jur. (N.S.) 884.

Several Causes.]—Four plaintiffs instituted an original and two supplemental causes, and three of the same plaintiffs on a subsequent abatement filed a supplemental bill by a new solicitor, making the other plaintiff a defendant, who also appeared by another solicitor. On a petition in the four causes, the solicitor in the last supplemental suit, and not the solicitor on the record in the first three causes, was held entitled to appear for the plaintiffs. *Ward* v. *Swift*, 6 Hare, 309.

Knowledge that Name is used without Authority.]—If a solicitor has used the name of a party as plaintiff in a suit with his knowledge, but without his authority, and such party allows the suit to proceed without taking steps to have his name removed from the record, this will not be an adoption of the solicitor, nor equivalent to a retainer of him by the party. *Hall* v. *Laver*, 1 Hare, 571; 4 Y. & Coll. 218; 5 Jur. 241.

A party to a cause, for whose benefit, in common with others, the cause has been prosecuted, cannot avail himself of the benefit resulting from the suit discharged of the expenses of it, although he may have been made a party to it without his authority. *Ib.*

May be Inferred.]—The existence of the relation of solicitor and client between parties may be inferred from their acts, although the solicitor has not received any express retainer. *Blyth* v. *Fladgate*, 60 L. J., Ch. 66; [1891] 1 Ch. 337; 63 L. T. 546; 39 W. R. 422.

The matter of a mortgage to trustees was undertaken by S. as a partner in F., S. & F., at a time when there were no trustees of the settlement, in the expectation that the new trustees when appointed would adopt the security, which they did:—Held, that the relation of solicitor and client subsisted between the firm and the trustees, and that the firm were liable to the trustees for the damages sustained by them by reason of the negligence of the firm. *Ib.*

A. and B. sue out a commission as solicitors to the petitioning creditor, and the assignees afterwards appoint C. to act as solicitor, but it is agreed between him and A. and B., with the privity of the assignees, that all three shall jointly act as solicitors and share the profits, and the assignees afterwards recognise the acting of A. and B. as such joint solicitors:—Held, that this

amounted to a retainer by the assignees of A. and B. as joint solicitors with C. *Hammond, Ex parte, Wooding, In re*, 3 Deac. & C. 626; 1 Mont. & Ayr, 328; 3 L. J., Bk. 62.

The solicitor appointed by the creditors' assignees is the solicitor of all the assignees in the bankruptcy; but he is not by such appointment otherwise constituted the agent of the official assignee. *Hughes* v. *Morris*, 9 Hare, 636; 21 L. J., Ch. 761; 16 Jur. 603.

As to what constitutes a relationship of attorney and client. *Goddard* v. *Carlisle*, 9 Price, 169; 23 R. R. 164.

Where the plaintiff was employed as a solicitor to carry on proceedings in chancery, after which the defendant married one of the parties to the suit, and eventually received a proportionate part of the property in dispute, in right of his wife, under an order of that court:—Held, that he was liable to pay the plaintiff his proportion of the bill of costs, after taxation, although there had been no retainer of the plaintiff by the defendant, and although the bill had not been delivered to the latter, but to a co-defendant, who had suffered judgment by default. *Gray* v. *Wainman*, 7 Moore, 467; 1 L. J. (o.s.) C. P. 21.

An attorney, who was the ordinary attorney for a borrower, also acted in the matter of a particular loan for the lender, but did not make any charge against the lender for his services. The security he took was not sufficient:—Held, that he was properly charged as an attorney acting on the retainer and employment of the lender, and was in that character liable to an action for damages for the loss suffered through the insufficiency of the security. *Donaldson* v. *Haldane*, 7 Cl. & F. 762.

Contract by Company to Employ.]—In a declaration against a company a count alleged that, in consideration that the plaintiff had agreed to become the permanent attorney and solicitor of the company, and to act as such, for reward, the company promised the plaintiff to retain and employ him, as such permanent attorney; and that, in pursuance of the agreement, the company in fact retained and employed him, and the plaintiff acted, and had always been ready and willing to act, as the permanent attorney of the company; and alleged, for breach, that the company wrongfully, and without any just or reasonable cause for so doing, discharged him from being or acting as such attorney:—Held, that the count was not supported by proof of a resolution of the directors, that the plaintiff be appointed permanent solicitor to the institution; the word "permanent" denoting, in such resolution, no more than a general employment, as contradistinguished from an occasional or special employment. *Elderton* v. *Emmens*, 4 C. B. 479; 16 L. J., C. P. 209; 11 Jur. 612. *See next Case.*

A count that it was agreed by and between the plaintiff and a company that from a certain day the plaintiff, as the attorney and solicitor of the company, should receive a salary of 100*l.* per annum in lieu of rendering an annual bill of costs, and should for such salary advise and act for the company on all occasions in all matters connected with the company, with certain exceptions. That the said agreement being so made, in consideration that the plaintiff had, at the request of the company, promised the company to perform the same in all things on his part, the company promised to perform the same in all things on their part, and to retain and employ him as such attorney and solicitor on the terms aforesaid, and alleged, for breach, that the company, disregarding the promise and agreement, did not nor would continue to retain or employ the plaintiff as such attorney or solicitor on the terms aforesaid, but wrongfully, and without any reasonable cause, dismissed and discharged him from such employment and retainer, and thence hitherto refused to retain or employ him as such attorney or solicitor:—Held, that the count was good after verdict, for that it sufficiently alleged an agreement by the company, creating the relation of attorney and client, and a promise to continue that relation for at least a year. *Emmens* v. *Elderton*, 13 C. B. 495; 4 H. L. Cas. 624; 18 Jur. 21.

A solicitor had a retainer to act generally for a company, and also a special retainer to conduct a chancery suit on behalf of the company. Being employed by another client to go to America, he collected information on behalf of the company in furtherance of their suit, but without special instructions from the company to do so. On his return to England, he reported to the company what he had done, and they made use of the information he had obtained. He afterwards took three journeys to Paris to conduct negotiations for a compromise of the same suit without instructions from the company, but with the knowledge of some of the directors, and on two of them he was accompanied by the chairman:—Held, that, under the special circumstances of the case, the solicitor was entitled to charge the company for his professional services in America, and also for his professional services and expenses on his journeys to Paris. *Snell, In re*, 5 Ch. D. 815; 36 L. T. 534; 25 W. R. 736—C. A.

—— **Articles of Association.**]—Articles of association contained a clause in which it was stated that the plaintiff should be solicitor to the company, and should transact all the legal business of the company, including parliamentary business, for the usual and accustomed fees and charges, and should not be removed from his office, unless for misconduct. The articles were signed by seven members of the company, and were duly registered, and the company incorporated under the Companies Act, 1862. The plaintiff acted as solicitor to the company for some time, but ultimately the company ceased to employ him and employed other solicitors. The plaintiff brought an action against the company for breach of contract in not employing him as solicitor to transact their legal business on the terms of the articles:—Held, that the articles of association were a matter between the shareholders inter se, or the shareholders and the directors, and did not create any contract between the plaintiff and the company. *Eley* v. *Positive Government Security Life Assurance Co.*, 45 L. J., Ex. 451; 1 Ex. D. 88; 34 L. T. 190; 24 W. R. 338—C. A.

By Corporations.]—By an act, incorporating a railway company, power was given to the directors to appoint and displace any of the officers of the company:—Held, that the appointment of an attorney to the company under this power need not be under seal. *Reg.* v. *Cumberland JJ.*, 5 Railw. Cas. 332; 5 D. & L. 431; 17 L. J., Q. B. 102; 12 Jur. 1025.

The retainer or appointment of an attorney by a corporation must be by its common seal. Where,

therefore, there has been such appointment, he cannot recover the amount of his bills of costs from the corporation of the business which he had transacted on behalf of that body. *Arnold* v. *Poole Corporation*, 5 Scott (N.R.) 741 ; 2 D. (N.S.) 574 ; 4 Man. & G. 860 ; 12 L. J., C. P. 97 ; 7 Jur. 653.

Business was done for a corporation by an attorney, whose appointment was not under seal. After several bills had been delivered for business done by him as such attorney, and also for costs incurred by him as town clerk, he received payments on account, which, in the absence of any specific appropriation by the corporation, he appropriated at the time to the discharge of certain bills, upon which, for the reason above stated, he could have maintained no action :—Held, that, inasmuch as his claim on those bills was a just and an equitable claim, though, from the absence of a contract under seal, they could not be made the subject of an action, the appropriation so made by him could not be called in question. *Ib.*

The retainer of an attorney by a corporation to conduct the opposition to a bill in parliament is an act which must be done by it under its common seal. *Sutton* v. *Spectacle Makers Co.*, 10 L. T. 411 ; 12 W. R. 742.

A resolution by a corporation to retain an attorney to take steps in opposition to a rule nisi obtained against the corporation to assess compensation for the dismissal of an officer, coupled with an order that the return should be filed, is a sufficient authority to him to defend the return to the writ of mandamus. *Reg.* v. *Lichfield Town Council*, 10 Q. B. 534 ; 16 L. J., Q. B. 333 ; 11 Jur. 888.

The mayor and assessors of a borough, having refused to revise the list of burgesses of certain parishes within the borough, on the ground that they had not been published within the time prescribed by the 5 & 6 Will. 4, c. 76, s. 15, and having rejected certain notices of claims and objections, on the ground that they had not been personally delivered to the town clerk, the parties thus disfranchised obtained writs of mandamus to compel the succeeding mayor and assessors to hold another court to revise the lists. The corporation, under their seal, retained an attorney to defend them against these proceedings, but the defences substantially failed :—Held, that he was entitled to maintain an action against the corporation for his costs incurred under the retainer ; and that, inasmuch as there was nothing to shew that the defence was unjustifiable or improper, the expenses were chargeable on the borough fund. *Lewis* v. *Rochester Corporation*, 9 C. B. (N.S.) 401 ; 30 L. J., C. P. 169 ; 7 Jur. (N.S.) 680 ; 3 L. T. 300 ; 9 W. R. 100.

—— **Salary—Fixed Sum.**]—The town council of a borough resolved :—"That 100 guineas be fixed as the salary of the town clerk for his attendance on the business of the council and committees, and that he be paid the usual charges and expenses in defending and bringing actions." Certain bills of the town clerk for business done for the corporation having been taxed :—Held, on motion to review the taxation, that the master was right in disallowing charges made for matters which, as town clerk, it was his duty to perform ; also, that the salary of 100 guineas was to be considered as remunerating him for all business he might do for the corporation, except defending and bringing actions. *Thomas* v. *Swansea Corporation*, 2 D. (N.S.) 470 ; 12 L. J., Ex. 73.

By Next Friend.]—Where a person lends his name as the next friend of an infant plaintiff, and, for the purpose of complying with the rules of the court of chancery, signs a retainer to an attorney to conduct the suit, although he does not further interfere in the matter, and the attorney receives his instructions from third parties, the next friend is liable on his retainer for the costs, unless he displaces this primâ facie liability by clear proof that the attorney acted on the credit of other persons. *Hawkes* v. *Cottrell*, 3 H. & N. 243 ; 27 L. J., Ex. 369. S. P., *Flower, In re*, 19 W. R. 578.

—— **Right of Infant against Solicitor.**]—Where an infant, suing by prochein ami, has obtained judgment for damages and costs, which have been paid to the attorney appointed by the prochein ami to conduct the suit for him, he may maintain an action against such attorney to recover the amount as money received for his use. *Collins* v. *Brook*, 5 H. & N. 700 ; 29 L. J., Ex. 255 ; 6 Jur. (N.S.) 999 ; 2 L. T. 774 ; 8 W. R. 474—Ex. Ch.

By Infant.]—An infant, who has no property of her own to settle, may contract with a solicitor for the preparation of a marriage settlement by her intended husband, under which proper provision is made for her benefit, as such may be considered a necessary suitable to her estate and condition. *Helps* v. *Clayton*, 17 C. B. (N.S.) 550 ; 34 L. J., C. P. 1 ; 10 Jur. (N.S.) 1148 ; 11 L. T. 476 ; 13 W. R. 161.

Infant is bound by conduct of his solicitor in a cause. *Tillotson* v. *Hargrave*, 3 Madd. 495.

A continued employment of an attorney by an infant client, after the latter comes of age, may amount to an undertaking to pay a prior bill of costs. *Guy* v. *Burgess*, 1 Sim. 117.

A suit was instituted in the name of two infants by their next friend. One came of age, and some time afterwards the next friend obtained an order for changing the solicitors of the plaintiffs. It was discharged with costs. *Brown* v. *Brown*, 11 Beav. 562.

By Lunatic or Incapacited Person.]—A solicitor employed on part of a lunatic can have no action against him for his bill of costs. *Barnesley* v. *Powell*, Ambl. 102.

A solicitor, who had been retained to conduct proceedings under a commission of lunacy, and acted on behalf of the committees, was held entitled to stand as a simple contract creditor against the estate after the death of the lunatic, in respect of his costs, although more than six years had elapsed from the order of the chancellor directing taxation of the costs incurred in reference to the commission, the statute having no operation till after the death of the lunatic. *Stedman* v. *Hart*, 2 W. R. 462 ; 1 Kay, 607.

A solicitor who has been instructed by a defendant to defend a suit for him can properly continue to do so, although the defendant, through an attack of paralysis, has become incapable of attending to matters of business. *Steel* v. *Cobb*, 1 N. R. 302 ; 11 W. R. 298.

By Married Women.] — A married woman, having separate property, and living apart from her husband, employed the plaintiffs as her solicitors, and promised them, by letter, that she would pay their bills, but did not refer to her separate property :—Held, that that property was liable to pay the bills. *Murray* v. *Barlee*, 3

Myl. & K. 209 ; 3 L. J., Ch. 184. *And see* 7 Sim. 194.

A retainer by a married woman to a solicitor to act in respect to one portion of her separate estate, operates as a charge upon all property settled to her separate use, and is not confined to the particular property upon which the solicitor is called upon to act. In such a case the solicitor does not lose his lien from the circumstance of the property ceasing to be separate estate of the wife by the death of the husband. *Bolden* v. *Nicholay*, 3 Jur. (N.S.) 884.

A solicitor, before instituting proceedings for a client, especially on behalf of a wife against her husband, is bound to ascertain how the facts stand, and whether there is a reasonable expectation that the proceedings will be successful. *Baylis* v. *Watkins*, 2 De G. J. & S. 91 ; 33 L. J., Ch. 300 ; 10 Jur. (N.S.) 114 ; 9 L. T. 741 ; 12 W. R. 324.

An attorney had been employed by a wife (while she was for just cause living apart from her husband) to resist a habeas corpus which the husband had procured to be issued to recover from her the possession of their child, aged over seven years, and now sought to recover from the husband the costs of the proceedings, averring specially that the wife was living separately from her husband, on account of his cruelty ; that the work was done upon the retainer of the wife, and at her request, and that it was necessary for the purpose of maintaining her rights :— Held, that, upon the facts alleged, the attorney was not entitled to recover. *Macredy* v. *Taylor*, Ir. R. 7 C. L. 256—Ex. Ch. Reversing, Ir. R. 6 C. L. 336 ; 20 W. R. 252.

A wife is entitled to pledge her husband's credit for all the costs as between solicitor and client reasonably incurred by her in respect to the institution and prosecution of a divorce suit against her husband. *Ottaway* v. *Hamilton*, 47 L. J., C. P. 725 ; 3 C. P. D. 393 ; 38 L. T. 925 ; 26 W. R. 783—C. A.

By Partners.]—The managing partner of a trading partnership has authority to instruct solicitors to enter an appearance, in accordance with Ord. XLVIII.A, r. 5, for the partners individually in an action brought against the partnership in the name of their firm for a trade debt. *Tomlinson* v. *Broadsmith*, 65 L. J., Q. B. 308 ; [1896] 1 Q. B. 386 ; 74 L. T. 265 ; 44 W. R. 471—C. A.

By Surveyors of Highways.]—The retainer of a surveyor of highways, if given in an ordinary manner, maks him responsible for all attorney's business done under it, although done after the expiration of his term of office. *Champ* v. *Stokes*, 6 H. & N. 683 ; 30 L. J., Ex. 242 ; 7 Jur. (N.S.) 607 ; 4 L. T. 334.

In an action by A. & B., who were attorneys, against surveyors of highways of a parish, for business done in procuring an order of magistrates to divert highways in the parish, and, on an appeal against that order, it appearing that A. & B., in their bill, charged for drawing a resolution of a parish meeting held before the order was applied for, which resolution stated that the order was to be applied for at the instance and at the expense of a railway company :—Held, that A. & B. must be considered to have undertaken the business on those terms, unless there was an express employment of them by the surveyors, and on their credit, of which there ought to be direct proof. *Spurrier* v. *Allen*, 2 Car. & K. 210.

—— **Vestrymen Signing Resolution.**]—Vestrymen who signed a resolution ordering the parish surveyor to take steps for defending an indictment for not repairing a road, are not responsible for the payment of the attorney employed by the surveyor. *Sprott* v. *Powell*, 3 Bing. 478 ; 11 Moore, 398 ; 4 L. J. (o.s.) C. P. 161 ; 28 R. R. 665.

Joint or Separate.]—To determine the liability for costs of co-plaintiffs in a suit the court will look into the transaction to see whether the contract though joint in form, was intended by the parties to be joint and several ; and such intention may be presumed from the circumstances. *Furlong* v. *Scanlan*, Ir. R. 9 Eq. 202.

Therefore where C. was employed to conduct a partition suit on the joint retainer of M. and S., co-plaintiffs with equal rights as tenants in common, there being no special contract, and it appeared that the benefit of the partition would enure to each of them severally :—Held, that the liability for costs was several as well as joint, and that C. might prove against M.'s assets for the amount. *Ib.*

Separate retainers were given to an attorney by the defendant and two other persons, as defendants to conduct their defence ; but a joint appearance was entered, and a joint answer put in ; one set of counsel only was employed, to whom one set of briefs was delivered, and joint affidavits were made, and joint consultations obtained, the defence throughout being conducted as a joint defence. In an action by the attorney to recover the whole costs from the defendant :—Held, that the plaintiff was entitled to recover the whole of his costs from the defendant ; for, though the retainers were separate, there was evidence that they had merged into one joint liability ; and not having raised the question of separate liability at the trial, it was not open to the defendant, to raise it afterwards. *Burridge* v. *Bellew*, 32 L. T. 807.

If there are separate contracts with the attorney, each defendant is liable for his own share only of the costs, and if the contract is joint, then each is liable for the whole. *Ib.*

In a suit by a shareholder against the directors, secretary and the company to restrain an action for calls, to be relieved of his shares on the ground of misrepresentation in the prospectus, and to be indemnified by the directors, the defendants, having all appeared by A., the same solicitor, put in a joint and several answer, signed by one counsel, and joined in their defence, signed three separate retainers to A., all in the following terms : "You having up to the present time conducted the defence of this suit on behalf of all the defendants, and, in pursuance of their instructions in that behalf, we the undersigned do hereby confirm such instructions, and request you to continue such defence, and to take such steps as you may consider necessary in the matter" :—Held, that the retainers were separate and not joint, and that the assets of the company (in liquidation) were liable for one-ninth only of the costs. *Allen, In re, Davies* v. *Chatwood*, 48 L. J., Ch. 358 ; 11 Ch. D. 244 ; 40 L. T. 358 ; 27 W. R. 485.

Where a judge's order is made by consent to consolidate actions against several defendants who have severally employed the same attorney, upon their undertaking to be bound by the event of the trial of one, the order to consolidate operates

as a joint retainer by the defendants of the attorney, and they are jointly liable to him for the costs of the action which is tried. *Anderson* v. *Boynton*, 7 D. & L. 25; 13 Q. B. 308; 19 L. J., Q. B. 42; 14 Jur. 14.

Circumstances under which the solicitor of an annuitant, selling under a power of sale, was considered also the solicitor of the grantor of the annuity. *Blaye's Trusts, In re*, 1 Macn. & G. 488; 2 H. & Tw. 140; 19 L. J., Ch. 89; 14 Jur. 49.

A solicitor, on the sole retainer of the debtor, prepared a creditors' deed, the first trust of which was to pay the costs of its preparation. The trustees acted, and employed the same solicitor in the trust. The solicitor is entitled to charge the costs of preparing the deed, though retained by the trustees for that purpose. *Sadd, In re*, 34 Beav. 650; 34 L. J., Ch. 562; 11 Jur. (N.S.) 774; 12 L. T. 816; 13 W. R. 1009.

Where, by the constitution of the committee, the acts of the majority of the managing committee of a railway company bound the whole:—Held, that a solicitor, employed by the committee in a suit, instituted against the committee by some of the shareholders for misconduct, was authorised to enter an appearance for any one of the members of the committee. *Goodman* v. *De Beauvoir*, 4 Railw. Cas. 380; 12 Jur. 989. Affirmed, 12 Jur. 1037.

—— **Set off of Debt against Costs.**]—Two executors in a suit gave a joint retainer to a firm of solicitors. In the course of the proceedings it was certified by the chief clerk that one executor, who had since died insolvent, was indebted to the testator's estate:—Held, that the surviving executor was entitled to be paid out of the estate all the costs for which he was liable, and that the costs incurred for the deceased executor in taking the account of his debt must be set off against the sum found due from him. *Watson* v. *Row*, 43 L. J., Ch. 664; L. R. 18 Eq. 680; 22 W. R. 793.

—— **Taxation of Costs.**]—*See* post.

—— **Power of Clients to Act separately.**]—Three petitioners retained the same solicitor in an application to wind up a company. The order was made, and subsequently two of the petitioners severed, and obtained an order of course at the rolls to change their solicitor:—Held, that the two had no right to act separately, and the order to change solicitors must be discharged. *Norwich and Norfolk Provident Permanent Building Society, In re*, 22 W. R. 854. S. P., *Brown* v. *Brown*, 11 Beav. 562.

One of several co-plaintiffs concurred in the prosecution of the suit up to a particular period, and then instructed the solicitor of the plaintiffs not to take any further proceedings in the cause. On proceedings being, nevertheless, taken, the dissentient co-plaintiff moved that the solicitor for the plaintiffs might be ordered to indemnify him in respect of subsequent costs of the suit. The motion was refused, with costs. *Winthrop* v. *Murray*, 7 Hare, 150; 18 L. J., Ch. 484; 13 Jur. 955.

By Third Person.]—A defendant was held to be bound by the act of an attorney who had been retained by his father, when it appeared that he knew, and had not disapproved, of the retainer. *Cameron* v. *Baker*, 1 Car. & P. 268; 28 R. R. 777.

Semble, there is no doubt of the unsoundness of the doctrine that A. employing B., a professional lawyer, to do any act for the benefit of C., A. having to pay B., and there being no intercourse of any sort between B. and C., if through the gross negligence or ignorance of B. in transacting the business, C. loses the benefit intended for him by A., C. may maintain an action against B., and recover damages for the loss sustained. If this were law a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested. There must be privity of contract between the parties. *Robertson* v. *Fleming*, 4 Macq. H. L. 167.

—— **Withdrawal — Restraining Defendant from interfering—Sufficiency of Indemnity.**]—Where the defendant in an action had agreed, in consideration of an indemnity against costs, to allow a third party to defend the action in his name, and had in pursuance of that agreement given to such third party's solicitor a retainer to act in the defence of the "action and any appeals therefrom":—Held, that the indemnity appearing to be undoubtedly sufficient, the nominal defendant had no right to withdraw the retainer so as to prevent, or otherwise to interfere with, an appeal in his name to the house of lords. Injunction granted to restrain him from so doing. Whether, if the sufficiency of the indemnity had been doubtful, the result would have been the same, quære. *Montforts* v. *Marsden*, 64 L. J., Ch. 52; [1895] 1 Ch. 11; 12 R. 193; 71 L. T. 620—C. A.

Liability of Trustees on Bankruptcy of Client.]—If A., having employed an attorney to defend an action, assign his property to trustees for the benefit of his creditors, and the trustees direct the attorney to go on with the defence, they are liable to pay the attorney for what he does after they directed him to go on, but are not liable for the bygone business, unless there is an agreement in writing to make them so. *Becke* v. *Penn*, 7 Car. & P. 397.

A deed of assignment for the benefit of creditors assigned the estate and effects of the debtor to trustees, upon trust to sell the same, and out of the produce, in the first place, to pay and satisfy themselves all costs and expenses which they should be put to in having the deed prepared, and in and about executing the trusts:—Held, that a trustee, who had signed the deed and sold the property under it, was liable for the costs of preparing the deed, in an action by the attorney, though not instructed by him, and though his consent to act had not been obtained before the preparation of the deed. *Campion* v. *King*, 6 Jur. 35.

Preparation of Leases and Mortgages.]—In preparing leases and mortgages, slight evidence will prove a direct retainer of the lessor's or mortgagee's solicitor, by the lessee or mortgagor. *Smith* v. *Clegg*, 27 L. J., Ex. 300.

A proposed mortgagee's solicitor has no claim for his charge against the proposed mortgagor, where the negotiation for the mortgage goes off through the default of the latter; he must look

to the person who retains him, leaving him to his remedy against the party who occasioned the fruitless expenses. *Wilkinson* v. *Grant*, 18 C. B. 319; 25 L. J., C. P. 233.

Where, in a mortgage transaction, the mortgagor is himself a solicitor, and prepares the mortgage deed, the mortgagee employing no other solicitor, the mortgagor is considered as the agent or solicitor of the mortgagee in the transaction; and it makes no difference that the mortgagor is not paid by the mortgagee. *Hewitt* v. *Loosemore*, 9 Hare, 449; 21 L. J., Ch. 69; 15 Jur. 1097.

In a transaction where a lease was assigned as a security for a loan, a solicitor, generally acting for the borrower in other cases as well as in this, acted also for the lender, but did not make to the latter any charge for his services:—Held, that he was nevertheless liable to the latter, and his representatives, for a failure of the security occasioned by want of notice to the lessor. *Donaldson* v. *Haldane*, 7 Cl. & F. 762.

If the attorney of a lessor, who is not attorney for the lessee, prepares the lease, the lessor is the person liable to pay the attorney for it, and the lessor can recover over against the lessee; and this is so whether the lessee takes up the lease or refuses to do so. *Baker* v. *Merryweather*, 2 Car. & K. 737.

A. applied to his attorney, who was an attorney of B., to prepare an assignment of a lease to B. The attorney recommended an underlease, to which A. objected, as being more expensive. The attorney said, "You won't have to pay it, for the lessee always pays for the lease." A. gave instructions for an underlease, and his attorney prepared it; but B. would not take it up or pay for it:—Held, that A. was liable to his attorney for the expenses of preparing the underlease. *Ib.*

A lessor and lessee, in the presence of the lessor's attorney, signed an agreement that a lease should be prepared by the lessor's attorney, and paid for by the lessee. The lease was prepared accordingly, but the lessor, who had only a life estate, dying, the lease was never executed:—Held, that the lessor's attorney was entitled to recover of the lessee the charge for drawing the lease. *Webb* v. *Rhodes*, 3 Bing. (N.C.) 732; 4 Scott, 497; 3 Hodges, 138; 6 L. J., C. P. 212.

The solicitor of a lessor who has prepared a draft lease cannot recover for his services from the intended lessee, unless there is a privity of contract between them. It is not sufficient for a lessee to have instructed his own solicitor, and that solicitor to have handed over the work to the lessor's solicitor. *Ipstone Park Colliery Co., In re, Brough's Claim*, 18 W. R. 285.

See *Grissell* v. *Robinson*, 3 Bing. (N.C.) 10; 3 Scott, 329; 2 Hodges, 138; 5 L. J., C. P. 313.

Preparation of Marriage Settlement.]—A., on the marriage of his daughter with B., executed a deed of appointment (under a power contained in his own marriage settlement) in favour of his daughter, appointing to his daughter 4,000*l.* This B. settled on his marriage. The marriage settlement of B., and the deed of appointment, were both prepared by C., who was originally the solicitor of A. There was no evidence to shew whether A. had agreed to give his daughter 4,000*l.* or to execute an appointment of that sum:—Held, that whether A. or his daughter was to pay C. the expenses of this deed of appointment was not a question of usage, but a question of contract; and that it was for the jury to determine upon whose credit the business was done. *Hayward* v. *Fiott*, 8 Car. & P. 59.

On the occasion of settling personal property upon a marriage, it is the professional usage for the lady's solicitor to draw the settlement, and for the husband to pay for it, although the only property settled is the husband's; and where nothing has taken place to exclude such usage, the husband is legally liable, in the event of the marriage, to pay the lady's solicitor his costs of the settlement, if the retainer was by the lady, or else to indemnify whoever on her part has properly incurred expense by retaining a solicitor to prepare such settlement. *Helps* v. *Clayton* 17 C. B. (N.S.) 553; 34 L. J., C. P. 1; 10 Jur. (N.S.) 1148; 11 L. T. 476; 13 W. R. 161.

Retaining Fee at Parliamentary Election.]—An attorney who is retained as the agent of a candidate to represent a place in parliament is not entitled to recover anything for a retaining fee, unless there has been an express agreement that such fee should be paid to him. *Parker* v. *Robinson*, 7 Car. & P. 241.

Proof of.]—Upon an application by a client, a judge's order was made referring a bill of costs to be taxed without prejudice to the client's disputing the retainer, and restraining the attorneys from commencing or prosecuting any action touching their demand pending such reference. There was no undertaking on the part of the client, nor any order upon him, to pay what should be found due. At the request of both parties, the master entertained and decided the question of retainer, and he gave his allocatur for the balance due, and for the costs of the taxation:—Held, that the decision of the master upon the question of retainer was conclusive, and that the attorneys were entitled to have judgment entered up for them for the amount. *Lawless, In re*, 6 C. B. 123; 18 L. J., C. P. 793. See *Callow* v. *Jenkinson*, 2 L. M. & P. 403; 5 Ex. 666.

A letter written by a deceased solicitor, proposing to act as the solicitor of a particular individual, is not receivable in evidence as having been written by the authority of that individual, on proof merely that there was such a solicitor in practice at the time, that the letter was in his handwriting, and that it came from the custody of the person to whom it purported to be addressed; and in order to render the letter receivable, it must be proved aliunde that the writer had been duly authorised by the individual for whom he professed to act as solicitor. *Bright* v. *Legerton*, 2 De G. F. & J. 606; 30 L. J., Ch. 338; 7 Jur. (N.S.) 559; 3 L. T. 713; 9 W. R. 239.

Parol evidence is admissible, not to vary or add to a written agreement, but to shew the instructions and directions given to the solicitor to prepare it. *Gemmill* v. *Macalister*, 9 Jur. (N.S.) 285; 7 L. T. 841; 11 W. R. 486—H. L.

A solicitor seeking to charge a person with the costs of legal proceedings, conducted in the name of another, must support his claim by the clearest and most unequivocal evidence. *Clark, In re*, 1 De G. M. & G. 43; 21 L. J., Ch. 20; 15 Jur. 1047.

Issue directed under the circumstances to try whether a solicitor authorised to use relator's name, although such relator afterwards acknowledged the authority. *Att.-Gen.* v. *Skinners' Co.* C. P. Cooper, 1.

Two counsel appearing for the same party by different attorneys, petition to stand over to verify retainer of the attorney by affidavit. *Butterworth* v. *Clapham*, cited 1 Jac. & Walk. 673, n.

Determined by Final Judgment.]—The authority of an attorney is determined on final judgment being signed. *Macbeath* v. *Cook*, 1 M. & P. 513; 12 Moore, 122. *S. C.*, nom. *Macbeath* v. *Ellis*, 4 Bing. 578.

—— **Death of Client.**]—The retainer of an attorney is determined by the death of his client. *Whitehead* v. *Lord*, 7 Ex. 691; 21 L. J., Ex. 239.

After considerable delay in the prosecution of a suit, the solicitor of a deceased party was served with a notice of motion:—Held, that his duty to the court rendered it proper for him to appear on the motion. *Chalie* v. *Gwynne*, 9 Beav. 319.

Death of Solicitor.] — After notice of trial given, the defendant's attorney died, and the plaintiff, not being aware of the fact, went to trial, and obtained a verdict and judgment, and sued out execution, under which the defendant was detained in custody. The court refused to set aside the proceedings, or to discharge the defendant out of custody, as it did not appear but that the defendant knew of the attorney's death at the time it occurred, and had withheld that knowledge from the plaintiff. *Ashley* v. *Brown*, 1 L. M. & P. 451; 19 L. J., Q. B. 477; 15 Jur. 399.

Solicitor must conduct Suit to Termination, unless Notice given.]—The contract of an attorney retained to conduct an action is continuing, and, as a general rule, can be determined by him only on reasonable notice. *Nicholls* v. *Wilson*, 2 D. (N.S.) 1031; 11 M. & W. 106; 12 L. J., Ex. 266. S. P., *Harris* v. *Osbourn*, 2 C. & M. 629; 4 Tyr. 445; 3 L. J., Ex. 182.

A solicitor quitting his client before time cannot bring an action for his bill. *Cresswell* v. *Byron*, 14 Ves. 273; 9 R. R. 275.

As a general rule, an attorney or solicitor retained to conduct a suit is under the obligation to carry it on to its termination, and he cannot sue for his bill of costs until that period has arrived. He may, however, give a reasonable notice to his client to supply him with adequate funds; and in case of refusal, he may sue him for his costs. *Whitehead* v. *Lord*, 7 Ex. 691; 21 L. J., Ex. 239. S. P., *Van Sandau* v. *Browne*, 9 Bing. 402; 2 M. & Scott, 543; 1 D. P. C. 715; 2 L. J., C. P. 34. *Rowson* v. *Earle*, M. & M. 538. *Hoby* v. *Built*, 3 B. & Ad. 350; 1 L. J., K. B. 121.

An attorney who has undertaken a cause is not bound to proceed without adequate advances from time to time by his client for expenses out of pocket; and, therefore, the court will not compel an attorney, even after notice of trial, to carry the cause into court, unless the client supplies him with sufficient funds to pay the expenses out of pocket thereby incurred. *Wandsworth* v. *Marshall*, 2 C. & J. 665; 1 L. J., Ex. 250. S. P., *Lawrence* v. *Potts*, 6 Car. & P. 428.

An attorney who is retained for the conduct of a chancery suit, and accepts such retainer, thereby enters into a specific contract to carry on the proceedings, and he cannot without due notice, and before the suit is terminated, rescind the contract, and sue on a quantum meruit. *Coppinger* v. *Synnott*, 3 Ir. C. L. R. 563.

A solicitor may refuse to continue in the conduct of a suit upon sufficient grounds, and, upon his giving up the suit before it is concluded, upon good grounds, he may sue his client for the costs incurred during the time of being employed. *Bryan* v. *Twigg*, 3 L. J., Ch. 114.

If a client repudiates his retainer of an attorney to conduct a suit, the latter is entitled to bring an action for his costs without waiting for the final completion of the suit. *Hawkes* v. *Cottrell*, 3 H. & N. 243; 27 L. J., Ex. 369.

The employment of a solicitor to conduct an action constitutes an entire contract; and a solicitor who withdraws from the conduct of an action before its termination cannot sue for the costs he has incurred unless his withdrawal was for good reason, and upon reasonable notice. *Underwood* v. *Lewis*, 64 L. J., Q. B. 60; [1894] 2 Q. B. 306; 9 R. 440; 70 L. T. 833; 42 W. R. 517—C. A.

The retainer and employment of a solicitor in such a matter as a bankruptcy, an administration or winding-up, do not constitute an entire contract so as to deprive the solicitor of his right to payment, except for costs out of pocket, till the whole matter is completed, and successive bills of costs in such a matter are not necessarily to be treated as one bill brought down to the date of the latest delivery. *Hall and Barker, In re*, 47 L. J., Ch. 621; 9 Ch. D. 538; 26 W. R. 501.

II. AUTHORITY.

a. To Conduct Proceedings.

Instituting Proceedings.]—A solicitor ought to have a special authority from his client for instituting a suit, but such authority need not be in writing. *Lord* v. *Kellett*, 2 Myl. & K. 1.

It is not sufficient for a solicitor, before he commences a suit against executors, to obtain an authority from his client to take proceedings to get an account; there must be, in substance, a clear authority to institute a suit. *Atkinson* v. *Abbott*, 3 Drew. 251. S. P., *Wright* v. *Castle*, 3 Mer. 12; 17 R. R. 3.

A. delivered papers to B., an attorney, telling him "that she was entitled to an estate, and that she would pay him if she recovered it"; B. took the papers, saying that he would do what he could for her, and without further communication commenced an action of ejectment, which he afterwards abandoned, under the conviction that A. had no title:—Held, that B. acted without due authority, both in commencing and discontinuing the ejectment, and was not entitled to recover the costs thus incurred. *Tabram* v. *Horn*, 1 M. & Ry. 228; 6 L. J. (O.S.) K. B. 24; 31 R. R. 321.

A retainer to a country solicitor does not justify an action in which his London agents are the solicitors on the record. A., an illiterate woman, being desirous of knowing whether there was any balance coming to her, as administratrix of C., her deceased husband, out of the proceeds of a sale by the mortgagee of property mortgaged by C., gave to B., a country solicitor (who had recovered judgment in an action against her, as administratrix, for a debt due to him from her deceased husband) this written retainer: "I hereby authorise you to act as my solicitor in the administration of my late husband's estate,

and authorise you to investigate the accounts of the mortgagee, and take such steps as you may think proper in the matter on my behalf." A writ was subsequently issued by a London firm of solicitors in the names of A. and B., as plaintiffs, claiming an account of the proceeds of sale of the mortgaged property, and payment of the balance, the claim by A. being "as legal personal representative of C.," by B. "as a creditor of C. who had obtained judgment against A., and had obtained execution by the appointment of a receiver of the balance due from C." Upon motion by A. that her name might be struck out of the writ as having been issued without her knowledge, and without any authority on her part:—Held, that the retainer was not sufficient to justify the issue of the writ; but whether sufficient or not, it was a retainer to B., and did not authorise the London firm to issue the writ in the name of A. as her solicitors. *Wray* v. *Kemp*, 53 L. J., Ch. 1020; 26 Ch. D. 169; 50 L. T. 552; 32 W. R. 334.

—— **Fresh Action.**]—A solicitor received authority in 1831 to file a bill in an administration suit on behalf of a woman then unmarried. In 1836 he informed her that she and her husband would be co-plaintiffs to a bill in the same suit. In 1849 he wrote to her as a widow, for information, to which she replied, hoping that there might be immediate distribution. The solicitor afterwards filed bills of supplement, and revivor in the suit, making her a co-plaintiff:—Held, that he had sufficient authority. *Bewley* v. *Seymour*, 14 Jur. 213.

A retainer to commence a suit, which suit is afterwards abated by a plea of nonjoinder, is sufficient evidence of a retainer to commence another action against the parties named in the plea in abatement. *Crook* v. *Wright*, R. & M. 278.

Defending Action.]—A solicitor may, in the exercise of the general authority given him by his client, defend a suit. *Wright* v. *Castle*, 3 Mer. 12; 17 R. R. 3.

Entering Appearance for Defendant.]—The fact that a solicitor has acted for a client in all matters connected with a trust does not authorise him to enter an appearance for the client as defendant to an originating summons taken out against the client for an account by one of the beneficiaries under the will. Appearance set aside, with costs to be paid by the solicitor. *Gray, In re, Gray* v. *Coles*, 65 L. T. 743.

A solicitor must be taken, in the absence of proof to the contrary, to have authority from his client, though an infant, to enter an appearance for him; and, where the appearance has been entered, the court will act upon it without service; and, therefore, after appearance entered for an infant, a guardian ad litem may be appointed for him, although he has not been served with the bill. *Lloyd* v. *Rossmore*, Ir. R. 9 Eq. 488.

Consent—Funds in Court.]—Semble, no circumstances can justify a solicitor in instructing counsel to consent, on behalf of a client, to the disposing of funds in court, in which the client has an interest, without express authority from the client. *Wheatley* v. *Bastow*, 3 Eq. R. 865; 7 De G. M. & G. 261; 24 L. J., Ch. 727; 1 Jur. (N.S.) 1124; 3 W. R. 540.

Order to Attend Proceedings.]—An order to attend proceedings, obtained by a solicitor without the written authority of his client, will be discharged on the application of that client. *Bird* v. *Harris*, 43 L. T. 434; 29 W. R. 45.

Client alleged to be a Lunatic.]—A solicitor is not prevented from taking legal proceedings on behalf of his client by the mere fact that, to his knowledge, a petition in lunacy for an inquiry into the state of mind of his client is pending, provided that he believes the client to be sane. The court will, however, in a proper case, when informed of the petition, stay the proceedings until the inquiry is completed. *Hartley* v. *Gilbert* (13 Sim. 596) and *Beall* v. *Smith* (43 L. J., Ch. 245; L. R. 9 Ch. 85) explained. *Armstrong and Sons, In re*, 65 L. J., Ch. 258; [1896] 1 Ch. 536; 74 L. T. 134; 44 W. R. 281.

Putting in Fraudulent Defence.]—Where a solicitor has put in a fraudulent defence for his client without the knowledge of the client, the client is not bound by the act of the solicitor. *Williams* v. *Preston*, 51 L. J., Ch. 927; 20 Ch. D. 672; 47 L. T. 265; 30 W. R. 555—C. A.

Award—Reference to Arbitration.]—If an attorney is employed by a person to act for him, after an award has been made against him, and he is also desired to do what is needful, he is thereby warranted to carry the whole award, so far as it respects his client, into effect, though his immediate business was to do but part of it. *Dawson* v. *Lawley*, 4 Esp. 65. And see *Anderson* v. *Watson*, 3 Car. & P. 214.

An attorney authorised to appear for a party in an action has incidentally authority to refer it, without any fresh authority to that effect. *Faviell* v. *Eastern Counties Ry.*, 2 Ex. 344; 6 D. & L. 54; 17 L. J., Ex. 297.

All the parties in a suit, except one who was not present, but whose solicitor consented on his behalf, agreed in court to refer the matter in dispute to the final determination of an arbitrator. On a bill of review, brought by the absent party:—Held, that solicitor's assent to interlocutories may bind; it cannot bind to a reference finally to determine. *Colwel* v. *Child*, 1 Ch. Ca. 86; 1 Ch. Rep. 195.

An attorney having appeared for a corporation in an action, to the knowledge of the directors, the corporation is bound by his acts as their attorney, though he was not authorised to appear by any authority under seal. *Faviell* v. *Eastern Counties Ry.*, supra. S. P., *Smith* v. *Troup*, 7 C. B. 757; 6 D. & L. 679; 18 L. J., C. P. 209.

Acting for Several Parties.]—A joint and several answer, filed for two persons by a solicitor having authority from one only, will not be ordered to be taken off the file on the application of one party in the absence of the other. *Wiggins* v. *Peppin*, 2 Beav. 403; 3 Jur. 721.

Where a solicitor carries on suits, and was employed by the assignees, without the authority of the majority in value of the creditors, the estate of the bankrupt is not liable to his bill for such suits. *Whitchurch, Ex parte*, 1 Atk. 210.

In a sale under a decree, the solicitor of the plaintiffs, having the management of the sale, is to be considered (as between the vendor and the purchaser) to be the agent of all the parties to the suit. *Dalby* v. *Pullen*, 1 Russ. & M. 296; 8 L. J. (O.S.) Ch. 74.

Undertakings.]—An undertaking given by his attorney to withdraw pleas is binding on the defendant, even without a formal consent by the plaintiff or his attorney. But if the undertaking is not carried out, and the plaintiff in consequence loses the benefit of a subsequent judgment, the defendant's attorney is not necessarily liable for the plaintiff's debts and costs. *Burnett* v. *Provis*, 22 L. T. 543.

Setting aside Consent Order.]—The court will not, on the application of the client, set aside an order made on a consent signed by his solicitor, on the allegation that he acted without authority, there being no case of fraud or misrepresentation. *Connatty* v. *O'Reilly*, 11 Ir. Eq. R. 333.

Payment of Counsel's Fees.]—A solicitor has no implied authority to pledge his client's credit to counsel by an express promise to pay his fees, whether they relate to litigation or not, so as to enable the counsel to sue the client for them. *Mostyn* v. *Mostyn*, 39 L. J., Ch. 780; L. R. 5 Ch. 457; 22 L. T. 461; 18 W. R. 657.

Receiving Costs from other Side.]—Where costs are ordered to be paid to a defendant, his attorney is competent to demand and receive them, without any express power of attorney. *Mason* v. *Whitehouse*, 4 Bing. (N.C.) 692; 6 Scott, 575; 6 D. P. C. 602; 7 L. J., C. P. 295.

Service of Notices on former Solicitor.]—Where a judgment has not been worked out, nor the fruits of the judgment obtained, inasmuch as it is the duty of the solicitor of the defendant to defend his client's interest in the event of execution being levied against him, his authority still continues so as to make service of a notice of appeal on him good service on his client, until such time as the client has taken the proper steps for informing his opponent that he has withdrawn his solicitor's authority. *De la Pole* (*Lady*) v. *Dick*, 54 L. J., Ch. 940; 29 Ch. D. 351; 52 L. T. 457; 33 W. R. 585—C. A.

A cause is at an end upon the replication confessing a plea in bar and praying for judgment for costs. And a rule calling on the defendant to shew cause why the master should not tax must be served on the defendant personally. *Boyle* v. *Churchill*, 2 L. T. 219.

Form of Application.]—Want of authority to the solicitor to file a bill cannot be raised in opposition to a motion in the cause; it must be made the subject of a substantive motion to stay proceedings or to take the bill off the file: and such a motion may be made by a defendant. *Bowen* v. *Bowen*, Ir. R. 7 Eq. 251.

A proper party to a suit whose name has been inserted in the bill as a plaintiff, without his own knowledge or concurrence, will not, while the record remains in that state, be allowed to appear by a distinct solicitor. *Pyecroft* v. *Gregory*, 2 L. J. (O.S.) Ch. 122.

A plaintiff instructed his solicitor to give no further indulgence to the defendants: the solicitor's clerk, who was ignorant of that circumstance, and who was sworn to be ignorant of the practice of the court, consented in writing, in the name of his master, to alterations made in the title of the answer after it was deposited with the clerk of records and writs. On the application of the plaintiff, the court ordered the answer to be taken off the file, with liberty for the defendants to re-swear it within three weeks. *Raistrick* v. *Elsworth*, 12 Jur. 782.

Interpleader.]—A solicitor who has recovered judgment for a client under an ordinary retainer, has no authority, without special instructions, to engage in proceedings in interpleader. *James* v. *Richnell*, 57 L. J., Q. B. 113; 20 Q. B. D. 164; 58 L. T. 278; 36 W. R. 280.

Discharge of Defendant taken in Execution.]—A plaintiff's attorney on the record has not by virtue of his retainer, any implied authority to discharge out of custody a defendant in execution before he has received payment of the sum recovered in the action. He must have the special authority of the plaintiff for that purpose. *Savory* v. *Chapman*, 3 P. & D. 604; 8 D. P. C. 656; 11 A. & E. 829; 9 L. J., Q. B. 186; 4 Jur. 411.

The attorney for a plaintiff, where the defendant has been taken in execution upon a ca. sa., although as such attorney he has authority to receive the fruits of the judgment, has no authority to enter into any other arrangement with the defendant for his discharge from custody under such writ. *Connop* v. *Challis*, 2 Ex. 484; 6 D. & L. 48; 17 L. J., Ex. 319.

Sheriff—Withdrawal of.]—The attorney in an action has authority to order the sheriff to withdraw from possession under a fi. fa. *Levi* v. *Abbott*, 4 Ex. 583; 19 L. J., Ex. 62.

Although an execution creditor or his solicitor, after delivery of a writ of fi. fa. to the sheriff, may withdraw the execution, or postpone the sale of chattels seized under it, there is no such implied power in the solicitor's managing clerk, notwithstanding that he is left in charge of his employer's office and professional business during the temporary absence of such employer. *Whyte* v. *Nutting*, [1897] 2 Ir. R. 241.

Postponing Execution.]—A solicitor has authority to enter into an undertaking on behalf of his client, not to issue a writ of fieri facias against the client's debtor, in consideration of the acceleration of payment of the debt. *Commonwealth Land, Building, Estate and Auction Co., In re, Hollington Ex parte*, 43 L. J., Ch. 99; 29 L. T. 502; 22 W. R. 106.

An attorney retained for the conduct of an action has no implied authority, after judgment in favour of his client, to enter into an agreement, on his behalf to postpone execution. *Lovegrove* v. *White*, 40 L. J., C. P. 253; L. R. 6 C. P. 440; 24 L. T. 554; 19 W. R. 823.

Directing Seizure of Particular Goods.]—It is not within the scope of the implied authority of the solicitor of a judgment creditor issuing a fi. fa. to direct the sheriff to seize particular goods. *Smith* v. *Keal*, 9 Q. B. D. 340; 47 L. T. 142; 31 W. R. 76—C. A. Affirming 51 L. J., Q. B. 487; 46 J. P. 515.

Proceedings under Execution.]—The conduct of a cause by an attorney, in the name of A., does not make A. liable in trespass for acts done under a fi. fa. in such cause, without some evidence of a retainer. *Crook* v. *Wright*, R. & M. 278.

Where the attorney of a plaintiff, in an action in which judgment had been recovered, issued a fi. fa. thereupon, which he indorsed with a direction, by means of which the house of a wrong person was entered:—Held, that such person

could maintain trespass against the plaintiff in the original action. *Jarmain* v. *Hooper*, 1 D. & L. 769; 7 Scott (N.R.) 663; 6 Man. & G. 827; 13 L. J., C. P. 63; 8 Jur. 127.

A defendant is liable in trespass for the act of her attorney in improperly causing the plaintiff to be arrested under a ca. sa. *Collett* v. *Foster*, 2 H. & N. 356; 26 L. J., Ex. 412; 5 W. R. 790.

To Compromise Client's Case—Client Acquiescing.]—Where a cause is compromised by the counsel and attorneys in court, in the presence of the client, and after conference had with him, with a view to an arrangement, and the client does not dissent, and the terms of the compromise have been embodied in an order of nisi prius, subsequently made a rule of court, the arrangement will not be disturbed upon a suggestion by the client, that though present when it was made, he did not understand what was going on. *Chambers* v. *Mason*, 5 C. B. (N.S.) 59; 28 L. J., C. P. 10; 5 Jur. (N.S.) 148.

If an attorney has express authority from his client to compromise a case only on condition of securing for him a certain sum, that (coupled with the fact that he afterwards compromised the suit on payment of a larger sum, and professed to have compromised it in pursuance of that authority) may be evidence of an agreement upon his part to accept the surplus of the money paid over the amount of the net sum his client expected to receive in satisfaction of his costs, not only as between party and party, but between attorney and client. *Churchyard* v. *Watkins*, 27 L. J., Ex. 13.

—— **Without Express Permission of Client.**]—Where the respective attorneys of a plaintiff and defendant signed an agreement to withdraw a record on certain terms, and that the defendant's costs should be taxed by certain persons as between attorney and client:—Held, that the defendant was not bound by such an arrangement on the part of his attorney. *Iveson* v. *Conington*, 2 D. & R. 307; 1 B. & C. 160; 1 L. J. (O.S.) K. B. 71; 25 R. R. 344. And see *Burrell* v. *Jones*, 3 B. & Ald. 47; 22 R. R. 296.

An attorney retained to defend an action is not guilty of actionable negligence if he enters into a compromise without the consent of his client, provided he acts bonâ fide and with reasonable care and skill, and the compromise is for the benefit of the client, and is not made in defiance of his express prohibition. *Chown* v. *Parrott*, 14 C. B. (N.S.) 74; 32 L. J., C. P. 197; 9 Jur. (N.S.) 1290; 8 L. T. 391; 11 W. R. 608.

A solicitor or counsel has full authority to either compromise or abandon the claims of his client, provided it is in a matter within the scope of the suit. Secus, in a collateral matter. *Wood, In re, Wenham, Ex parte*, 21 W. R. 104.

An attorney has general authority to compromise an action on behalf of his client, provided he acts bonâ fide and reasonably, and not in defiance of the direct and positive instructions of his client. *Pristwich* v. *Poley*, 18 C. B. (N.S.) 806; 34 L. J., C. P. 189; 11 Jur. (N.S.) 583; 12 L. T. 390; 13 W. R. 753.

A. having suffered personal injuries through the negligence of the servants of H. & Co., applied to an attorney, and the attorney's clerk agreed with H. & Co. to accept a certain sum "in full satisfaction of all demands for the injuries" sustained by A., and gave a written undertaking to that effect. A. having repudiated the transaction and brought an action:—Held, that the agreement entered into by the attorney's clerk, as it took place before the issuing of any writ, was not binding upon A. *Duffy* v. *Hanson*, 16 L. T. 332.

A party is bound by the consent of his counsel given in court, though they had no instructions to consent, if they were at the time apprised of all those facts of which the knowledge was essential to the proper exercise of their discretion, but he will be relieved from an order made by such consent, if they give that consent in ignorance of material circumstances. How far a party will be affected by the remissness of his solicitor in not immediately objecting to an order, made by consent of counsel in court, when neither the party nor his solicitor was present, and instructions to consent had not been given by either. *Furnival* v. *Bogle*, 4 Russ. 142; 6 L. J. (O.S.) Ch. 91; 28 R. R. 34.

An attorney has not, by virtue of his office, an implied authority to compromise an action, but a client may become bound by a compromise entered into by his attorney without his authority, by not repudiating it within a reasonable time. *Swinfen* v. *Swinfen*, 24 Beav. 549; 27 L. J., Ch. 35; 3 Jur. (N.S.) 1109; 6 W. R. 10. And see *S. C.*, at law, 1 C. B. (N.S.) 364; 26 L. J., C. P. 97; 3 Jur. (N.S.) 85.

A compromise is nothing more than a sale of the subject-matter of the suit by one party to the other; and as an attorney, acting within the scope of his authority, has no power to sell the subject-matter of the suit to a stranger, so he has no power to sell it to the other side. *Ib.*

At the trial of an issue, counsel agreed upon terms of compromise, and it was made a rule of the court of common law. The compromise was unauthorised by the plaintiff, and effected without the instructions of his attorney. There being no subsequent acquiescence, a bill by the defendant in the action for specific performance of the compromise was dismissed. *Ib.* See *S. C.* on appeal, slightly varying the decree, 27 L. J., Ch. 491; 4 Jur. (N.S.) 774; 6 W. R. 480.—L.JJ.

—— **Against the Client's Wish.**]—A plaintiff, having recovered judgment in an action for breach of promise of marriage, instructed her attorney not to accept any compromise, but at the same time permitted him to continue to act as her attorney for obtaining the fruits of the judgment. The attorney, however, did accept a compromise offered by the opposite party, who had no notice of any limitation having been put on the attorney's authority:—Held, that although the compromise was entered into without the plaintiff's authority, it was nevertheless binding upon her, and might be relied upon by the defendant in that suit if the plaintiff should attempt to enforce judgment; and that, therefore, the attorney was liable to an action for negligence for compromising against the plaintiff's instructions. *Butler* v. *Knight*, 36 L. J., Ex. 66; L. R. 2 Ex. 109; 15 L. T. 621; 15 W. R. 407.

A compromise entered into by a solicitor under his implied authority is not affected by his client's subsequent repudiation, nor by his client's previous express prohibition, unless the opposite party had notice of it. *Berry* v. *Mullen*, Ir. R. 5 Eq. 368.

A client is bound by a compromise entered

into by his attorney, though in violation of express directions not to compromise, if the other party has acted bonâ fide, and without notice of such prohibition. *Brady* v. *Curran*, Ir. R. 2 C. L. 314 ; 16 W. R. 514.

An attorney retained to conduct a cause, and having express directions from the client not to enter into a compromise, has no power, under such retainer, to enter into any compromise, even though reasonable and bonâ fide, and for the benefit of the client ; and, if he does so, is liable to an action for damages, though the damage actually sustained is nominal. *Fray* v. *Vowles*, 1 El. & El. 839 ; 28 L. J., Q. B. 232 ; 5 Jur. (N.S.) 1253 ; 7 W. R. 446.

It is no defence to such action that the compromise was entered into by the advice of counsel employed by the attorney, under his retainer, for the conduct of the cause. *Ib.*

—— **Avoué in Canada.**]—An avoué in Canada has authority to bind his client by any proceeding in the cause, but not by any transaction dehors the cause, such as an agreement to settle. *King* v. *Pinsoneault*, 44 L. J., P. C. 42 ; L. R. 6 P. C. 245 ; 32 L. T. 174 ; 23 W. R. 576.

—— **Who Liable for.**]—An attorney on behalf of his client, the defendant, promises to pay 500*l.* to plaintiff ; this being done by the authority of the client, attorney not liable, but only client. Otherwise, if the attorney had no authority from client to make this engagement. *Johnson* v. *Ogilby*, 3 P. Wms. 277. See *Bentley, Ex parte*, 2 Deac. & C. 578 ; 2 L. J., Bk. 39.

Brokers and factors, who act or agree for their principals, not liable in their own capacities. *Id.* 279.

Compare Cases sub tit. BARRISTER.

Authority to Compromise — Action not Commenced.]—A solicitor retained to bring an action has no implied authority to compromise the claim before action brought. *Macaulay* v. *Polley*, 66 L. J., Q. B. 665 ; [1897] 2 Q. B. 122 ; 76 L. T. 643 ; 45 W. R. 681—C. A.

b. To Receive Money for Client.

See Conveyancing Act, 1881, s. 56.

Payment of Debt.]—Where the debt has been paid to the plaintiff's clerk after writ issued, and before service thereof, and the attorney is aware of the payment, he has no right to proceed further with the action, although he will be entitled to the costs of his writ. *Wyllie* v. *Phillips*, 4 Scott, 474 ; 5 D. P. C. 644 ; 3 Bing. (N.C.) 776 ; 6 L. J., C. P. 224.

Payment of a debt to the attorney of a plaintiff amounts to payment to the plaintiff himself, and the latter is bound by the receipt of his attorney. *Yates* v. *Freckleton*, 2 Doug. 623. See *Vorley* v. *Garrard*, 2 D. P. C. 490.

Payment to the clerk of the plaintiff's solicitor though unauthorised to receive it, is no waiver of the plaintiff's right. *Perry* v. *Turner*, 1 D. P. C. 300 ; 2 C. & J. 89 ; 2 Tyr. 128 ; 1 L. J., Ex. 13.

Payment to the plaintiff's late solicitor who has been changed without the leave of the court will be good. *Powell* v. *Little*, 1 W. Bl. 8.

Money due from Mortgagor.]—The mere fact that a solicitor is in possession of a mortgage deed executed by his client does not authorise him to receive the mortgage money for the client. If the client has not received the money the mortgagee cannot maintain the validity of the mortgage by shewing that he paid the money to the solicitor, unless he can shew that the solicitor was expressly authorised by the client to receive it. *Swinbanks, Ex parte, Shanks, In re*, 48 L. J., Bk. 120 ; 11 Ch. D. 525 ; 40 L. T. 825 ; 27 W. R. 898—C. A.

G. and H. were mortgagees for 1,000*l.* on property of S. Their solicitors, D. & P., who had the deeds in their custody, applied to the defendant, who was also a client of theirs, saying that they believed he had 1,000*l.* to invest on mortgage, and that G. and H. wanted 1,000*l.* on a transfer of S.'s mortgage. The defendant inspected the property, and being satisfied, he, on the 12th of June, 1878, sent the 1,000*l.* to D. & P., who gave him a receipt for it. In July, D. & P. fraudulently induced G. and H. to execute a deed of transfer to the defendant with a receipt indorsed, which deed they stated to G. and H. to be a deed of reconveyance to S. on his paying off the mortgage. D. & P. shortly afterwards handed this deed with the title deeds to the defendant, and went on paying him interest as if they had received it from S., who was in fact paying his interest to the agents of G. and H. ; G. and H. made no inquiry as to the mortgage, and this went on till 1883, when D. & P. became bankrupts, and the 1,000*l.* received from the defendant, which had never been handed over to G. and H., was lost. G. and H. then brought their action against the defendant, asserting a right against the property in the nature of an unpaid vendor's lien :—Held, that as the plaintiffs by the deed of transfer and receipt which they handed to D. & P. enabled them to represent to the defendant that the 1,000*l.* which he had previously handed to D. & P. had come to the hands of the plaintiffs, they had raised a counter equity which prevented their claiming a vendor's lien, though this would not have been the case if (D. & P. having no authority to receive money for the plaintiffs) the defendant had paid the 1,000*l.* to D. & P. at the time when the deeds were delivered to him, since he would then have known that the plaintiffs had not received the money. *Swinbanks, Ex parte* (11 Ch. D. 525), distinguished. *Gordon* v. *James*, 30 Ch. D. 249 —C. A.

A solicitor employed both by a mortgagor and mortgagee received the interest on the mortgage debt regularly, and after a time fraudulently obtained from the mortgagor a portion of the principal. At first the mortgagee received his interest regularly from the solicitor at his office ; but ultimately allowed the interest to fall into arrear till a large sum became due to the mortgagee. During this time the mortgagee made no application to the mortgagor :—Held, that the solicitor was the agent of the mortgagee to receive the interest but not the principal ; and that in order to bind the mortgagee by the solicitor's acts in receiving the principal, it was necessary to shew either that what he did was with the intention of adopting those acts, or that the position of the mortgagor was altered. *Kent* v. *Thomas*, 1 H. & N. 473.

A. borrowed 8,000*l.* on mortgage from his solicitor, B. Of this money, 800*l.* belonged to C., a client of B.'s, who had handed it to B. for investment. No notice was ever given to A., either by B. or by C., that the 800*l.* belonged to C. Afterwards A. paid off the 8,000*l.*, and B. shortly after died insolvent. On a claim made

by C. for the 800*l.* against A. :—Held, that as C., by his negligence in not giving notice of his claim to A., had enabled A. to pay back the whole of the mortgage money to B., he had no equity to compel A. to pay part of the money over again; and claim refused. *Southampton's (Lord) Estate, In re, Roper's Claim*, 50 L. J., Ch. 155; 43 L. T. 625; 29 W. R. 210.

—— **Cheque instead of Cash.**]—A solicitor, having authority from the mortgagees to accept a tender of the amount due under the mortgage, has no implied authority to accept the tender of a cheque in lieu of cash, so as to make such a tender good in law as against the mortgagees. *Blumberg* v. *Life Interests and Reversionary Securities Corporation*, 66 L. J., Ch. 127; [1897] 1 Ch. 171; 75 L. T. 627; 45 W. R. 246. Affirmed on the facts, 67 L. J., Ch. 118; [1898] 1 Ch. 27; 77 L. T. 506—C. A.

Purchase-Moneys.]—The possession by a vendor's solicitor of an executed conveyance for purchase of lands, with the signed receipt for the consideration money indorsed, is not in itself an authority to the solicitor to receive the purchase-money. *Viney* v. *Chaplin*, 2 De G. & J. 468; 27 L. J., Ch. 434; 4 Jur. (N.S.) 619; 6 W. R. 562.

It is well settled that it is not within the ordinary business of a solicitor to receive purchase-money belonging to his client, or money due to him on mortgage, nor to receive money from him for the purpose of investment generally, and one partner is not liable for the misapplication of money so received by another without his privity. *Bourdillon* v. *Roche*, 27 L. J., Ch. 681; 6 W. R. 618.

Secus, where the money is received for the purpose of being invested on a particular security. *Ib.*

Purchasers have a right to demand the attendance of the vendors in person to receive the purchase money, and the vendors cannot insist on its being paid to their solicitor on production of the conveyance duly executed. *Bellamy and Metropolitan Board of Works, In re*, 52 L. J. Ch. 870; 24 Ch. D. 387; 48 L. T. 801; 31 W. R. 900; 47 J. P. 550—C. A.

A. purchased an estate from B., and on the completion, one solicitor acted for both parties, and the purchase-money was paid into his hands. Afterwards the purchaser was defeated by C., who had a paramount mortgage. The purchaser presented a petition against the solicitor, asking payment by the solicitor out of the purchase-money of the losses occasioned, or that he might indemnify the petitioner. The petition was dismissed, the court holding that the money having come to the hands of the solicitor as agent of the vendor and not of the petitioner, it could not interfere. *Tylee* v. *Webb, Hinton, In re*, 14 Beav. 14; 15 Jur. 1023.

Possession of Receipt.]—A solicitor producing a deed containing a receipt must, in order to discharge a person paying him, be acting for the person sought to be charged, and having the deed in his office is not equivalent to production of it. *Day* v. *Woolwich Equitable Building Society*, 58 L. J., Ch. 280; 40 Ch. D. 491; 60 L. T. 752; 37 W. R. 461.

Payments from Receiver.]—The solicitor having carriage of the proceedings has not, as such, and in the absence of special authority in that behalf, power to give a valid receipt for moneys ordered to be paid by a receiver to his client. *Browne's Estate, In re*, 19 L. R., Ir. 183—C. A. S. P., *Ind, Coope & Co.* v. *Kidd*, 63 L. J., Q. B. 726; 10 R. 528; 71 L. T. 203.

Right to retain Moneys—Husband and Wife.]—A woman entitled to property for her separate use was desirous of raising money for the improvement of her estate, while her husband also wished to raise money to discharge a debt. They accordingly arranged through their solicitor to borrow money upon mortgage of the separate estate, and upon policies upon the lives of each of them respectively. The money was to be advanced by instalments, and when the first instalment was due the husband and wife signed a joint authority for the solicitor to receive it for them. He received the money, and claimed to retain part of it in respect of a separate debt due to him as solicitor of the husband:—Held, that in an action by husband and wife, the solicitor could not retain the money, or set off against it a debt due from the husband, as it was received upon the express understanding that it was to be held for the husband and wife jointly, so that there never was any reduction into possession on the part of the husband. *Jones* v. *Cuthbertson*, 42 L. J., Q. B. 221; L. R. 8 Q. B. 504; 28 L. T. 673; 21 W. R. 919—Ex. Ch.

Deposit on Sales.]—An attorney was employed to sell lands, which he did, partly by private contract, and partly at auction; he received a deposit on each sale, and signed receipts for them as agent for the vendor. By the conditions of the sale a deposit was to be paid to him as agent for the vendor. On being applied to by the vendor, he declined to pay over the deposits to him till the sales were completed:—Held, that he had received the deposits as the vendor's agent and not as a stakeholder, and that, therefore, the vendor could recover interest on them from the time of the demand. *Edgell* v. *Day*, 1 H. & R. 8; 35 L. J., C. P. 7; L. R. 1 C. P. 80; 12 Jur. (N.S.) 27; 13 L. T. 328; 14 W. R. 87.

In a partition action real estate was ordered to be sold out of court by the plaintiff, the purchase-moneys to be paid into court. The sale took place under conditions which disclosed that the sale was made under an order of the court. The auctioneers paid the balance of the deposit after deducting their charges to the vendor's solicitor, who did not pay it into court:—Held, that the case was within the decision of *Biggs* v. *Bree* (51 L. J., Ch. 263), and the auctioneers had discharged their liability in respect of the deposit. *Brown* v. *Farebrother*, 58 L. J., Ch. 3; 59 L. T. 822.

Semble, a custom on the part of auctioneers to pay sale-moneys to the vendor's solicitor, without an authority for that purpose, could not be supported in law. *Ib.*

The practice of the solicitors having the conduct of a sale to pay the deposits into court for the auctioneer is within the ordinary business of a solicitor. An auctioneer sent the deposits received on a sale to the solicitors of the plaintiff, who had the conduct of the sale, to be paid into court. This deposit was received by one of the members of the firm, and misappropriated. On the question whether the auctioneer should not have himself paid this deposit into court, and whether he was not therefore liable to pay it over again:—Held, that the receipt and payment

into court of the auctioneer's deposit was within the ordinary business of the solicitors to the party having the conduct of the sale, and that the innocent members of the firm were therefore liable for the defalcation of their partner. *Biggs* v. *Bree*, 51 L. J., Ch. 263; 46 L. T. 8; 30 W. R. 278—C. A.

c. NOTICE TO, WHEN BINDING ON CLIENT—*See* NOTICE.

d. IN OTHER CASES.

Offer of Compensation.]—An objection to title on purchase having been waived, an offer of compensation made by a clerk of the vendor's solicitor, without express authority, is of no effect. *Burnell* v. *Brown*, 1 Jac. & Walk. 168; 21 R. R. 136.

Acceptance of Offer.]—A vendor instructed her solicitors to sell a house, subject to stipulations, for a fixed sum; and an intending purchaser agreed to give the sum. If her solicitors accept the offer unconditionally it would not bind the vendor, as being ultra vires the solicitors. *Chinnock* v. *Ely* (*Marchioness*), 11 Jur. (N.S.) 329; 12 L. T. 251; 13 W. R. 597.

Transfer of Bond—Relief.]—A. authorised his solicitor to borrow 700*l.* from B., to pay off a mortgage, and for that purpose executed a bond and a transfer of the mortgage. The solicitor, who had in his hands 700*l.* belonging to B., handed over to him the bond, in which it was stated that it was intended as a collateral security. The solicitor retained the transfer, which was never executed by the mortgagee, and afterwards absconded, without having paid off the mortgage. The court relieved A. from the bond. *Young* v. *Guy*, 8 Beav. 147.

Material Fact not disclosed by Party's Solicitor.]—A deed had been executed between A. and B., the negotiation for which on A.'s behalf had been carried on by C., his solicitor. B. filed a bill to set aside the deed on the ground that C. had not disclosed certain material circumstances, the knowledge of which would have prevented B. from executing the deed:—Held, that unless it could be shewn that A. was at the time aware of the circumstances, B. was not entitled to relief. *Solomon* v. *Honywood*, 3 N. R. 605; 10 L. T. 186; 12 W. R. 572.

III. DUTY AND RELATIONS AS TO CLIENTS.

a. IN CONDUCT OF ACTIONS.

To examine into Client's Case.]—Before commencing an action it is the solicitor's duty to inform himself correctly of the nature of his client's demand, and of the proof that can be adduced in support of it. *Gill* v. *Lougher*, 1 C. & J. 170; 1 Tyr. 121; 9 L. J. (O.S.) Ex. 24.

If an attorney undertakes to conduct a cause for the costs out of pocket, it being represented to him by his client that such client took a certain interest under a deed, the attorney cannot charge more than the costs out of pocket, though it should turn out that the cause was lost because his client did not take the interest under the deed which he stated that he took, it being the duty of the attorney to see the deed before so bringing the action. *Thwaites* v. *Macherson*, 3 Car. & P. 341; M. & M. 199.

A solicitor, before instituting proceedings for a client, especially on behalf of a wife against her husband, is bound to ascertain how the facts stand, and whether there is a reasonable expectation that the proceedings will be successful. *Baylis* v. *Watkins*, 33 L. J., Ch. 300; 10 Jur. (N.S.) 114; 9 L. T. 741; 12 W. R. 324.

Useless Litigation.]—Duty of solicitors to check useless litigation. *Ottley* v. *Gilby*, 8 Beav. 602; 14 L. J., Ch. 177.

Witness—Examination.]—Solicitors are justified in obtaining from a witness, prior to his examination, a statement of the facts; but it is improper to obtain a statement upon oath, unless required for the purpose of the cause. *Harvey* v. *Mount*, 8 Beav. 439; 14 L. J., Ch. 233; 9 Jur. 741. See *Gill* v. *Laugher*, supra.

To Communicate Offer of Settlement.]—If an attorney, who is conducting a cause, does not communicate to his client an offer of compromise made by the other party, but goes on with the action to put cash in his own pocket, he cannot after that charge his client with the costs incurred; but, as it is the duty of an attorney to communicate such an offer to his client, it must be presumed that he did so, till the contrary is shewn. *Still* v. *Thomas*, 8 Car. & P. 762.

Not Prosecuting Action.]—If an attorney has reasonable and probable grounds for commencing an action, and desists from prosecuting it because he afterwards discovers that the cause cannot be successfully proceeded with, he is entitled to recover his costs from his client. *Lawrence* v. *Potts*, 6 Car. & P. 428.

Following Directions of Client.]—An attorney retained to defend an action is not bound, in following the instructions of his client, to do what is merely meant for delay. *Johnson* v. *Alston*, 1 Camp. 176.

An attorney was held liable to pay the costs of sham pleas, though instructed by his client so to plead. *Vincent* v. *Groome*, 1 Chit. 182.

The court will not require an attorney to disclose the authority by which he pleads a sham plea. *Merrington* v. *Beckett*, 3 D. & R. 231; 2 B. & C. 481; 1 L. J. (O.S.) K. B. 246.

In Court at Trial.]—Where a jury retire to consider of their verdict, the attorneys of the parties ought to remain in court to hear it delivered. *Dauntley* v. *Hyde*, 6 Jur. 133.

Taking Opinion of Counsel.] — Counsel's opinion is not necessarily a justification of a solicitor for the course he adopts in the conduct of a suit. *Bryan* v. *Twigg*, 3 L. J., Ch. 114.

Quære, how far an attorney is justified, as between him and his client, by the opinion of counsel, in prosecuting an action which is unsuccessful, and which the court considers to have been groundless. *Clarke, In re*, 1 De G. M. & G. 43; 21 L. J., Ch. 20; 15 Jur. 1047.

Filing Affidavits.]—Under Ord. XXXVIII. rr. 10 and 15, it is the imperative duty of the solicitor of any party to cause to be filed every affidavit sworn and used in the course of such proceedings. *Taylor* v. *Gates*, 72 L. T. 436—C. A.

Disclosure of Information to Persons not Clients.]—Where a solicitor is consulted by a client and consequently obtains information

from documents and otherwise affecting the character or credit of another person, semble, it is no part of his duty to convey that information or to shew those documents to the other person so affected. *Saunders* v. *Seyd and Kelly's Credit Index Co.*, 75 L. T. 193—C. A.

Acting for Partnership—Duty to Individual Partners.]—It is not the ordinary duty of a solicitor instructed by the managing partner to act for a partnership in an action brought against the firm to communicate to each of the partners the result of the proceedings. A communication to the managing partner is sufficient. *Tomlinson* v. *Broadsmith*, 65 L. J., Q. B. 308; [1896] 1 Q. B. 386; 74 L. T. 265; 44 W. R. 471—C. A.

b. In Preparation and Custody of Documents.

Preparation of Wills.]—It is a failure of duty on the part of a solicitor to prepare a will under any circumstances without seeing the testator, and it is utterly inexcusable to do so for an aged testator on the instructions of a person who is named an executor, and is to receive such a benefit as a legacy of 3,000*l.*, with a percentage on the income of the property to be administered by him. The solicitor in such a case might prepare a draft, or even an engrossment, but he ought never to part with it until he had seen the testator. *Clery* v. *Barry*, 21 L. R., Ir. 152—C. A.

—— **Of Voluntary Deed.**]—It is the duty of a solicitor who prepares a voluntary deed on behalf of a client to distinctly call the attention of the settlor to the advisableness of inserting a clause of revocation, and to point out the results that might ensue from the omission. *Horan* v. *Macmahon*, 17 L. R., Ir. 641—C. A.

An aged lady of weak intellect made a voluntary settlement, which was set aside, as it contained no power of revocation. The solicitor who drew it admitted that he had not expressly told her of the absence of such a power:—Held, that he must pay his own costs. *Henshall* v. *Fereday*, 27 L. T. 743; 21 W. R. 240. Affirmed, 29 L. T. 46; 21 W. R. 570.

A solicitor acted for both parties in the matter of a voluntary settlement, which was set aside for undue influence. He was made a defendant to the suit for that purpose. The court, though exonerating him from culpability in the matter, made him bear his own costs, because he had not acted with proper prudence in the matter. *Harvey* v. *Mount*, 8 Beav. 439; 14 L. J., Ch. 233; 9 Jur. 741.

—— **Of Mortgage—Measure of Damages.**]—A solicitor advanced money to his client on a second mortgage, in which was inserted a power of sale exercisable at any time, without the usual proviso requiring that notice should be given, or some interest should be three months in arrear; and it was not shewn that he explained to the client that the power was not in the usual form. The solicitor afterwards took possession, and for several years received the rents, which, together with some payments made by the mortgagor, exceeded the interest on both mortgages. He then sold the property without notice:—Held, in an action by the mortgagor against the solicitor, that the omission from the power of sale of the usual qualifying clause was a breach of duty, and that the mortgagee was liable in damages as for an improper sale, unless it could be shewn that some interest was three months in arrear; and whether the absence of explanation did not make it improper even if there was interest in arrear, quære. *Cockburn* v. *Edwards*, 51 L. J., Ch. 46; 18 Ch. D. 449; 45 L. T. 500; 30 W. R. 446—C. A.

Held, that the difference between party and party costs and solicitor and client costs of the present action could not be given to the plaintiff by way of damages. *Ib.*

When Solicitor a Trustee.]—B., a solicitor, drew the will of R., his father-in-law, which bequeathed a share of residue, amounting to 45,000*l.*, to B.'s wife, and appointed B. sole executor. The will contained no direction that this sum should be for the separate use of B.'s wife. There was no evidence as to what had passed between B. and R. at the time of the execution of the will:—Held, that, in the absence of evidence, the court could not assume such a dereliction of duty on B.'s part in not informing R. of the effect of the will, as to make B. a trustee for his wife. *Birchall, In re, Wilson* v. *Birchall*, 44 L. T. 243; 29 W. R. 461.

On a contract for the sale of part of an estate, the purchaser requiring a fine to be levied of it for the purpose of removing admitted defects in the title, the vendor employed an attorney, who was his relation, and had been professionally employed by him on previous occasions, to levy the fine and complete the contract. The attorney advised the levying of a fine of the whole of the vendor's estate, without telling him the effects of it: such fine was accordingly levied, and the vendor died without declaring its uses, and without republishing his will, previously made, by which he had devised the whole estate to his wife, who survived him. After the vendor's death the attorney claimed the estate as his heir-at-law; alleging, that the will was revoked by the fine, and he brought actions of ejectment to recover possession thereof. The widow filed a bill in chancery for relief; and on an issue directed by that court, a jury found that the attorney fraudulently omitted to tell the vendor what effect the fine would have upon a devise of the property comprised in it. The court of chancery, upon that verdict, decreed the attorney to be a trustee for the devisee of the lands and hereditaments which so descended to him as heir-at-law. The house of lords, affirming that decree, further held, that the attorney's alleged ignorance of the effect of a fine on a will of the lands comprised in it, and his omission to inquire whether the conusor, his client, had made a will, were such professional ignorance and neglect as afforded a principle by which a court of equity might, independent of the ground of fraud, hold him to be a trustee for a third person, of any benefit resulting to himself from his professional ignorance or neglect, to the prejudice of that person. *Bulkley* v. *Wilford*, 2 Cl. & F. 102; 8 Bli. (N.S.) 111. See *Lysaght* v. *McGrash*, 11 L. R., Ir. 142. *And see* Fraud.

Drawing Deed—Estoppel.]—An attorney who draws and attests a deed, conveying land from A. to B., is not allowed afterwards to say that the property in the land and deed did not pass. *Lord* v. *Wardle*, 3 Bing. (N.C.) 680; 4 Scott, 402; 1 Jur. 382.

Handing over Documents on Change of Solicitor.]—*See* post, cols. 1740, 1741.

At Trial.]—It is the duty of solicitors to have the original documents at the hearing. *Gallimore* v. *Gill*, 4 W. R. 773.

To Take Care of Client's Documents.]—It is the duty of an attorney, when duly called upon by his client to deliver him the papers of which he has the charge, to deliver them in a reasonable condition. The question whether the condition in which they are delivered is reasonable is for the jury. *L. & N. W. Ry.* v. *Sharp*, 10 Ex. 451; 3 C. L. R. 52; 24 L. J., Ex. 44; 18 Jur. 964; 3 W. R. 12.

An attorney who has received his client's deed to keep for him and has lost it for want of proper care, cannot set up such loss as an answer to an action of detinue. *Reeve* v. *Palmer*, 5 C. B. (N.S.) 91; 28 L. J., C. P. 168; 5 Jur. (N.S.) 916; 7 W. R. 325—Ex. Ch.

An attorney, with whom deeds are deposited, places them, without his client's knowledge, in the hands of a party from whom he has borrowed money for his client. The attorney afterwards is unable to inform his client where the deeds are: —He is chargeable with having mislaid such deeds. *Wilmot* v. *Elkington*, 1 N. & M. 749; 2 L. J., K. B. 103.

Property in Letters.]—On payment of a solicitor's bill, the client is entitled to the possession of letters written to the solicitor by third parties, but not to copies of letters written by the solicitor to third parties, unless they are paid for by the client. *Thomson, In re*, 20 Beav. 545; 24 L. J., Ch. 599; 1 Jur. (N.S.) 718; 3 W. R. 474.

Semble, that a solicitor is entitled to retain the original letters written to him by his client. *Ib.*

Where a solicitor of a company writes a letter apparently on behalf of the company, he has no such property in it as to entitle him to prevent its publication, although he swears that it was written in his private capacity. *Howard* v. *Gunn*, 32 Beav. 462.

Letters received by a solicitor from his client, and copies of letters addressed by a solicitor to his client, are the property of the solicitor. *Wheatcroft, In re*, 46 L. J., Ch. 669; 6 Ch. D. 97; 26 W. R. 69.

c. Acting Against Former Client or Disclosing His Affairs.

In what Cases—Injunction.]—An attorney, or solicitor, cannot give up his client and act for the opposite party in any suits between them. *Cholmondeley (Earl)* v. *Clinton (Lord)*, 19 Ves. 261; 13 R. R. 183.

Attorney is prevented from communicating his client's secrets, even by striking off the roll; not permitted to give evidence of them. *Id.* 268.

The jurisdiction to restrain a solicitor from acting for the antagonist of his former client is founded upon the principle that a man ought to be restrained from doing any act contrary to the duty he owes to another; and will be exercised at the instance of the former client, irrespective of the question whether the solicitor was discharged by him or had discharged himself, whenever the transaction in reference to which the injunction is sought so flows out of or is connected with that in which the solicitor was formerly retained that the same matter of dispute may probably arise. *Hutchins* v. *Hutchins* (1 Hog. 315) and *Biggs* v. *Head* (Sau. & Sc. 335) approved and adopted. On appeal, the injunction granted by the vice-chancellor was disapproved and dissolved by consent, the solicitor undertaking not to disclose his client's secrets. *Little* v. *Kingswood Collieries Co.*, 52 L. J., Ch. 56; 20 Ch. D. 733; 47 L. T. 323; 31 W. R. 178. S. P., *Brady* v. *Lawless*, Sau. & Sc. 365, n.

A solicitor who has been discharged by his client, cannot be afterwards concerned against him in the same suit. *Hutchins* v. *Hutchins*, 1 Hog. 315.

The court will not permit a solicitor to disclose any communications made to him in that character, and will not speculate about their materiality. Semble, their is no substantial distinction between the cases of a discharged solicitor, and of one who refuses to act. *Biggs* v. *Head*, Sau. & Sc. 335. See also *Hobhouse* v. *Hamilton*, *Id.* 359, n. *Keon* v. *Nesbitt*, *Id.* 365, n. *Waller* v. *Fowler*, *Id.* 869, n.

The application to restrain a solicitor may be made by motion in the cause in respect of which such injunction is sought, and need not necessarily be made by petition. *Ib.*

A., a solicitor, had been employed by B. to negotiate and conclude an agreement on her behalf. Disputes then arose between them as to A.'s bill of costs, which B. procured to be taxed and reduced. A suit was subsequently commenced by C. against B., the object of which was to set aside the agreement, and in which A. and D., who had lately become his partners, were solicitors for C. The court restrained A. and D. from acting as the solicitor of C. in the suit, and restrained A. from communicating to C. any information relating to the agreement that had come to his knowledge confidentially as the solicitor of B. *Davies* v. *Clough*, 8 Sim. 262; 6 L. J., Ch. 113; 1 Jur. 5. Affirmed, 8 Sim. 269, n.

Motion to restrain a solicitor from giving evidence of confidential matters refused; the propriety of his being examined being left to the consideration of the court before which he might appear as a witness. *Beer* v. *Ward*, Jac. 77.

A solicitor who has been discharged, may, upon proof of his misconduct, be restrained from communicating information that came to him confidentially from his client, semble. *Ib.*

Injunction decreed to restrain a solicitor from communicating, to a party who was suing a former client, documents or matters of evidence which had come to the possession or knowledge of the solicitor in respect of his employment for such client, and to restrain the party suing from using in his action, or otherwise, any documents or matters of evidence which he had so obtained. *Lewis* v. *Smith*, 1 Macn. & G. 417.

Where an attorney has been employed in a cause, and is afterwards discharged by his client, not on the ground of misconduct, the court will not restrain him from acting for the opposite party, unless it clearly and distinctly appears that he has obtained information in his former character which it would be prejudicial to the cause of his former client to communicate. *Johnson* v. *Marriott*, 2 C. & M. 183; 2 D. P. C. 343; 4 Tyr. 78; 3 L. J., Ex. 40.

The court refused to restrain a defendant's attorneys from acting for him in the cause, on the alleged ground that they had, in the character

of solicitors for the defendant and others interested (jointly with the plaintiff) in a chancery suit, in attendance upon a master, obtained a knowledge of the plaintiff's case, and of the evidence upon which it was to be supported; the defendant's attorneys deposing that they in that suit acted also for the defendants, and had not thereby obtained any further knowledge of the plaintiff's case than would be disclosed by a particular of demand. *Grissell* v. *Peto*, 2 M. & Scott, 2; 9 Bing. 1; 1 L. J., C. P. 139.

The court refused to restrain, at the instance of an administratrix, a solicitor who had acted on behalf of the administratrix in the affairs of her intestate's estate, from acting as the solicitor of some of the next of kin in a suit for the administration of the estate. *Hutchinson* v. *Newark*, 3 De G. & Sm. 727.

How far solicitor may, after being concerned for one party, be restrained from being concerned for the opposite party. *Robinson* v. *Mullett*, 4 Price, 353; 18 R. R. 723.

The court will not exercise its summary jurisdiction over an attorney simply because he has, from improper motives, given information which might be used against a former client. There must be actual misconduct quâ attorney, by the adverse use of information while the relation of attorney and client is still subsisting, or by the betrayal of secrets relating to the client's business, obtained by the attorney while acting in a confidential capacity, and acquired also in consequence of his so acting. *Cutts, In re*, 16 L. T. 71.

A bill was filed by the residuary legatees under a will, against the executors, of whom one was also beneficially interested as a legatee, and had undertaken the sole management of its affairs. The bill charged particular acts of mismanagement, and the appropriation by the managing executor to his own purposes of part of the trust funds. The solicitor for the plaintiffs, having been for several years the friend and solicitor of the managing executor, had become well acquainted with the circumstances of the trust: he had been engaged in recovering money from a debtor to the estate, and had been consulted by the managing executor when one of the residuary legatees, the present plaintiff, had applied for the executorship accounts, which had been delivered under the solicitor's advice. The solicitor's bill for the matters was made out against the managing executor, not as executor, but personally. The bill was taxed, and an action brought for the amount, which was paid, and the character of solicitor and client thus ceased in 1847. A motion by the managing executor, the former client, for an injunction to restrain the solicitor from acting as the solicitor for the plaintiffs in the cause against him, was dismissed. *Parratt* v. *Parratt*, 2 De G. & Sm. 258; 17 L. J., Ch. 346; 12 Jur. 740.

Notwithstanding the rule that a solicitor must not use information acquired in his professional capacity in any subsequent proceedings against his former client, a solicitor, who has acted in the formation of a company and been discharged, may act for a petitioner to wind up the same company, when all the facts upon which the petition is based might have been ascertained by any person in the position of the petitioner. *Holmes, In re, Electric Power Co., In re*, 25 W. R. 603.

Dissolution of Partnership.]—Solicitors in partnership cannot dissolve their partnership, as against their client, without his consent, so as to enable the retiring partner, as discharged, to act against him. *Cholmondeley (Earl)* v. *Clinton (Lord)*, 19 Ves. 273; 13 R. R. 183.

Disclosing Defects in Client's Title.]—An attorney, being employed to raise money on mortgage for A., disclosed to the proposed lender certain defects in A.'s title, per quod he was subjected to divers actions at the suit of the proposed lender, was delayed in obtaining the money he wanted, and compelled to give a higher rate of interest:—Held, that this was a breach of duty for which an action lay by A. against the attorney, notwithstanding he had been the attorney of the proposed lender before his retainer by A. *Taylor* v. *Blacklow*, 3 Bing. (N.C.) 235; 3 Scott, 614; 2 Hodges, 224; 6 L. J., C. P. 14.

Clerk to Solicitor.]—A clerk to a solicitor commencing practice for himself, not to be restrained from acting as solicitor for parties against whom his master was employed, upon general allegations of his having in his former service acquired information likely to be prejudical to the clients of his master. *Bricheno* v. *Thorp*, Jac. 300; 23 R. R. 69.

Death of Client.]—The obligation to keep secret confidential communications does not cease with the death of the client. *Biggs* v. *Head*, Sau. & Sc. 335.

d. PURCHASES AND DEALINGS WITH—*See* FRAUD.

e. IN OTHER CASES.

Refusing to Produce Client.]—There is no obligation on an attorney or a solicitor to produce his client for the purpose of being served with process by a third person, and a security obtained by the solicitor from his client during the period of the client's concealment will not be thereby avoided in favour of such third person. *Shaw* v. *Neale*, 6 H. L. Cas. 581; 27 L. J., Ch. 444; 4 Jur. (N.S.) 695; 6 W. R. 635.

Duty to give Personal Attention.]—Where by a deed between mortgagees, mortgagors, and an attorney, the attorney was to be receiver of the rents, tithes, and other profits of an estate in the country, and he carried on business in London:—The court held, that he was not obliged to leave his business in town, but might employ an agent in the country to collect for the estate in question: and they construed the deed so as to allow the attorney to charge for the agent's expenses, before paying over the net proceeds of the estate to the various owners. *Gilbert* v. *Dynely*, 3 Scott (N.R.) 364; 3 Man. & G. 12; 5 Jur. 843.

A solicitor carrying on business in a town remote from his residence by a clerk who was paid a percentage of profits, cannot recover for business done by such clerk from a client who never saw or knew the solicitor, nor ever had the benefit of his judgment. *Hopkinson* v. *Smith*, 1 Bing. 13; 7 Moore, 237; 25 R. R. 571. S. P., *Taylor* v. *Glassbrook*, 3 Stark. 75; 23 R. R. 160.

Practice of solicitors, partners, dividing business, considering one only as agent to the other, disallowed, the client being entitled to their united exertions. *Cholmondeley (Earl)* v. *Clinton (Lord)*, 19 Ves. 273; 13 R. R. 183.

Dealing with Company.]— Semble, it is a breach of duty in a solicitor, for which he may justly be blamed, if, in dealing with a public company, he places the smallest reliance on any representation of any agent of the company as to its future acts. A solicitor, dealing with a public company, ought never to be satisfied with anything but the most solemnly-executed agreement of the company. *Leominster Canal Co.* v. *Shrewsbury and Hereford Ry.*, 3 Jur. (N.S.) 930; 5 W. R. 868.

Appointing Son as co-Trustee.]—On the retirement of one of two trustees of a will, the continuing trustee, who was the solicitor to the trustees, appointed his son, who was his partner in his business, to be a new trustee. The trusts of the will were being administered by the court:—Held, that, without any reference to the personal fitness of the son, by reason of his position, the appointment was one which the court ought not to approve, though it would not have been invalid if the court had not been administering the trusts. *Norris, In re, Allen* v. *Norris*, 53 L. J., Ch. 913; 27 Ch. D. 333; 51 L. T. 593; 32 W. R. 955.

When Acting for Trustees.]—It is the duty of a solicitor to inform his client, when a trustee, that if he does not tax his bill of costs, the items not properly chargeable will be disallowed in passing his account. *Flower, Ex parte*, 18 L. T., 457.

It is improper conduct in a solicitor acting for a trustee to attempt to protect his client against the just demands of a cestui que trust, by throwing formal difficulties in the way of the latter, which the solicitor would not otherwise have insisted on as necessary for the protection of his client. *Aylmer* v. *Winterbottom*, 4 Jur. (N.S.) 19.

Attesting Bill of Sale.]—A solicitor is an officer of the court, and is liable to serious consequences if he neglects his duty of explaining the effect of a bill of sale to the grantor. He is also liable to an action by his client, as well as to proceedings of a penal character—per James, L.J. *National Mercantile Bank, Ex parte, Haynes, In re*, 49 L. J., Bk. 62; 15 Ch. D. 52; 43 L. T. 36; 28 W. R. 848; 44 J. P. 780—C. A.

Title—Sale of Land.]—When lands are decreed to be sold, the solicitor of the defendant, the inheritor, is bound to give the benefit of his peculiar means of information and assistance in making out title, for which he is to be paid a reasonable compensation. *Blennerhassett* v. *M'Namara*, 1 Moll. 52.

Investigating Suspicious Transactions.]—It is to be presumed that legal advisers, in discharge of their duty to their client, investigate suspicious transactions, and satisfy themselves, before they approve them, that it is for their client's benefit to confirm them. *De Montmorency* v. *Devereux*, West, 64; 7 Cl. & F. 188; 2 Dr. & Wal. 410; 4 Jur. 403.

Giving Advice.]—An attorney is bound to give sufficient advice to his client; and if any advantage of property come to him by his ignorance, or the neglect of his duty, he shall be a trustee thereof for the benefit of the person who would be entitled thereto, if the attorney had known and done his duty. *Bulkley* v. *Wilford*, 2 Cl. & F. 177; 8 Bli. (N.S.) 111.

Acting for all Parties.]—A. purchased an estate from B., and on the completion, one solicitor acted for both parties, and the purchase-money was paid into his hands. Afterwards the purchaser was defeated by C., who had a paramount mortgage. The purchaser presented a petition against the solicitor, asking payment by the solicitor out of the purchase-money of the losses occasioned, or that he might indemnify the petitioner. The petition was dismissed with costs, the court holding, first, that it had no jurisdiction to award compensation or damages in such a case; and, secondly, that the money having come to the hands of the solicitor, as agent of the vendor, and not of the petitioner, it could not interfere. *Tylee* v. *Webb, Hinton, In re*, 14 Beav. 14; 15 Jur. 1023.

H. and B. were clients of the same solicitor M. to whom B. gave an authority in writing to sell certain property. Acting on this authority M. entered into an agreement with H. to sell the property to him:—Held (reversing 2 Jur. (N.S.) 922), that this was a transaction in which there was a necessity for the utmost openness of dealing, and the court, not being satisfied that this existed in the case before it, refused specific performance of the agreement entered into. *Hesse* v. *Briant*, 6 De G. M. & G. 623; 5 W. R. 108.

Sufficient ground for the interference of equity that a person entrusted to act as attorney for all parties, abuses the confidence placed in him. *Costigan* v. *Hastler*, 2 Sch. & Lef. 165.

I. LIABILITY OF SOLICITOR.

I. AS PRINCIPAL TO THIRD PARTIES.

Entering Appeal at Sessions.]—The solicitor, and not the client, is liable to the clerk of the peace for fees connected with the entering of an appeal at the sessions. *Langridge* v. *Lynch*, 34 L. T. 695.

Sheriff's Fees for Executing Writs.]—The solicitors of a judgment creditor, in the course of their duty as such solicitors, lodged a writ of fi. fa. at the office of the sheriff, with a request for execution, giving however no instructions as to the selection of any particular bailiff. The sheriff employed one of his officers to execute the writ, which the officer thereupon proceeded to do. On an action being brought by such sheriff's officer against the solicitors of the judgment creditor to recover his fees for executing the writ:—Held, that the solicitors were not liable to pay the fees; that the law, apart from the contract to pay them (express or implied), cast no such liability upon them; and that, from the mere fact that they in the ordinary course of their duty lodged the writ at the sheriff's office for execution, no such contract could be implied. *Maybery* v. *Mansfield* (9 Q. B. 745) followed. *Brewer* v. *Jones* (10 Ex. 655) dissented from. *Royle* v. *Busby*, 50 L. J., Q. B. 196; 6 Q. B. D. 171; 43 L. T. 717; 29 W. R. 315—C. A.

An attorney who issues a fi. fa. is not bound to pay the costs incurred by a sheriff's officer, who makes an unsuccessful levy under the writ. *Merriman* v. *Newman*, 20 W. R. 369.

An attorney of judgment creditors issued a fi. fa., and the warrant was placed in the hands of a sheriff's officer for execution; he thereunder seized goods which were claimed by other persons. An interpleader summons was taken out, and the officer was ordered to withdraw

upon payment to him by the claimants of four days' possession money. The officer was in possession of the goods seized eleven days. He afterwards sued the attorney for the fee for executing the warrant, and for seven days' possession money:—Held, that as the levy under the writ had produced nothing, he was not liable. *Ib.*

A bailiff may recover from the attorney in the cause the costs of executing the fi. fa., although the bailiff was not specially nominated by the attorney. *Brewer* v. *Jones*, 10 Ex. 655; 3 C. L. R. 369; 24 L. J., Ex. 143; 1 Jur. (N.S.) 240; 3 W. R. 215.

Expenses of Witnesses.]—The attorney in a cause is not personally liable to a witness whom he subpœnas to give evidence in the cause for her expenses of attendance. *Robins* v. *Bridge*, 3 M. & W. 114; 6 D. P. C. 140; M. & H. 357; 7 L. J., Ex. 49.

An attorney, being in the position of an agent for his client, is not liable for the charges or expenses of a skilled witness retained by him, in pursuance of his general instructions, to make surveys, researches, calculations or experiments, with a view to examination as a witness in his client's cause. *Lee* v. *Everest*, 2 H. & N. 285; 26 L. J., Ex. 334; 5 W. R. 759.

The client, in such a case, is primâ facie liable; and although it is competent to the attorney to make himself personally liable to pay the charges, there must be evidence of an express undertaking on his part so to do; and the mere fact that the attorney has employed the witness in such a way, and that in the course and conduct of the cause he has had communications with the skilled witness, that being in the course of his business as the attorney, is no evidence of such an undertaking. *Ib.*

A., an attorney, caused B. to be subpœnaed as a witness in a cause in which A. was attorney; and B., before he went to the assizes, asked A. who was to pay him, and A. said he would do so. After the assizes, at which B. attended and was examined, A.'s clerk, by the direction of A., gave B. an I O U for the amount of B.'s expenses and loss of time, which amount A. received from the opposite party, after the costs in the cause had been taxed:—Held, that B. might recover the amount from A. *Evans* v. *Philpotts*, 9 Car. & P. 270.

The mere circumstance of a party being the attorney in the cause will not make him responsible for refreshments supplied by a coffee-house keeper to the witnesses while attending the trial. But the fact of his being found in communication with the witnesses at the coffee-house, is some evidence to go to the jury that the supplies were sanctioned by him. *Fendall* v. *Nokes*, 7 Scott, 647; 2 Arn. 101; 3 Jur. 726.

A solicitor who takes witnesses to an inn, is primâ facie liable to the innkeeper for the expenses incurred. *Cariss* v. *Richardson*, 1 L. J. (o.s.) K. B. 11.

On Contracts on behalf of Client.]—A solicitor who attends a sale, and bids for his client, is responsible for the payment of the deposit, and will be attached if it is not paid. *Hobhouse* v. *Hamilton*, 1 Hog. 401.

In what case an agreement made by a scrivener, on behalf of his client, to compound a debt, shall bind the scrivener, though not the client. *Parrot* v. *Wells*, 2 Vern. 127.

A solicitor contracted, in his own name, to purchase a freehold; he resisted the performance of it on the ground that he had acted as the mere agent of a client, and that, it being a case of hardship, damages at law would be an adequate remedy to the vendor:—Held, that he was bound to perform the contract. *Saxon* v. *Blake*, 29 Beav. 438.

A contract having been entered into by a firm of solicitors acting on behalf of their client, to pay the plaintiff certain sums of money, the plaintiff filed a bill against the client and the solicitors, alleging that the client was bound by the contract, but that the client denied that he was so bound, on the ground that the solicitors had no authority to enter into such contract, and the bill prayed specific performance by the client or otherwise, if it should appear that the solicitors were not authorised, then that the solicitors themselves might be declared personally liable to perform the same. A demurrer to the bill by the solicitors was allowed on the ground that the plaintiff did not himself allege that the client was not bound, and, also, that alternative relief could not be prayed against one defendant in case relief could not be obtained against another defendant. *Clark* v. *Rivers* (*Lord*), 37 L. J., Ch. 70; L. R. 5 Eq. 91; 17 L. T. 166; 16 W. R. 123.

II. TO ACTIONS OF TORT.

False Imprisonment.] — An action for false imprisonment lies as well against an attorney as against his client, who sues out at the suit of his client an illegal writ of capias ad satisfaciendum against a defendant, and causes him to be imprisoned thereon. *Barker* v. *Braham*, 3 Wils. 368; 2 W. Bl. 866. See *Rogers* v. *Popkin*, 2 Stark. 404.

Attachment of Client—Acting without Authority.]—A bill filed without the authority of the plaintiff was dismissed with costs, and the plaintiff was taken under an attachment for non-payment of costs. The court, on motion, ordered the solicitor to indemnify A., but refused to release A. as against the claim of the defendants:—Held, also, that A. was not, on such application, to be deprived of his right against the solicitor to damages for his imprisonment. *Hood* v. *Phillips*, 6 Beav. 176.

Trespass.]—An attorney is not liable with his client in a joint action of trespass, unless it can be proved that he has gone beyond the strict line of his duty. *Sedley* v. *Sutherland*, 3 Esp. 202. S. P., *Carrett* v. *Smallpage*, 9 East, 330.

So, where an arrest is made under process, which is afterwards set aside for irregularity, the attorney in the suit is liable in trespass as well as the plaintiff; and if in an action of trespass he justifies under the process, it is a good replication that the process was irregularly sued out, and was afterwards set aside by rule of court for irregularity. *Codrington* v. *Lloyd*, 8 A. & E. 449; 3 N. & P. 442; 1 W. W. & H. 358; 7 L. J., Q. B. 196; 2 Jur. 593.

Where an attorney, at the instance of a creditor, sued out process against a debtor in the county court, and the attorney's agent, after the debt and costs had been paid, but in ignorance of that fact, signed judgment and sued out execution, and levied upon the debtor's goods, though he had never appeared:—Held, that both the creditor and his attorney were liable to the

debtor in an action of trespass. *Bates* v. *Pilling*, 9 D. & R. 44; 6 B. & C. 38; 5 L. J. (O.S.) K. B. 40.

An attorney who delivers to a bailiff a precept issued out of a local court, to be executed within the jurisdiction, is not liable in trespass jointly with the bailiff for executing the precept out of the jurisdiction, unless he was aware that it was to be executed out of the jurisdiction, although his name was indorsed on the precept, with directions to levy, and he was aware that the bailiff intended to make the levy in the manner he did. *Sowell* v. *Champion*, 6 A. & E. 407; 2 N. & P. 627; W. W. & D. 667; 7 L. J., Q. B. 197.

An attorney, who deliberately directs the execution of a warrant, is liable in trespass if it proves bad. *Green* v. *Elgie*, 5 Q. B. 99; D. & M. 199; 14 L. J., Q. B. 162.

An attorney, to whom his client had assigned a debt for which judgment had been recovered, indorsed a fi. fa. in the action, "The defendant resides at W., in the county of B., and is an innkeeper." The defendant in that action resided with R., his mother-in-law, and managed the business, which she carried on at an inn at W. The levy was made upon her goods in that inn. In an action against the sheriff and the attorney: —Held, that the attorney must be taken to have directed the sheriff to levy the goods of R., and was therefore liable. *Rowles* v. *Senior*, 8 Q. B. 677; 15 L. J., Q. B. 231; 10 Jur. 354. See *Childers* v. *Wooler*, 2 El. & El. 287; 29 L. J., Q. B. 129; 2 L. T. 49; 8 W. R. 321.

An action on the case is not maintainable against an attorney, who, being retained to sue for a debt a person of the same name with the plaintiff, by mistake and without malice takes all the proceedings to judgment and execution against the plaintiff, or having obtained judgment against the right person, by mistake and without malice issues execution against the plaintiff. *Davies* v. *Jenkins*, 1 D. & L. 321; 11 M. & W. 745; 12 L. J., Ex. 386; 7 Jur. 801.

If attorneys conducting the business of a fiat in bankruptcy take out a summons to attend before a commissioner under 6 Geo. 4, c. 16, s. 33, which is disobeyed, and they afterwards obtain a warrant of the commissioner to arrest and bring before him for examination the party so summoned, which warrant proves invalid, the attorneys are not liable in trespass if they have taken no steps in the execution of the warrant, except ordering it to be prepared by an agent, who, when it was ready, gave the messenger notice to take it. *Cooper* v. *Harding*, 7 Q. B. 928; 9 Jur. 777.

Action for wrongful seizure of goods against an execution creditor and her attorney, jointly. The attorney, who had given the sheriff a fi. fa. against C., sent a man, with the sheriff, to point out his goods. He pointed out goods which the sheriff seized, and which, on an interpleader issue, were found to be the goods of D.:—Held, that the attorney, by the direction which he had given the sheriff, had made himself personally liable in trespass. *Power* v. *Fleming*, Ir. R. 4 C. L. 404.

Held, also, that, the attorney having directed the sheriff to seize the goods which the man sent should point out, the consequence was just the same as if he had himself pointed out the wrong goods and directed the sheriff to seize them. *Ib.*

D. obtained, as special damage, a verdict for the costs of the interpleader proceedings which he had taxed against the execution creditor, and for the payment of which by her he had an order of the court, but which he was unable to recover:—Held, that, as his action was brought against both the execution creditor and her attorney, the same damages must be recovered against both; that, as D. had an order which was equivalent to a judgment of the court against her, he could not recover the amount of them as damages against her, and, therefore, the verdict should be reduced by the amount. *Ib.*

Refusal to sign Defendant's Discharge unless paid on independent demand.]—Where a defendant, on being taken in execution under a ca. sa., tendered the debt and costs to the plaintiff's attorney, and required him to sign his discharge, which he refused to do until he had paid an independent collateral demand for costs:—Held, that the plaintiff and his attorney were liable to an action on the case for such refusal. *Crozer* v. *Pilling*, 6 D. & R. 129; 4 B. & C. 26; 3 L. J. (O.S.) K. B. 131; 28 R. R. 199.

Improperly suing out Writ of Attachment.]—Upon a change of solicitors in certain suits in equity, an order was made by the master of the rolls, requiring the former solicitor to hand over to the newly-appointed solicitor all papers and documents in his possession, custody or power relating to the suits. Some of the papers were in the hands of counsel and others in the hands of a law stationer, who respectively claimed liens thereon for their fees and charges; and the solicitor alleging that his client had undertaken to provide funds for fees and disbursements, but had failed to do so, was consequently unable to comply with the order as to those papers. The newly-appointed solicitor, upon an affidavit alleging the neglect to obey the order, but not mentioning the excuse set up, obtained from the clerk of records and writs a writ of attachment, under which the former solicitor (already in custody for debt) was detained. An application having been fruitlessly made to the master of the rolls to set aside the attachment, upon a statement of all the facts, the former solicitor appealed to the lords justices, who reversed the decision of the master of the rolls, with costs, and ordered the writ to be set aside and the solicitor discharged from custody:—Held, that neither the solicitor who so sued out the attachment nor the client was liable in trespass. *Williams* v. *Smith*, 14 C. B. (N.S.) 596.

Trover.]—A., the acceptor of a bill of exchange, had agreed with his creditors to pay a composition, partly in money and partly in notes. The bill having become due, the drawer was unable to take it up, but the indorsee intrusted it to the drawer to get the composition in money and notes for him. The drawer handed it to his attorney, with other bills accepted by A., to get the composition for him, and, at the same time, obtained an advance of 200*l.* from the attorney. The attorney obtained the composition in money, and repaid himself the 200*l.*, and carried the balance to the account of the drawer. For the composition in notes he took one note for the aggregate amount of the composition on the several bills handed to him:—Held, that the attorney was not liable to the indorsee, either in trover for the bill or for the money kept back by him to repay the advance to his client,

the drawer. *Symonds* v. *Atkinson*, 1 H. & N. 146; 25 L. J., Ex. 313.

When Acting in Accordance with Opinion of Counsel.]—In an action against an attorney, for a malicious or fraudulent proceeding, it is not enough in order to excuse him that he acted on counsel's opinion, unless he also shows a case fairly stated, and advice obtained bonâ fide and properly pursued. *Andrews* v. *Hawley*, 26 L. J., Ex. 323.

III. TO ACCOUNT.

In what Cases.]—It is the duty of a solicitor to keep clear and distinct accounts. *Clarke, In re*, 13 Beav. 173. Affirmed, 1 De G. M. & G. 43; 21 L. J., Ch. 20; 15 Jur. 1047.

Where advances have been made by a solicitor to his client, by way of loan, the client being in distress, a general account will be ordered of such transactions. *Hicks* v. *Morland*, 2 L. J., Ch. 206.

Where a party gave a sum of money to his solicitors to invest:—Held, that as this was a single isolated transaction, a bill for an account as between principal and agent could not be maintained as against the solicitors. *Mare* v. *Lewis*, 4 Ir. Eq. R. 219.

A. placed moneys in the hands of her solicitor, who acted also for her as a money scrivener, undertaking to find securities for her. He placed the moneys out on insufficient securities, misrepresenting to her their character:—Held, that as against him, if living, it would have been, and as against his estate after his death it was not a matter for an action for negligence, but a matter of account between principal and agent, and the client had a right to reject the charge for disbursements on insufficient securities. *Smith* v. *Pococke*, 2 Drew. 197; 2 Eq. R. 368; 23 L. J., Ch. 545; 18 Jur. 478; 2 W. R. 285.

The summary jurisdiction by petition at the rolls does not exclude the right of a client to file a bill against his solicitor for a general account. *O'Brien* v. *Lewis*, 9 Jur. (N.S.) 321; 7 L. T. 734.

Demurrer to a bill by a solicitor for an account between himself and his client in respect of moneys received and paid and of loans made by the former for and on behalf of the latter, and of bills of costs due from the former to the latter, allowed, as not amounting to a case of mutual account. *Padwick* v. *Hurst*, 18 Beav. 575; 23 L. J., Ch. 657; 18 Jur. 763; 2 W. R. 501.

Upon demurrer, a general allegation that accounts are of a complicated nature is not sufficient, unless supported by specific allegations of facts showing their complex character. *Ib.*

A bill or claim for an account filed against a confidential agent cannot be resisted on the ground that the defendant has also been employed as a solicitor in the same matter. *Oddy* v. *Secker*, 2 Sm. & Gif. 193.

A bill was filed by a solicitor against a person employed as his occasional clerk, and in that character receiving and paying moneys for him, and claiming against him a sum for services, the master having paid from time to time moneys to and for the clerk. The bill prayed an injunction to restrain an action brought by the clerk for the balance of the account:—Held, that this was not such an account as to require the interference of equity, and the injunction was refused. *Fluker* v. *Taylor*, 3 Drew. 183.

Statute of Limitations.]—The ordinary relation of a solicitor to his client in questions of account is not of such a fiduciary character as to bar the Statute of Limitations, 21 Jac. 1, c. 16. *Watson* v. *Woodman*, 45 L. J., Ch. 57; L. R. 20 Eq. 721; 24 W. R. 47.

Accounts when Re-opened.] — The general expressions of Lord Redesdale, in *Lewes* v. *Morgan* (3 Y. & J. 230), are not to be construed to mean that accounts settled between parties standing in the relation of solicitor and client are to be disregarded. It would be absurd that a solicitor, however accurately his accounts were settled, and however plainly his books show primâ facie that the accounts were regular, should more than any other man be put to vouch his account over again. *Hickson* v. *Aylward*, 3 Moll. 15.

An account settled between a client and her solicitor, including arranged bills of costs, decreed to be opened and the bills referred for taxation in an action instituted nearly two years after such settlement, on the grounds of undue influence, and that the charges were improper and excessive, and that much of the business done was unnecessary and ought not to have been done. *Watson* v. *Rodwell*, 47 L. J., Ch. 418; 7 Ch. D. 625; 26 W. R. 524. See also *Webb, In re, Lambert* v. *Still*, 63 L. J., Ch. 145; [1894] 1 Ch. 73; 70 L. T. 318—C. A.

Accounts between a mortgagee solicitor and his client, the mortgagor, stated and signed more than thirty years ago, were opened on the grounds that the client had no independent advice, and signed without examination or explanation, that the accounts contained improper items, and that a third person was put forward as the mortgagee. *Ward* v. *Sharp*, 53 L. J., Ch. 313; 50 L. T. 557; 32 W. R. 584.

In impeaching settled accounts between solicitor and client, it is sufficient to allege generally that the accounts are erroneous, without specifying the particular items. *Lawless* v. *Mansfield*, 1 Dr. & War. 557; 4 Ir. Eq. R. 113.

Bonds and bills given by a client to his solicitor are not sufficient evidence of the debt; if the accounts have been opened, the consideration for them must be proved. *Ib.*

A firm of solicitors purchased leasehold property, and soon afterwards they formed a company (of which they were appointed the solicitors) to take over the property, which they sold to the company at a price greatly in excess of that which they had paid for it:—Held, that no fiduciary relation having existed between the parties at the time when the solicitors purchased the property, and there having been no fraud, concealment, or misrepresentation on the part of the solicitors, and all the then members of the company having been fully aware of the facts, the sale could not be opened, and the solicitors were not accountable for the profit made on the transaction. *Mason's Hall Tavern Investment Co.* v. *Nokes*, 22 L. T. 503.

Solicitor who advanced money to infant for subsistence of his family, and acted as his confidential adviser, is in nature of guardian to him, and an account settled between them within a month after infant became of age and without latter having any assistance, was opened, notwithstanding vouchers were delivered up. *Revett* v. *Harvey*, 1 Sim. & S. 502; 2 L. J. (O.S.) Ch. 39; 24 R. R. 219.

As to the form in which settled accounts

between attorney and client should be delivered. *Johnes* v. *Lloyd*, 10 Price, 62.

Settlement of accounts between attorney and client is not conclusive, the nature of their connection taking their accounts out of the general rule of equity. *Lewes* v. *Morgan*, 5 Price, 42; 19 R. R. 566.

See also ACCOUNTS AND INQUIRIES.

For Profits.]—A solicitor was active in founding a banking company. Before its establishment he entered into a secret arrangement with a stranger, that the latter should purchase some property eligible for the banking-house on a joint speculation. After its establishment, the company purchased part of the premises for their banking-house, not knowing that their solicitor was interested in it:—Held, that he must account to the company for all the profits made by him by the whole transaction, but that the stranger was under no such liability. *Tyrrell* v. *Bank of London*, 10 H. L. Cas. 26; 31 L. J., Ch. 369; 8 Jur. (N.S.) 849; 6 L. T. 1; 10 W. R. 359.

Taking Accounts.]—In taking an account of the pecuniary transactions between an attorney and his client, the production of a bond entered into by the latter is not sufficient evidence of a debt to that amount, and actual payment must be proved. *Lewes* v. *Morgan*, 3 Y. & J. 230. *S. C.*, nom. *Morgan* v. *Evans*, 8 Bli. (N.S.) 777; 3 Cl. & F. 159.

Where an account is decreed to be taken of the dealings and transactions between an attorney and his client, in the course of which the attorney has taken securities from the client, the attorney must not only prove the securities, but likewise the consideration for which they were given. Therefore, where a promissory note was given by the client to his attorney under circumstances of great suspicion, but the client was unable for want of witnesses to prove fraud in the attorney, the court upon decreeing an account between the parties, directed an inquiry as to whether the attorney could by any, and what affirmative evidence prove the consideration for the note. *Jones* v. *Thomas*, 2 Y. & Coll. 498.

When on a bill, against a firm of solicitors who were the trustees of a settlement, for an account, but in which there was no charge of wilful neglect or default, and no relief prayed as against it, the plaintiff succeeded in establishing his case; the court directed an inquiry as to the defendant's dealings with the trust fund, and if on taking the accounts it should appear that they had been guilty of wilful neglect or default in the discharge of their duty, they should be charged, in taking the accounts, with such wilful neglect or default. *Nash* v. *Howell*, 21 L. T. 743.

The solicitor of an administratrix receiving money belonging to the estate of the intestate is not a trustee for the estate; and if he makes payments out of it for the use of the administratrix, which are either previously directed, or subsequently adopted by her, he will be charged only with the balance actually in his hands. *Watkins* v. *Maule*, 1 L. J. (O.S.) Ch. 82.

H. by agreement with J. became solicitor on the record in certain suits, and an arrangement was made that moneys received by him as such solicitor should be applied to meet some fees to counsel due from J. The moneys were so received and applied after J.'s death. J.'s estate was insolvent, and a summons was taken out by his executor for payment of the sums:—Held, that as H. had received these moneys as solicitor on the record and by express agreement with J., he was entitled to retain them, subject only to an account. *Jeyes* v. *Jeyes*, 45 L. J., Ch. 245; 34 L. T. 167.

—— **Appropriation of Payments.**] — Where directors of a company carry on business unauthorised by the deed of settlement, and moneys have been paid by the company to the solicitors on account of costs generally, the solicitors have no right post litem motam to appropriate such payments to the costs incurred in respect of the unauthorised business, but, on the contrary, the court will appropriate the payments to the costs which the company was liable to pay. *Phœnix Life Assurance Co., In re, Howard and Dolman, Ex parte*, 1 Hem. & M. 433; 2 N. R. 548; 11 W. R. 984.

There were numerous money transactions between N., a solicitor, and D., his client. Before 1825 they settled their accounts on two or three occasions, whenever it appeared convenient. From 1824 to 1846 there was a sum of 5,000*l.* placed in D.'s hands by N., for which D. gave his bond, and there were other sums secured by D.'s promissory note. D. gave N. moneys as he asked for them in gross sums, nothing being said as to their appropriation. Upon D.'s death, a bill for an account being filed against his executors:—Held, that the account should be taken without appropriating any sum credited to either party in satisfaction of interest; that no balance should be struck before the end of the account; and that every sum credited to either party should carry interest from the date at which it was credited. *Napper* v. *Dendy*, 5 W. R. 4.

IV. WHEN ACTING WITHOUT AUTHORITY.

Generally.]—When a solicitor acts without authority, he must as a general rule pay the costs thereby occasioned. *Savage, In re*, 15 Ch. D. 557; 29 W. R. 348.

Where a person is made a plaintiff in an action without proper authority, and orders have been, without his knowledge, made against him, under which he is liable to pay costs to the defendant, the proper order to make is to stay all proceedings in the name of the person in question and all proceedings against him in the action since he was added as a plaintiff, and to direct his name to be struck out for the purpose of future proceedings; the solicitor who wrongly made him a party must pay all his costs, and all the costs which he has been ordered to pay, and also all the defendant's costs, the costs of the person wrongly made plaintiff as between solicitor and client, and the costs of the defendant as between party and party, and in such costs must be included the costs of the application to be relieved from the consequences of the misjoinder. The rule laid down in *Reynolds* v. *Howell* (42 L. J., Q. B. 181; L. R. 8 Q. B. 398), and adopted in *Nurse* v. *Durnford* (49 L. J., Ch. 229; 13 Ch. D. 764, and *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong* (49 L. J., Ch. 231; 13 Ch. D. 310), applied. *Fricker* v. *Van Grutten*, 65 L. J., Ch. 823; [1896] 2 Ch. 649; 75 L. T. 117; 45 W. R. 53—C. A.

Solicitors who instituted an action in the name of two plaintiffs, one of whom was an infant (whose name had since been struck out on the ground of want of authority), were ordered on the defendants' application to pay to the defendants their costs of the action so far as they were attributable to the joinder of the infant as a plaintiff, notwithstanding that the solicitors were unaware of the infancy when they instituted the action. *Geilinger* v. *Gibbs*, 66 L. J., Ch. 230; [1897] 1 Ch. 479; 76 L. T. 111; 45 W. R. 315.

The principle to be deduced from *Fricker* v. *Van Grutten* (65 L. J., Ch. 823; [1896] 2 Ch. 649) and previous cases is that where a solicitor without authority puts forward a person as responsible to the defendants for the costs of the action, the solicitor is to be substituted for such person as regards the defendants. *Ib.*

The rule that proceedings taken by a solicitor without proper authority, will be annulled with costs, to be paid by him, does not apply unless he was aware of the circumstances which invalidated his authority; and notice from the other side is not sufficient to fix him with knowledge, if he had good reason to suppose that the facts stated in the notice were not true. *Thomas* v. *Finlayson*, 19 W. R. 255.

Liability incurred by Means of Fraud.]—An attorney having brought an action without any authority to do so from the plaintiff, was ordered to pay the defendant's costs of the action:—Held, that his liability to pay such costs was a liability incurred by means of a fraud within the Bankruptcy Act, 1869, s. 49. *Jenkins* v. *Fereday*, 41 L. J., C. P. 152; L. R. 7 C. P. 358; 27 L. T. 37; 20 W. R. 781.

Action Dismissed—Indemnity against Costs.]—Where a solicitor files a bill, the onus lies upon him to show that he had the plaintiff's authority for doing so, and if he fails to show such authority, or a subsequent acquiescence on the part of the plaintiff, the plaintiff is entitled to have his name removed from the record, with costs to be paid by the solicitor. *Maries* v. *Maries*, 2 Eq. Rep. 361; 23 L. J., Ch. 154; 2 W. R. 635.

Where a solicitor has commenced an action in the name of a plaintiff without authority, the proper course is for the plaintiff to serve notice of motion on the defendant as well as on the solicitor, that the action may be dismissed, and that the solicitor may pay the costs of the plaintiff as between solicitor and client, and the costs of the defendant as between party and party. *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong*, 49 L. J., Ch. 231; 13 Ch. D. 310; 41 L. T. 637; 28 W. R. 217—C. A.

A suit was prosecuted through a solicitor, and the plaintiffs alleged without their authority; the defendant gave notice of motion to dismiss the bill for want of prosecution, which being served on the solicitor, he requested the plaintiffs to name a new solicitor, which they refused to do; the solicitor then moved that he might be dismissed as solicitor:—Held, that no such order could be made; but personal service on the plaintiffs of the notice of motion to dismiss was ordered. The plaintiffs took no step to relieve themselves from their liability:—Held, that the defendant was entitled to have the bill dismissed with costs to be paid by the plaintiffs, leaving them to obtain as against the solicitor any remedy they might have. *Tarbuck* v. *Woodcock*, 6 Beav. 581.

Order to dismiss a bill, with costs to be paid by the plaintiff's solicitor, the bill having been filed without special authority from the plaintiff. *Wright* v. *Castle*, 3 Mer. 12; 17 R. R. 3.

Where a solicitor had taken no written authority to file a bill, and the parol one, which he asserted, was denied by the plaintiff, the bill was taken off the file, and the plaintiff ordered to pay the costs of the defendant in the first instance, and the solicitor to pay the costs both of plaintiff and defendant. *Martindale* v. *Lawson*, C. P. Cooper, 83.

A solicitor, taking a proceeding in a suit in the name of a person, without his authority, is personally liable to pay the costs, charges, and expenses occasioned to the other parties thereby. *Malins* v. *Greenway*, 10 Beav. 564; 17 L. J., Ch. 26, 331; 12 Jur. 66, 319.

If a solicitor gives a relator an indemnity for costs, or uses his name without authority (though afterwards assented to), the court will order the information to be taken off the file with costs, to be paid by the relator and attorney. *Att.-Gen.* v. *Skinners' Co.*, C. P. Cooper, 7.

Bill filed by solicitor from instructions of brother-in-law of plaintiff, solicitor having never received any communication from plaintiff himself, dismissed, and solicitor ordered to pay costs, plaintiff having absconded before bill was filed. *Hall* v. *Bennett*, 2 Sim. & S. 78; 25 R. R. 160. See also *Betagh* v. *Burke*, 2 Moll. 384. *Wade* v. *Stanley*, 1 Jac. & Walk. 674. *Stuckey, Ex parte*, 2 Cox, 283; *Dundas* v. *Dutens*, id. 236; 1 R. R. 112.

The retainer of a solicitor need not be in writing; but if he neglects taking that precaution, and, his retainer being afterwards questioned, there is nothing but assertion against assertion, he must bear the cost of the risk he thus undertakes. *Wiggins* v. *Peppin*, 2 Beav. 403; 3 Jur. 721.

A suit instituted by a solicitor without authority dismissed on motion with costs of the suit, and of the motion as between solicitor and client. *Allen* v. *Bone*, 4 Beav. 493.

Bill taken off the file at the expense of solicitor, who had taken no written authority to sue, and whose parol authority was denied. *Martindale* v. *Lawson*, C. P. Cooper, 83.

A., who was an equitable mortgagee by deposit of deeds of property belonging to the estate of B., was paid off by C. on an agreement with the executors of B. (as their solicitor stated), that proceedings should be taken in A.'s name to enforce the mortgage security, and thereby to effect a sale of the whole or part of the mortgaged property; and the solicitor of the executors filed a claim for foreclosure in the name of A. against the representatives of B. A. denied that he had given authority to file the claim in his name, and moved that it might be taken off the file:—Held, that there being only assertion against assertion, and the solicitor alone stating that instructions were given in the presence of A., the case was to be governed by *Allen* v. *Bone* (4 Beav. 493), and the claim was dismissed, with costs to be paid by the solicitor. That in such a case the court could not adjudicate between the solicitor, by whom the claim was filed, and the defendants, the representatives of B., by whom the instructions were given to file the claim in A.'s name; and the court left the solicitor to any legal remedy he might have against such parties.

Crossley v. *Crowther*, 9 Hare, 384; 21 L. J., Ch. 565.

A bill filed by an insolvent as assignee of a debt against trustees of a creditor's deed, but which was filed by a solicitor without the plaintiff's authority or knowlege, ordered to be taken off the file, with costs as against the solicitor; and the defendants are not necessary parties to such an application. *Jerdein* v. *Bright*, 6 L. T. 279; 10 W. R. 380.

Solicitors instituting a suit in their client's name, without authority, are liable to indemnify him from all costs, and a passive acquiescence by the client in the use of his name does not of itself amount to an adoption of the proceedings. All the partners are equally liable, notwithstanding only one of them may have conducted the suit. *Manby, In re*, 26 L. J., Ch. 313; 3 Jur. (N.S.) 259.

Semble, that if B. had during the course of the litigation became aware of the use of his name, his subsequently omitting to interfere actively to prevent its continuance would not, per se, have been sufficient to relieve the solicitors from liability to him for the costs. *Ib.*

Solicitors of the assignees of a bankrupt estate instituted a suit in the names of the assignees, but without any written retainer from the official assignee, against a mortgagee of the bankrupt's property to redeem the mortgage, which was dismissed with costs:—Held, on the petition of the official assignee, that although he was cognisant of the existence of the suit, yet as there was no sufficient evidence of his having given a retainer, the solicitors were bound to pay and indemnify the official assignee against the costs. *Norton* v. *Cooper*, 3 Sm. & G. 375.

A solicitor obtained a retainer to proceed against executors, who had, after a long lapse of time, neglected to prove the will, and had rendered no account, to compel probate of the will, and to take such other proceedings for obtaining an account as might be necessary. He instituted a suit to compel probate, and obtained in it an account which was insufficient. He took then no other steps for three years, and then, without further consulting the client, filed a bill for an account; he had no other authority than that retainer, and the client denied any parol authority to file a bill:—Held, that the retainer did not justify the solicitor, and the bill was dismissed, with costs to be paid by the solicitor, as in *Allen* v. *Bone* (4 Beav. 493). *Athinson* v. *Abbott*, 3 Drew. 251.

Where an action is brought by an attorney without the plaintiff's consent, and the defendant at the trial agrees to withdraw a juror, the court will not order the attorney acting for the plaintiff to pay the costs of the defendant. *Hammond* v. *Thorpe*, 1 C. M. & R. 64; 4 Tyr. 838; 2 D. P. C. 721; 3 L. J., Ex. 358.

A purser of a mine, assuming to be authorised to sue on behalf of the adventurers, instructed an attorney to sue in the name of twelve of them. At the trial the record was withdrawn, and the defendant obtained a rule for the costs of the day. Immediately after taxation, on the 19th September, 1854, three of the plaintiffs obtained judge's orders to strike their names from the record, on the ground that they had ceased to have any interest in the mine, and that their names had been used without their knowledge or consent. On the 5th of May, the defendant obtained a rule to rescind these orders and for the attorney to pay the costs already incurred, and to give security for the defendant's further costs:—Held, that the application was too late. *Collins* v. *Johnson*, 16 C. B. 588; 3 C. L. R. 1285; 24 L. J., C. P. 231.

—— **Next Friend.**]—Where an action was commenced on behalf of a married woman by a next friend acting without her authority, the court, on the application of the defendants, ordered the action to be dismissed, and that the solicitors acting for the next friend should pay all the costs. *Schjott* v. *Schjott*, 51 L. J., Ch. 368; 19 Ch. D. 94; 45 L. T. 333; 30 W. R. 329—C. A.

The mother of an infant employed a solicitor to prosecute a suit on behalf of the infant. The person first named as next friend in the cause died; the mother subsequently discharged the solicitor; and after such discharge, he amended the bill and named a new next friend without the mother's sanction. The court ordered that, on payment by the mother to the next friend of the costs incurred by him in the suit, the next friend should be removed and another appointed, and that the solicitor should pay the costs of the application and of the new appointment. *Lander* v. *Ingersoll*, 4 Hare, 596.

Acting for Non-existing Person.]—An attorney, though he need not be instructed by a plaintiff personally, but may receive instructions from any one interested in the action, is liable to the defendant for costs, if it turns out that the plaintiff is a non-existing person. *Hoskins* v. *Phillips*, 16 L. J., Q. B. 339.

Joining Person as Co-plaintiff.]—The name of a plaintiff having been inserted on the record without his knowledge, consent, or authority, on motion by the defendants to dismiss for want of prosecution, and on motion by the plaintiff to have his name struck out from the record:—Held, that the solicitors to the record who had purported to act for the said plaintiff were liable to pay his costs of the motion as between solicitor and client, and also to pay the costs of the defendants of the action and all the motions therein. The form of order in *Dundas* v. *Dutens* (1 Ves. 196; 1 R. R. 112) not followed. *Nurse* v. *Durnford*, 49 L. J., Ch. 229; 13 Ch. D. 764; 41 L. T. 611; 28 W. R. 145.

A bill being filed without the written authority of one of several co-plaintiffs, and the evidence being unsatisfactory as to the retainer; his name was struck out as co-plaintiff, with costs to be paid by the solicitor. *Pinner* v. *Knights*, 6 Beav. 174.

Where a solicitor files a bill without a written authority, the onus of proof is cast on him. If there be any doubt on the matter, the court will hold him liable. *Ib.*

An attorney who makes a person even a formal plaintiff without his express consent, is himself liable for the costs incurred by such plaintiff. *Peed* v. *Cussen*, Hayes, 66.

The names of persons made plaintiffs in a bill, without their authority, ordered to be struck out with costs to be paid by the solicitor, their application, after they were apprised of the fact, having been made without delay. Where persons who have been made plaintiffs without their consent, have, after the fact has come to their knowledge, acquiesced for a considerable period, their names will not, on their application, be struck out of the bill, semble. *Wilson* v. *Wilson*, 1 Jac. & Walk. 457.

Where parties moved to have their names struck out of the record on the ground that they had been used by the solicitor without their authority, and the solicitor could not produce any written authority from them, the court refused the motion, the facts and documents showing that the parties had been aware of the use of their names, and had allowed a long space of time to elapse without taking any steps. *M'Nally* v. *Knox*, 5 L. T. 186.

A bill was filed in the name of several co-plaintiffs, but, as to one of them, without his authority. His interests being found conflicting with those of the other co-plaintiffs, and not having acquiesced, he obtained an order after replication, and on motion, that his name might be struck out as one of the plaintiffs, and that his cost of suits and of the application might be paid by the solicitor who filed the bill. *Tabbernor* v. *Tabbernor*, 2 Keen, 679 ; 6 L. J., Ch. 19.

A bill had been filed by one of the directors of an incorporated company, in the name of the company, praying an injunction against the other directors of the company, to restrain them from allotting, or pretending to allot, any shares, from affixing their seal, or otherwise acting or pretending to act in the name of the directors of the company. On motion to take the bill off the file, on the ground that the solicitor had not the authority of the company, it appearing that one director alone had authorised such bill to be filed, without the consent of the other directors :—Held, that such bill should be taken off the file, and the costs of the application and of the suit should be paid by the solicitor filing such bill :—*Fergus Navigation and Embankment Co.* v. *Kingdom*, 4 L. T. 262.

A., one of five co-plaintiffs, moved to have his name struck out of a bill as having been inserted without his authority. He also asked that the solicitor might pay the costs. After the date of the motion the solicitor died. The co-plaintiffs opposed the motion, and proved that A. had assigned the subject-matter in dispute by an instrument not under seal, and had thereby authorised the assignee to use his name :—Held, that the authority in the assignment must have been intended to have some meaning, and the motion refused with costs. *Rees* v. *Rees*, 2 Eq. R. 234.

Cause at issue, one of the plaintiffs applies to have name struck out of bill, on ground that he knew not of its insertion. Defendant objected, he being only plaintiff of ability to pay costs. Objection good, and application refused ; but solicitor who inserted plaintiff's name ordered to indemnify him. *Titterton* v. *Osborne*, Dick. 350.

Discontinuance of Action.]—A company, named as a co-plaintiff in an action, served a notice of motion on the solicitors who had issued the writ for an order that the name of the company might be struck out of the writ, and that the solicitors might be ordered to pay the company's costs, on the ground that the writ had been issued without its authority. Before the motion could be heard the solicitors served a notice that the plaintiffs wholly discontinued the action :—Held, notwithstanding the discontinuance, that the court had jurisdiction to make the order asked for. *Gold Reefs of Western Australia* v. *Dawson*, 66 L. J., Ch. 147 ; [1897] 1 Ch. 115 ; 75 L. T. 575 ; 45 W. R. 285.

Staying Proceedings.]—Where an attorney brings an action in the name of a person without his authority, the court will stay the proceedings, on the motion of the defendant, and make the attorney pay the costs. *Hubbard* v. *Phillips*, 2 D. & L. 707 ; 13 M. & W. 703 ; 14 L. J., Ex. 103.

When an attorney brings an action without the authority of the plaintiff, the plaintiff is entitled to have the proceedings stayed without payment of costs. *Reynolds* v. *Howell*, 42 L. J., Q. B. 181 ; L. R. 8 Q. B. 398 ; 29 L. T. 208 ; 22 W. R. 18.

If the plaintiff's attorney wilfully in the bill describe the plaintiff as resident within the jurisdiction, when, in fact, he is resident out of the jurisdiction, he will be ordered to pay the costs of the motion to stay the proceedings, until security for costs be given. *Knox* v. *O'Brien*, 3 Ir. Eq. R. 62.

Acting after Authority Revoked.]—A solicitor, after the revocation of his authority, cannot take any further steps, and, if he does, will be answerable for the costs of them, as well as for the costs of any motion to restrain him from proceeding. *Freeman* v. *Fairlie*, 8 L. J., Ch. 44.

Entering Appearance.]—Where a defendant has been served with process to appear, and an attorney without authority appears for him, the court will proceed as if the attorney really had authority, unless the attorney is not solvent, in which case the court will relieve the defendant on equitable terms if he has a defence on the merits. *Bailey* v. *Buckland*, 5 D. & L. 115 ; 1 Ex. 1 ; 16 L. J., Ex. 204 ; 11 Jur. 564.

But if a plaintiff, without serving a defendant with process to appear, accepts an appearance entered for him by an unauthorised attorney and proceeds to judgment, the court will set aside the judgment with costs, and leave the plaintiff to recover by summary proceeding against the delinquent attorney those costs and the expenses to which he has been put by him. *Ib.*

By the deed of settlement of a banking company, it was provided that the funds or property of the company should be vested in trustees, and that it should be lawful for the directors to direct legal proceedings on behalf of the bank, and to direct the necessary parties to commence, prosecute, or defend the same ; that such parties should not release or discontinue such proceedings without the consent of the directors, and that they should be indemnified out of the property of the bank against all expenses and losses in consequence. Property was purchased by the bank, and was conveyed to H. and two others, who were then the trustees. On a bill being filed by persons claiming a beneficial interest against the three trustees, the solicitors of the bank entered an appearance for all three of them, and prepared an answer, without any express authority from, or knowledge on the part of H., who moved that the appearance for him might be cancelled or withdrawn :—Held, that the appearance had not been entered without his authority, having regard to the deed, and the fact that the suit was one in which he had no interest whatever, and the motion was refused with costs. *Henrich* v. *Sutton*, L. R. 6 Ch. 220 ; 24 L. T. 530 ; 19 W. R. 515.

A plaintiff and his sister had given a mortgage to M., a solicitor, and the bill was filed against M. and the sister to have accounts taken of what was due, and for redemption. The sister was alleged to be of unsound mind, though not found so by inquisition. The plaintiff's

solicitor did not serve the bill on the sister, but, by the plaintiff's instructions, assumed to act for her, entered an appearance in her name, and obtained at the rolls the appointment of a guardian ad litem. The appearance and the appointment of a guardian were discharged by Wickens, V.-C., on evidence that the sister had sufficient capacity to authorise a solicitor to act for her, and that she had authorised M. so to act:—Held, on appeal, that whether the capacity of the sister was proved or not, the order of the vice-chancellor was right, for that the appearance and the appointment of a guardian founded on it were irregular. *Camps* v. *Marshall*, L. R. 8 Ch. 462.

Though the court will not in general, where a defendant is prejudiced by the act of an attorney in acting for him without authority, leave him to his remedy against the attorney, if solvent, that rule does not apply where the defendant is in custody by reason of the unauthorised act, or where the plaintiff or his attorney is party to the wrong. *Hambidge* v. *De La Croúée*, 3 C. B. 742.

A declaration that an attorney, wrongfully, and without the consent or retainer of the plaintiff, entered an appearance for him in an action by D. (a third party) against the plaintiff, and took upon himself to conduct the action, and such proceedings were thereupon had that D. recovered judgment and issued execution, and the plaintiff was obliged to pay the amount recovered and the costs of the execution:—Held, ill, after verdict, as not showing any damage resulting from any act of the attorney. *Westaway* v. *Frost*, 17 L. J., Q. B. 286; 12 Jur. 698.

—— **For Infant Defendant.**]—Where a writ of summons is served on an infant, and an appearance entered for him by a solicitor, without knowledge of his infancy and bonâ fide, and costs are subsequently incurred by the plaintiff in proceedings in the action, which became abortive by reason of the defendant's infancy:—Held, that although the appearance and defence will be set aside as irregular, the solicitor entering the appearance is not personally liable for the costs thereby occasioned to the plaintiff. *Wade* v. *Keefe*, 22 L. R., Ir. 154.

Substantive Motion.]—Want of authority to the solicitor to file a bill cannot be raised in opposition to a motion in the cause; it must be made the subject of a substantive motion to stay proceedings or to take the bill off the file; and such a motion may be made by the defendant. *Bowen* v. *Bowen*, Ir. R. 7 Eq. 251.

Application on Notice to Solicitor.]—A bill was filed by a married woman concerning her separate property, in the name of a next friend, who had died two years before the bill was filed. About fifteen months afterwards her solicitor substituted B. as her next friend, without his knowledge. A year later the bill was dismissed for want of prosecution, with costs. Notice of this motion to dismiss the bill was served on the plaintiff's agent, and by him sent by post to B., but not in time to enable him to appear on the motion. This was the first intimation that B. received of the existence of the suit. The solicitor of the married woman had become insolvent, and had absconded to America. B. moved, without serving the solicitor, personally, or by substitution, with notice of the motion, to vary the order dismissing the bill with costs, by ordering that the solicitor should pay the costs. This motion was refused, with costs. *Bligh* v. *Tredgett*, 5 De G. & Sm. 74; 21 L. J., Ch. 204; 15 Jur. 1101.

An order upon an attorney of one of the parties to pay costs incurred in proceedings in a cause, he not being a party applying to the court, is bad, if the attorney had no notice by the summons that he would be called upon to pay such costs. *Wood, Ex parte*, 9 L. T. 420; 12 W. R. 136.

V. TO REFUND COSTS PAID.

Where Appeal successful.]—Where, after service of notice of appeal from the judgment of a divisional court, the successful party levied his costs, and the judgment was afterwards reversed on appeal:—Held, that the party's solicitor was responsible for repayment of the costs in default of refunding by his client. *Fitzmaurice* v. *Jordan*, 32 L. R., Ir. 112—C. A.

Costs paid under a decree or order, which is afterwards reversed on appeal, must be repaid by the solicitor who received them to the person from whom they were received. *Malone* v. *O'Connor*, 2 Ir. Eq. R. 13.

When there was a decree with costs in this court, which was subsequently reversed by the lords, who directed that the bill below should be dismissed with costs, but before the appeal the plaintiff's solicitor had compelled the defendant to pay the costs below, upon receiving the plaintiff's receipt therefor; and the plaintiff had directed his solicitor to retain those costs in his possession for the purpose of defending the appeal:—Held, that the defendant could not, upon the decree of the lords, compel the solicitor of plaintiff to refund the costs so paid. *Smith* v. *Clarke*, 2 Con. & L. 160; 3 Dr. & War. 344; 5 Ir. Eq. R. 423.

An action being dismissed at the hearing with costs, a sum of money which had been paid into court as security for the defendant's costs was ordered to be paid out to the solicitors for the defendants in part payment of the defendant's costs. The judgment was reversed by the court of appeal, and the costs ordered to be paid by the defendants. The plaintiffs asked for an order against the defendant's solicitors for repayment by them:—Held, that the court had no jurisdiction on the appeal to order the defendant's solicitors to refund the money, the solicitors not being present. Nor, semble, could such an order have been made if they had been served with notice of the application. *Lydney and Wigpool Iron Ore Co.* v. *Bird*, 33 Ch. D. 85; 55 L. T. 558; 34 W. R. 749—C. A.

Where a judgment, under which costs directed to be paid to the successful party have been paid to his solicitor on his behalf, is afterwards reversed on appeal, and the costs are ordered to be repaid by the party, the court will not, in the absence of an undertaking by the solicitor, order him personally to refund the costs. *Fitzmaurice* v. *Jordan* (32 L. R., Ir. 112) disapproved. *Hood-Barrs* v. *Crossman*, 66 L. J., Q. B. 357; [1897] A. C. 172; 76 L. T. 297; 45 W. R. 465—H. L. (E.)

Costs Unnecessarily Incurred.]—In 1825 an assignment from provisional assignee to assignee was prepared, but through neglect of solicitor never executed. The provisional assignment ordered to be vacated, and a new assignment executed by the commissioners. It seems

the 1 & 2 Will. 4, c. 56, s. 25, does not apply in such a case. The solicitor, having been paid for the assignment, ordered to refund. *Bennett, Ex parte, Stephens, In re*, 2 Mont. & Ayr. 306; 1 Deac. 70; 5 L. J., Bk. 5.

The court will not compel an attorney to refund to his client costs unnecessarily incurred, unless he has been guilty of gross negligence. *Meggs* v. *Binns*, 2 Bing. (N.C.) 625; 3 Scott, 52; 2 Hodges, 10; 5 L. J., C. P. 225.

A solicitor who, in order to gain some advantage for himself, induced his client to prosecute an appeal, which was dismissed with costs, and would not have benefited the client if it had succeeded, was ordered to repay to the client the respondent's costs, and declared not to be entitled to any costs against the client. *Harbin* v. *Masterman*, 65 L. J., Ch. 195; [1896] 1 Ch. 351; 73 L. T. 591; 44 W. R. 421—C. A.

Costs paid to Solicitor acting without Authority.]—If an attorney sues out a writ against A., at the suit of B., without any authority express or implied from B. for so doing, and A. pays the costs of such writ to the attorney, A. may recover back the amount of those costs, by an action for money had and received against the attorney; but if the attorney had any authority, either express or implied, from B. to sue out the writ, such action for money had and received will not lie against the attorney, even though B. had no cause of action against A. *Dupen* v. *Keeling*, 4 Car. & P. 102.

Payment Necessary.]—Where a declaration alleged that an attorney improperly conducted certain actions, whereby the plaintiff was compelled to pay a sum of money for debts and costs, and also paid and became subject to divers costs:—Held, that he could only recover sums actually paid and not those also for which he was liable; and that a sum which had been levied by an execution against his goods was an actual payment. *Jones* v. *Lewis*, 9 D. P. C. 143; 5 Jur. 194. S. P., *Pritchet* v. *Boevey*, 1 C. & M. 775; 3 Tyr. 949; 2 L. J., Ex. 251.

VI. IMPROPER PROCEEDINGS AND MISCONDUCT.

Petition—Writ.]—Costs against solicitor for improper petition. *Williamson, Ex parte*, Mont. & Bli. 226; 2 L. J., Bk. 48.

Where a bankrupt presented an unnecessary petition, his solicitor was ordered to pay 40*s.* costs. *Parker, Ex parte*, Buck. 313.

Though an attorney, by signing his name in conformity with the general order, is not to be considered as guaranteeing the success of a petition in bankruptcy, yet where it appears to have arisen out of his interested views, he will be made to pay the costs of it. *Cuthbert, Ex parte*, 1 Madd. 78.

The petition dismissed, and the costs directed to come out of the solicitor's pocket who took the affidavits. *Hogan, In re*, 3 Atk. 813.

Semble, if a bill be dismissed at the hearing, with costs, and the plaintiff be then out of the jurisdiction, and the plaintiff's suit be so frivolous and vexatious that the bill could not have been filed bonâ fide in expectation of a favourable decree, or if the solicitor of the plaintiff guarantee his client against the costs of the suit, the court, upon the petition of the defendants, will compel the solicitor of the plaintiff to pay the taxed costs. *Cockle* v. *Whiting*, 1 Russ. & M. 43.

In a writ of summons it is necessary to state truly the residence of the plaintiff; the business address of the plaintiff is not enough. Where a solicitor had given the business address of the plaintiff in Finsbury, but the plaintiff really lived and carried on business in Vienna and only came over to England occasionally, the solicitor was ordered to indemnify the defendant against the costs of the action and to pay the costs of the application. *Karpeles* v. *Friedlander*, 53 J. P. 264.

Appearance.]—Solicitor ordered to pay all the costs occasioned by his refusing to appear for defendant at the hearing, pursuant to his undertaking, and the costs of the application. *Cook* v. *Broomhead*, 16 Ves. 133.

Bad Pleas.]—False plea, put in for delay, ordered to be taken off the file, with costs to be paid by the solicitor. *Aubrey* v. *Aspinall*, Jac. 441.

Where a sham plea was calculated to raise issues requiring different modes of trial, the court suffered the plaintiff to sign judgment as for want of a plea, and made the defendant or his attorney pay the costs occasioned by the plea, and the costs of the rule for correcting the proceedings. *Thomas* v. *Vandermoolen*, 2 B. & Ald. 197; 20 R. R. 404. S. P., *Bones* v. *Punter*, 2 B. & Ald. 777; 1 Chit. 564.

Solicitor to Trustee in Bankruptcy.]—The right of the solicitor to a trustee in bankruptcy to be paid his costs out of the bankrupt's estate is only the right of his client, the trustee; he has no independent right. If either the trustee or the solicitor has been guilty of misconduct, the court can refuse to allow the solicitor's costs to be paid out of the estate, and this notwithstanding that the costs have been taxed and an allocatur has been made by the taxing-master. *Harper, Ex parte, Pooley, In re*, 51 L. J., Ch. 810; 20 Ch. D. 685; 47 L. T. 177; 30 W. R. 650—C. A.

Omission to keep Accounts.]—A solicitor acted as receiver of rents on behalf of his client, the accounts by him in that character being settled periodically. He was also engaged on various occasions in raising money for his client by means of mortgages, and his bills of costs with respect to these transactions were generally settled by means of deductions from what he received for the client on the completion of each transaction. He was also employed in the transaction of general professional business for his client. The rent account was treated as an entirely separate matter from the account for general business, and in 1854 a settlement of the general account was come to, on which occasion the client paid the solicitor upwards of 1,000*l.* The solicitor kept no proper accounts of sums received by him on behalf of his client. Upon the solicitor's death in 1859 his executors sent in a further bill of costs against the client for general business:—Held, that the omission to keep accounts was not a reason for depriving the solicitor of his proper taxed costs for the business done. *Lee, In re*, L. R. 4 Ch. 43; 19 L. T. 435; 17 W. R. 108.

Action by Trustee.]—The solicitor of a party beneficially interested, using the name of a mere

trustee, in litigating a question of interest to his client, is bound to put such mere trustee on his guard, as to his responsibility for damages or costs, and, by neglecting to do so, may render himself responsible in default of his principal, without giving any undertaking, or being guilty of any misconduct. *Scallan, Ex parte*, 1 Moll. 63.

Office Copies.]—It is the duty of solicitors not to take office copies without being authenticated; and where the copy of depositions proved to be very incorrect, but was taken and paid for before it was compared or attested, the solicitor was ordered to pay the costs of the day. *Morgan* v. *Roe*, 12 Ir. Eq. R. 21.

Carrying out Decree.]—A solicitor having exhibited gross neglect in not carrying out a decree of the court, he was ordered to pay the costs of the master's report, together with the costs of the application and order consequent thereon. *Ridley* v. *Tiplady*, 20 Beav. 44; 24 L. J., Ch. 207; 1 Jur. (N.S.) 249; 3 W. R. 276.

Order made on wrong Statement.]—When persons, even without mala fides, make or adopt a statement, the contrary of which they ought to have known by reasonable diligence to be the truth, and a wrongful order is made by the court grounded on such statement, all such persons are liable to indemnify the persons who suffer through such an order from all the consequences. The primary liability in respect of costs falls upon the solicitor, through whose agency the order was obtained, and the primary liability as to the fund lost through the order falls upon those who wrongfully received it. *Spencer, In re*, 39 L. J., Ch. 841; 21 L. T. 808; 18 W. R. 240.

Instructions—Delivery of Papers.]—A bill having been dismissed with costs, owing to the plaintiff's solicitor having neglected to instruct counsel or deliver papers, the cause was, on motion supported by affidavit, under the circumstances ordered to be restored upon payment of costs by the plaintiff's solicitor. *Birch* v. *Williams*, 24 W. R. 700.

If a cause, which is meant to be defended, is called on, and tried as an undefended cause, in consequence of the defendant's attorney neglecting to deliver his briefs, the court will grant a new trial, compelling the attorney to pay the costs, as between attorney and client, out of his own pocket. *De Bonfigny* v. *Peale*, 3 Taunt. 484; 12 R. R. 687.

Plaintiff's solicitor ordered personally to pay costs of the day for default in supplying documents, and the claim ordered to be struck out of the paper. *Somerville* v. *Jamieson*, 1 W. R. 123.

Upon solicitor's appearing to be guilty of a gross neglect, the court will order him to pay the costs. *Fawkes* v. *Pratt*, 1 P. Wms. 593.

Solicitor to fiat must bear any expense which his neglect would cause the estate. *Bennett, Ex parte, Stephens, In re*, 2 Mont. & Ayr. 308; 1 Deac. 70.

Neglect.]—The master having reported, under the provisions of the 15 & 16 Vict. c. 80, that he was unable to proceed with an order of reference, by reason of the neglect of the parties to attend his summons, and the neglect having been occasioned by the solicitor of the plaintiff, the court directed the reference should be proceeded with in chambers: and the client undertaking not to bring an action against the solicitor in respect of the conduct of the suit, it also ordered the solicitor to pay the costs of the master's certificate, and of the subsequent proceedings. *Ridley* v. *Tiplady*, 20 Beav. 44; 24 L. J., Ch. 207; 1 Jur. (N.S.) 249; 3 W. R. 276.

Client found Lunatic.]—A solicitor who was aware that a petition in lunacy against his client was pending, obtained on her behalf an order ex parte without disclosing the fact. He believed her to be sane, but she was subsequently found to be of unsound mind. Upon the order being discharged:—Held, that he had not been guilty of such professional misconduct as to make him liable for the costs. *Armstrong and Sons, In re*, 65 L. J., Ch. 258; [1896] 1 Ch. 536; 74 L. T. 134; 44 W. R. 281.

Unnecessary Proceedings.]—If a solicitor institutes unnecessary proceedings, the court will take care that the client shall not suffer by the course adopted. *Wood* v. *Wood*, 4 Russ. 558.

The solicitor for some of the defendants was agent for the rest; the former were entitled to move to dismiss, and they moved accordingly; but no order could be made, as the time for the other defendants to answer the amendments had not expired. Motion refused, with costs, as the solicitor must have known that the motion could not succeed. *Partington* v. *Baillie*, 5 Sim. 667; 4 L. J., Ch. 40.

Where time is applied for, to send an affidavit of justification into the country to amend a mistake in the jurat, the court will make the attorney pay the costs of the application. *Shilletoe's Bail*, 9 D. & R. 6.

Where an attorney, knowing that bail were insufficient, caused them to be put in, and gave notice of justification, the court compelled him to pay the costs of the opposition. *Blundell* v. *Blundell*, 1 D. & R. 142; 5 B. & Ald. 533.

Upon a taxation, a solicitor put in an insufficient examination. He was ordered, on motion, to pay the costs occasioned thereby, and of the four-day order and of the application. *Bainbrigge, In re*, 11 Beav. 620.

Where an amendment was refused at the trial by reason of the wilful misrepresentation of the plaintiff's attorney, the attorney was ordered to pay the costs of a rule absolute for a new trial. *Williams* v. *Jones*, 4 W. R. 99.

Correcting Error.]—Order being rendered nugatory by mistake in the title of the cause, the solicitor was ordered to pay the costs of motion to rectify the mistake. *Black* v. *Creighton*, 2 Moll. 552.

Mistake arising from the negligence of clerk or solicitor allowed to be rectified, the order on the motion to amend, providing that the costs should not be charged against the client or fund. *Caledon (Lord)* v. *Every*, 1 Moll. 224.

In drawing up a decree, the word "inquiry" was erroneously inserted for the word "sale." It became necessary for the defendant to make an application to correct the error:—Held, that the solicitor of the defendant must bear the costs. *Bolton, In re*, 9 Beav. 272; 10 Jur. 22.

A solicitor was ordered to pay the costs of an application rendered necessary by his own delay and mistake. *White* v. *Hillacre*, 3 Y. & Coll. 278; 8 L. J., Ex. Eq. 65.

A plaintiff's solicitor held personally liable to the costs of a reference to the master, to inquire and report whether a purchaser was entitled to any and what compensation, by reason of a misdescription in the rental, caused by his neglect in not examining the tenants' leases lodged in the master's office. *Taylor* v. *Gorman*, Fl. & K. 567; 4 Ir. Eq. R. 550.

If the solicitor upon whom the subpœna to hear judgment is served refuses to indorse on the original an admission of the service thereof, he will be ordered to pay the costs rendered necessary by such refusal. *Ross* v. *Wood*, 2 Dr. & Wal. 490.

Non-attendance in Court.]—Plaintiff's solicitor ordered to pay the costs of the day, in consequence of his non-attendance in court when the cause was called on. *Courtney* v. *Stock*, 2 Dr. & War. 251; 1 Con. & L. 366.

Where a plaintiff was nonsuited through the neglect of the attorney's clerk to attend in court, the court refused to set aside the nonsuit, except upon the terms of the attorney paying the costs occasioned by the defendant's attending to try. *White* v. *Sandell*, 3 D. P. C. 798.

A plaintiff sued a solicitor who appeared in person. The defendant took out a summons to dismiss the action for want of prosecution, but did not attend the summons personally, being represented by his clerk. The plaintiff's solicitor contended that the defendant must himself attend, but the chief clerk overruled the objection; at the request of the plaintiff's solicitor he adjourned the summons to the judge upon this point. The defendant attended before the judge, but the plaintiff's solicitor did not attend, and the judge dismissed the application with costs and ordered the plaintiff's solicitor personally to pay the costs of the defendant's attendance. On motion to vary so much of the order as directed, the solicitor to pay the costs personally:—Held, that Ord. LXV. r. 5, empowered the judge to make the order and that the order was right. *Barnard* v. *Scoles*, 37 W. R. 668.

Issuing Execution.]—When, under an order for the payment of costs in chancery, a writ of fieri facias had been issued and executed by the sheriff, the court refused to set aside the writ; but, believing it had been issued in bad faith, ordered the solicitor who had taken it out to pay all charges attending its issue and execution, and also the costs of a motion for that purpose. *Commonwealth Land, Building, Estate and Auction Co., In re, Hollington, Ex parte*, 43 L. J., Ch. 99; 29 L. T. 502; 22 W. R. 106.

A solicitor has authority to enter into an undertaking on behalf of his client, not to issue a writ of fieri facias against the client's debtor, in consideration of the acceleration of payment of the debt. *Ib.*

A breach of such an undertaking, by the issue of writs against the debtor, was held to be contrary to good faith, and the solicitor was ordered to pay the expenses of issuing such writs, and of an application to recover them. *Ib.*

Connection with Proceedings.]—The court of chancery will not order the costs of proceedings to be paid personally by the solicitor conducting them, on account of any misconduct unconnected with those proceedings. *Gregg, In re*, and *Prance, In re*, 39 L. J., Ch. 107; L. R. 9 Eq. 137; 23 L. T. 234; 18 W. R. 589.

Deed improperly Prepared.]—The court of chancery will, in a proper case, order a solicitor to pay the costs of litigation occasioned by deeds improperly prepared by him. *Baker* v. *Loader*, 42 L. J., Ch. 113; L. R. 16 Eq. 49; 21 W. R. 167.

A solicitor may be guilty of such negligence in respect to a deed settled in chambers as to make him liable to his client, notwithstanding that the deed professes to be a deed settled by the court. *Stanford* v. *Roberts*, 53 L. J., Ch. 338; 26 Ch. D. 155; 50 L. T. 147; 32 W. R. 404; 48 J. P. 692.

In the absence of fraud the court has no jurisdiction to order a solicitor who has made a mistake in the preparation of a document to pay the costs of a suit for its rectification. *Clark* v. *Girdwood*, 47 L. J., Ch. 116; 7 Ch. D. 9; 37 L. T. 614; 26 W. R. 90.

An order was made by the court, in 1858, for the sale by private contract of lands, and an application was made by an illiterate person to the vendor's solicitor, who had the conduct of the sale, to become the purchaser of part of the premises, and a conditional contract was entered into, whereby the vendors agreed to sell and the purchaser to buy the premises. The purchaser also agreed, at his own expense, to obtain an order of the court confirming the sale, and in default that the vendors might obtain such an order at the purchaser's expense. On the same day the purchaser gave a written retainer to the vendor's solicitor to act as his attorney. The purchaser was a marksman, and both the above instruments were witnessed by the same solicitor. Afterwards an order was obtained confirming the purchase, and ordering payment of the money into court. The purchaser, after the contract, finding that a good title could not be made, failed to pay the purchase-money, whereupon another order was obtained for payment, in default of which the purchaser was attached and committed to prison. On motion to set aside the attachment, the vendors and their solicitor opposed the application; but the court ordered the attachment to be set aside and the prisoner to be discharged, the agreement to be delivered up and cancelled, and the costs of the prisoner throughout the proceedings, and of all parties on the motion, to be paid by the solicitor. *Bromage* v. *Davies*, 4 Jur. (N.S.) 683.

An attorney saying he only followed directions in drawing deeds, under fraudulent circumstances, will not excuse him from paying costs. *Bennett* v. *Vade*, 2 Atk. 328.

A solicitor, assisting his client in obtaining a fraudulent release, is properly made a party, and liable to costs, if the principal be not solvent. *Bowles* v. *Stewart*, 1 Sch. & Lef. 227.

Scandalous Matter.] — Where unfounded charges of corruption were brought against commissioners by a petitioner, who appeared to be the tool of other parties, the court ordered the commissioners their "costs, charges, and expenses," and suspended the order until the attorney for the petitioner should show cause why he should not personally pay the costs. *Williams, Ex parte*, 3 Deac. & C. 103.

Solicitor having inserted scandalous matter in an answer, and put counsel's name thereto without authority, committed, and ordered to pay costs. *Bishop* v. *Willis*, 5 Beav. 83, n.

The attorney for the defendant having been examined as their witness, and having made certain scandalous and impertinent statements in his deposition in reply to the last interrogatory, was compelled to pay the costs of expunging it. *Gude* v. *Mumford*, 2 Y. & Col. 446; 1 Jur. 577.

Where an affidavit is reported to be scandalous, the agent in London who files the affidavit is responsible for the costs as between attorney and client, notwithstanding the country attorney may have himself drawn the affidavit. *Wake, Ex parte*, 3 Deac. & C. 246; Mont. & Bli. 259; 2 L. J., Bk. 38.

Unreasonable Proceedings.]—Where accounts are being taken in chambers, before the chief clerk, either party has a right to have an item which has been found against him adjourned before the judge without taking out a summons for that purpose. And where a question of principle is involved in a particular item it may be necessary to do this. But the ordinary practice is to wait till the account is completed, and then take the adjournment once for all before the judge. If a solicitor were to insist upon his right to take particular items before the judge in an unreasonable manner, the court might make him pay the costs personally. *Upton* v. *Browne*, 20 Ch. D. 731; 47 L. T. 289; 30 W. R. 817.

—— **Notice of Appeal.**]—A former solicitor of the plaintiff in an action, who was suing in formâ pauperis, served notice of appeal on all the defendants who had been successful in the court below. These respondents appeared by counsel on the hearing of the appeal, but no relief was then asked as against one of them. He had not been previously informed that the appeal would not be pressed against him, and had incurred expense in preparing to resist the appeal:—Held, that it was a proper case for giving leave to the respondent to serve the solicitor with a notice of motion for an order to show cause why he should not pay the costs incurred by serving notice of appeal without good cause. *Martinson* v. *Clowes*, 52 L. T. 706; 33 W. R. 555—C. A.

Improper Proceedings.] — Where a solicitor commenced interpleader proceedings which were not warranted by the facts, the solicitor was ordered to pay the costs. *Cook* v. *Rosslyn*, 3 Giff. 175; 7 Jur. (N.S.) 1070; 5 L. T. 133.

An amendment was refused at the trial by reason of the wilful misrepresentation of the plaintiff's solicitor. The court held that the amendment ought to have been made, and granted a new trial, but ordered the solicitor to pay the costs of the rule. *Williams* v. *Jones*, 4 W. R. 99.

Irregular Proceedings.]—The court will not, on a summary application, order an attorney to pay the costs of setting aside proceedings for irregularity, even where he has admitted that it was owing to his error, and has promised to pay, unless there is clear evidence of the nature of the negligence, and that it was gross. *Dickenson* v. *Jacobs*, 5 L. T. 757; 10 W. R. 303.

A pauper's solicitor will be ordered to pay the costs of any irregular proceeding. *Brown* v. *Dawson*, 2 Hog. 76.

When in notice of motion on behalf of feme covert, no prochein ami is named, her solicitor will be liable for costs awarded against her. *Cox* v. *M'Namara*, 1 Hog. 78.

Where a motion is made on behalf of a married woman, without a next friend being named, the court has jurisdiction to make the solicitor who gave the instructions for the motion pay the costs of it. *Pearse* v. *Cole*, 16 Jur. 214.

If a bill is ordered to be taken off the file, on the ground that the plaintiffs assume to sue in a corporate character, to which they are not entitled, the costs will be ordered to be paid by the town agent of the plaintiffs, and not by their solicitor in the country. *Ruthin Corporation* v. *Adams*, 7 Sim. 345; 4 L. J., Ch. 168, n.

Inadvertence.]—An attorney is not to lose the amount of his bill on account of any error in the execution of his duty, which a cautious man might fall into; but if the charges contained in his bill are brought upon his client by inadvertence, he cannot recover them in action. *Montriou* v. *Jefferys*, 2 Car. & P. 113; R. & M. 317.

Before Payment by Client.]—A plaintiff who has been made liable to the costs of the day, by the negligence of his attorney, cannot compel the attorney to pay him those costs, unless he (the plaintiff) has first paid them to the defendant. *Layton* v. *Wood*, 3 Jur. 124.

Liability of Solicitor's Executor.]—A. verbally agreed with B., his solicitor, for the sale of land to B. This agreement, which was never reduced to writing, provided that B. should bear all expenses of making out the title, that possession should be at once given, and that the purchase-money should be paid at a fixed future date, with interest in the meantime. B. entered into possession, but took no further steps in the completion of the purchase, and before the purchase-money became due, died. In a suit by A. for specific performance against the executor of B.:—Held, that B. as A.'s solicitor, ought to have had an agreement in writing prepared, and that the executor was bound to complete the purchase and pay the costs of the suit. *Brafield* v. *Scriven*, 22 W. R. 202.

Liability of Partnership.]—A mortgagee of an estate, with knowledge that there were registered judgments against the mortgagor, sold the estate, and with the advice of his solicitor, after deducting the amount due on the mortgage, paid the balance to the mortgagor, who was at that time indebted to the solicitor. The judgment creditors having recovered against the mortgagee, he obtained a degree against the partners of the solicitor (who was then dead) and against the executors of the deceased partner for the amount and costs:—Held, that the mortgagee was entitled to sue in equity. *Rew* v. *Lane*, 3 Jur. (N.S.) 125; 5 W. R. 110.

Notice of Application.]—If it is intended to ask as part of an order that costs be paid by the plaintiff's attorney, on the ground of alleged misconduct on his part, it is necessary to give distinct notice in the summons of the intention to make such application; and if a judge without any such notice to the attorney, orders the attorney to pay costs, that part of the order will be set aside. *Rouch* v. *Alberty*, 33 L. J., Q. B. 127; 9 L. T. 420; 12 W. R. 136.

The application will not be granted unless the solicitor receives proper notice of the charges against him. *Gregg, In re*, and *Prance, In re*, supra.

Order to Pay—Appeal without Leave.]—An order that the costs of an application at chambers on behalf of a client shall be paid by the solicitor personally cannot be costs left to the discretion of the court within s. 49 of the Judicature Act, 1873, unless the solicitor has been guilty of misconduct or negligence, and, therefore, an appeal lies from such order without leave as to whether there has been such misconduct or negligence. *Bradford, In re*, 53 L. J., Q. B. 65; 15 Q. B. D. 635; 50 L. T. 170; 32 W. R. 238—C. A.

Repayment to Client of Costs payable to other Side.]—Where a legatee's solicitor, after a distinct refusal by trustees of the will to give information as to the state of the trust fund, had at once, by a very hostile summons, sought to compel them to furnish it:—Held, that undue haste in taking proceedings to enforce a right was not sufficient ground for ordering a solicitor, under Ord. LXV. r. 11, to repay to his client the costs (if any) payable by the client to the other side; but that, both parties being in the wrong, there ought, as between party and party, to be no costs of the summons or of the appeal, and as between solicitor and client the costs of the legatee's solicitor ought to be disallowed. *Dartnall, In re, Sawyer* v. *Goddard*, 64 L. J., Ch. 341; [1895] 1 Ch. 474; 12 R. 237; 72 L. T. 404; 43 W. R. 644—C. A.

VII. FOR NEGLIGENCE.

What Skill and Diligence required.]—Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill; he does not, if he is an attorney, undertake at all events to gain the cause. *Lamphier* v. *Phipos*, 8 Car. & P. 475.

An attorney is only responsible in damages to his client for gross ignorance or gross negligence in the performance of his professional services. *Purves* v. *Landell*, 12 Cl. & F. 91.

In undertaking a client's business, an attorney undertakes, on his own part, for the existence and the due employment of skill and diligence; where an injury is sustained by his client, in consequence of the absence of either, he is responsible to his client for such injury. *Hart* v. *Frame*, 6 Cl. & F. 193; Macl. & R. 595; 3 Jur. 547.

The question of negligence in not complying with the practice of the courts is a question of fact for the jury under the judge's direction as to the law. *Hunter* v. *Caldwell*, 10 Q. B. 83; 12 Jur. 285—Ex. Ch. Affirming 16 L. J., Q. B. 274.

In order that a solicitor may be liable for negligence it must be shown that he has been guilty of gross and not of ordinary negligence. *Elkington* v. *Holland*, 9 M. & W. 659; 1 D. (N.S.) 643; 11 L. J., Ex. 273. See *Nash* v. *Swinburne*, 3 Man. & G. 630; 4 Scott, 326; 1 D. (N.S.) 190; 11 L. J., C. P. 56.

It is not every mistake or misapprehension of an attorney that will make him liable to an action for negligence. The question in such an action is, whether the attorney has used reasonable skill and reasonable care. *Shillcock* v. *Passman*, 7 Car. & P. 289.

An attorney is bound, under pain of being made responsible in an action, to bring a fair and reasonable amount of care and skill to the performance of his professional duty. *Parker* v. *Rolls*, 14 C. B. 691.

Although relief may be given at the suit of a client against his solicitor for loss sustained by gross negligence, yet where the loss was in respect of a matter of conduct as to which the advice of the solicitor was founded on the opinions of competent surveyors as to the value of the property, and those opinions submitted to the judgment of the client, the court dismissed the bill. *Chapman* v. *Chapman*, L. R. 9 Eq. 276; 22 L. T. 145; 18 W. R. 533.

In an action against an attorney, the declaration alleging that the plaintiff's wife filed a petition against him in the divorce court for a judicial separation, on the ground of cruelty; that he employed the defendant as his attorney in the suit, and that he had a good defence in it, but was willing to consent to a decree for a judicial separation, provided that, if he did so, no evidence upon the charges contained in the petition should be taken; and that the defendant, knowing the premises, negligently advised him not to defend the suit, and induced him to give such consent, and not to attend the hearing with any evidence in support of his defence; but that evidence was taken whereby, it being unanswered, his character had been greatly injured; the plaintiff's case being, that he was induced not to defend, on the assurance that evidence would not be taken:—Held, that he could not complain of the advice given unless it was given upon that specific ground (which it was not disputed would have involved gross ignorance on the part of the defendant). *Hill* v. *Finney*, 4 F. & F. 616.

When cause of Action arises.]—In an action on the case against an attorney for negligence, the court held that the cause of action arose at the time the negligence occurred, and not at the time negligence was discovered, or the consequential damages ensued. *Smith* v. *Fox*, 6 Hare, 386; 17 L. J., Ch. 170; 12 Jur. 130. S. P., *Wood* v. *Jones*, 61 L. T. 551.

Trust property was transferred to new trustees in July, 1875. The solicitor employed in the transaction did not give certain notices necessary to perfect the title of the new trustees; and in April, 1879, a subsequent mortgagee of the property obtained priority over the trustees by giving notice of his charge:—Held, that there was no complete cause of action against the solicitor in respect of negligence till April, 1879, from which date the Statute of Limitations therefore ran. *Bean* v. *Wade*, 1 Cab. & E. 519.

Double Retainer—Conflicting Interests.]—A. employed B. as his solicitor in an action against C. The learned judge on the trial reserved his judgment, intimating that there would certainly be a verdict for A. as regarded part of his claim, but as to the balance he would consider the matter. In the interval and before judgment actually given, D., a former client of B.'s, consulted him professionally whether he could safely leave in C.'s possession property bought by him of C., which was nearly all C.'s property, and on B.'s advice a bill of sale was executed by C. in D.'s favour. When judgment was given, C. filed a petition for liquidation of his affairs, and in consequence of the bill of sale A. only received a dividend under the liquidation proceedings on his judgment:—Held, that there was a right of action on the ground of negligence if B. acted in ignorance of his duty; or on the ground of misconduct and breach of duty if he

were aware of it. *Barber* v. *Stone*, 50 L. J., Q. B. 297.

Omitting to give Notice to Trustees.]—A., an attorney employed by B. to invest money, lent it to C. on an agreement, by which C. as a security charged his interest in consols standing in the names of trustees for C. A. neglected to give notice to the trustees. A judgment creditor of C. subsequently to this loan obtained a charging order under 1 & 2 Vict. c. 110, s. 14, notice of which was given to the trustees. C. obtained the benefit of the Insolvent Debtors Act. B. brought an action against A. for negligence; the judge directed the jury, in estimating the damages, to consider that as no notice had been given to C.'s trustees of the charge created by B., the subsequent charge created by the judge's order had priority over it:—Held, that the direction was correct, and that the judgment creditor had the same rights as a subsequent incumbrancer without notice, and was therefore to be preferred in equity to it. *Watts* v. *Porter*, 3 El. & Bl. 743; 2 C. L. R. 1553; 23 L. J., Q. B. 345: 1 Jur. (N.S.) 133.

Omitting to make Agreement by Deed.]—Semble, that an attorney who receives instructions to prepare a security for the payment of an annuity to a woman in consequence of past cohabitation, is guilty of negligence if he does it by a mere agreement only not under seal. *Parker* v. *Rolls*, 14 C. B. 691.

Effect of Will—Fine.]—A solicitor's alleged ignorance of the effect of a fine on a will of the lands comprised in it, and his omission to inquire whether the conusor, his client, had made a will, is such professional ignorance and neglect as afforded a principle by which a court of equity might independent of the ground of fraud, hold him to be a trustee for a third person, of any benefit resulting to himself, from his professional ignorance or neglect, to the prejudice of that person. *Bulkley* v. *Wilford*, 2 Cl. & F. 102; 8 Bli. (N.S.) 11.

When Acting in Accordance with Opinion of Counsel.] — An agreement was entered into between A. and B. B. died, and administration to his effects was granted to C., his daughter. D., who was a friend of C., employed the same attorney who had prepared the original agreement to prepare another between him and C., by which he was authorised to bring an action against A., on the original agreement in C.'s name, and also instructed the attorney to bring such action. The action was brought, and after argument on demurrer, the original agreement was declared void, on the ground of champerty. But it appeared that the attorney, in preparing such original agreement, had consulted a conveyancer, who gave it as his opinion that the agreement was valid:—Held, that the attorney was entitled under the circumstances, to recover from D., his employer, the costs of preparing the second agreement, and also those of bringing the action upon the first. *Potts* v. *Sparrow*, 6 Car. & P. 749.

Preparing Deeds.]—A trader having petitioned the court of bankruptcy under 12 & 13 Vict. c. 106, s. 211, an order was made that his estate should be received and possessed by the official assignee, and be taken possession of by the messenger. One of the creditors employed an attorney to prepare an assignment of his effects for the benefit of the general body, informing him that all would concur therein. The assent of all the creditors not having been obtained the assignment became unavailing:—Held, that the attorney was not guilty of gross ignorance or gross negligence in preparing the assignment under such circumstances. *Lewis* v. *Collard*, 14 C. B. 208; 2 C. L. R. 1345; 23 L. J., C. P. 32; 2 W. R. 105.

Preparing a warrant of attorney from two, without inserting words to guard against the possibility of one of them dying before judgment does not constitute negligence sufficient to base an action. *Kettle* v. *Wood*, 5 L. J. (O.S.) K. B. 173.

Where an attorney omitted to insert a defeasance in a warrant of attorney:—Held, that the attorney was guilty of a breach of the duty imposed on him by the court, and was answerable on motion. *Shaw* v. *Evans*, 14 East, 576.

Mixing Client's Money.]—If an attorney pays into his banker's hands money of his client, mixing it with his own, and the bankers fail, the attorney is liable to make good the loss. *Robinson* v. *Ward*, 2 Car. & P. 59; R. & M. 274.

Mistake upon Points of Law.]—An attorney is not liable for the consequence of a mistake in a point of law upon which a reasonable doubt may be entertained. *Kemp* v. *Burt*, 1 N. & M. 262; 4 B. & Ad. 424; 2 L. J., K. B. 69.

A mere error in judgment, or a mistake upon a point of law, or in the construction of a difficult act of parliament is not such negligence as renders an attorney liable to his client for a loss sustained in consequence of such error or mistake; in such cases regard must be had to all the circumstances of the transaction, and if they are such as show gross or culpable neglect on the part of the attorney, he will be responsible. *Crosbie* v. *Murphy*, 8 Ir. C. L. R. 301.

A solicitor was retained by a debtor to prepare a composition deed, the first trust of which was the payment of the costs of preparing the deed. The trustees accepted the trusts, and acted upon the deed. It was afterwards discovered, according to a case decided before the deed was prepared, that the deed was invalid, as not binding non-assenting creditors. The debtor was subsequently made bankrupt. The trustees refused to pay the solicitor's bill of costs on the ground of gross negligence; but the objection was overruled. *Sadd, In re*, 34 Beav. 650; 34 L. J., Ch. 562; 11 Jur. (N.S.) 774; 12 L. T. 816; 13 W. R. 1009.

Where an attorney, being employed by masters to take proceedings against apprentices for misconduct, did so specifically on a wrong section of a statute:—Held, such an instance of want of skill and diligence as to render him liable to repay to his clients all damages and costs occasioned by his error. *Hart* v. *Frame*, 6 Cl. & F. 193; Macl. & R. 595; 3 Jur. 547.

Instituting Proceedings in Improper Court.]—If an attorney brings an action within a court of limited jurisdiction, knowing that the circumstances which gave the right of action arose out of the jurisdiction of such court, he is guilty of negligence, and liable in damages. *Williams* v. *Gibbs*, 6 N. & M. 788; 5 A. & E. 208; 2 H. & W. 241.

An attorney, before he takes upon himself to sue out a writ in a court of peculiar constitution, is bound to ascertain that the court has machinery to carry out the object of the action. *Cox* v. *Leech*, 1 C. B. (N.S.) 617; 26 L. J., C. P. 125; 3 Jur. (N.S.) 442; 5 W. R. 199.

Though, when an attorney is employed to recover a small debt, he is liable to his client for unnecessarily and improperly suing in a superior court (unless, with a knowledge of the consequences, his client instructs him so to do), yet his liability will depend upon whether from his client's instructions he might reasonably suppose that he would recover, and desired to sue for, a sum which would carry costs, or that, from the circumstances and the nature of the question, a judge would certify for costs; and if he might reasonably so have supposed he will not be liable, even though his client, failing to recover in the superior court, became subject to the costs of suit in that court. *Lee* v. *Dixon*, 3 F. & F. 744.

The plaintiff, who was acting as solicitor for the defendants, was instructed by them to commence proceedings against the owner of certain premises to recover the amount due from him as the frontager in respect of the expenses of repairing a road upon which his premises abut'ed. The proceedings might have been instituted in the county court, but the plaintiff commenced them in the chancery court of the county palatine of Lancaster. The action was dismissed by the vice-chancellor, and the present defendants refused to pay the plaintiff's costs, upon the ground that he had been guilty of negligence in not commencing the action in the county court:—Held, that as the vice-chancellor of the county palatine had no jurisdiction to inflict any penalty as to costs upon a plaintiff for bringing in the county palatine court an action which might have been brought in the county court, the plaintiff had not been guilty of actionable negligence in not advising that the proceedings should be commenced in the county court. *Barker* v. *Fleetwood Improvement Commissioners*, 62 L. T. 831; 54 J. P. 711.

Not Attending to Conduct of Cause.]—Where a plaintiff employed the defendant (an attorney) to conduct an ejectment for the recovery of premises forfeited to him by the tenant's breach of covenant to repair, and it was referred to an arbitrator, who was to decide what repairs were necessary, but the attorney neglected to attend him, whereby the plaintiff was obliged to pay the defendant's costs incurred in the ejectment, instead of the tenant:—Held, that an action was maintainable. *Swannell* v. *Ellis*, 8 Moore, 340; 1 Bing. 347; 2 L. J. (o.s.) C. P. 8.

In Procuring Evidence.]—Where a plaintiff's attorney suffered a cause to be called on for trial, without having ascertained whether a material witness, whom the plaintiff had undertaken to bring into court, had arrived, in consequence of which he was nonsuited:—Held, that in an action against such attorney for negligence, it was rightly left to the jury to determine whether he had used reasonable care in conducting the cause, and the jury having found that he had not, the court refused to disturb the verdict. *Reece* v. *Rigby*, 4 B. & Ald. 202; 23 R. R. 251.

A solicitor, who procures certain evidence to prove facts acting under counsel's advice, is not liable for negligence if such evidence is rejected at the trial. *Godefroy* v. *Dalton*, 6 Bing. 460; 4 M. & P. 149; 8 L. J. (o.s.) C. P. 79; 31 R. R. 467.

A solicitor who does not serve his client's father with a subpœna, but tells the client that his father must attend the trial is not liable to an action for negligence. *Price* v. *Bullen*, 3 L. J. (o.s.) K. B. 39; 26 R. R. 645.

An attorney employed to conduct an action in which certain measurements were material, employing a surveyor to make them, who was given to drinking, and not ascertaining before the trial that he had made the measurements, in consequence of which there was a nonsuit:—Held, that there was evidence of negligence. *Mercer* v. *King*, 1 F. & F. 490.

Not Registering a Lis pendens.]—In an action against a solicitor for negligence, the declaration stated that his client was equitably interested in four tenth parts of the lease of a colliery, that the lessee had entered into negotiations for the sale of the lease to a company, and that the client retained him, as solicitor, to file a bill in chancery against the lessee and the company for the purpose of enforcing his claim in respect of his shares, and praying that the lessee might convey and secure to him four-tenths of the purchase money, and that the company might be decreed to do all matters necessary to confirm such conveyance and security, and might be enjoined from paying his proportion of the purchase money to the lessee. Breach, that the solicitor did not register the bill as a lis pendens, according to 2 & 3 Vict. c. 11, s. 7, whereby the lessee was enabled to dispose of the lease to another company, and to receive the purchase money, and the client was deprived of his share in it:—Held, that the declaration was good, as the bill in chancery, which prayed for an equitable lien against the intended purchasers of the lease was a lis pendens, which ought to have been registered under the statute, and that, having regard to the terms of the bill, it was the duty of the solicitor to have registered it, without any express request on the part of his client. *Plant* v. *Pearman*, 41 L. J., Q. B. 169; 26 L. T. 313; 20 W. R. 314.

In Filing Writs.] — A declaration that the plaintiffs employed the defendant as attorney to sue H. for the recovery of a debt; and thereupon it was his duty to use proper care in conducting the suit; yet he did not use proper care in this, that having sued out writs for the recovery of the money and for saving the Statute of Limitations, he did not, upon H. not being found so as to be served, duly file the writs with a proper officer, according to the practice of the court, whereby the action was barred by the statute:—Held, first, that although the 2 & 3 Will. 4, c. 39, s. 10, did not in terms require such writs to be filed, yet the word "file" in the declaration might have the sense of bringing the writs to the office, and in that sense would be included in the word "returned" in the statute, and such filing would, therefore, be a necessary part of the practice in saving the Statute of Limitations, and a part of the attorney's duty. *Hunter* v. *Caldwell*, 10 Q. B. 69; 16 L. J., Q. B. 274; 11 Jur. 770. Affirmed, 10 Q. B. 83; 12 Jur. 285—Ex. Ch.

Not Indorsing Time of Service.]—An attorney retained to bring an action, and not the person employed as process server, is liable to be sued by the client for damage caused through neglect in omitting to make the indorsement of service. *Curlewis* v. *Broad*, 1 H. & C. 322; 31 L. J., Ex. 473; 10 W. R. 797.

Omitting properly to instruct Counsel.]—An attorney in a cause is not answerable for the absence, neglect, or want of attention of the

counsel engaged in it. *Lowry* v. *Guilford*, 5 Car. & P. 234.

A plaintiff's attorney having without reasonable excuse neglected to instruct counsel, or to appear at the assizes when the cause was called on, in consequence of which the plaintiff was nonsuited, the court granted a new trial only upon the terms of the attorney paying the costs of the day out of his own pocket. *Townley* v. *Jones*, 8 C. B. (N.S.) 289 ; 29 L. J., C. P. 299 ; 6 Jur. (N.S.) 1159.

No action lies against an attorney for negligence in the conduct of a cause at nisi prius upon matters within the province of counsel, or for omitting to move for a new trial without instructions so to do. *Fray* v. *Foster*, 1 F. & F. 681.

In an action against an attorney for neglecting to instruct counsel to appear for the plaintiff in an action brought by the latter against a third party, he pleaded that he did not neglect to instruct counsel to appear. When the cause was called on for trial, the counsel for the plaintiff rose with a brief, called his attorney, who was not present, and the witnesses, who did not answer, and then withdrew the record :—Held, that the plaintiff was entitled to succeed, the meaning of the issue being that counsel had not been properly instructed to appear. *Hawkins* v. *Harwood*, 4 Ex. 503 ; 7 D. & L. 181 ; 19 L. J., Ex. 33.

Where an attorney of a vendee of an estate was employed to investigate the title thereto, and, in taking the opinion of counsel thereon, omitted to state in the case certain deeds materially affecting the title ; and upon the faith of the opinion given (which would have been different, had all the deeds been stated) the vendee concluded the purchase, but was afterwards damnified by finding that the title was imperfect:—Held, that the attorney was liable to him in an action of negligence. *Ireson* v. *Pearman*, 5 D. & R. 687 ; 3 B. & C. 799 ; 3 L. J.(O.S.) K. B. 119 ; 27 R. R. 490.

Letting Judgment go by Default.]—An attorney was sued for negligence in allowing judgment to go by default, in an action which the plaintiff had retained him to defend ; the negligence being proved :—Held, it was for the attorney to defend himself by shewing, if he could, that the plaintiff had no defence in that action ; and not for the plaintiff to begin by shewing he had a good defence, and so had been damnified by the judgment by default. *Godefroy* v. *Jay*, 7 Bing. 413 ; 5 M. & P. 284.

Issuing Execution and Realising Fruits of Judgment.]—Primâ facie, it is the duty of an attorney who has recovered a verdict for a client in an action, to issue execution, and at all events, if desired to do so. And if told at the time when retained that his client has no money for costs, he cannot demand payment of costs incurred before issuing execution. But to maintain an action for negligence against him for not issuing execution, he deeming it not desirable to do so, there must be some evidence that it was desirable or for the benefit of the client to do so ; as that he did not make due inquiries that the debtor could pay. In such a case the attorney is liable for the amount, if any, which the jury think execution would have realised for his client. *Harrington* v. *Binns*, 2 F. & F. 942.

Omission to procure Investment—Liability to Person not a Client.]—An order was obtained by the solicitor for the plaintiff that the purchaser of property, sold under an order of the court in an action, should pay his purchase-money into court, and that the money when paid in should be invested in consols. The plaintiff had the conduct of the sale. The money was paid into court by the purchaser, but the plaintiff's solicitor omitted to leave with the paymaster the necessary request for its investment, and consequently the investment was not made. On the further consideration of the action it was ordered that the balance of the purchase-money, after the payment of certain costs, should be paid to the receiver in the action, in part satisfaction of a balance due to him. The carriage of the order was given to the receiver, and he then discovered that the purchase-money had not been invested. He took out a summons, asking that the plaintiff's solicitor might be ordered to pay to him the amount of interest lost by the non-investment of the purchase-money :—Held, that the solicitor, as the officer of the court having the conduct of the sale, was responsible not only to his client but to the court for the due discharge of his duty, and that he must make good to the person entitled the loss of interest, but that he was entitled to a set-off in respect of a gain which had resulted from a fall in the price of consols between the time when the investment ought to have been made and the date of the order on further consideration, and that this liability could be enforced by summons in the action. The solicitor was ordered to pay the costs of the summons, though on allowing the set-off, it appeared that the amount to be paid by the solicitor would be only 5*l.* 8*s.* 6*d.* *Batten* v. *Wedgwood Coal and Iron Co.*, 55 L. J., Ch. 396 ; 31 Ch. D. 346 ; 54 L. T. 245 ; 34 W. R. 228.

In Investigating Title.]—Semble, an attorney ought himself to peruse a title on the part of his client, before he sends it for counsel's opinion. *Draw* v. *Scroope*, 1 D. P. C. 69 ; 2 B. & Ad. 581 ; 9 L. J. (O.S.) K. B. 291.

A bill in equity will not lie against a solicitor for negligence in investigating a title. *British Mutual Investment Co.* v. *Cobbold*, 44 L. J., Ch. 332 ; L. R. 19 Eq. 627 ; 32 L. T. 251 ; 23 W. R. 487.

Attorney as agent, on sale of an estate, not disclosing to the buyer an incumbrance, and leading him to suppose the title would be a good one, held liable to make satisfaction in default of the vendor. *Arnot* v. *Biscoe*, 1 Ves. 95.

B., being in pecuniary difficulties, consulted her solicitor as to the best means of raising money. He suggested that leasehold property which had been settled by her upon trust for herself for life with remainder to her children, might be treated as belonging to her absolutely and be mortgaged. The trustees of the settlement declined to join in raising money, but, knowing all the circumstances of the case, retired from the trust conditionally on other trustees being appointed. This was done, and money raised by the new trustees, the existence of the settlement being concealed from the mortgagees. On a bill by the mortgagee against B., her solicitor, and the old and new trustees, nine years after the discovery of the fraud, praying for a declaration that all were

liable to make good the moneys advanced by the mortgagee:—Held, that all were liable as prayed. *Clark* v. *Hoskins*, 15 W. R. 1161.

When it was sought to restrain a solicitor from proceeding in a suit to recover costs, and to declare him guilty of fraud, on the ground of not having disclosed a will affecting the title in property which his client was about to purchase, it appearing that a copy of the will having been handed to a solicitor who had previously acted for the vendee in the sale:—Held, that fraud should not be presumed against him, notwithstanding the fact that he had prepared an answer to be sworn by the plaintiff in a chancery suit, in which it was expressly stated that the plaintiff made the purchase without any notice of the will. *M'Elroy* v. *Murphy*, 22 W. R. 501.

—— **Of Leasehold Property.**]—A. entered into a contract for purchase of leasehold property under conditions of sale, one of which was, that the purchaser should take an underlease "according to the draft underlease already prepared, which will be produced at the time of sale, and may in the meantime be inspected at the office of Mr. H.; but no abstract of the vendor's title thereto shall be required, nor the lessor's title objected to or gone into." He afterwards employed an attorney to complete the purchase, who failed to make the requisite search, or to investigate the vendor's title, or to require the production of the original lease. It subsequently appeared that the premises had been previously mortgaged, and A. was turned out of possession by the mortgagee:—Held, that this amounted to negligence on the part of the attorney sufficient to maintain an action against his executor, and that A. was entitled to recover, in addition to the amount he had paid to obtain a good title, interest on the same during the time he held possession, as he had been obliged to pay the mortgagee mesne profits during that period. *Allen* v. *Clark*, 7 L. T. 781; 11 W. R. 304.

If attorneys employed by a vendor to settle on his part the assignment of a term, allow him to execute an unusual covenant, without explaining the liability thereby incurred, they are responsible to him for consequent loss, notwithstanding he is himself at the time of the assignment aware of the fact in respect of which he afterwards incurs liability on his covenant. *Stannard* v. *Ullithorne*, 10 Bing. 491; 4 M. & Scott. 359; 3 L. J., C. P. 307.

Restrictive Covenant.]—A solicitor was consulted by a lessee of premises with reference to the building of a wall, to the erection of which on the demised premises his lessor objected. The lease was shewn to the solicitor. The solicitor made no inquiries as to whether there was any objection to building the wall, other than what might be contained in the lease. The land was subject to a restrictive covenant against any such erection in favour of the original vendors of the freehold, and the wall after erection had to be pulled down:—Held, that the solicitor had been guilty of no negligence. *Pitman* v. *Francis*, 1 Cab. & E. 355.

Parting with Deposit.]—On a contract for purchase, a part of the purchase-money was paid as "deposit" to the vendor's solicitor, who paid it away at the desire of the vendor without the concurrence of the purchaser. This created a difficulty in completing the purchase, as a mortgagee of the estate would not join in the conveyance without payment to him of the deposits. In a suit by the purchaser for specific performance, the solicitors were declared liable to make good the money. *Wiggins* v. *Lord*, 4 Beav. 30.

Mortgage Transactions.]—A solicitor in advancing money on mortgage may be employed, (1) to invest in a particular mortgage; (2) to find securities to be approved by the client and then invest the money; (3) to find securities and invest the money, the client taking little or no part in the business. In an action for negligence against the solicitors, the statute of limitations is a good defence in the first case and also in the second case if the client has approved of the mortgage, no relation of trustee and cestui que trust then existing between them. *Dooby* v. *Watson*, 57 L. J., Ch. 865; 39 Ch. D. 178; 58 L. T. 943; 36 W. R. 764. See *Hughes* v. *Twisden*, 55 L. J., Ch. 481; 54 L. T. 570; 34 W. R. 498.

Where there is not merely an agency between the parties, but also a superadded fiduciary relation, the remedy of the principal, who is then also the cestui que trust, is not one arising merely from contract, or duty springing from such contract, where a common-law liability would alone exist, but is one to be dealt with on the equitable relation of trustee and cestui que trust. *Power* v. *Power*, 13 L. R., Ir. 281.

A party gave a sum of money to a firm of solicitors, to invest upon freehold security. They found a security, and invested the money upon it. The security turned out valueless:—Held, that the giving money to a solicitor for the purpose of general investment does not in itself create the relation of trustee and cestui que trust, so as to make the solicitor liable as trustee for a deficiency in the security. *Mare* v. *Lewis*, 4 Ir. Eq. R. 219.

Held, also, that as this was a single isolated transaction, a bill for an account, as between principal and agent, could not be maintained as against the solicitors. *Ib.*

The attorney for a trader in insolvent circumstances, being introduced by him to the plaintiff, a young woman entitled to a reversionary interest, with the view of obtaining from her an advance of money, and having obtained for her an advance upon the security of her reversionary interest, upon high interest, and upon improvident terms, was then a party to the loan of it to his client, the trader, without any security. The money having been lost:—Held, that if he was employed by the plaintiff only to obtain for her an advance of the money, he was not liable; but that if he was employed by her generally, to look after her interests in the entire transaction, and to advise her as to her advance of the money, he was liable for negligence in reference to his advice as to such an advance. *Langdon* v. *Godfrey*, 4 F. & F. 445.

Where money is entrusted by A. to his solicitor for investment, but without any particular investment being then in contemplation, and is allowed to remain in the hands of the solicitor, the amount becomes a debt due from the solicitor to A. If the solicitor afterwards misapplies the money, and to cover his fraud obtains from another client, B., upon a false representation, a transfer of B.'s equitable interest under a previously executed mortgage, no money of A. being then paid to B., the transfer thus obtained may, on

B. discovering the fraud, be set aside in equity, for no money of A. having been received by B. at the time the transfer was executed, no interest passed to A. by its execution. *Wall* v. *Cockerell*, 1 N. R. 486; 10 H. L. Cas. 229; 32 L. J., Ch. 276; 9 Jur. (N.S.) 447; 8 L. T. 1; 11 W. R. 442.

What circumstances may constitute acquiescence of B. in the solicitor's fraud, and deprive him of the right to relief. *Ib.*

One of the plaintiffs employed the defendant, a solicitor, to invest a sum of money for her, requiring that the security should be good, and the interest paid regularly. The defendant wrote, saying that he had found a security, and in his letter he misstated the amount of the prior charges and the rental, and represented that the interest of the prior charges had always been paid with the utmost regularity. The defendant, who was also solicitor for the borrowers, knew that the present loan was being obtained with a view to meet the interest on some of the prior charges then falling due, on the security turning out of insufficient value:—Held, that the defendant had received the money to invest on a safe investment, and, having constituted himself a fiduciary agent, was liable to pay the mortgagor and her trustees, who were co-plaintiffs, the sum so invested. *Hamilton* v. *Lane*, 25 L. R., Ir. 188.

A solicitor took an insufficient security for his client, and the nature of the transaction was such as in the opinion of the court to create a case of combined agency and trust:—Held (under the circumstances), that he was personally responsible for the deficiency, and for the costs of the suit. *Craig* v. *Watson*, 8 Beav. 427.

Scrivener or attorney puts out his client's money on a security, which he might on the least inquiry have found to be defective, or even where he had notice of ejectment delivered on a prior mortgage, yet could not be charged in equity to answer the money. *Luke* v. *Bridges*, Pre. Ch. 146.

—— **Taking over Mortgage.**]—A bill charged that a solicitor had negligently recommended the plaintiff company to accept a freehold house as security for a loan of 5,000*l.*, and had advised that the mortgagors had the absolute fee-simple in the house free from incumbrance, whereas, in fact, they had only an interest in one moiety, and that subject to incumbrances and a contract for sale. The bill prayed that the solicitor might be decreed to make good the 5,000*l.* and costs, and to take over the security from the client. A suit for the realisation of the security was pending, and the mortgagors were bankrupts, so that the actual loss, if any, was not ascertained:—Held, that the court had no jurisdiction to grant such relief, and that, even if such jurisdiction existed, there was a discretion to refuse to exercise it in such a case, and a demurrer was allowed. *British Mutual Investment Co.* v. *Cobbold*, 44 L. J., Ch. 332; L. R. 19 Eq. 627; 32 L. T. 251; 23 W. R. 487.

—— **Redemption of Prior Mortgage.**]—An attorney having been retained by two trustees about to advance trust-money upon the security of property already mortgaged, to see that the security was sufficient, and that the proper deeds were executed, one of the trustees advanced the money on the execution of the mortgage without receiving an assignment of the first mortgage. It having turned out that there was no other previous mortgage, and the security having proved insufficient:—Held, that there was not evidence of negligence on the part of the attorney, although by the agreement which he had prepared, part of the money advanced was to be applied to the redemption of the prior mortgage; it not appearing that the attorney was aware of the trustee's intention to act as he did. *Brumbridge* v. *Massey*, 28 L. J., Ex. 59.

—— **Omitting to make proper Searches.**]—It is the duty of an attorney for an intended mortgagee to search at the insolvent court for the purpose of learning whether the intended mortgagor has taken the benefit of the insolvent acts, if there is reason to suspect that he has been insolvent, or is or has been in embarrassed circumstances. *Cooper* v. *Stephenson*, 21 L. J., Q. B. 292; 16 Jur. 424.

The plaintiff, who held a mortgage for 4,600*l.* upon lands belonging to one F., agreed to make him a further advance of 4,000*l.* upon having an additional piece of land, which F. had subsequently acquired, added to the former security. The defendant, who acted as the plaintiff's solicitor in the transaction, omitted to ascertain (as the fact was) that a third person had an equitable charge to the extent of 46*l.* upon this additional piece of land; in consequence of which the plaintiff, upon the sale of the property, was unable to convey without paying the 46*l.*:—Held, that this was negligence for which the defendant was liable; and that in the absence of evidence to reduce the amount, the 46*l.* so paid was the proper measure of damages. *Whiteman* v. *Hawkins*, 4 C. P. D. 13; 39 L. T. 629; 27 W. R. 262.

Where an attorney acts for a client who advances money on the security of a legacy given to the borrower under a will, he is not warranted in relying upon a partial extract from the will; it is his duty to examine the will itself. *Wilson* v. *Tucker*, 3 Stark. 154; D. & R., N. P. C. 30; 25 R. R. 777.

—— **Not Registering Mortgage.**]—A company employed a solicitor, who was not its ordinary solicitor, in a particular matter, and at his request gave him a mortgage of part of its property to secure the payment of his costs. The mortgage was not registered, under the Companies Act, 1862, s. 43:—Held, that it was the duty of the solicitor to see that the mortgage was registered, and that as he had not done so, he could not claim the benefit of it in the winding up of the company. *Patent Bread Machinery Co., In re, Valpy, Ex parte*, L. R. 7 Ch. 289; 26 L. T. 228; 20 W. R. 347.

—— **Not Explaining Mortgage to Client.**]—B. being entitled to a sum of 2,916*l.* stock in reversion expectant on the death of an old lady aged eighty-two, obtained through the defendant E., who acted as solicitor for both parties, a loan of 1,650*l.* upon mortgage. The mortgage contained a power of sale upon three months' notice, or on interest being one month in arrear. B. alleged, and the court held truly, that he had stipulated that the stock should not be salable without six months' notice, and that E. had assured him it was not. The stock was sold under the power, the interest being in arrear, for 1,950*l.*, as subject to succession duty at 3 per cent. The tenant for life was then in a precarious state of health and died within three months. It was

afterwards found that only 7*l.* was payable for succession duty. None of the purchase-money was paid except the deposit, the rest being left upon mortgage of the stock:—Held, that the sale could not be set aside, either on the ground of undervalue, as there was no fraud; nor by reason of the purchase-money being left on mortgage, nor on account of the mistake as to succession duty, that being merely a ground of compensation. *Bettyes* v. *Maynard*, 49 L. T. 389; 31 W. R. 461—C. A.

—— **Non-disclosure as to Value.**]—A mortgagee's solicitors noticed on the title very considerable difference in the prices previously paid for the property, and pointed this out to the valuers, who, notwithstanding, adhered to their valuation on behalf of the mortgagee. The solicitors, knowing that the mortgagee would rely on the opinion of the valuers, did not point out to the mortgagee the variation in prices:—Held, that the solicitors had not failed in their duty to the mortgagee. *Scholes* v. *Brook*, 63 L. T. 837.

—— **Liability to Co-Trustee.**]—In an action against trustees, the court held that the investments were improper; that the trustees had been guilty of negligence in not making inquiries as to the particulars, and in not giving proper instructions to the valuers, and in acting upon valuations which under the circumstances they ought not to have acted upon, and they were jointly and severally liable for the money lost. One of the trustees, A., was a solicitor, authorised to make professional charges for work done for the trust. The other was the widow of the testator, and the tenant for life under his will of the trust funds. A. took the more active part in making the investments, and was paid costs for his professional work, charging scale fees both for negotiating the loans, deducing the title, and preparing and completing the mortgages; and he did not, in the opinion of the court, communicate what he did to his co-trustee in such a way as to enable her to exercise her judgment upon the investments, and make them her acts as well as his own:—Held, that A. had undertaken to find proper investments, and that the widow had joined in advancing the fund on the faith that the investments were proper ones which had been looked into by A., as solicitor; that she had been misled by him, and he had been guilty of negligence in his duty as a solicitor; and that, as between A., and the widow, A. was primarily liable for the breach of trust. *Partington, In re, Partington* v. *Allen*, 57 L. T. 654.

—— **Time for Proceeding.**]—A solicitor, being entrusted with moneys from time to time, professed to lay them out upon ample and perfect security, only mentioning that one was reversionary. The solicitor died, and it was discovered that the mortgagors in every case were not worth suing, and two had been bankrupts, and he had himself purchased one security, but as to some railway shares he had been a loser. On claim filed alleging fraud, after six years, and a contention on the part of the general creditors that it was a case for damages for negligence and not for fraud:—Held, that in all the cases in some shape the estate of the deceased solicitor was liable; and although accounts had been rendered and might be regarded as settled, they were still open to surcharge and falsification; and where, as in this case, more than six years had elapsed, the remedy was in equity for gross negligence amounting to fraud. *Smith* v. *Pococke*, 2 Drew. 197; 2 Eq. R. 368; 23 L. J., Ch. 545; 18 Jur. 478; 2 W. R. 285 See *Dooby* v. *Watson*, supra.

—— **Private Arrangement—Condonation.**]—Want of fidelity in a solicitor cannot, upon a question of certificate, be visited with merely slight penalties, and public interest being concerned, in the matter, no private dealing can amount to a condonation of the offence. *Selby, Ex parte*, 6 De G. M. & G. 783; 25 L. J., Bk. 13; 2 Jur. (N.S.) 29.

—— **Proceedings by Representative.**]—An administrator may declare in assumpsit that the defendant as attorney undertook to investigate and see that a title about to be conveyed to the intestate was good, and that he had omitted to do so to the injury of the intestate's personal estate. *Knights* v. *Quarles*, 2 Br. & B. 102; 4 Moore, 532; 52 R. R. 659.

—— **Proceedings against Representatives.**]—The plaintiff advanced money on a mortgage of certain property, on the faith of certain representations made to him by the solicitor, who negotiated the mortgage for him, that the security offered was a good one. These representations were untrue, and were known by the solicitor, when he made them, to be so. The misrepresentation was not discovered until after the solicitor's death, and shortly after that the plaintiff commenced this action against the solicitor's executors to recover the amount lent, and the arrears of interest:—Held, that, although the plaintiff would have had a good claim against the solicitor himself if he had been alive, yet that, never having asserted it in his lifetime, he could not now, after the death of the person who was to blame for the loss, assert it against his representatives. *Young* v. *Wallingford*, 52 L. J., Ch. 590; 48 L. T. 756; 31 W. R. 838.

An executrix of an attorney is liable for his negligence in not making due inquiry into the validity of a security upon which the client proposes to advance money. *Wilson* v. *Tucker*, 3 Stark. 154; D. & R., N. P. C. 30; 25 R. R. 777.

—— **Charge on Estate.**]—A solicitor having received money to invest for a client upon mortgage of a particular property, represented in writing to the client that the money was all invested as arranged, and paid him interest as on the mortgage. After the solicitor's death it was discovered that the solicitor had not effected the mortgage, but had mixed the money with his own, and had invested a larger sum, purporting to be his own money, upon mortgage of the identical property. In a creditors' suit for the administration of the insolvent estate of the solicitor:—Held, under the circumstances, that the solicitor's estate was bound by the representation, and that the client's money was repayable out of the proceeds of sale of the mortgaged estate. *Middleton* v. *Pollock, Wetherall, Ex parte*, 46 L. J., Ch. 39; 4 Ch. D. 49; 35 L. T. 608; 25 W. R. 94.

C., confidential solicitor of H., borrowed money on the security of his mortgage deeds, and purchased an estate. On payment of the mortgage, C. applied the money to the payment of his debt, representing to H. that the money was re-invested:—Held, that H. was entitled

to a charge on the estate to the amount of his claim. *Hopper* v. *Conyers*, L. R. 2 Eq. 549 ; 12 Jur. (N.S.) 328 ; 14 W. R. 628.

—— **Repayment of Dividend.**]—A solicitor invested the money of one of his clients without his knowledge on an improper mortgage security. The client, believing the security to be insufficient, proved against the estate of a partner of the solicitor, which was being administered in chancery, for the whole amount of the debt, and, under a compromise, received a dividend out of the estate. Afterwards it turned out that the security was sufficient to pay the client in full :—Held, that the dividend must be repaid to the solicitor's estate, and did not enure for the benefit of the subsequent incumbrancers on the mortgaged property. *Sawyer* v. *Goodwin*, 45 L. J., Ch. 289 ; 1 Ch. D. 351 ; 34 L. T. 635 ; 24 W. R. 493.

—— **Authority of Partner.**] — A firm of solicitors received money from R., a client, for the purpose of investment. No investment was made at the time, and the money was employed by them for their own use. After the death of one of the partners his executors commenced a partnership action, in which H., the surviving partner, was appointed one of two receivers. H., without communicating with his co-receiver or with R., put certain deeds forming part of the partnership property into a box with R.'s name outside. R. subsequently obtained possession of these deeds and claimed to retain them as security for the money owing to her by the firm. The articles of partnership contained a clause providing that, on the death of either partner, the surviving partner should, within six months of the next general annual account, pay to the representatives of the deceased partner, his share of the profits of the year, and should execute a bond for payment within two years to them of the share of the capital of the deceased partner :—Held, that H. had no power of giving R. a security upon these deeds, which formed part of the partnership property, and that R. must deliver them up to the receivers in the partnership action. *Hills* v. *Reeves*, 30 W. R. 439. Affirmed, 31 W. R. 209—C. A.

Interest on Money.]—Scrivener, &c., receiving money, and giving a note to place it out at interest, is bound to do so, and is not discharged from paying interest for it, unless his employer accepts the security and interest. Balance of an account, stated by such scrivener, &c., will carry interest. *Barwell* v. *Parker*, 2 Ves. 364.

Solicitor in a cause charged with interest on money directed to be laid out for an infant's benefit, notwithstanding a deed from his grandmother giving other moneys in trust for the infant, and directing that he should not be so chargeable. *Brown* v. *Pring*, 1 Ves. 407.

See also INTEREST ON COSTS, &C., post, col. 1734.

Purchase by Client of Farm Produce—No Inquiry as to Payment of Rent.]—An attorney employed to advise a proposed purchase of farming produce which it is desired to leave on the ground for some time, is primâ facie bound to inquire as to the payment of the past rent ; but if the client himself has made inquiries about the matter, and leads his attorney to believe that he is satisfied about it, it is not negligence in the attorney to omit to call for the receipts or take the other precautions which otherwise would be usual and necessary. *Waine* v. *Kempster*, 1 F. & F. 695.

Taking Improper Indemnities.] — Where a party sues or defends in autre droit as assignee, or under such circumstances as to render an indemnity a prudent and proper precaution to take, it is the duty of an attorney to advise it ; and in the case of a defendant, to obtain such an indemnity as will be sufficient to cover costs, and such damages as may reasonably be anticipated in the event of the defence failing. *Graham* v. *Lawrence*, 1 F. & F. 285.

Money Improperly Paid out of Court.]—If a solicitor, knowing that money in court belongs to one person, presents a petition and obtains payment to another, he is personally responsible. The principle applies, if he has merely a knowledge of circumstances, which, if duly considered, would lead to a knowledge of the facts. *Ezart* v. *Lister*, 5 Beav. 585 ; 12 L. J., Ch. 10.

A solicitor was ordered to refund money improperly paid out of court when he ought to have made inquiries which would have shewn him that a signature was forged. *Slater* v. *Slater*, 58 L. T. 149.

Trustees paid into court, under the trustees relief act, a legacy of 500*l.* bequeathed to D., an infant, to the credit of an account in the matter of the trusts of the will of the testator. Two years afterwards they transferred into court to the same account a sum of consols, representing a legacy of 7,000*l.* bequeathed to M., and after her death to her children, and on both occasions the trustees in the petitions stated that the office of N., their solicitor, was to be the place for the service of any notice in reference to the funds. A year after the transfer of the consols a petition was presented by M., by her next friend, a solicitor, and by the trustees for the purpose of dealing with the consols, and the solicitors on the record for the petitioners were the firm of whom N. was a member, and the office of N. was to be the place where any notice was to be served relating to the trust fund. The petition set forth what had been done in respect of the consols and other matters. An order was made in reference to the consols and dividends ; but in drawing it up an error occurred by including in it the whole of the fund standing to the credit of the account, and the future dividends were, as ordered, paid to M. during her life. D. had suffered loss by payments wrongly made to M. (now deceased), and she on attaining majority, presented a petition asking that the estate of M. might be made primarily liable for the loss which she had suffered, and that N. might be made liable for any deficiency : —Held, that N., as officer of the court, had been guilty of negligence in not seeing that all the facts relating to the funds were brought before the court when the order was made, and that he must, after D. had exhausted the estate of M., make good any deficiency, and pay the costs of the petition. *Dangar's Trusts, In re*, 58 L. J., Ch. 315 ; 41 Ch. D. 178 ; 60 L. T. 491 ; 37 W. R. 651.

Money was paid into court in an action for unliquidated damages with a defence of tender, so that it ought not to have been taken out before trial, but the plaintiff's solicitor before trial bonâ fide, but inadvertently, took the sum

out of court and paid it over to the plaintiff:—Held, that under the circumstances the solicitor ought not to be ordered to refund it. *Davys* v. *Richardson*, 57 L. J., Q. B. 409; 21 Q. B. D. 202; 59 L. T. 765; 36 W. R. 728—C. A.

Appointment of Receiver.]—A receiver was appointed by the court, upon the representation of the plaintiff's solicitor that the receiver had entered into the usual recognisances, which he had not, in fact, done. A loss occurred in consequence of the receiver's liability being only in the nature of a simple contract debt. The solicitor was, at the instance of a defendant, made personally liable for the loss occasioned by his neglect. *Simmons* v. *Rose, Ward, In re*, 31 Beav. 1.

If a solicitor in a cause, having assumed, improperly, the character of a receiver, neglects to collect the rent, while the parties consider him to be acting as a receiver, he makes himself responsible for any rents lost in consequence of his neglect. *Wood* v. *Wood*, 4 Russ. 558.

Ignorance or Negligence.]—An attorney shall not be heard to plead ignorance of the effect of a fine on a will; he is bound to have the knowledge and to give the information to his client, and shall not have any benefit from his ignorance. The principles of equity that are applied to trustees are also applicable to persons entrusted with the management of property, in legal proceedings respecting it, even without fraud. *Bulkley* v. *Wilford*, 2 Cl. & F. 181; 8 Bli. (N.S.) 111.

It is a principle of equity that no professional man shall take advantage of his ignorance or negligence. An attorney should know that a fine would revoke a will, and he as well as a barrister is bound to know the effect of acts which he is often employed to perform. *Ib.*

It is the duty of an attorney employed to levy a fine to ask his client whether he has made his will. *Ib.*

A solicitor employed by the relators in an information to conduct their case, causes by mistake two of the defendants to be examined in chief (as if on behalf of the relators), his intention being to cross-examine them. The information, which prayed a decree against all the defendants, was dismissed in consequence of this examination of defendants on behalf of the relators:—Held, upon a claim by the solicitor for his bill of costs against the executor of the relators, that he had shewn crassa negligentia and a want of reasonable skill; and his whole claim, the contract to conduct the suit being entire, was disallowed. *Stokes* v. *Trumper*, 2 Kay & J. 232; 3 W. R. 503. *S. C.*, on appeal, 3 W. R. 615.

Money Lent to Partner.]—A. & B. were in partnership as solicitors. A. received from a client, H., a sum of money to be laid out on good mortgage security, and without consulting H. lent it to B.:—Held, that B. had been guilty of a breach of the obligations of a solicitor to his client. *Selby, Ex parte*, 6 De G. M. & G. 783; 25 L. J., Bk. 13; 2 Jur. (N.S.) 29.

Fact of Negligence—Taxation of Costs.]—The taxing master in taxing a bill of costs between a solicitor and his client has power to disallow the costs of proceedings in an action conducted by the solicitor which were occasioned by the negligence or ignorance of the solicitor. But if the negligence goes to the loss of the whole action, he ought not to disallow them, but to leave the client to bring an action for negligence against the solicitor. *Massey and Carey, In re*, 53 L. J., Ch. 705; 26 Ch. D. 459; 51 L. T. 390; 32 W. R. 1008—C. A.

On a taxation between solicitor and client on the costs of a cause, objections were taken on behalf of the client to charges occasioned by the postponement of the trial and the amendment of the pleadings, on the ground that the postponement of the trial and the amendment of the pleadings had been rendered necessary by the negligence of the solicitor; the registrar had no jurisdiction to inquire into the question of negligence. *The Papa de Rossie*, 3 P. D. 160; 27 W. R. 367.

The master had no jurisdiction to disallow items on the ground that, in respect to the business to which they refer, the attorney was guilty of negligence. *Matchett* v. *Parkes*, 9 M. & W. 767; 1 D. (N.S.) 924; 11 L. J., Ex. 287.

Conviction on Criminal Charge.]—In an action against an attorney alleging that he was retained to conduct the defence of the plaintiff on a criminal charge, and that through his negligence the plaintiff was convicted:—Held, that the plaintiff, in order to recover more than nominal damages, must prove that he was convicted mainly through the attorney's negligence, and the negligence being, not taking the proofs of witnesses who were in court ready to be examined, but whom the counsel, on the plaintiff's own statement, did not wish to call, and whom the plaintiff did not insist on calling, and that the question for the jury was, whether the attorney had done anything which, under all the circumstances, was likely to be of any use. *Hatch* v. *Lewis*, 2 F. & F. 407. And see *S. C.*, 7 H. & N. 367; 31 L. J., Ex. 26; 7 Jur. (N.S.) 1085; 5 L. T. 254; 10 W. R. 58.

Relation of Client and Solicitor must Exist.]—An attorney is not liable to an action for negligence at the suit of one between whom and himself the relation of attorney and client does not exist, for giving, in answer to a casual inquiry, erroneous information as to the contents of a deed. *Fish* v. *Kelly*, 17 C. B. (N.S.) 194.

When a client employs a solicitor to do business for the benefit of a third party, the latter cannot maintain an action against the solicitor for negligence in the matter. *Robertson* v. *Fleming*, 4 Macq. H. L. 167; 1 Paterson, 1053.

Production of Books in Actions.]—The court will not, in an action against an attorney for negligence, make an order for the production of his books, upon a mere suggestion of the client's belief that they contain entries relating to the matters of which he complains. *Evans* v. *Louis*, L. R. 1 C. P. 656.

Answering Interrogatories.]—In an action against D., an attorney, and B., for not properly investing moneys entrusted to them, the plaintiff was allowed to administer interrogatories to B., although they were such that the answers might render him liable to a penalty for practising (in partnership with D.) as an attorney and a solicitor without having a proper certificate—the court holding, that the questions were put bonâ fide, to ascertain whether B. was really liable with D., and that B. might safely answer them, as they related to the business of the partner-

ship as scriveners. *Bickford* v. *D'Arcy*, 4 H. & C. 534 ; 35 L. J., Ex. 202 ; L. R. 1 Ex. 354 ; 12 Jur. (N.S.) 816 ; 14 L. T. 629 ; 14 W. R. 900.

Sufficiency of Pleading in.]—If a declaration states that the plaintiff retained the defendant, an attorney, to see if a certain security was good, and that he accepted the retainer, and neglected his duty, and represented the security to be good ; and that the plaintiff advanced his money, and that the security was bad, by means of which the plaintiff lost the interest :—Held, sufficient. *Howell* v. *Young*, 5 B. & C. 259 ; 8 D. & R. 14 ; 2 Car. & P. 238 ; 4 L. J. (O.S.) K. B. 160 ; 29 R. R. 237. S. P., *Whitehead* v. *Greetham*, 2 Bing. 464; M'Clel. & Y. 205 ; 10 Moore, 183 ; *O'Hanlon* v. *Murray*, 12 Ir. C. L. R. 161.

A declaration, that the plaintiff, at request of defendants, retained and employed them as attorneys, for fees, to use due care in ascertaining the title of R. to lands which were to be charged as security for payment of 600*l.* by R. to the plaintiff, and to take due care that the same should be a sufficient security for the payment of the 600*l.* by R. to the plaintiff ; and in consideration thereof the defendants promised the plaintiff to use due care and diligence in and about ascertaining the title of R. to the lands, and to take due care that the same should be a sufficient security for such repayment of the 600*l.* by R. to the plaintiff :—Held, that the undertaking of the defendants, as laid, did not comprehend any inquiry into the value of the lands. *Hayne* v. *Rhodes*, 8 Q. B. 342 ; 15 L. J., Q. B. 137 ; 10 Jur. 71.

When it is sought to make a solicitor liable for negligence, that issue must be raised clearly upon the pleadings. *Bettyes* v. *Maynard*, 49 L. T. 389 ; 31 W. R. 461—C. A.

VIII. JOINDER OF AS PARTY TO ACTIONS.

See PRACTICE (PARTIES).

IX. FOR ACTS OF PARTNERS.

See PARTNERSHIP.

X. TO SUMMARY JURISDICTION.

See infra.

XI. IN OTHER CASES.

For Act of Clerk.]—Where a managing clerk of attorneys had, without their knowledge, received money for the purpose of investment : —Held, that the question was (in the absence of any actual authority) whether they had held him out as having authority so to receive it on their behalf. *Cornelius* v. *Harrison*, 2 F. & F. 758.

For Fraud of Clerk.]—Where an attorney's clerk had fraudulently simulated the court seal upon a writ of summons, the court set aside the writ and the proceedings thereon, and ordered the attorney (though blameless) personally to pay the costs. *Dunkley* v. *Farris*, 11 C. B. 457.

For Negligence of Clerk.]—On the trial of an action on a bill of exchange, the bill was not produced, and its non-production was accounted for by the evidence of two clerks of the plaintiff's attorney, by which it appeared that one of them laid the bill in an envelope on a desk in the attorney's office, and the other burned the envelope and, as was believed, the bill also. Secondary evidence of the bill having been received, and the plaintiff having obtained a verdict, the master, on taxation of the plaintiff's costs against the defendant, disallowed the costs of the attendance of the clerks to prove the facts :—Held, per Pollock, C.B., and Martin, B., that those costs had been rightly disallowed ; Alderson and Platt, BB., contra. *Matthews* v. *Livesey*, 11 Ex. 221 ; 3 C. L. R. 898 ; 24 L. J., Ex. 252 ; 1 Jur. (N.S.) 601 ; 3 W. R. 517.

To Charges of Fraud.]—When it was sought to restrain a solicitor from proceeding in a suit to recover costs, and to declare him guilty of fraud, on the ground of not having disclosed a will affecting the title in property which his client was about to purchase, it appearing that a copy of the will had been handed to a solicitor who had previously acted for the vendee in the sale :—Held, that fraud should not be presumed against him, notwithstanding the fact that he had prepared an answer to be sworn by the plaintiff in a chancery suit, in which it was expressly stated that the plaintiff made the purchase without any notice of the will. *M'Elroy* v. *Murphy*, 22 W. R. 501.

The non-production, in Ireland, of title-deeds to the solicitor instructed to prepare a mortgage upon an estate there will not of itself be deemed a proof that the solicitor has acted fraudulently, or even negligently, so as to affect the interest of his client. *Agra Bank* v. *Barry*, L. R. 7 H. L. 135.

—— **When not supported—Costs.**]—Although relief may be given at the suit of a client against his solicitor for loss sustained by gross negligence, yet where the loss was in respect of a matter of conduct, as to which the advice of the solicitor was founded on the opinions of competent surveyors as to the value of the property, and those opinions submitted to the judgment of the client, the court dismissed the bill ; and as fraud and improper motives were charged without evidence to support those charges, the bill was dismissed with costs. *Chapman* v. *Chapman*, L. R. 9 Eq. 276 ; 22 L. T. 145 ; 18 W. R. 533.

Deeds Abstracted — Security for Loan.]—A solicitor deposited some of his own deeds as a security for a sum of money due to two of his clients, in a box belonging to them. He retained the box, but after his death it was found that he had abstracted the deeds from the clients' other deeds :—Held, that the clients had a lien on all the solicitor's other deeds for their debt. *Mason* v. *Morley*, 34 Beav. 475.

For Breaches of Trust.]—A solicitor, acting for the sole survivor of three trustees, prepared, by his direction, a deed appointing the husband of the cestui que trust sole trustee in his place, and another solicitor, acting for the cestui que trust and her husband, perused and approved of the draft. The deed was executed, and the trust fund transferred to the husband as new trustee, and by him sold out and never replaced. There being no ground for imputing to either of the solicitors knowledge or suspicion of any improper design in the transaction :—Held, that neither of them was liable for the loss occasioned by the breach of trust. *Barnes* v. *Addy*, 43 L. J., Ch. 513; L. R. 9 Ch. 244; 30 L. T. 4; 22 W. R. 505.

For Money Received or Paid.]—A firm of solicitors, acting for two trustees and receiving trust moneys from them, and paying over a portion of such moneys to one only of the trustees, who afterwards dies insolvent, is liable to the trust estate for the whole amount of moneys received from the two trustees. *Lee* v. *Sankey*, L. R. 15 Eq. 204; 27 L. T. 809; 21 W. R. 286.

A solicitor was employed by the trustees for sale of an estate, his duty being to receive the purchase-moneys and pay them in to the trustees' banking account. He received large sums, paid them in to his private account, and died insolvent. His banking account at his death shewed a large credit, principally made up of specific sums which corresponded with receipts by him on account of sales of the trust estate:—Held, that these specific sums could be followed by the trustees, and that there could not be a set-off allowed in respect of sums alleged to have been paid by the solicitor on account of the trust estate. *Birt* v. *Burt*, 36 L. T. 943—C. A.

A solicitor having received money to invest for a client upon mortgage of a particular property, represented in writing to the client that the money was all invested as arranged, and paid him interest as on the mortgage. After the solicitor's death, it was discovered that the solicitor had not effected the mortgage, but had mixed the money with his own, and had invested a larger sum, purporting to be his own money, upon mortgage of the identical property. In a creditors' suit for the administration of the insolvent estate of the solicitor:—Held, under the circumstances, that the solicitor's estate was bound by the representation, and that the clients' money was repayable out of the proceeds of sale of the mortgaged estate. *Middleton* v. *Pollock, Wetherall, Ex parte*, 46 L. J., Ch. 39; 4 Ch. D. 49; 35 L. T. 608; 25 W. R. 94.

For Misfeasance.]—*See* COMPANY (WINDING-UP).

J. SUMMARY JURISDICTION.

I. GENERALLY.

In character of Officer of Court.] — The court will only exercise a summary jurisdiction over an attorney when he is acting in the character of an officer of the court, and not in an ordinary case of attorney and client. *Bull, Ex parte*, 3 Deac. & C. 116; 2 L. J., Bk. 76.

A solicitor is an officer of the court, and is liable to serious consequences if he neglects his duty of explaining the effect of the bill of sale to the grantor. He is also liable to an action by his client, as well as to proceedings of a penal character. Per James, L.J. *National Mercantile Bank, Ex parte, Haynes, In re*, 49 L. J., Bk. 62; 15 Ch. D. 52; 43 L. T. 36; 28 W. R. 848.

A trustee, who is a solicitor, cannot be removed under the jurisdiction of the court of chancery over solicitors, that jurisdiction being exercised only in respect of acts done by a solicitor in that character, or in some relation immediately arising out of it. *Blanchard, In re*, and *Le Doulcet, In re*, 30 L. J., Ch. 516; 4 L. T. 426; 9 W. R. 647.

Where a writ is sent to be served by a firm of attorneys, only one of whom has been admitted in the court, and they neglect to do so, the court has no jurisdiction, except over the one whose name is on their roll. *Cheshire* v. *Tyler*, 7 Jur. 704.

Directing an attorney to employ a proctor to obtain probate of a will is not such employment of him in the character of an attorney as will give the court summary jurisdiction over him, as to money received by him to pay the proctor. *Cowie* or *Cohen, Ex parte*, 3 D. P. C. 600; 1 H. & W. 211.

The test for determining whether the court has or has not jurisdiction is, whether, if the attorney had been called as a witness, the court would or would not have held him justified in refusing to answer on the ground of privilege. *Cutts, In re*, 16 L. T. 71.

Where an attorney has not fulfilled his engagement with respect to a loan of money, independently of his character of attorney, the court will not summarily compel him to fulfil it. *Chitty, In re*, 2 D. P. C. 421.

After Solicitor has Ceased to Practise.]—One who has been an attorney remains liable to the summary jurisdiction of the court for his conduct whilst he was an attorney, although he may have taken his name off the roll and ceased to be an attorney. *Simes* v. *Gibbs*, 6 D. P. C. 310; 1 W. W. & H. 40; 2 Jur. 418.

Matter arising in Cause before the Court.]—The court will not entertain a motion touching the conduct of an attorney, unless it appears that he is an attorney of the court, or that the transaction arises in part at least out of a cause before the court; nor will the court exercise its summary jurisdiction over an officer, unless in a case of palpable fraud. *Lord, In re*, 2 Scott, 131; 1 Hodges, 195. S. P., *Cole* v. *Grove*, 1 Scott (N.R.) 30; 4 Jur. 339.

The jurisdiction of the court of chancery over solicitors, as officers of the court for misconduct, is very special, and will not be exercised on an ordinary summons for taxation of a bill of costs. *Forsyth, In re*, 2 De G. J. & S. 509; 12 L. T. 687; 13 W. R. 932.

The court granted a rule nisi, calling upon an attorney to answer for an alleged misconduct, in a matter where no suit was depending, but which appeared to have been intrusted to him in the capacity of an attorney. *Knight, In re*, 1 Bing. 91.

The court will not interfere summarily between attorney and client, unless there has been a cause in court; especially where there is any fact in dispute. *Phillips, In re*, 1 W. W. & H. 418; 3 Jur. 479.

The court will exercise its summary authority over an attorney only with reference to his conduct in a cause. *Anon.*, 19 L. J., Ex. 219.

But where an attorney has been guilty of gross misconduct, the court will interfere summarily, although the misconduct does not amount to an indictable offence, and arose in a transaction in which he was not acting in that character. *Blake, In re*, 3 El. & El. 34; 30 L. J., Q. B. 32; 6 Jur. (N.S.) 1242; 2 L. T. 429.

After great Lapse of Time.]—Where more than seven years had elapsed after the settlement of transactions between an attorney and his client, the court refused to interfere to have them reopened, in the absence of any suggestion of fraud or misconduct. *Shipden, Ex parte*, 6 D. & R. 338.

Non-Payment of Counsel's Fees.]—The court will not, on motion, interfere to compel an

attorney to pay counsel's fees. *Angell, In re*, 29 L. J., C. P. 227; 6 Jur. (N.S.) 1373.

Preparing Hypothetical Case for Opinion of Court.]—Where an attorney, although without any corrupt or unworthy motive, prepares a special case in order to take the opinion of the court upon the will of a testator, and suggested facts which had no foundation:—Held, that he was guilty of a contempt, and he was fined in 30*l.* for his offence. *Elsam, In re*, 5 D. & R. 389; 3 B. & C. 597; 3 L. J. (O.S.) K. B. 75.

Extortionate Charges.]—Excessive and extortionate charges in a bill of costs as between attorney and client form no ground for a summary application against an attorney, in the absence of evidence of wilful fraud, the suitor being sufficiently protected by the taxation of the bill. *Meux* v. *Lloyd*, 2 C. B. (N.S.) 409.

Negligence.]—The court will not interfere summarily to try the question of negligence on the part of an attorney towards his client. *Brazier* v. *Bryant*, 2 D. P. C. 600.

Solicitor Guilty of Indictable Offence.]—The court will not proceed summarily against an attorney for matters which amount to an indictable offence, where it appears that the facts are not exclusively within his own knowledge. *Anon.*, 2 Jur. 467.

Preparing Bond with Insufficient Stamp.]—Where an attorney had wholly prepared and signed a bond to pay money to his client upon a wrong stamp, he was compelled upon motion to put a proper stamp upon it. *Gwilliam* v. *Barnet*, 2 Smith, 155.

Against Agent of Solicitor.]—If the agent of an attorney does wrong, the client cannot make a summary application against the agent. *Jones, Ex parte*, 2 D. P. C. 161.

Effect of Private Arrangement.]—Where serious charges of misconduct of an attorney are brought before the court, he will not be allowed to get rid of the matter by private arrangement, but the court will require a full explanation of such misconduct. *Attorney, In re*, 9 L. T. 299.

Action Pending.]—Application for summary remedy against a solicitor refused where the client had chosen her remedy by action. *Attorney, In re*, 4 W. R. 617.

Practice—Motion in Action.]—An application for the court to exercise its jurisdiction over a solicitor on account of conduct disclosed in an action may be made in the action, and therefore is a further proceeding within Rules of Supreme Court, 1875, Ord. LI. r. 1a. *Cave* v. *Cave, Cave, In re*, 49 L. J., Ch. 656; 43 L. T. 158; 28 W. R. 764.

—— **Chancery Division.**]—The chancery division will exercise the jurisdiction over solicitors conferred on it by s. 87 of the Judicature Act, 1873, according to the practice familiar to the chancery division, and will not grant a rule nisi. *Copp, In re*, 32 W. R. 25.

—— **Mentioning Name.**]—In motions respecting misconduct against attorneys, and for the exercise of the summary jurisdiction of the court, the practice is not to mention names. *Attorney, In re*, 2 L. T. 432; 8 W. R. 530.

—— **Application in Chambers.**]—Unless there is a cause in court, an application cannot be made in chambers against an attorney. *Higgs, Ex parte*, 1 D. P. C. 495.

—— **Plea of Statute of Limitations by Solicitor.**]—The court will not, in the exercise of its summary jurisdiction, prevent an attorney, who is a defendant in an action at the suit of his client, suing as administratrix, from pleading not directly to the merits, such as a plea of the statute of limitations, even though the accrual of the statute may have been owing to his neglect in not advising his client to take out letters of administration earlier. *Triston, In re*, 1 L. M. & P. 74.

—— **Entitling Motion.**]—An order was made that a solicitor (who was also a trustee of a will) should pay into court trust money which he had by affidavit admitted that he had in his hands, upon motion made by the cestui que trust in a suit to administer the estate of the testator, the notice of motion being entitled in the suit and in the matter of the solicitor. *Clerihew, In re, Howard, In re*, 24 L. T. 860; 19 W. R. 939—L. JJ.

Breach of Duty—Measure of Loss.]—Where negligence, or other breach of duty, is committed by a solicitor, an officer of the court, in a matter of which the court has seisin, the court can summarily order its officer to make good the loss occasioned by his neglect or breach of duty; but the limit of liability is the measure of the loss flowing from the negligence or breach of duty. *Marsh* v. *Joseph*, 66 L. J., Ch. 128; [1897] 1 Ch. 213; 75 L. T. 558; 45 W. R. 209—C. A.

User of Name without Authority — Ratification.]—To constitute a binding ratification by a person of an act done in his name without any previous authority, there must be full knowledge on his part of the facts, and unequivocal adoption after such knowledge, or the circumstances must be such as to warrant the clear inference that the supposed principal was adopting the acts of the supposed agent, whatever they were. Consequently, where a solicitor is told by another solicitor that his name has been used as solicitor for a party in a proceeding before the court, who was merely a formal party, and that a cheque awaits him at the office of the paymaster-general for his costs, the amount of which is commensurate with the business being of a formal character, and he, without any information or inquiry as to the nature of the proceeding, but having no reason to suspect any fraud, accepts the amount of the costs, that would be at most a ratification of the use of his name for a formal party on a formal application, and would not make him liable for frauds committed by the other solicitor for his own purposes by means of the use of the name. A solicitor in such a case would not be held liable for the loss occurring merely because he did not inform the court of the user of his name without authority. *Ib.*

II. ON UNDERTAKINGS.

Must act as Solicitor.]—In an application for the summary interference of the court upon an attorney's undertaking, the question is, did he or did he not act in the particular transaction in

the character of an attorney? If he did, the court will hold him liable. *Fairthorne, In re*, 3 D. & L. 548; 1 B. C. Rep. 40; 15 L. J., Q. B. 131; 10 Jur. 287. S.P., *Brandon* v. *Smith*, 1 W. R. 130.

An attorney giving an undertaking for another, in a cause in which he is not concerned as attorney, will not be forced summarily to fulfil it; but the party to whom it is given will be left to his action. *Walker* v. *Arlett*, 1 D. P. C. 61.

The undertaking of an attorney cannot be summarily enforced unless he is acting as attorney in the cause. In other cases the party to whom the undertaking is given must be left to his action. *Bateman, In re*, 2 D. P. C. 161.

An attorney who is a party in a cause, giving an undertaking to the sheriff in that cause, is not liable to have that undertaking summarily enforced by the court. *Northfield* v. *Orton*, 1 D. P. C. 415.

The court will not summarily compel an attorney to pay money pursuant to his undertaking to indemnify against costs, in an action where, at his instance, a party has allowed his name to be used as a plaintiff, without any interest in the matter. *Clifton, Ex parte*, 5 D. P. C. 218; 2 H. & W. 296.

The court will not exercise its summary jurisdiction to compel a vendor's solicitor to perform an undertaking given by him at the sale to do certain acts for clearing the title to the estate. *Peart* v. *Bushell*, 2 Sim. 38.

Where an attorney being employed to sue a defendant, gave his undertaking for the debt sought to be recovered to his own client, the court refused to enforce the fulfilment of the undertaking by attachment. *Evans, Ex parte*, 9 D. P. C. 106; 1 W. P. C. 2; 4 Jur. 991.

Statute of Frauds no Defence.]—The court will compel an attorney to perform his undertaking to pay a sum of money, even though in respect of the debt of another, and void under the Statute of Frauds, 29 Car. 2, c. 3, s. 4. *Hilliard, In re*, 2 D. & L. 919; 14 L. J., Q. B. 225; 9 Jur. 664. S. P., *Senior* v. *Butt*, 5 L. J. (o.s.) K. B. 136. *Evans* v. *Duncombe*, 1 C. & J. 372; 1 Tyr. 283; 9 L. J. (o.s.) Ex. 82. *Patterson, In re*, 1 D. P. C. 468.

To Pay Debt and Costs.]—An attorney of a mortgagor, desirous of selling the property, having induced the attorney of the mortgagee to give up the title deeds, on his undertaking to pay him the costs of preparing the abstract of title, the court granted a rule, ordering him to pay the amount pursuant to his undertaking. *Gee, In re*, 2 D. & L. 997; 10 Jur. 694.

A solicitor who guarantees payment of a debt due from his client, may, on default of payment by the client, be ordered by the court in a summary way to pay the amount himself, without any necessity on the part of the creditor to bring an action against the solicitor. *Pass, In re*, 35 W. R. 410.

Performance of agreement to compromise a suit entered into by the solicitor for the plaintiff and the solicitor for the defendant, for payment by the latter of the former's costs, not enforced by order in a summary way. *Gilbert* v. *Cooper*, 15 Sim. 647, n.; 17 L. J., Ch. 265.

A plaintiff having issued execution on a judge's order against the defendant, his attorney sent to the plaintiff the following letter: "Sir, —*Yourself* v. *Gordon*,—In consideration of your agreeing to suspend execution upon the judgment, I hereby undertake to make an arrangement with you respecting the payment of the debt and costs prior to Mr. G. being discharged from prison under his present detainers; or in the event of your not agreeing to the terms offered by me, to inform you in sufficient time of his intended discharge, so that you may not be deprived of your power of lodging a detainer against him in this action. Your reply, approving this arrangement, will oblige," &c. The court discharged a rule obtained to compel the attorney to pay the debt and costs. *Thompson* v. *Gordon*, 4 D. & L. 49; 15 M. & W. 610; 15 L. J., Ex. 344.

The attorneys for the plaintiff and defendant in a horse cause, which was ready for trial, but had been withdrawn at the assizes, signed the following undertaking: "We, the undersigned, attorneys for the plaintiff and defendant, do hereby personally consent, undertake and agree, that the record in this cause shall be withdrawn; that the defendant shall take back the horse in the pleadings named, and shall pay 64*l.* 17*s.* to the plaintiff; that the costs of the suit on the part of the defendant shall be taxed between the parties, on the principle between plaintiff and defendant; and that such taxation shall be perfected by," &c.:—Held, that the plaintiff's attorney in the original action was personally liable upon this undertaking to pay to the defendant's attorney the costs when taxed, pursuant to the agreement. *Iveson* v. *Conington*, 2 D. & R. 307; 1 B. & C. 160; 1 L. J. (o.s.) K. B. 71; 25 R. R. 354.

The solicitor for the petitioning creditor, on the commission being superseded, wrote to the bankrupt: "I am ready and hereby offer to allow and pay the costs" incurred by the bankrupt in petitioning for the supersedeas:—Held, that the solicitor was personally liable on this undertaking. *Bentley, Ex parte*, 2 Deac. & C. 578; 2 L. J., Bk. 39.

So, where the solicitors of the assignee of a bankrupt tenant, on whose lands a distress had been levied by the landlord, gave an undertaking in the following terms: "We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained":—Held, that they were personally liable. *Burrell* v. *Jones*, 3 B. & Ald. 47; 22 R. R. 296.

A., the solicitor of the London creditors of a bankrupt in the country, wrote to B., the solicitor of the country creditors of the bankrupt, the following letter: "I am willing, on behalf of the London creditors, to bear two-thirds of the expenses of Messrs. B. & B., or such barrister as you may think fit, for resisting Mr. K.'s proof under the commission, and of investigating the accounts of the assignees at the meeting on the 18th inst. I hereby undertake to bear and pay, on behalf of these creditors, two-thirds of the expenses incident thereto accordingly." And the meeting being afterwards adjourned, A. wrote to B. another letter, in which he said: "I shall have no objection to bear as before the proportion of expense of the barrister attending the meeting stated in your letter":—Held, that A. was personally liable for the proportion of the expenses. *Hall* v. *Ashurst*, 1 C. & M. 714; 3 Tyr. 420; 2 L. J., Ex. 295.

Plaintiffs were assignees of a mortgage granted by A. and B., for 2,000*l.*, and had procured an advance from them for a client, on the same security, of 325*l.*, and were creditors of A. and B. for a further sum of 164*l.* They had commenced actions for the first two sums, and obtained a verdict in the action for the last. Under these circumstances, an attorney, but not employed as such in his business, induced the plaintiffs to stay proceedings for two months in the last action, and to allow judgment to be suffered by default in the other two, on which no execution was to issue for two months. The consideration for this stay of proceedings was that the attorney undertook that the money should be paid, whenever the necessary securities should be completed; stating at the same time the name of another party through whom the money was to be procured, and to whom the mortgages were to be transferred. Ultimately, the third party in question refused to execute:—Held, that the attorney had rendered himself personally liable in respect of all these sums. *Harper* v. *Williams*, 4 Q. B. 219; 12 L. J., Q. B. 227.

The defendant in an action in this court being in prison for contempt, his solicitors, in order to induce the plaintiff's solicitors to give their consent to his release from arrest, entered into an undertaking, in terms unconditional, to pay an agreed sum as the costs of the application for his committal. This undertaking not having been performed, the plaintiffs moved in this matter for a summary order that the defendant's solicitors should be ordered to pay to the plaintiffs or their solicitors the agreed sum, pursuant to the undertaking, and the costs of that application. There was a conflict of evidence as to whether the undertaking was intended to be unconditional, or conditional only upon its being in accordance with the practice of the court (which it was now admitted it was not) to make the order for release only on terms of payment of costs:—Held, that the court had jurisdiction to entertain the application; that the application was properly made; that upon the evidence the undertaking was unconditional; and that there must, therefore, be an order in terms of the notice of motion. *Woodfin and Wray, In re*, 51 L. J., Ch. 427; 30 W. R. 422.

—— **When Binding on Firm.**]—S., being desirous of assigning a lease which he had deposited with the plaintiffs to secure advances, employed the defendants, who were in partnership as attorneys, to get the lease from the plaintiffs. T., one of the defendants, accordingly arranged with the plaintiffs that they should give up the lease on receiving from him the following undertaking, signed by him in the name of the firm: "We undertake, in consideration of your handing to us the deeds and papers in your possession relating to the Rose and Crown Inn, at Hounslow, so as to enable us to complete the assignment of the lease of such property, to pay you 200*l.* on the day after the completion of the assignment of such lease, and the further sum of 250*l.* on or before the 3rd September next." The other defendant was not aware that this undertaking was given; but the whole transaction was entered in the books of the firm, and the purchase-money was paid into the partnership account:—Held, that this was not a bare guarantee for the debt of a third person, but an undertaking to appropriate money to be received by the firm in the ordinary course of the partnership business, and that it was therefore binding on the firm. *Alliance Bank* v. *Tucker*, 17 L. T. 13; 15 W. R. 992.

One partner has no authority to sign an undertaking in the name of the firm for the payment of the amount of debt and costs to the plaintiff in an action, in order to procure the defendant's discharge from custody. *Hasleham* v. *Young*, 5 Q. B. 833; D. & M. 700; 13 L. J., Q. B. 205; 8 Jur. 338.

—— **Construction.**]—A., an attorney, having been employed by a former client of B., in consideration of the latter handing him over the papers in the cause, wrote as follows: "Out of any moneys which I may receive on this or any other proceeding on the plaintiff's account, I will hand you such balance as may remain due of your bill of costs as settled at 9*l.*":—Held, that A. was bound to pay B. out of the first moneys A. received on account of the client, and not out of the surplus after deducting his own costs. *Tharrett* v. *Trevor*, 7 Ex. 161; 21 L. J., Ex. 59.

Where the solicitors of the promoters of an act of parliament, whereby a company is created and empowered to raise capital and carry out works, and, if they so resolve, to raise separate capital for and carry out separately certain portions of such works as a separate undertaking, agree to pay certain claims out of the first capital raised by the company and the company duly raise capital for the separate undertaking and none other, the solicitors are not liable under the agreement. *Allan* v. *Regent's Canal, City and Docks Ry.*, 54 L. J., Q. B. 201. Reversed in C. A.

—— **Delay in Application.**]—An attorney for a defendant in a feigned issue undertook to pay a given sum of money on a given day. The money was not demanded on the day specified, but repeated applications were subsequently made for the money in vain. Between three and four years after the money became due, a summary application was made to the court to compel the attorney to pay the money pursuant to his undertaking. The court, notwithstanding the delay which had taken place, made the rule absolute, with costs. *Swan, In re*, 1 B. C. Rep. 99; 15 L. J., Q. B. 402; 10 Jur. 715.

To repay Costs if pending Appeal successful.]—Where a successful plaintiff's solicitor was paid his taxed costs by the defendant on his giving the usual undertaking to repay the same if a pending appeal by the defendant was successful, the court enforced such undertaking on the appeal being successful although execution was stayed. *Swyny* v. *Harland*, 63 L. J., Q. B. 415; [1894] 1 Q. B. 707; 9 R. 210; 70 L. T. 227; 42 W. R. 297—C. A.

To enter Appearance.]—Where in a collision action in rem solicitors for the defendants accept service of the writ and indorse it with the words, "We accept service on behalf of the defendants, the owners of the 'A.,' and undertake to put in bail in a sum not exceeding the value of the said barque 'A.'" and in consequence of their authority being withdrawn by the defendants they do not enter an appearance, they do not thereby commit a breach of their undertaking so as to render themselves liable to attachment, inasmuch as they have never expressly undertaken to appear. *The Anna and Bertha*, 64 L. T. 332; 7 Asp. M. C. 31.

To Withdraw Pleas.]—If an undertaking given by an attorney to withdraw pleas is not carried out, and the plaintiff in consequence loses the benefit of a subsequent judgment, the defendant's attorney is not necessarily liable for the plaintiff's debt and costs. *Burnett* v. *Provis*, 22 L. T. 543.

An action having been compromised, the defendant and his solicitors signed an agreement that if the defendant did not carry out its terms his solicitors would withdraw the plea:—Held, that the solicitors were personally liable for not withdrawing the plea and that they did not sign the agreement merely as agents for the defendant. *Leedham* v. *Smith*, 4 W. R. 241.

To add Parties.]—Upon an alleged misjoinder of husband and wife as petitioners, counsel, upon the instructions of the solicitor, undertook to amend by making it the petition of the wife by her next friend:—Held, that the solicitor was not personally responsible for the performance of the undertaking. *Williams, In re*, 12 Beav. 510; 19 L. J., Ch. 422; 14 Jur. 561.

Not to Molest Witness.]—On motion, which was opposed, to enlarge the time for closing evidence until one month after the production, as a witness, of S., an order granting the enlarged time was made, upon the undertaking of both B., the husband of S., and his solicitor, that in the event of S. being produced for examination, no attempt should be made, either directly or indirectly, to discover her place of residence, or in any way to molest her. B. and his solicitor signed the registrar's book at the foot of the undertaking. On the examination of S. before the examiner, the solicitor of B., after the terms of the undertaking had been read to him, served her with a subpœna to attend as a witness in another cause:—Held, that the service of the subpœna upon S. while before the examiner amounted to an act of molestation; and though the court would not commit the solicitor to prison, yet it ordered him to pay the costs of an application to commit him. *Lawford* v. *Spicer*, 2 Jur. (N.S.) 564; 4 W. R. 497.

To Pay Legacy Duty.]—Where an attorney was intrusted by executors with a sum of money for the purpose of paying legacy duty, and failed so to apply it, the court refused to interfere summarily to compel him to refund the money, as it did not appear that this employment was necessarily in his professional character, or that he had on other occasions ever acted as attorney for the parties. *Webb, In re*, 2 D. & L. 932; 14 L. J., Q. B. 244; 9 Jur. 538.

Guarantee as Surety.]—Where a party, about to borrow money to carry on a lawsuit in an ecclesiastical or in an Irish court, referred the lender to an attorney to inform him of the nature of the suit, and the latter gave a guarantee of the loan, but one on which an action would not lie:—Held, that the court would not interfere summarily to enforce the guarantee. *Kearns, In re*, 11 Jur. 521.

To give Security for Costs.]—A defendant obtained a judge's order in the following terms: "It is ordered that the plaintiff do forthwith give security for costs to the satisfaction of the master; no stay of proceedings in the meantime, the attorney for the plaintiff hereby undertaking to find such security":—Held, that the attorney was not bound to find security for costs unless further proceedings were taken by the plaintiff. *Hill* v. *Fletcher*, 5 Ex. 470; 1 L. M. & P. 518; 19 L. J., Ex. 320.

To obtain Client's Consent to a Reference.]—Where an attorney, in order to get possession of papers belonging to A., in the hands of A.'s former attorney, who had a lien upon them for the amount of a bill then in dispute, undertook that A. should enter into an unqualified reference not revocable:—Held, that the attorney was liable, pursuant to his undertaking, to procure A.'s signature to an agreement of reference, and to find security for the performance of an award to the satisfaction of the master. *Hughes, Ex parte*, 5 B. & Ald. 482.

When Acting as Agent.]—Upon a proposed sale of a bankrupt's effects, the plaintiff gave notice of a claim to part under a bill of sale, whereupon the solicitors of the assignees wrote to the plaintiff's solicitors in these terms: "In consideration of A., for whom you act, consenting to the sale, we hereby, on behalf of the assignees, consent," &c.; to which the plaintiff's attorneys answered in these terms: "In compliance with the undertaking given by you herein, we, on the part of the plaintiff, consent to the sale":—Held, that these letters shewed, upon the face of them, under the circumstances, that the solicitors of the assignees professed to contract only as agents. *Lewis* v. *Nicholson*, 18 Q. B. 503; 21 L. J., Q. B. 311; 16 Jur. 1041.

An attorney wrote the following letter to the plaintiff: "Sir,—Mr. Wright has handed me your letter of the 3rd respecting the nonpayment of the bill for 91*l.* due on Saturday. I am now making arrangements for an advance to Mr. Wright, to enable him to pay this and other claims upon him, and if you will have the goodness to hold the bill for a few days, I shall be prepared on his behalf to take it up." The plaintiff had no further communication with the attorney, and on the receipt of the letter was not aware that he was an attorney:—Held, that this letter did not render him personally liable. *Allaway* v. *Duncan*, 16 L. T. 264; 15 W. R. 711.

A solicitor contracted, in his own name, to purchase a freehold; he resisted the performance of it on the ground that he had acted as the mere agent of a client, and that, it being a case of hardship, damages at law would be an adequate remedy to the vendor:—Held, that he was bound to perform the contract. *Saxon* v. *Blake*, 29 Beav. 438.

An attorney on behalf of his client, the defendant, promises to pay 500*l.* to plaintiff; this being done by the authority of the client, attorney not liable, but only client. Otherwise, if the attorney had no authority from client to make this engagement. *Johnson* v. *Ogilby*, 3 P. Wms. 277.

When Acting for Company.]—Where an attorney of a railway company contracted as such, but managed all the concerns of the company, there being no acting committee:—Held, that the attorney was not personally liable under such contracts. *Russell* v. *Reece*, 2 Car. & K. 669.

Effect of Client's Death.]—An undertaking by a defendant's solicitor to pay debt and costs is enforceable, though the defendant dies before taxation. *Hellings* v. *Jones*, 3 Bing. 70; 10 Moore, 360; 3 L. J. (O.S.) C. P. 164.

Semble, the defendant's attorney, having given

a written undertaking to pay to the plaintiff whatever the deficit might be on a sale of the mortgaged premises under the decree in a foreclosure suit, will be compelled to perform it, notwithstanding the death of his client. *Bailey* v. *Daniell*, Hay. & J. 586.

When Discharged.]—Where an attorney undertook to pay the sum which should be awarded to be paid by his client in a particular reference, the arbitrator having to make his award by a particular day, did not do so, and the judge's order for enlarging the time was made by consent, the attorney acting on that occasion for his client:—The court held him discharged from his undertaking, he not having recognised it after the original time for making the award had expired. *Staite* v. *Haddon*, 9 D. P. C. 995.

So where a defendants' attorney, on their being sued by the plaintiff, undertook by letter to procure their signature to a cognovit for the payment of the debt and costs, which he failed to do; but the plaintiff afterwards said that he would proceed with the action:—Held, that this was virtually a waiver of the attorney's undertaking, and that he could not be called on by the court to perform it. *Miller* v. *James*, 8 Moore, 208.

Mode of Enforcing.]—The undertaking of an attorney can only be enforced by attachment where he has given it for his client. *Watts, Ex parte*, 1 D. P. C. 512.

An attorney not entering an appearance in pursuance of his undertaking was liable to an attachment, under Reg. Gen., Hil. Term, 1853. *Jacob* v. *Magnay*, 12 L. J., Q. B. 93; 7 Jur. 326. S. P., *Mould* v. *Roberts*, 4 D. & R. 719.

Although on an auditâ querelâ personal service of the original process cannot be dispensed with, yet an attorney who undertakes to accept process and appear for the defendant may be punished by attachment for not performing his undertaking. *Williams* v. *Roberts* 1 L. M. & P. 381; 19 L. J., Ex. 269; 14 Jur. 399.

Application—Service of.]—Service of a rule calling on an attorney for payment of money pursuant to his undertaking, on a clerk not in his employ, although at the place registered at the master's office as the place for serving the attorney with rules and other proceedings, is not sufficient. *Bragg* v. *Hatchard*, 28 L. J., Ex. 35.

—— **By whom Made.**]—On summary proceedings against a solicitor to enforce an undertaking given by him to the solicitor of the other party, such undertaking is for the benefit of the client, and the application must be made on behalf of the client and not of his solicitor. *Lee, Ex parte*, 10 W. R. 699.

III. ATTACHMENT.

Enforcing Undertakings.]—*See* supra.

Disobedience to Order of Court.]—The first step, when a solicitor neglects to obey an order of court, is to move for his attachment. *Anon.*, 36 L. T. 113.

Where an attorney is in contempt for disobeying a rule, the proper course of proceeding against him is by moving for an attachment, and not by applying to strike him off the roll. *Townley, Ex parte*, 3 D. P. C. 39.

Where an attorney disobeys a rule of court requiring him to do a particular act, an application cannot in the first instance be made to strike him off the roll, but a rule nisi for an attachment may be obtained; if by the same rule he is required to pay certain costs, and a clause is also introduced into it authorising the issue of attachment in case of nonpayment, that may at once issue although a rule nisi only will be granted for disobedience to the other part of the rule. *Grant, Ex parte*, 3 D. P. C. 320.

Twelve months after issue joined in an action, a judge made an order that the plaintiff's attorney should declare in writing to the defendant the plaintiff's occupation, and that after five days all further proceedings should be stayed until such delivery. The order having been served and disobeyed:—Held, that the order was not within 15 & 16 Vict. c. 52, s. 7, and that an attachment would not lie against the attorney for such disobedience. *Malpas* v. *Mudd*, 3 H. & N. 246; 27 L. J., Ex. 367.

To entitle a defendant to obtain an attachment against an attorney for disobeying an order of a judge, made for not declaring the place of abode of the plaintiff, he must have made a demand in writing. *Brown* v. *Wigens*, 7 L. T. 622.

See PRACTICE (WRIT).

Default in Payment subsequent to Order Striking off Roll.]—Where a solicitor makes default in payment of a sum of money which he has been ordered to pay in the character of an officer of the court, he is not the less liable to an attachment because in the interval between the date of the order and the time fixed for payment he has been struck off the roll, and has ceased to be a solicitor. *Strong, In re*, 55 L. J., Ch. 553; 32 Ch. D. 342; 55 L. T. 3; 34 W. R. 614; 51 J. P. 6—C. A.

Unqualified Person acting as Solicitor.]—An order had been made against an unqualified person acting as a solicitor, on the assumption that he was a solicitor, for the delivery up of documents by him and for an account. This order he disobeyed. Upon an application for attachment:—Held, that the court had jurisdiction to make an order of attachment against such a person, notwithstanding that he was not in fact qualified to act as a solicitor. *Hulm and Lewis, In re*, 61 L. J., Q. B. 502; [1892] 2 Q. B. 261; 66 L. T. 683.

An Officer of the Court.]—A solicitor received on behalf of a client a sum of 339*l.*, which he paid into his account with his own bankers and dealt with as his own money. He afterwards forwarded to his client a sum of 100*l.*, and refused to pay the balance, on the ground that he had a claim against an agent whom his client had employed to communicate with him. Application having been made to the queen's bench division to compel the solicitor to pay the money, the matter was referred to a master, who reported that the balance was due from the solicitor to his client. An order was made by the queen's bench division, and also a subsequent order was made at chambers, that the solicitor should pay the balance claimed to his client. These orders not having been complied with, an order for the attachment of the solicitor was made by a judge at chambers:—Held, that the orders for the payment of the balance claimed were not merely in

the nature of civil process, but were orders made against the solicitor as an officer of the court, and that an attachment was properly granted. *Ball, In re* (L. R. 8 C. P. 104) explained. *Freston, In re* (11 Q. B. D. 545) followed. *Dudley, In re, Monet, Ex parte*, 53 L. J., Q. B. 16; 12 Q. B. D. 44; 49 L. T. 737; 32 W. R. 264—C. A.

A solicitor, employed to obtain money charged on lands sold in the landed estates court of Ireland, proved the claim, and having drawn out the money by means of a power of attorney, executed by his client under his own advice, failed to pay it over to the client:—Held, that his misconduct was committed in his capacity of solicitor, and that he was accordingly liable to attachment. *M., In re*, 1 L. R., Ir. 188—L.JJ.

Order for Payment of Money.]—Where money has been wrongfully detained by an attorney from his client, and a rule requiring him to pay that money over has been made absolute against him, it being clearly shewn that he was aware of what the rule required him to do, the court granted a rule for an attachment absolute in the first instance, he not having complied with the rule. *Burgin, Ex parte*, 1 D. (N.S.) 292.

Where an attorney employed to recover a debt received the money, and a rule of court was obtained ordering him to pay it over, which he disobeyed, the court refused to grant an attachment, as the remedy for the disobedience of the rule was by proceeding under 1 & 2, Vict. c. 110, s. 18. *Robinson, In re*, 10 B. & S. 75.

The court will refuse to grant an attachment against an attorney for disobeying a rule of court ordering him to pay money, unless special circumstances are shewn, as the remedy for such disobedience is by execution under 1 & 2 Vict. c. 110, s. 18. *Ball, In re*, 42 L. J., C. P. 104; L. R. 8 C. P. 104.

When a solicitor made default in the payment of a sum of money which he received on behalf of his client, and an order for payment within a certain date was obtained from the court, the client undertaking to give credit for any sum due by her, on nonpayment of the sum, within the fixed period, an order for an attachment was obtained. The solicitor not having made any affidavit of credits due from the client, was not allowed to treat them as a set-off against the sum for nonpayment of which the attachment was sought. *Anon.*, 22 W. R. 479.

See also infra, PAYMENT OF MONEY, post, col. 1511.

For Negligence.]—Where a solicitor has been negligent in attending to a client's business, the court can grant an attachment against him; and courts of law exercise the same summary jurisdiction over attorneys. *Floyd* v. *Nangle*, 3 Atk. 568. *S. C.*, nom. *Lloyd* v. *Nangle*, Dick. 129.

Order to deliver up Documents.]—The court will not issue an attachment against an attorney for not delivering up papers pursuant to a rule of court, unless shewn that the person making the demand was duly authorised to do so, and stated that fact to the attorney. *Doe* d. *Hickman* v. *Hickman*, 8 D. P. C. 833. See *Dicas, In re*, 9 L. J. (o.s.) Ch. 183.

A judge's order having been made directing an attorney to deliver up deeds to a client, the court granted an attachment against him for refusing to deliver them up unless the client would pay him for a schedule thereof, to be kept by the attorney. *Willand, Ex parte*, 11 C. B. 544.

See also infra, DELIVERY UP OF DOCUMENTS, post, col. 1503.

Debtors Act, 1869, s. 4, sub-s. 4.]—The default by a solicitor in payment of a balance found due from him upon taxation of his bill under the common order for that purpose is in default in payment of a sum of money ordered to be paid by the solicitor in his character of an officer of the court within the meaning of the Debtors Act, 1869, s. 4, sub-s. 4, and an attachment may be issued against him. *Rush, In re*, 39 L. J., Ch. 159; L. R. 9 Eq. 147; 21 L. T. 692; 18 W. R. 331. S. P., *W., In re*, Ir. R. 8 Eq. 355; 22 W. R. 479.

A solicitor may be imprisoned for default in payment of a balance ordered to be paid on a common order to tax his bill of costs. *Ib.*

Default by a solicitor in payment of the balance found due from him to his client upon taxation, under the common order, is default in payment of a sum of money, when ordered to be paid by a solicitor in his character of an officer of the court (Debtors Act, 1869, s. 4), and an attachment may be issued against him. *White, In re*, 23 L. T. 387; 19 W. R. 39.

Default by a solicitor in payment of a bill of costs found on taxation to be due from him to another solicitor whom he had employed to act for him, is "default by a solicitor in payment of a sum of money, when ordered to pay the same in his character of an officer of the court making the order," within the fourth exception to the Debtors Act, 1869, s. 4, and an attachment may be issued against him. *Barfield, In re*, 24 L. T. 248; 19 W. R. 466.

A solicitor was ordered to pay the costs of an unsuccessful appeal against an order to tax his bill of costs, which had been obtained by his client:—Held, that the nonpayment of the costs of the appeal was not a default in payment of money within the Debtors Act, 1869, s. 4, sub-s. 4. *Hope, In re*, 41 L. J., Ch. 797; L. R. 7 Ch. 523; 26 L. T. 814; 20 W. R. 694.

Of the three possible periods for ascertaining whether the person ordered to pay and making default held the character of a solicitor, and was as such within the exception of s. 4, sub-s. 4, of the Debtors Act, 1869, viz.:—(1) of the act done; (2) of the order made; or (3) of the default committed, that to be looked to is, if not the first, at the latest the second period. In cases of a trustee and person acting in a fiduciary capacity (sub-s. 3) (and per Fry, L.J., in that of a solicitor also) the period to be looked to is that of the act done. *Strong, In re*, 55 L. J., Ch. 553; 32 Ch. D. 342; 55 L. T. 3; 34 W. R. 614; 51 J. P. 6—C. A.

—— **Part Payment.**]—A writ of attachment against a solicitor for nonpayment of a sum of money due from him as an officer of the court may be executed, although the client has since the issue of the writ accepted a sum of money in part payment. *Harvey* v. *Hall* (L. R. 16 Eq. 324) distinguished. *Fereday, In re*, 64 L. J., Ch. 894; [1895] 2 Ch. 437; 13 R. 639; 73 L. T. 56.

—— **Town Agent of Country Solicitor.**]—A solicitor, the London agent of a country solicitor, made default in payment of a sum ordered to be paid by him in an action for an account of his agency:—Held, that the defendant was liable to

imprisonment under s. 4, sub-s. 3, of the Debtors Act, 1869, as a person acting in a fiduciary capacity, but not liable under s. 4, sub-s. 4, as a solicitor ordered to pay in his capacity of officer of the court. *Litchfield* v. *Jones*, 57 L. J., Ch. 100; 36 Ch. D. 530; 58 L. T. 20; 36 W. R. 397.

—— **How Discharged from Prison.**]—When a solicitor has been committed to prison under the Debtors Act, 1869, s. 4, for disobeying an order to pay money into court, on the expiration of twelve months he can be discharged only after obtaining an order of the court. *Thompson, In re, Nalty* v. *Aylett*, 30 L. T. 783; 22 W. R. 857.

Not Refunding Money pursuant to Master's Allocatur.] — An attachment may be issued against an attorney for not refunding a sum of money pursuant to the master's allocatur, without a previous rule to show cause. *Anon.*, 10 Jur. 198, n.

When Right Lost.]—A solicitor was ordered to pay money to a receiver of the court on pain of sequestration and imprisonment. His property was seized on a fi. fa. under the order, but possession was given up under an agreement:—Held, on breach of the agreement by him, that he could not be attached under the order. *Harvey* v. *Hill*, 43 L. J., Ch. 95; L. R. 16 Eq. 324; 28 L. T. 734; 21 W. R. 783. See *Fereday, In re*, supra.

Solicitor not Shewing Cause.]—A rule requiring an attorney to shew cause why he should not pay a sum of money, was enlarged at his request, but no cause being shewn, and the rule being made absolute, the court granted an attachment absolute in the first instance. *Brightmore, Ex parte*, 6 Jur. 15.

Disobedience to a Subpœna.]—An attachment will lie against a solicitor of a parish for disobedience to a subpœna duces tecum from the crown office, requiring him to produce the rate-books of the parish at petty sessions in an inquiry into a pauper's settlement. *Reg.* v. *Carey*, 2 New Sess. Cas. 103.

Order requiring Client to Pay.]—If a rule of court requires a client to pay a certain sum of money, an attachment cannot be obtained against his attorney for its nonpayment. *Poole* v. *Watkins*, 4 D. P. C. 11.

Delivering Account Ordered — Incorrect.]—Where a client obtained an order that his attorneys should deliver him an account of all moneys received on his behalf, and they accordingly delivered an account, the court refused to grant an attachment against them upon affidavits impeaching the correctness of the account. *Lawrence, Ex parte*, 2 D. P. C. 230.

Effect of Bankruptcy.]—A bankrupt's certificate does not remove an attorney's liability to an attachment for not duly investing his client's money. *Grant, Ex parte*, 3 D. P. C. 320. See *Newberry, In re*, 5 N. & M. 419; 1 H. & W. 375; 5 A. & E. 100; 5 L. J., K. B. 4.

An attachment against a solicitor for his default in the payment of a sum of money, which he has been ordered to pay in his character of an officer of the court, is not a merely civil process, but is in its nature punitive or disciplinary, and therefore the fact that a receiving order in bankruptcy has been made against the solicitor is not of itself a sufficient reason for refusing to issue an attachment against him in such a case; but that when such an order for the payment of money has been made against a solicitor before the making of a receiving order against him, and he has not obeyed it, the court has, under s. 10 of the Bankruptcy Act, 1883, a discretion whether it will order an attachment to issue by way of punishment to the solicitor, and it will decline to do so if it is satisfied that the person who asks for the order can derive no benefit from it, and that the making of it will embarrass the bankruptcy proceedings. Sect. 9, sub-s. 1, of the Bankruptcy Act, 1883, does not apply to proceedings pending against a debtor at the time when a receiving order is made against him. On appeal:—Held, that the court of appeal would not interfere with the discretion of the court below. *Wray, In re*, 56 L. J., Ch. 1106; 36 Ch. D. 138; 57 L. T. 605; 36 W. R. 67—C. A.

Misdescription of Parties.] — The court set aside an attachment against an attorney for not paying over moneys received in his professional character, where the party obtaining it had described herself in her affidavit as a widow, whereas she was at that time a married woman, although it did not appear that the false name and descriptions were used for any fraudulent purpose. *Reg.* v. *Carttar*, 1 L. M. & P. 386; 19 L. J., Q. B. 422.

An attachment was ordered absolutely in the first instance against an attorney for nonpayment of money to another attorney of the party, for whom the former had been changed pursuant to an order of the court; although in that order, as well as in the order for changing the attorney, he had been called John, whereas his real name was James; but he had attended several summonses taken out as against John, and had consented to some of them without objecting to the misnomer, which cured the mistake. *Stevenson* v. *Power*, 9 Price, 384.

Not without Notice.]—Under an order to tax made in 1873, a balance was found due from a solicitor in respect of moneys received by him, and ought to have been paid within twenty-one days from the 21st of August, 1875:—Held, that the case was governed by Rules of Court, 1875, Ord. XLIV. r. 2, and that an attachment for nonpayment could not be issued without notice to the solicitor. *Solicitor, In re*, 1 Ch. D. 445; 24 W. R. 103.

Service of Order against Solicitor.]—An action was ordered to be stayed, and the costs of the defendants to be paid by the plaintiff's solicitor. The order was served by leaving a copy at the office of the solicitor, but was not obeyed. Upon the application of the defendants, the court made an order for an attachment to issue against the solicitor, and for payment by him of the costs, of the application and the attachment as between solicitor and client. *Tilney* v. *Stansfield*, 28 W. R. 582.

Personal service of an attachment against an attorney for not paying money pursuant to the master's allocatur cannot be dispensed with. *Anon.*, 1 D. & R. 529.

Service of Rule Nisi.] — A notice of motion for a writ of attachment for disobedience to an order made on an original petition need not, as well as the order, be served personally on the

respondent to the petition, but may be served by being left at his residence. *Browning* v. *Sabin* (5 Ch. D. 511) explained. *Ryan, In re*, 49 L. J., Ch. 295 ; 14 Ch. D. 152 ; 42 L. T. 310 ; 28 W. R. 529.

On a motion for an attachment against an attorney for disobeying a rule, it is sufficient if it can be collected from the affidavit of service that such rule has been personally served ; it is not necessary that the words "personal service" should be used. *Short* v. *Smith*, 1 Man. & G. 211 ; 8 D. P. C. 584 ; 1 Scott (N.R.) 153.

A rule nisi was obtained against a solicitor to shew cause why an attachment should not issue against him for disobedience to an order of the court. There was no personal service of such rule nisi upon him. He had at one time instructed counsel to show cause against the making absolute of such rule, and such counsel had consented to an application for a postponement of the hearing being made to the court by the counsel for the applicant, but upon the application to make absolute the rule nisi, the counsel who had been instructed formerly did not appear, nor did anyone appear on behalf of the solicitor. The court held that personal service might, under the circumstances, be dispensed with, and made absolute the rule for an attachment. *Alcock, In re*, 45 L. J., C. P. 86 ; 1 C. P. D. 68 ; 33 L. T. 532 ; 24 W. R. 320.

Service of a notice of motion for a writ of attachment upon the solicitor on the record, of the party against whom the attachment is to be issued, is sufficient notice to the party, without personal service. *Browning* v. *Sabin*, 46 L. J., Ch. 728 ; 5 Ch. D. 511.

A notice of motion under Ord. XLIV. r. 2, for leave to issue a writ of attachment, is sufficiently served upon the solicitor upon the record of the party against whom the attachment is to issue. *Richards* v. *Kitchin*, 36 L. T. 730 ; 25 W. R. 602.

Service of a rule on the London agent of a country firm is good service, so as to found a motion for a contempt against a partner who allows it, but it is not sufficient as regards the other partner. *Holiday, In re*, 9 D. P. C. 1020 ; 5 Jur. 532.

Order for Delivery of Bill not complied with.]—*See* post, col. 1547.

IV. DELIVERY UP OF DOCUMENTS.

Production of Documents for the Purposes of Evidence.]—*See* EVIDENCE.

When Order will be made.]—The court will not summarily order a solicitor to deliver up a deed to his client unless it be clearly shown not only that his solicitor has no lien upon it, but that he is holding it for the applicant alone, and as his solicitor. *Cobeldick, Ex parte*, 12 Q. B. D. 149 ; 49 L. T. 741 ; 32 W. R. 239—C. A.

Death of Solicitor.]—An administrator appointed pendente lite is entitled to call upon the late attorney of the deceased to deliver up deeds and papers belonging to the deceased, which are in his possession. *Du Faur, Ex parte*, 3 Hodges, 135.

The court refused to grant a rule calling upon an attorney to deliver up papers, when it appeared that the documents had come into his possession as executor to his father, who had been attorney to the applicant, but where the applicant did not adopt the son as his professional agent. *Nicholls, Ex parte*, 2 D. (N.S.) 423 ; 12 L. J., Q. B. 103 ; 7 Jur. 374.

No Cause in Court.]—Order, without cause in court, upon general jurisdiction over solicitor, that he shall deliver his bill for purposes of getting from him title deeds deposited with him for suffering recoveries, &c. *Uxbridge (Earl), Ex parte*, 6 Ves. 425.

Where a solicitor has in his possession deeds and papers belonging to his client, which he refuses to part with, the court has jurisdiction to order the solicitor to deliver the deeds and papers, and also his bill of costs, the party offering to pay what the master shall find to be due to him, though there is no cause pending, and though no part of the costs has been incurred in respect of any action or suit in law or equity. *Murray, In re*, 1 Russ. 519.

Though there is no cause pending, the court will order a solicitor to deliver up deeds and writings in his possession, the party undertaking to pay him the costs justly due to him ; and, as incident to that jurisdiction, it will order the costs to be taxed, though no part of the costs relates to suits or actions. ——, *In re*, 4 L. J. (o.s.) Ch. 207.

What Costs.]—Where a solicitor refuses to deliver up deeds and papers in his possession, except upon payment of his bill of costs, the court has jurisdiction to order taxation of such bill, and the delivery up of the deeds and papers, upon payment of the taxed costs, though the costs have been incurred in respect of conveyancing and other general business, and not in respect of the prosecution or defence of any suit or action. *Rice, In re*, 2 Keen, 181 ; 6 L. J., Ch. 291 ; 1 Jur. 351. *See two preceding Cases.*

A solicitor prepared and obtained the execution of a conveyance, knowing the title deeds were in the possession of an adverse party. The sale went off in consequence of absence of title deeds, and the conveyance, being a cloud on the title, was ordered to be delivered up by the solicitor without payment of his costs. *Potts* v. *Dutton*, 8 Beav. 493.

When Solicitor has a Lien upon them.]—The court will not order an attorney to deliver up papers on which he has a lien for a balance of a bill of costs, although an offer is made to pay the amount into court, subject to the verdict of a jury. *Broomhead, In re*, 5 D. & L. 52 ; 16 L. J., Q. B. 355. S. P., *Cobeldick, Ex parte*, supra.

—— **Payment into Court or giving Security.**]—The court has jurisdiction, upon payment into court, or giving security for a sum sufficient to answer the solicitor's demand, to order before taxation delivery up by a solicitor of the client's papers, where retention by the solicitor of the papers on which he claims a lien would embarrass the client in the prosecution or defence of pending actions. Quære (per Lindley, L.J.), whether the jurisdiction is not extended by Ord. L. r. 8. *Galland, In re*, 55 L. J., Ch. 478 ; 31 Ch. D. 296 ; 53 L. T. 921 ; 34 W. R. 158—C. A.

Where a solicitor had been appointed clerk to a local board, with a salary, for conducting the legal as well as the ordinary business of the board :—Held, that an order for production of papers would prejudice the clerk's lien, it could

not be made before the trial of the action without payment into court of a sum sufficient to meet the amount claimed by the clerk, upon which he was to have the same lien as upon the papers; and the court ordered that upon that being done the clerk should deliver up to the plaintiffs all books and papers claimed. *Newington Local Board* v. *Eldridge*, 12 Ch. D. 349—C. A.

Where a party has a pressing necessity for papers in the hands of his solicitor, the court will order them to be delivered up, upon a deposit being made, sufficient to cover the amount of the solicitor's bill and the costs of the taxation. *Clutton* v. *Pardon*, Turn. & R. 304; 24 R. R. 68.

A solicitor, who had by deposit of his client a lien on deeds for costs and other moneys, was ordered to deliver them up to his client on payment into court by the latter of a sum sufficient to cover the demand, and the usual taxation was directed. *Mills* v. *Finlay*, 1 Beav. 560.

Where the committees of a lunatic had been authorised by the court to raise money by a mortgage of his estate, but were unable to do so, in consequence of some of the title deeds being in the hands of solicitors, who claimed a lien upon them, but the items of their accounts were disputed, the court ordered that the mortgagee should be at liberty to pay to the committees a sufficient sum to discharge the lien on the title deeds, without prejudice to their right to have the accounts investigated. *Davies, In re*, 12 L. J., Ch. 456; 7 Jur. 584.

In a suit instituted against a solicitor, who had also acted in the capacity of steward for an account, and for delivery of title deeds, the court upon motion ordered the deeds to be delivered up to the plaintiff, upon payment into court of so much of the balance claimed by the answer, as was not covered by any security. *Balch* v. *Symes*, Turn. & R. 87; 23 R. R. 195. See *Tyler* v. *Drayton*, 2 Sim. & S. 309.

The lien of a solicitor on the papers of his client for the amount of his bill is equivalent to a contract; and, therefore, a solicitor will not be ordered to deliver up such papers until he is actually paid; and, semble, that payment into court of a sum of money is not sufficient to entitle the client to demand the papers; but semble also, that if the solicitor's withholding a document would occasion the loss of the property to which it relates, the court will make such an order as, without prejudicing the solicitor's lien, will allow of the documents being made available for the purpose of securing the property. *Richards* v. *Platel*, Cr. & Ph. 79; 10 L. J., Ch. 379; 5 Jur. 834.

It requires a strong case to induce the court to take the papers from a solicitor; still this court has authority to compel the production of the deeds upon the money being brought into court. *Blunden* v. *Desart*, 2 Con. & L. 111; 2 Dr. & War. 405; 5 Ir. Eq. R. 221.

The court will, before the completion of the taxation, order the delivery up of papers by a solicitor to his client, either upon payment into court of the amount claimed, or in case it appears from the solicitor's own account that a balance is due from him to his client. *Bevan and Whitting, In re*, 33 Beav. 439.

A solicitor ordered, pending a taxation of his bill, to deliver over his client's papers, on the client undertaking to produce them, and giving security for the amount claimed. *Jewitt, In re*, 34 Beav. 22.

Upon an application for delivery over of all documents in a discharged solicitor's possession made by clients undertaking to pay into court a sum amply sufficient to secure the solicitor in respect of all demands, the court will make the order asked for, provided that circumstances of pressing necessity are shewn. *South Essex Equitable Investment and Advance Co., In re*, 46 L. T. 280.

A solicitor, having a lien upon a deed for his costs, will not be ordered to deliver his bill, nor deliver up the deed without getting an express undertaking that his costs will be paid when taxed. *M'Kenny* v. *Chambers*, Jon. & C. 105.

The court will not order a solicitor to deliver up papers in his hands before his bill is taxed, on payment of money on account. *Dyer* v. *Bowley*, 2 L. J. (o.s.) C. P. 41.

No Retainer—Estoppel.]—If a party successfully resists an action by an attorney for costs, on the ground of his never having been employed, he cannot afterwards summarily compel the attorney to give up documents which have come into his possession in the course of the business, for doing which the action was brought. *Maxwell, Ex parte*, 4 D. P. C. 87.

When Solicitor holds as Party or Trustee.]—The court will not compel an attorney to deliver up a deed where he holds it as a party or trustee. *Pearson* v. *Sutton*, 5 Taunt. 364.

But the court ordered an attorney, who held a deed as trustee, to deliver the draft of it to the cestui que trust, who had paid for the deed and draft. *Holdsworth, Ex parte*, 4 Bing. (N.C.) 386; 6 Scott, 170; 1 Arn. 189; 7 L. J., C. P. 225.

Where an attorney has drawn his own marriage settlement, under which he takes no interest, but is mentioned in it, and it is deposited with him for safety, the court will not compel him to give it up at the instance of a trustee under it. *Moxon, Ex parte*, 1 D. P. C. 7.

In Solicitor's Hands for Professional Purposes.]—The court will not compel an attorney to deliver up, on payment of his demand, a lease put into his hands for the purpose of making an assignment of it; there being no cause in court, nor any criminal conduct imputed to him in respect of it. *Lowe, In re*, 8 East, 237.

The court refused to order an attorney to deliver up a deed which had been given to him by one of the parties to it, to get executed by his client, who was another party. *Smart, Ex parte*, 1 H. & W. 526.

If an attorney receives possession of a deed from A., his client, in which B. is also interested, the court cannot compel the attorney, in an action brought against him by B., to give B. a copy of the deed. *Miers* v. *Evans*, 3 Jur. 170.

Where an attorney is employed by certain cestui que trusts, the court will not compel him to deliver up deeds to one of several trustees, one of such trustees objecting to the application. *Gregory, In re*, 6 Jur. 282.

A bond was taken from A., by a magistrate, on the charge of obtaining it by false pretences. A bill before the grand jury having been ignored, the bond was given to the attorney for the prosecution, who refused to deliver it up:—Held, that the court could not interfere. *Morris, Ex parte*, W. W. & D. 59; 1 Jur. 151.

The court will not compel an attorney to

deliver up, on payment of what is due to him, deeds which have been intrusted to him for the purpose of raising money upon them. *Millard, In re*, 1 D. P. C. 140.

But he is bound upon inquiry by his client, to inform him where such deeds are. *Wilmott* v. *Elkington*, 1 N. & M. 749 ; 2 L. J., K. B. 103.

The court can only interfere to compel an attorney to deliver up deeds in his possession, at the instance of the party who deposited them with him. *Thornton, In re*, 2 D. P. C. 156. See *Bunting, In re*, 2 A. & E. 467.

An attorney, with whom a will has been deposited by the testator, will not be compelled to deliver it up to the sole legatee under it. *Crisp, Ex parte*, 2 D. P. C. 455.

Where parties settle a case, without the intervention of the attorney, that settlement is no answer to an application against the attorney to deliver up the record to the opposite party, when successful. *Baber* v. *Harris*, 7 D. P. C. 589.

After Payment by Client.]—An attorney is not entitled to retain drafts and copies of original deeds for which his client has paid ; and if he will not deliver them up, the court will compel him to do so. *Horsfall, Ex parte*, 7 B. & C. 528 ; 1 M. & Ry. 306 ; 6 L. J. (O.S.) K. B. 48 ; 31 R. R. 266.

If A. has employed B. as his attorney, and has paid his bill, A. has a right to have his papers delivered up to him. *Anderson* v. *Passman*, 7 Car. & P. 193.

Solicitors, instructed by a committee of an association to carry on various matters of business for and on behalf of the association, having recovered judgment against one of the committee, for the amount of their bills of costs in respect of such matters, cannot be made to deliver up, to such defendant, the judgment after it has been paid and satisfied by him, or other securities connected with the debt held by them, either in virtue of the general jurisdiction of the court over solicitors as its officers, or under 19 & 20 Vict. c. 97, s. 5 ; the defendant can only proceed by action. *Phillips* v. *Dickson*, 8 C. B. (N.S.) 391 ; 29 L. J., C. P. 223 ; 6 Jur. (N.S.) 401 ; 2 L. T. 185 ; 8 W. R. 390.

Promissory Note obtained from Client by Duress.]—Where, during the imprisonment of a person, he employed an attorney to conduct an application for his discharge by the insolvent court, and the attorney refused to proceed until he had signed a promissory note, which he did, under protest ; and after his discharge an action was brought upon the note in the name of the clerk of the attorney, who was believed not to be interested in it, the court refused to grant a rule, calling upon the attorney to give up the note, upon the ground of its having been obtained by duress and fraud, but left the defendant to plead the facts as a defence to the action. *Watts* v. *Blaney*, 1 D. & L. 203; 7 Jur. 854.

Where Solicitor a Steward.]—The court, under special circumstances, will entertain a summary jurisdiction over an attorney, by obliging him to deliver up deeds, on satisfaction of his lien, though they came into his hands as steward of a court and receiver of rents. *Hughes* v. *Mayre*, 3 Term Rep. 275. *Grubb, Ex parte*, 5 Taunt. 206 ; 14 R. R. 743. See *Cocks* v. *Harman*, 6 East, 404 ; 2 Smith, 409 ; 8 R. R. 505.

In Case of Bankruptcy.]—Where a client has deposited a deed in the hands of his attorney, and the latter afterwards becomes a bankrupt, the court will not summarily interfere to compel the assignees to deliver up those deeds which have come to their hands from the bankrupt. *Roy, Ex parte*, 4 D. P. C. 573 ; 1 H. & W. 669.

An attorney who receives a deed from his client, and is compelled to produce it by commissioners of bankrupt, and afterwards receives it back from them, undertaking to produce it again if required, may nevertheless refuse to produce it in an action by the assignee of the bankrupt, under whose commission he was compelled to produce it. *Nixon* v. *Mayoh*, 1 M. & Rob. 76.

When Solicitor in Prison.]—A solicitor, in custody for debt, being incapacitated from practising, was ordered to deliver up his client's papers in pending suits, without payment of his costs, but to be held subject to his lien. *Williams, In re*, 28 Beav. 465 ; 6 Jur. (N.S.) 908 ; 8 W. R. 645.

Demand.]—A demand for papers must be made by one duly authorised to give a receipt for them. *Dicas, In re*, 9 L. J. (O.S.) Ch. 183. S. P., *Doe* d. *Hickman* v. *Hickman*, 8 D. P. C. 833.

Of Papers of Two Persons Jointly.]—Where an attorney has a lien upon the papers of two persons jointly, the court will not try the rights of the parties by directing to whom they shall be given up upon the lien being satisfied. *Duncan* v. *Richmond*, 1 Moore, 99 ; 7 Taunt. 391.

Order—Form of.]—An order of course to tax directed that, on payment, all the papers, &c., of the client should be delivered up. The solicitor claimed a special lien on some of the papers beyond the costs. A motion to discharge the order was refused, because, if the solicitor had such special lien, he would be protected when application was made to the court, for the delivery of the papers. *Teague, In re*, 11 Beav. 318.

In making an order for taxation, under s. 38 of the Solicitors Act, 1843, it is discretionary with the court whether or not to add the order for the delivery up of papers. *Jarman, Ex parte*, 46 L. J., Ch. 485 ; 4 Ch. D. 835.

A solicitor delivered to his client a bill of costs incurred in pending suits, in which he afterwards, with his client's knowledge, incurred further costs. While the suits were still pending, the client obtained an order of course for taxation and delivery up of papers, whereupon the client delivered a bill for the further costs. On a motion to discharge the order on the ground that the solicitor had a lien on the papers for further costs :—Held, that the order should be amended so as to include both bills. *Ib.*

Semble, that the proper form of order in such a case would be a simple order for taxation, without ordering the papers to be delivered up. *Ib.*

—— **Time for.**]—Where, upon an application for taxation, under the Solicitors Act, 1843, it appears probable that, upon grounds not determinable under that jurisdiction, payment ought not to be made without further investigation, this court may properly abstain from ordering

payment, or from ordering the delivery up of deeds, till the questions which cannot be determined under that jurisdiction have been properly investigated and determined elsewhere. *Dalby, In re*, 8 Beav. 469.

An administration suit was instituted against an executrix, who was also tenant for life, by parties entitled in remainder. The executrix died, during the suit, intestate. The suit was revived against the administrator de bonis non of the testator, and a common administration decree taken against him, but it was not revived against the personal representative of the executrix. The executrix had placed in the hands of her solicitor deeds and papers relating to the estate, and he claimed a lien upon them for costs incurred in relation to the suit. Upon bill filed by the administrator de bonis non for delivery of the documents to him:—Held, that it could not be decided whether any lien existed until it had been ascertained whether the executrix was a debtor to the estate, which could not be ascertained in the present suit, nor in any proceeding to which the personal representative of the executrix was not a party. *Turner* v. *Letts*, 7 De G. M. & G. 243; 3 Eq. R. 846; 24 L. J., Ch. 638; 1 Jur. (N.S.) 1057; 3 W. R. 494.

Petition.]—Summary order made upon petition under 6 & 7 Vict. c. 73, for delivery by the assignees of a bankrupt solicitor, who had employed a London agent, of papers belonging to the petitioner before payment of the agent's costs. Such a petition should be entitled in the matter of the agent as well as of the country solicitor, but does not require to be entitled in the matter of the act. *Walton, In re*, 4 Kay & J. 78.

Where a court orders a solicitor to deliver up papers to be afterwards returned to him, the time for delivery is within three days, and the time for return of them ten days after the purpose is answered for which they were delivered up. *Webster* v. *Le Hunt*, 9 W. R. 827.

Where a solicitor's bill of costs or the delivery of documents in his possession is required on other grounds than those relating to taxation, the application may be made by way of petition, notwithstanding the General Order of the 17th April, 1867, *Justice, In re*, 16 W. R. 821.

In an administration suit instituted by an infant cestui que trust under a will against the executors, one of the executors admitted that part of certain sums advanced by him on mortgage formed part of the trust estate. An order was made in the suit for the completion of contracts for sales of the mortgaged property, which had been entered into by the executor. Under this order the purchase-moneys were paid into court to the credit of the cause. The order directed the executor to execute the conveyances and deliver the title deeds to the petitioners, but the executor's solicitors refused to give up the deeds, claiming a lien upon them for costs due from the executor and advances made for the maintenance of the plaintiff:—Held, that the court had jurisdiction, on petition, to order the solicitors to deliver up the deeds. *Francis* v. *Francis*, 2 De G. M. & G. 73. And see *S. C.*, 3 De G. M. & G. 108.

Originating Summons not Applicable.]—The expression, "originating summons," does not include every summons by which proceedings are commenced without writ, but has reference exclusively to summonses by which such proceedings are commenced as could formerly have only been commenced by bill or writ. Consequently the procedure laid down by the rules in the case of an originating summons does not apply to a summons for the delivery up of papers by a solicitor. *Holloway, In re, Pallister, Ex parte*, 63 L. J., Q. B. 672; [1894] 2 Q. B. 163; 9 R. 384; 70 L. T. 615; 42 W. R. 433—C. A.

Costs of Motion.]—By an order for taxation, the solicitor was ordered, on payment, to deliver over the papers. Having made default, he was ordered to pay the costs of a motion to compel him, though he had delivered them up after the notice of motion, but before it had been heard. *Minter, In re*, 19 Beav. 33.

Action on Bill after Order.]—The omission by a client to file a certificate of taxation of a solicitor's bill within the four days prescribed by the order of 29th October, 1692, does not render the order a nullity, but the client's representatives, after his death, may, notwithstanding the omission, obtain an order under the summary jurisdiction, for the delivering up of the client's papers on payment of the amount of the bill as taxed; and an action by the solicitor on the bill, after such taxation, is a contempt, and will be restrained by injunction at the instance of the representatives. *Campbell, In re*, 3 De G. M. & G. 585; 22 L. J., Ch. 865; 17 Jur. 1171; 1 W. R. 204.

Attachment.]—Messrs. G., solicitors, having been requested by P., another solicitor, on behalf of a client for whom they had hitherto acted, to deliver up all deeds belonging to the client on the usual terms, sent the deeds to a relative of the client, who held a power of attorney from him, with the bill of costs, the amount of which they retained out of moneys in their hands belonging to the client, and they then informed P. that they had no deeds in their possession, and no bill of costs against the client. An order of course was then taken out by P., on behalf of the client, for taxation and delivery up of deeds and papers, but it was not complied with, and a writ of attachment was issued against Messrs. G.:—Held, that they were not justified in refusing to deliver up the papers or to give in their bill for taxation. *Gregg, In re*, and *Prance, In re*, 39 L. J., Ch. 107; L. R. 9 Eq. 137; 23 L. T. 234; 18 W. R. 589.

—— **When in the Hands of Counsel.**]—The nondelivery of documents left by an insolvent solicitor with counsel and law stationers, and retained by them for nonpayment of fees and charges, is not a breach of an order upon the solicitor to deliver up to a new solicitor all deeds and documents in his possession or power relating to the affairs of his client in the suit. *Williams, In re*, 3 De G. F. & J. 104; 30 L. J., Ch. 610; 7 Jur. (N.S.) 323; 4 L. T. 103; 9 W. R. 393.

—— **When in the Hands of Agent.**]—Where an order has been made that an attorney deliver to a client his papers, it is no answer to an attachment for disobedience of the order, that the agent of the attorney having possession of the papers claims a lien on them in respect of agency charges. *Andrew, In re*, 7 H. & N. 87; 30 L. J., Ex. 403.

Practice on.]—The court will not grant a rule requiring an attorney to deliver up papers, and in the alternative for an attachment in case of a nondelivery, but each branch must be made the subject of a separate motion. *Roscoe* v. *Hardman*, 5 D. P. C. 157; 2 H. & W. 118.

The court will not issue an attachment against an attorney for not delivering up papers pursuant to a rule of court, unless shewn that the person making the demand was duly authorised to do so, and stated that fact to the attorney. *Doe* d. *Hickman* v. *Hickman*, 8 D. P. C. 883; 1 Man. & G. 566.

—— **Affidavits.**]—Affidavits in support of an application against an attorney, to compel him to deliver up a document, may be intitled in the action out of which the claim arises, although judgment has been signed and execution issued. *Simes* v. *Gibbs*, 6 D. P. C. 310; 1 W. W. & H. 40.

V. FOR PAYMENT OF MONEY AND OF COSTS.

Where Relation of Solicitor and Client exists.]—A client agreed in writing to lend his solicitor a sum of money to enable him to make a purchase of land, but if the purchase was not completed, the money was to be at once repaid. The purchase was not made, and the money was not returned. The client applied for an order for repayment, under the summary jurisdiction of the court:—Held, that, there being no relation of solicitor and client, between the parties in respect of the agreement, no order could be made under the summary jurisdiction of the court. *Bryant, In re*, 50 L. T. 450.

A. purchased an estate from B., and, on the completion, one solicitor acted for both parties, and the purchase-money was paid into his hands. Afterwards, the purchaser was defeated by C., who had a paramount mortgage. The purchaser presented a petition against the solicitor, asking payment by the solicitor out of the purchase-money of the losses occasioned, or that he might indemnify the petitioner. The petition was dismissed with costs; the court holding, first, that it had no jurisdiction to award compensation or damages in such a case; and, secondly, that the money having come to the hands of the solicitor as agent of the vendor, and not of the petitioner, it could not interfere. *Tylee* v. *Webb*, 14 Beav. 14; 15 Jur. 1023.

As to the summary jurisdiction of the court over solicitors, where moneys are paid to them by clients in that character. *Ib.*

A solicitor was appointed a member of a committee of a company, with power to compromise two suits. He, with the approbation of his co-committee, compromised them and received the money. A summary application that he might pay over the money or be struck off the rolls was refused with costs. *Harvey, In re*, 27 Beav. 330.

The court will not, in the exercise of its summary jurisdiction over solicitors, call upon a solicitor to account for moneys received by him where they were received by him, not in the character of solicitor to the person making the application, but of solicitor to another person. *Dixon* v. *Wilkinson*, 4 De G. & J. 508; 4 Drew. 614; 5 Jur. (N.S.) 1063; 7 W. R. 351, 624.

A. was solicitor to the plaintiff in a cause, and also to the receiver, and the receiver was in the habit of remitting the rents to him:—Held, that A. must be considered to have received the rents as solicitor or agent of the receiver, and that the plaintiff could not call upon him to account for them under the summary jurisdiction. *Ib.*

The court will not summarily compel an attorney to pay over money borrowed for his client on security, unless the security is by deed, perused by the attorney on behalf of his client. *Anon.*, 11 Jur. 396.

On an application for a rule to an attorney to produce an account of all fees and fines received by him as steward of a manor, the affidavit must disclose improper conduct on his part quâ attorney. *Attorney, In re*, 3 W. R. 515.

Where a party purchased parcel of a manor for building, and paid to an attorney, who acted for him in the purchase, money in his capacity of steward of the manor, the court refused to compel the attorney to refund the money by summary proceeding. *Faith, Ex parte*, 9 D. P. C. 973; 5 Jur. 653.

No Certificate Taken Out.]—Where an attorney being off the roll in consequence of not taking out his certificate, employed his agent to sue out process, and costs were paid in the action to the agent, the court would not compel either the attorney or his agent to refund the costs. *Nash* v. *Goode*, 9 D. P. C. 929; 5 Jur. 653.

Clerk becoming Solicitor.] — The court will not compel an attorney to pay over or account for money received by him during his clerkship. *Deane, Ex parte*, 2 D. P. C. 533.

Order against Partners.]—Where money has been paid by a client to one or two attorneys, partners, and which has been applied to their own use in account with their bankers, the court will summarily compel them to refund. *Ford, In re*, 8 D. P. C. 684.

Where a client had corresponded, and dealt exclusively with one only out of a partnership of three solicitors, and remitted a sum of money to that one alone, although desired by him to remit the money to the firm, a motion against all three partners, under summary jurisdiction of the court to compel them to pay the money, refused as to the two partners who had thus been excluded from the fair means of the knowledge of the remittance. The summary jurisdiction of the court over its officers extends to relief only in cases of personal misconduct and neglect of duty. *Lawrence, In re*, 2 Sm. & G. 367; 2 Eq. R. 931; 23 L. J., Ch. 791; 18 Jur. 742; 2 W. R. 680.

A receiver having been appointed for the plaintiffs in a cause, paid certain moneys to one of a firm of solicitors of the plaintiffs, who were also his solicitors in the matter. The partner to whom the money was paid misapplied the moneys and absconded, and the plaintiffs moved that the other partners might make good the deficiency. Where the other partners disputed their liability for the acts of the defaulting partner:—Held, that no order could be made against them under the general jurisdiction of the court over solicitors. *Chater* v. *Maclean*, 3 Eq. R. 375; 1 Jur. (N.S.) 175; 3 W. R. 261.

Effect of Bankruptcy.]—The court will not compel an attorney to pay a sum of money he has received in his character of attorney, he having after the receipt of the money become bankrupt, and obtained his certificate. *Culliford*,

Ex parte, 8 B. & C. 220; 5 L. J. (O.S.) K. B. 229. S. P., *Baron* v. *Martell*, 9 D. & R. 390; *Rex* v. *Edwards*, 9 B. & C. 652; 7 L. J. (O.S.) K. B. 341.

Unless fraud is shewn. *Bonner, In re*, 1 N. & M. 555; 4 B. & Ad. 811.

Order to Account for Money.]—Where an attorney was employed by S. to collect and get in effects due to him as administrator of another person, the court compelled such attorney to render an account to the executors of S. of moneys received by him, although he had never been employed by S. or his executors to conduct any proceedings at law, or in equity, on his or their behalf. *Aitkin, In re*, 4 B. & Ald. 47; 22 R. R. 616.

Where bills have been deposited with an attorney, and he has advanced money on them, and he refuses to account, the court will not compel him summarily to pay over the alleged balance. *Schwalbanker, Ex parte*, 1 D. P. C. 182.

Where an attorney has been employed to prepare mortgage deeds, and receives the money raised by the mortgage, he may be called upon summarily to account for it. *Cripwell, Ex parte*, 5 D. P. C. 689; W. W. & D., 356; 1 Jur. 755.

The circumstance of an attorney holding a security for his claim is not sufficient to induce the court to interfere in a summary way to compel him to account. *Cardross (Lord) In re*, 7 D. P. C. 861; 5 M. & W. 545; 9 L. J., Ex. 36.

Where an attorney, for the purpose of securing a balance due to him from a client, effected a policy of insurance on the life of a client, and charged the premiums to him, and on the client's death received the amount of the policy, the court refused to interfere summarily to compel the attorney to account with the administrator of the client to deliver up the policy. *Ib.*

When local solicitors are retained by the treasury, to conduct prosecutions on their behalf, such local solicitors are agents for the treasury, and are therefore bound to account to the treasury for any sums of money received in respect of costs, and to pay over to the treasury the difference between the sums so received as costs and the sum allowed them on taxation. *Parkinson, In re*, 56 L. T. 715.

Where an attorney received money to pay over to a proctor for probate of a will, the court refused to interfere summarily to make him account for it. *Cohen* or *Cowie, Ex parte*, 3 D. P. C. 600; 1 H. & W. 211.

Repayment—Negligence.]—The court will not compel an attorney to repay his client a sum of money expended by him in consequence of the attorney's alleged negligence, unless the negligence is clearly and unequivocally established. *Meggs* v. *Binns*, 2 Bing. (N.C.) 625; 3 Scott, 52; 2 Hodges, 10; 5 L. J., C. P. 225.

Effect of Agreement.]—Or compel an attorney to pay over money, the right to which is dependent on the existence of a special agreement between the client and the attorney, which the latter disputes. *Hodson* v. *Terrall*, 2 D. P. C. 264.

Or where the payment has been the result of an agreement. *Haigh* v. *Jones*, 6 Scott (N.R.), 696; 1 D. & L. 81.

Order when made.]—If attorney (being concerned as well for mortgagor as mortgagee) has been appointed receiver of rents and profits of mortgaged estates; and on the order made for delivery of possession, there is found to be a balance remaining in his hands beyond what is sufficient to satisfy the mortgagee; he will be ordered to pay such balance into court, notwithstanding the general report has not yet been made, on which there may possibly be found to be a greater sum of money due to him than the balance in his hands. *Lewes* v. *Morgan*, 5 Price, 42; 19 R. R. 566.

A married woman, to whom a sum of money was payable for her separate use, received a cheque from the accountant-general, and handed it over to her solicitor, who accompanied her. The solicitor was, on motion, ordered to pay the balance to his client, and held, that the onus being on the solicitor to show cause for not paying it over, he could not set up a voluntary agreement to pay her husband's debt. *Mawhood* v. *Milbanke*, 15 Beav. 36.

A solicitor, professionally concerned in a transaction for A., received on his account, in the course of that transaction, a sum of money. Afterwards it was arranged between A. and B. and the solicitor, that the sum should remain in the solicitor's hands as a security for the payment of the expenses of certain proceedings taken in parliament by B. to obtain an act for a divorce. The application to parliament having failed, and the costs of it not having exhausted the fund:—Held, that under the summary jurisdiction of the court over the solicitor, it could order the repayment to A. of the balance. *Wortham, Ex parte*, 4 De G. & Sm. 415.

A solicitor who has received and has in his hands the money of his client will be summarily ordered to pay over the amount. *Becke, In re*, 18 Beav. 462.

A solicitor received moneys for his client, an administratrix:—Held, that he could not set up proceedings by the next of kin, of whose rights he had notice, as a defence for not paying the administratrix. *Ib.*

A solicitor received from his client a sum of money to pay off a mortgage. He did not so apply it, but claimed a lien on it for his costs. He was summarily ordered to repay the amount to his client, but without interest. *Cullen, In re*, 27 Beav. 51.

The court will not call upon an attorney to repay money, or to account before the master, on the grounds merely that the attorney obtained such money from his client, as if for the purposes of a suit, but that his bill is said not to account satisfactorily for the obtaining and application of such money. *Marris, In re*, 2 A. & E. 582.

Payment into Court.] — Where a solicitor receives money to be paid into court, and neglects to do so, the court, under its summary jurisdiction, can compel him to repay the money. *Lawrence, In re*, 2 Sm. & G. 367; 2 Eq. R. 931; 23 L. J., Ch. 791; 18 Jur. 742; 2 W. R. 680.

An order was made on a trustee to pay into court interest found due from him, and the balance, beyond his costs to be taxed, of capital money certified to have come to his hands. The capital money had been received by the trustee's solicitors as part of the trust estate. The order was made on statements implying that the trustee, who was totally unable to pay, was solvent. The trustee having made default in payment of the interest, the court made an order, notwithstanding the former order, that the

solicitors should pay into court the capital come to their hands with interest. *Staniar* v. *Evans*, 56 L. J., Ch. 581; 34 Ch. D. 470; 56 L. T. 87; 35 W. R. 286.

Promissory Note taken for Debt.]—A party to an action who takes a promissory note from his solicitor for the debt which the solicitor has received from the opposite party deprives himself of the power to obtain summary relief for payment of the amount from his solicitor. *Anon.*, 3 L. J. (O.S.) K. B. 106.

Pending Action.]—Where an executor and a residuary legatee employed a solicitor in the matter of the executorship, and transferred into the joint names of client and solicitor stock to answer a legacy, and subsequently employed the same solicitor in two suits, in equity and in an action, in all of which matters costs were incurred, the court having, by an order made in both suits, ordered the payment of the legacy out of the fund, and the costs of the parties to the suits to be paid by themselves, refused a motion made on the part of the client, pending an action for the balance of bills of costs, asking that the solicitor might be ordered to join in transferring the balance of the fund, after payment of the legacy, into the client's name, on the ground that the proceedings in respect of which the costs claimed were incurred were closely connected with the purposes for which the fund was invested, and that the claim was one to be settled by a court of law. *Robinson, In re*, 5 Jur. (N.S.) 1021.

If a person commences an action against his attorney for money owing to him, he cannot make a summary application against him to make him pay the amount, until he has discontinued the action. *Anon.*, 5 Jur. 678.

Judgment recovered by Client.]—Where a solicitor has committed a breach of professional duty in failing to pay over money received by him for his client, the fact that the client has brought an action against him and recovered judgment for the money does not take away the disciplinary jurisdiction of the court summarily to order payment of the money to the client. *Davies, In re* (15 W. R. 46), not followed. *Grey, In re*, 61 L. J., Q. B. 795; [1892] 2 Q. B. 440; 41 W. R. 3—C. A.

The court will not grant a rule calling upon an attorney to shew cause why he should not pay over to his client moneys received by him as his attorney, where the client has sued the attorney and recovered judgment for such moneys against him. *Davies, In re*, 15 L. T. 161; 15 W. R. 46.

Upon whose Application Order made.]—The court will not order an attorney to pay over a sum of money received by him in his character of attorney, except upon the application of the client to whom the money is due. *Fenton, In re*, 5 N. & M. 239; 3 A. & E. 404; 1 H. & W. 310; 4 L. J., K. B. 204.

Where a summary order is asked for against solicitors to the plaintiff in an action for not paying over moneys received from a receiver appointed in that action, the receiver must be a party to the application. *Chater* v. *Maclean*, 3 Eq. R. 375; 1 Jur. (N.S.) 175; 3 W. R. 261.

Payment of Interest.]—The court will not grant an application requiring an attorney to pay over the interest of a sum of money which has come improperly into his hands. *Fenn* v. *Wild*, 1 D. P. C. 498.

Town Agent—Country Solicitor.]—The town agent of the solicitor of the plaintiff, in an action in which judgment had been recovered for a debt, refused to pay over to the plaintiff the amount of the debt which had been received by him from the sheriff under a writ of fi. fa., on the ground that he was entitled to retain such amount for a debt due to him from the country solicitor of equal amount. The country solicitor had no lien on such amount against his client, the plaintiff:—Held, that the court, in the exercise of its summary jurisdiction over its own officers, would order the town agent to pay over the amount of the debt to the plaintiff. In such a case the court will exercise its summary jurisdiction, although there be no fraud imputed to the town agent. *Edwards, Ex parte, Johnson, In re*, 51 L. J., Q. B. 108; 8 Q. B. D. 262; 45 L. T. 578—C. A.

A country solicitor receiving debt and costs on service of a writ sent to him was ordered to pay over the amount. *Walker* v. *Pearce*, 7 L. T. 285.

Retainer Denied.]—Summary process refused to compel an attorney to pay over money recovered in an action for a person who, while the action was pending, repudiated all liability and denied the retainer. *Marshall, In re*, 5 W. R. 200.

Money Repaid.]—Where a solicitor has fraudulently obtained and withheld his client's money, the repayment of the money is not a purgation of the offence. *H., In re*, 31 L. T. 730.

Practice.]—A judge has power to make an order on an attorney in a cause to pay money, and such order will be made a rule of court as of course, without a rule to shew cause. *Wilson* v. *Northorp*, 2 C. M. & R. 326; 4 D. P. C. 441; 5 Tyr. 1102.

An order upon the former solicitor to the creditors' assignee of a bankrupt's estate to pay over money forming part of the estate, and admitted by him to be in his hands, ought not to be made ex parte. *Prance, Ex parte, Kemp, In re*, 21 L. T. 341; 18 W. R. 55.

An order was made that a solicitor (who was also a trustee of a will) should pay into court trust money which he had by affidavit admitted that he had in his hands, upon motion made by the cestui que trust in a suit to administer the estate of the testator, the notice of motion being entitled in the suit and in the matter of the solicitor. *Clerihew, In re, Howard, In re*, 24 L. T. 860; 19 W. R. 939.

An application against an attorney to pay over to his client a sum of money received by him for such client, there being no imputation upon him which he is required to answer, should be made at chambers, and not to the court. *Stecher* v. *Kralick*, 17 L. T. 441.

—— **Affidavits.**]—Affidavits in support of a motion to compel an attorney to pay over money which he has received as attorney in a cause, may be entitled "In the matter of the attorney," and need not be entitled in the cause. *Randall, Ex parte, Wood, In re*, 6 D. & L. 154; 2 B. C. Rep. 294; 17 L. J., Q. B. 232; 12 Jur. 962.

—— **Service of Proceedings.**]—Where it is clearly shewn that an attorney keeps out of the

way to avoid being served with a rule for the payment of money, the court will allow service upon his clerk to be good service. *Hinton* v. *Deane*, 4 D. P. C. 352.

The court refused to make an order that service of a petition against an attorney for an order to pay certain costs for which he had been declared liable, by leaving a copy at his chambers, should be deemed good service. *Sandys, In re*, 3 Deac. & C. 34.

VI. ANSWERING MATTERS IN AFFIDAVITS.

No Primâ Facie Case — Incorporated Law Society.]—Where an application is made to the committee of the council of the Incorporated Law Society, under s. 13 of the Solicitors Act, 1888, to require a solicitor to answer allegations contained in an affidavit, and the committee are of opinion that no primâ facie case of misconduct is made out upon the affidavit, the society are not bound to take any further proceedings in the matter. *Reg.* v. *Incorporated Law Society*, 65 L. J., Q. B. 326; [1896] 1 Q. B. 327; 74 L. T. 67; 44 W. R. 307—C. A.

Criminal Offence Disclosed.]—The court will not compel an attorney to answer the matters in an affidavit, where, if the facts suggested exist, they might be the foundation of an indictment. *Robertson* v. *Mills*, 1 D. (N.S.) 772; 6 Jur. 896. S. P., *Short* v. *Pratt*, 1 Bing. 102; 1 L. J. (O.S.) C. P. 9.

Where an attorney has been guilty of such misconduct as may amount to a criminal offence, the court will not call on him to answer the matters of an affidavit. *Stephens* v. *Hill*, 10 M. & W. 28; 1 D. (N.S.) 669; 11 L. J., Ex. 329; 6 Jur. 585.

When an attorney charged with a criminal offence denies his guilt, the court will not try the issue on affidavits. *Hill, In re*, 9 B. & S. 481; 37 L. J., Q. B. 295; L. R. 3 Q. B. 543; 18 L. T. 564; 16 W. R. 1061.

The court will not grant a rule calling on an attorney to answer the matters of an affidavit charging him with an indictable offence, but they will, under such circumstances, grant a rule nisi, calling on him to shew cause why he should not be struck off the roll of the court. *Anon.*, 12 W. R. 311.

Doubt as to Fraud.]—A rule calling on an attorney to answer the matters in an affidavit on the ground of his having acted without authority, will not be granted when there is any doubt whether he may not have done so erroneously and not fraudulently. *Anon.*, 10 W. R. 86.

Payment of Sum Due on Taxation.]—It is no ground for calling upon an attorney to answer matters that he is unable to pay the amount found due from him to his client upon a taxation of a bill containing excessive and extortionate charges. *Meux* v. *Lloyd*, 2 C. B. (N.S.) 409.

Action Contrary to Injunction.]—The court will interfere to restrain an action at law the bringing of which is against the spirit, although not within the letter, of a former injunction. A solicitor assisting his client in bringing such an action may be called upon by the court to answer the matters of the affidavits. *Brenan* v. *Preston*, 1 W. R. 173.

After Death of Plaintiff.]—Where, after judgment obtained, a rule was obtained calling upon the plaintiff and his attorney to shew cause why he or his attorney should not refund a sum of money paid in the cause to the attorney, and the plaintiff had died since the commencement of the action:—Held, that the attorney, as an officer of the court, was bound to answer the affidavits on which the rule had been obtained. *Haigh* v. *Jones*, 1 D. & L. 81; 6 Scott (N.R.) 696; 5 Man. & G. 634.

Action Commenced.]—It is no answer to an application calling upon an attorney to answer the matters of an affidavit, that the applicant has already filed a bill in equity against the attorney for an account in reference to the transactions complained of, even though the proceedings in equity have resulted in a decree against the attorney. *Wright, In re*, 12 C. B. (N.S.) 705.

Sufficiency of Answer.]—Upon a rule calling upon an attorney to answer matters, the charge being that he had recovered from a defendant an excessive sum for costs, upon a false statement that judgment had been signed and execution issued, when in fact no judgment had been signed, it appearing that the attorney himself had no personal knowledge of the matter, the court discharged the rule, but ordered him to refund the overcharge and pay the costs of the application. *Eyre, In re*, 1 C. B. (N.S.) 151.

A rule having been obtained calling on an attorney to answer the matters contained in an affidavit, and his answer being unsatisfactory, the court made the rule absolute that he should answer peremptorily on the first day of the following term and pay the costs of the rule within a week. *Fairchild, Ex parte*, 23 W. R. 213.

If an attorney, required to answer the matters of an affidavit, swear in his exculpation to an incredible story, the court will grant an attachment against him, though he positively deny the malpractices imputed to him. *Crossley, In re*, 6 Term Rep. 701; 3 R. R. 322.

A rule having been obtained ordering an attorney to answer the matters in an affidavit, which charged him with a receipt of money of his client, which he had denied but had not accounted for, the attorney made, and after long delay filed, an affidavit, not denying the receipt of the money, nor that he had denied the receipt of it, and not satisfactorily accounting for it:—Held, that the court could not, without some further and substantive application, either attach him for not answering, or order him to pay the money. *Everest, In re*, 11 W. R. 114.

Not Answering.]—Upon a report by the master that the matters contained in interrogatories were not answered, the court may order the attorney to be struck off the roll. *Holmes, In re*, 12 Jur. 657.

An attorney not appearing pursuant to a rule to answer the matters of an affidavit, on being called three times in open court, a writ of attachment was ordered to be issued against him. *Easton* v. *Neville*, 18 C. B. 548. S. P., *Wicher, In re*, 5 D. P. C. 715.

If a rule is obtained against an attorney to answer matters in affidavit, and to shew cause why he should not pay a sum of money, and he does not answer the matters or shew cause why

he should not pay, the court, on an affidavit of service, will make absolute the rule to pay, and grant an attachment for not answering. *Bluck, In re*, 31 L. J., Q. B. 262 ; 6 L. T. 506 ; 10 W. R. 668.

When an attorney does not appear to shew cause against a rule calling on him to answer the matters of an affidavit, the court will make the rule absolute to answer within a certain time, and in default, that an attachment issue against him, and also that he be struck off the roll. *Worman, In re*, 1 H. & C. 636 ; 32 L. J., Ex. 83; 7 L. T. 249 ; 11 W. R. 26.

Motion—By whom made.]—An application for a rule, requiring an attorney to answer the matters of an affidavit, must be made by a gentleman at the bar. *Pitt, Ex parte*, 5 B. & Ad. 1077 ; 2 D. P. C. 439.

—— **Affidavits.**]—Affidavits, on which a rule calling on an attorney to answer the matters in an affidavit has been granted, need not be intitled at all. *Grantham, In re*, 4 D. & L. 427 ; 11 Jur. 242.

But affidavits in answer to the rule must be intitled in the same way as the rule. *Ib.*

Where, however, they are not so intitled, the court enlarged the rule in order that they might be amended. *Ib.*

Where a rule calling on an attorney to answer the matters of an affidavit is discharged by consent, the court will not allow the affidavits in support of the rule to be taken off the file of the court. *Anon.*, 12 W. R. 1012.

—— **Reference to Master.**]—Where it has been referred to the master to examine into the charges, and to report to the court, it is not competent to the counsel for the accused to go into the evidence given before the master ; the court will only look to his report. *Wright, In re*, 12 C. B. (N.S.) 705. See *Simmons, In re*, 15 Q. B. D. 348.

VII. STRIKING OFF THE ROLL.

a. For What Misconduct.

Offence not in the Character of Solicitor.]—Upon an application by the Incorporated Law Society to strike the name of a solicitor off the roll, it appeared that he had been summarily convicted of allowing houses, of which he was the landlord, to be used by the tenants as brothels :—Held, that a solicitor may be struck off the roll for an offence which has no relation to his character as a solicitor, the question being whether it is such an offence as makes a person guilty of it unfit to remain a member of the profession. Conviction for a criminal offence primâ facie makes a solicitor unfit to continue on the roll ; but the court has a discretion, and will inquire into the nature of the crime, and will not as a matter of course strike him off because he has been convicted ; and the court considered that in the present case the nature of the offence was such that the solicitor ought to be struck off the roll. *Weare, In re, Incorporated Law Society, Ex parte*, 62 L. J., Q. B. 596 ; [1893] 2 Q. B. 439 ; 69 L. T. 522 ; 58 J. P. 6—C. A.

Where an attorney, being applied to by B. to invest money for him, borrowed it upon his own security and the deposit of a mortgage deed, and afterwards committed a fraud upon B. in receiving the money due upon the mortgage without communicating that fact to B., and in continuing to pay interest to him, the court suspended his certificate for two years, though the transaction was not strictly between attorney and client. *Blake, In re*, 3 El. & El. 34 ; 30 L. J., Q. B. 32 ; 6 Jur. (N.S.) 1242 ; 2 L. T. 429.

Semble a solicitor will be struck off only for some misconduct in his business as a solicitor, or when criminal proceedings have been taken against him. *Dicas, In re*, infra.

On a motion to strike off the roll, it is not necessary that the misconduct should be in connection with his character as attorney, secus as to paying money or fulfilling an undertaking. *Hill, In re*, 9 B. & S. 481 ; 37 L. J., Q. B. 295 ; L. R., 3 Q. B. 543 ; 18 L. T. 564 ; 16 W. R. 1061.

Verdict for Libel in Civil Proceeding.]—The court will not strike a solicitor off the roll on the ground that a verdict in a civil suit has been found against him for a libel. *Dicas, In re*, 2 D. P. C. 110 ; 2 L. J., Ex. 267.

Accepting Loans from Client on attaining his Majority.]—A solicitor received from a client, within a few months of the latter attaining his majority, large sums of money. The terms upon which the money was received were not reduced to writing, but the money was regarded as a loan to the solicitor at interest. The solicitor invested the money in various speculations, and a large part of it was lost :—Held, that the solicitor was guilty of professional misconduct, meriting a sentence of suspension from practice. *Solicitor, In re, Incorporated Law Society, Ex parte*, 63 L. J., Q. B. 313 ; [1894] 1 Q. B. 254 ; 10 R. 34 ; 70 L. T. 27 ; 42 W. R. 237.

Nonpayment of Counsel's Fees.]—A solicitor who has obtained payment of the disbursements in his bill of costs, including fees to counsel, and improperly neglects to pay those fees to counsel, is guilty of professional misconduct, although he may not have received the full amount of his bill of costs. *Solicitor, In re, Incorporated Law Society, Ex parte*, 63 L. J., Q. B. 397 ; 10 R. 576.

Improperly indorsing Summons.]—An attorney indorsing a summons as if it had been attended before the judge, when in fact it had not, though a consent had been given to the order by the other side, was suspended from practice. *De Medina, In re*, 10 W. R. 627.

Injunction—False Representation.]—Solicitor falsely representing that an injunction was granted, liable to damages, to an indictment, and to be struck off the roll. *Kimpton* v. *Eve*, 2 Ves. & B. 352 ; 13 R. R. 116.

Communicating Secrets.]—Attorney prevented from communicating his client's secrets, even by striking off the roll ; not permitted to give evidence of them. *Cholmondeley (Earl)* v. *Clinton (Lord)*, 19 Ves. 268 ; 13 R. R. 183.

Conspiracy to Defraud.]—An attorney had been convicted of a conspiracy to cheat and defraud tradesmen, and among the overt acts alleged were the collusively signing of judgments and issuing writs of fi. fa. thereon. The court struck his name off the roll, though the indictment was held defective, for not setting out the names or designating the class of the persons intended to

be defrauded. *King, In re*, 8 Q. B. 129; 15 L. J., Q. B. 2; 10 Jur. 7.

Perjury.]—The court will not strike an attorney off the roll on an affidavit alleging a distinct case of perjury, unless enough appears on his own admission to render the interposition of a jury unnecessary. *Anon.*, 3 N. & P. 389.

A bill of costs of an attorney was reduced, on taxation from 1,100*l.* to 370*l.*, and 374*l.*, part of the bill, sworn to have been paid to witnesses, was reduced to 47*l.*; the court refused a rule to strike him off the rolls on the ground that the charge could be established by witnesses only, and was therefore proper for the consideration of a jury. *Anon.*, 1 W. W. & H. 355.

An attorney who had made a false affidavit of increase, which had been acted upon by the master in the taxation of costs, was fined 100*l.* for contempt of court, and suspended for three years. *Mant, In re*, 5 L. T. 254; 10 W. R. 13.

Cheating in Gambling.]—The court refused an application to strike an attorney off the roll for alleged unfair play in gambling, after the relation of attorney and client between him and the applicant had ceased; the applicant having filed a bill in chancery respecting the promissory notes given by him in payment of the money won, which was still pending. *Stratford, Ex parte*, 12 L. J., Q. B. 331; 7 Jur. 412.

Nonpayment of Money.]—Mere nonpayment of money by an attorney, pursuant to an order and rule of court, is no ground for striking him off the roll. *Guilford* v. *Sims*, 13 C. B. 370.

An attorney who has been directed by the master to refund a sum of money, disobeys the direction, and keeps out of the way, will be struck off the roll. *Anon.*, 10 Jur. 198. *See also cases* ante, col. 1511 et seq.

Improperly bringing qui tam Actions.]—It is no cause for striking an attorney off the roll, that he has commenced several qui tam actions for the purpose of revenge. *Warren, Ex parte*, 1 H. & W. 113.

Where an attorney brings several qui tam actions, and after their commencement makes an offer to the defendant to compromise them, it is no ground for striking him off the roll. *Smith* v. *Gillett*, 3 D. P. C. 364.

Acting without Authority.]—A solicitor took upon himself without authority to instruct counsel to appear for parties, one of whom was abroad at the time, and to consent to or not oppose a petition to transfer a fund in court in which the parties had important interests, upon which petition the fund was ordered to be transferred, and the fund was lost. The solicitor's explanation of his conduct not being satisfactory, he was ordered to be struck off the roll, although he was not a party, but only a witness in the cause. *Collins, In re*, 7 De G. M. & G. 558; 3 Eq. R. 865; 24 L. J., Ch. 732; 1 Jur. (N.S.) 1125.

A solicitor, who had filed a bill for specific performance in the name of the assignee of a bankrupt, without having obtained his consent or retainer, and who had also allowed his client to make an affidavit containing a statement which he knew to be false, was sentenced to be suspended for the space of ten years from practising as an attorney or solicitor. *Gray, In re*, 20 L. T. 730.

Acting without authority in conducting a prosecution of a prisoner for felony is no ground for striking an attorney off the roll. *Davis, In re*, 1 B. C. C. 207; 2 W. R. 58.

Defect in Articles, Service, Admission, or Inrolment.]—A motion to strike an attorney off the roll on the ground of misconduct, and the want of regular service in his clerkship, comes too late when the party had been three years and a half admitted. *Anon.*, 2 B. & Ad. 766; 9 L. J. (O.S.) K. B. 321.

An attorney who has been admitted fraudulently will be struck off the roll, and the court will grant an attachment against the master. *Hill, Ex parte*, 2 W. Bl. 991.

Where an attorney had been admitted on payment of a less amount of stamp duty than was by law required, by mistake of the officers of the court or the stamp office, and without any fraud or mala fides on his part, the court will make an order for striking him off the roll, unless he consents to pay the proper duty. *Myers, In re*, 8 Q. B. 515; 15 L. J., Q. B. 209; 10 Jur. 563.

The court will not strike a solicitor off the roll on account of an irregularity in the service of his clerkship and misconduct prior to his admission. *Page, In re*, 1 Bing. 160; 7 Moore, 572; 1 L. J. (O.S.) C. P. 45.

Signing Fictitious Name.]—Semble, that a solicitor by signing a fictitious name to a demurrer, purporting to be a barrister's signature, renders himself liable to be struck off the roll. *Smith* v. *Matham*, 4 D. & R. 738.

Solicitor Trustee.]—Where a solicitor was a trustee, and had appropriated the trust fund, which was in court, to his own use, the court ordered him to be struck off the roll. *Thorndike* v. *Hunt*, 5 Jur. (N.S.) 879.

A solicitor who, being one of the trustees of a settlement, had been guilty of fraudulent misapplication of, and misrepresentation as to, a part of the trust fund, was ordered to be struck off the rolls upon the petition of his co-trustees. In such a case, the fact that the delinquent was not, at the time of committing the fraud in question, acting as the solicitor of the defrauded cestuis que trustent is immaterial. *Hall, In re, Dolland* v. *Johnson*, 2 Jur. (N.S.) 633; 4 W. R. 686.

A court of equity, ex mero motu, ordered a solicitor trustee who had been guilty of a breach of trust, to shew cause why he should not be struck off the roll. *Thompson* v. *Finch*, 25 L. J., Ch. 681—L.JJ.

A solicitor induced his co-trustee to join him in executing a power of attorney, by which trust stock standing in their joint names was sold, and he obtained from such co-trustee an authority to place the proceeds to his private account at his banker's. The proceeds were subsequently lost through the solicitor's insolvency; and although he was himself entitled to a reversionary interest in a portion of the trust-property, he was struck off the roll. *Chandler, In re*, 22 Beav. 253; 25 L. J., Ch. 396; 2 Jur. (N.S.) 366.

Compromising Criminal Charge.]—It is a high misdemeanour in an attorney to compromise a criminal charge; therefore, an attorney was fined 500*l.*, and suspended six months, for taking 200*l.* from one who was charged with forgery, to let

him out of the custody of a tipstaff. *Rex* v. *Vaughan*, 1 Wils. 221.

Effect of Bankruptcy.]—The court will not strike an attorney off the roll where he has become bankrupt, having moneys of a client in his hands which ought to have been paid over, unless a clear case of fraudulent misappropriation is made out against him. *Sparks, In re*, 17 C. B. (N.S.) 727.

False Recitals in Deed.]—An attorney on the roll of the high court of Bengal prepared a conveyance on behalf of his brother containing a false recital as to the consideration, knowing the same to be false, and attested the execution of the deed with such false recital, and signed his name as a witness to the receipt of the consideration-money, knowing that no consideration had passed or was intended to pass. The deed was duly registered. The court ordered him to be struck off the roll:—Held, that he was properly called upon to explain the circumstances under which the deed was executed; but that, as there was no evidence that he was guilty of any fraudulent or dishonest intention, and as no dishonest use was attempted to be made of the deed, and as no person had been injured thereby, the circumstances were not sufficient to warrant the order of the court. *Stewart, In re*, 5 Moore, P. C. (N.S.) 187; 37 L. J., P. C. 25; L. R. 2 P. C. 88; 16 W. R. 1000.

Inducing Witness to Absent Himself.]—An attorney induced a witness subpœnaed by the opposite party, to absent himself from the trial on receiving an indemnity against the consequences of disobedience to the subpœna:—Held, that his name ought to be struck off the roll. *Stephens* v. *Hill*, 10 M. & W. 28; 1 D. (N.S.) 669; 11 L. J., Ex. 329; 6 Jur. 585.

b. PRACTICE.

Where Matters complained of Amount to Indictable Offence.] — Where an attorney has been guilty of professional misconduct in the course of a cause, the court will grant a rule calling on him to shew cause why his name should not be struck off the roll, even although the matters complained of may amount to an indictable offence. *Stephens* v. *Hill*, 10 M. & W. 28; 1 D. (N.S.) 669; 11 L. J., Ex. 329; 6 Jur. 585.

The court will not grant a rule, calling on an attorney to shew cause why he should not be struck off the roll, if the affidavits in support of the rule state an offence for which he would be liable to indictment. *Anon.*, 5 B. & Ad. 1088.

The court will not proceed summarily against a solicitor for matters which amount to an indictable offence, where it appears that the facts are not exclusively within his own knowledge. *Anon.*, 2 Jur. 467.

Suspension — Subsequent Conviction for Felony.]—It is not an inflexible rule that a solicitor who has been convicted of felony will, as a matter of course, be struck off the roll. Where a solicitor, having been employed as clerk by a firm of solicitors and having embezzled money belonging to them—for which he was suspended by the court from practice for eighteen months—was subsequently convicted on precisely the same facts of embezzlement and sentenced to imprisonment:—Held, that as all the facts which were now before the court were before the court when the solicitor was suspended, except the fact of his subsequent conviction for the felony, it would be unfair to punish him again for the same offence by striking him off the roll. *Incorporated Law Society, Ex parte, Solicitor, In re*, 37 W. R. 598—C. A. Affirming 61 L. T. 842.

Compromising Misconduct.] —A warrant of attorney given to prevent proceedings on a rule for striking an attorney off the roll is void. *Kirwan* v. *Goodman*, 9 D. P. C. 330; 5 Jur. 298.

When an attorney has fraudulently obtained and withheld his client's money, the repayment of the money is not a purgation of the offence. *H., In re*, 31 L. T. 730.

Where serious charges of misconduct against an attorney are brought before the court of which he is a member, the court will not permit any private arrangement of it to be made between the parties, but will require that such misconduct be fully explained to the satisfaction of the court. *Anon.*, 9 L. T. 299.

A solicitor, guilty of gross fraud towards, and abuse of confidence of, his client, struck off the roll; and in a fit case, such as this, for the exercise of the jurisdiction of the court, the circumstance of the latter having been negotiated for a compromise:— Held, not a ground for refusing the public protection. *Martin, In re*, 6 Beav. 337.

A solicitor having advised his client (a person in an humble station of life) to commit a breach of trust by selling out stock of which the client was a trustee, and having himself profited by the breach of trust, was ordered to be struck off the roll unless he shewed good cause to the contrary; but having, in obedience to the decree in the cause, replaced the stock and paid the costs of the suit, the court (taking into consideration his youth and other circumstances) abstained from further proceeding in the matter, upon his undertaking to pay to the other parties to the suit their costs, charges and expenses. *Goodwin* v. *Goswell*, 2 Coll. 462; 10 Jur. 422.

Application, How made.]—An application to strike a solicitor off the roll must be upon notice of motion. *Anon.*, 36 L. T. 113.

—— **By Barrister.**]—The court will not receive an application to strike an attorney off the roll, except on the application of a barrister. *Anon.*, 3 N. & M. 566.

By Person not a Client.]—A solicitor, adjudicated bankrupt, made during his public examination certain admissions. At the instance of the Board of Trade, the official receiver made an affidavit in support of an application to the committe of the Incorporated Law Society under the Solicitors Act, 1888. The charges contained in this affidavit were based entirely upon the solicitor's admissions; none of the persons alleged to have been injured by the solicitor's conduct were made parties to the application, nor were they to be called as witnessses; but it was proposed to adduce in evidence the notes of the public examination and the proceedings in bankruptcy alone. Upon the hearing before the committee, a preliminary objection was taken that the official receiver had no locus standi:— Held, that the objection was not a valid one, and that the application ought to be heard on its merits,

Incorporated Law Society, Ex parte, Sankey, In re, 59 L. J., Q. B. 238; 25 Q. B. D. 17; 38 W. R. 533—C. A. Affirming 62 L. T. 567.

Rule Nisi—Form of.]—On an affidavit imputing criminal conduct to an attorney, the form of the rule in the first instance is to shew cause why he should not be struck off the roll, or be suspended from practice for so long a time as the court shall think fit. *Attorney, In re*, 7 L. T. 716; 11 W. R. 268.

The court will not grant a rule in the alternative, calling on an attorney to shew cause why he should not be struck off the roll or answer the matters in the affidavit, as either branch of the rule should be the subject of a distinct application. *Burton* v. *Chesterfield (Earl)*, 9 Jur. 373.

Restraining Solicitor from Applying for Renewal of Certificate.]—A solicitor had not taken out his certificate for several years, and did not take any notice of an application to explain his conduct, or that he might be struck off the roll. The court, under the special circumstances of the case, did not think fit to strike him off the roll or suspend him, but made an order restraining him from applying to renew his certificate without the leave of the court. *Whitehead, In re*, 54 L. J., Ch. 796; 28 Ch. D. 614; 52 L. T. 703; 33 W. R. 601—C. A.

Time for Application.]—An attorney was convicted of embezzlement in July, 1861:—Held, that an application to strike him off the roll was not too late, though made in Michaelmas term, 1862. *Thompson, In re*, 13 C. B. (N.S.) 288; 7 L. T. 327.

Unsatisfactory Answer.]—If an attorney is called upon to answer matters in an affidavit merely, however dissatisfied the court may be with his answer, the court will not order him to be struck off the roll without giving him an opportunity of being further heard. *H., In re*, 31 L. T. 730.

Service of Proceedings.]—Where it was sworn that an attorney had no place of residence in this country, an order nisi for his being struck off the roll was permitted to be served at his last place of residence. *Mark, In re*, 4 Deac. & C. 28.

The rule nisi must be served personally. *Solicitor, In re*, 1 C. L. R. 481; 23 L. J., Ex. 24.

Where an attorney had been convicted of felony, and was undergoing his sentence, a rule to strike him off the roll was well served upon him in prison; and though he was civiliter mortuus, the court allowed counsel, instructed by his friends, to shew cause against the rule. *Thompson, In re*, 13 C. B. (N.S.) 288; 7 L. T. 327.

Affidavits.]—An affidavit to ground an application to strike an attorney off the roll for misconduct in a cause may be intitled in the cause, though judgment has been obtained in it. *Stephens* v. *Hill*, 10 M. & W. 28; 1 D. (N.S.) 669; 11 L. J., Ex. 329; 6 Jur. 585.

It is no objection to affidavits in support of an application to strike an attorney off the roll, that they are intitled as if there was a cause in court. *Caine, Ex parte*, 4 Jur. 220.

—— **Solicitor Struck off at his own Request.**]—An attorney cannot be struck off the roll on his own motion, though he has never practised, without an affidavit that no proceedings are pending against him for misconduct. *Anon.*, 1 Chit. 557.

Where he applies to be struck off the roll at his own request, he must not only swear that no proceedings are pending against him, but also that he expects none. *Gray, Ex parte*, 9 D. P. C. 336; 5 Jur. 25. S. P., *Jones, Ex parte*, 2 L. J. (O.S.) K. B. 151; *Shoobridge, Ex parte*, 4 W. R. 526; *Owen, Ex parte*, 6 Ves. 2; *Foley, Ex parte*, 8 Ves. 33.

But he need not state the ground on which he applies. *Burrell, Ex parte*, 11 Jur. 1062. S. P., *Charnock, Ex parte*, 1 W. W. & H. 548; 3 Jur. 23.

An attorney was struck off the roll of the court of exchequer at his own request, on an affidavit made by another person that an application, supported by his own affidavit, had been made by the attorney himself to the court of queen's bench to be struck off the roll there, exhibiting a rule of that court for that purpose, and alleging that the reason why no affidavit was made by the attorney in the court of exchequer was that he was out of town, and would not return in time to make the necessary affidavit to enable him to be struck off during the term. *Sturdy, In re*, 2 Jur. (N.S.) 452.

An attorney was struck off the roll at his own request, and afterwards (in the same term) applied to be restored. His affidavit described him as "one of the attorneys of the court":—The court required it to be amended. *Simpson, In re*, 1 C. B. (N.S.) 554.

Rule not acted on.]—Where a rule had been granted to strike a solicitor off the roll at his own request, but it had not been acted on, and nothing was done beyond obtaining it, it was allowed to be rescinded. *Attorney, Ex parte*, 5 W. R. 687.

Jurisdiction of Court.]—The court of common pleas has, by virtue of its general jurisdiction, power to strike an attorney off the roll of the court of common pleas at Lancaster. A fortiori, where one of its judges is pro tempore chief justice of that court. *Briggs, Ex parte*, L. R. 8 C. P. 63.

A divisional court of the high court of justice may order the name of a solicitor to be struck off all the existing rolls of the former courts consolidated into the high court of justice, and may order his name to be struck off, or not to be inserted in the register of solicitors of the supreme court of judicature. *Martin, In re*, 24 W. R. 111.

From the evidence given by a solicitor in an action in the court of the county palatine of Lancaster, he appeared to have been guilty of gross misconduct in his character of solicitor as to one of the mortgages to which the action related. The plaintiffs in the action having appealed, the conduct of the solicitor came under the consideration of the court of appeal, who directed the official solicitor to take proceedings. The official solicitor accordingly moved in the court of appeal for an order calling on the solicitor to explain his conduct, or that he might be struck off the roll:—Held, that the court of appeal had jurisdiction to entertain the application, although not brought before them by way of appeal. *Whitehead, In re*, 54 L. J., Ch. 796; 28 Ch. D. 614; 52 L. T. 703; 33 W. R. 601—C. A.

Inquiry before Committee of Law Society.] — The high court of justice has jurisdiction to award to a solicitor the costs of an inquiry before the committee of the Incorporated Law Society, when the committee by their report have exonerated him of professional misconduct. *Lilley, In re, Roney, Ex parte*, 61 L. J., Q. B. 311; [1892] 1 Q. B. 759; 66 L. T. 271; 40 W. R. 321—C. A.

An application to the committee of the Incorporated Law Society under the Solicitors Act, 1888, s. 13, was not a condition precedent to the application to strike the solicitor off the roll, the case being one where no report of a master would have been necessary before the act, and the old jurisdiction of the high court being saved by s. 19. *Weare, In re, Incorporated Law Society, Ex parte*, 62 L. J., Q. B. 596; [1893] 2 Q. B. 439; 69 L. T. 522; 58 J. P. 6—C. A.

—— **Mandamus.**] — Certain charges having been made against a solicitor, the committee of the Incorporated Law Society instituted an inquiry. The committee were of opinion that the evidence adduced by the complainant did not establish a primâ facie case against the solicitor, and at their suggestion the case was withdrawn. The court refused to grant a rule nisi for a mandamus to the committee to file a report. *Whitfield and the Incorporated Law Society, Ex parte*, 5 R. 114; 67 L. T. 856.

The statutory committee of the Incorporated Law Society, acting under s. 13 of the Solicitors Act, 1888, have an absolute discretion at any stage of the proceedings to determine that a primâ facie case of professional misconduct has not been made out calling for an answer. A mandamus will not issue against the committee ordering them to hear and determined the matters alleged and report to the court thereon, as the efficient and convenient remedy formerly open to an aggrieved applicant of coming direct to the court itself is reserved by ss. 13 and 19 of the Solicitors Act, 1888. *Reg.* v. *Incorporated Law Society, Chapman, Ex parte*, 64 L. J., Q. B. 797; [1895] 2 Q. B. 456; 15 R. 597; 73 L. T. 187; 43 W. R. 687.

Appeal to Court of Appeal.]—When the high court makes an order ordering a solicitor to be struck off the rolls for misconduct, it does so in exercise of a disciplinary jurisdiction over its own officers, and not of a jurisdiction in any criminal cause or matter within the meaning of s. 47 of the Judicature Act, 1873, and therefore an appeal lies from such order to the court of appeal. *Hardwick, In re*, 53 L. J., Q. B. 64: 12 Q. B. D. 148; 49 L. T. 584; 32 W. R. 191—C. A.

—— **Security for Costs.**] — A solicitor who appealed from an order striking him off the roll, and directing an account and payment of moneys due from him to clients of his who obtained the order, was directed to give security for costs, it being shewn that he was in insolvent circumstances. Whether security for costs would have been required if the solicitor had appealed only against an order striking him off the roll, quære. *Strong, In re*, 55 L. J., Ch. 506; 31 Ch. D. 273; 54 L. T. 219; 34 W. R. 420—C. A.

Order for Payment of Costs—Enforcement by Action.]—An order made by the court, upon an application to strike a solicitor off the roll for misconduct, and that the solicitor shall pay the costs of the proceedings may, by virtue of Ord. XLII. r. 24, be enforced by an action upon the order. An unsuccessful application by the person to whom the costs are ordered to be paid to attach the solicitor for disobedience to the order, is no bar to a subsequent action upon the order. *Godfrey* v. *George*, 65 L. J., Q. B. 249; [1896] 1 Q. B. 48; 73 L. T. 599; 44 W. R. 245—C. A.

K. COSTS.

I. AGREEMENTS AS TO.

Validity of—Payment in Proportion to Amount Recovered.]—By an agreement between a solicitor and his client, it was stipulated that the former should have 5*l.* per cent. commission on the gross amount of property recovered by him for the latter in addition to his costs:—Held, that the stipulation was contrary to the policy of the law, and that the solicitor must refund the amount received by him for commission, though included in a settled account. *Pince* v. *Beattie*, 2 N. R. 546; 32 L. J., Ch. 734; 9 Jur. (N.S.) 1119; 11 W. R. 979.

An agreement entered into by a client with his attorney, to pay him at a certain specified rate for business to be done, is not binding; but the charges made according to such agreement may be allowed on taxation, if the master, on inquiring into them, considers them proper. *Draw* v. *Scroope*, 2 B. & Ad. 581; 1 D. P. C. 69; 9 L. J. (O.S.) K. B. 291.

An agreement between a firm of solicitors and their clients, whereby the solicitors were to receive a percentage of 10*l.*, plus their ordinary charges, on the property to be recovered in an intended action, and in case no property should be recovered, then only costs out of pocket with interest thereon (semble) is clear champerty. *Solicitor, In re*, 45 L. J., Ch. 47; 1 Ch. D. 573; 24 W. R. 38.

An agreement is bad on the ground of maintenance, by which it is stipulated that an attorney, for carrying on a lawsuit pending to recover possession of an estate, shall advance the necessary moneys, and that the client shall, if he be successful, pay to the attorney, over and above the legal costs, a sum according to the benefit to the client from possession of the estate recovered. *Earle* v. *Hopwood*, 9 C. B. (N.S.) 566; 30 L. J., C. P. 217; 7 Jur. (N.S.) 775; 3 L. T. 670; 9 W. R. 272.

An agreement by a client residing in Ireland with her solicitor there that, if he would employ a solicitor in London to obtain letters of administration necessary to her obtaining a fund out of chancery, she would pay him a commission of 10 per cent. on the fund, and also reimburse him the payment to the London solicitor:—Held, to be an agreement against public policy, which the court would not enforce. *Strange* v. *Brennan*, 15 Sim. 346; 15 L. J., Ch. 389; 10 Jur. 649. Affirmed, 2 Coop. C. C. 1.

See also CHAMPERTY.

—— **Payment out of Property which is the Subject of Suit.**] — An agreement between a solicitor and his client, an illiterate person, for payment of his bills (taken at a given amount) solely out of the produce of some property, the subject of the suit, does not preclude taxation. *Ingle, In re*, 21 Beav. 275; 25 L. J., Ch. 169; 1 Jur. (N.S.) 1059.

An attorney entered into an agreement with a client to recover a debt due to the client, on the

terms that the attorney should be allowed to retain for his trouble half the sum recovered. The agreement was entered into in France, and by the law of that country it was not illegal; but the debt was to be recovered in England:—Held, that the agreement was bad, as amounting to champerty; and that the attorney was bound to hand over the amount recovered to his client, and was only entitled to retain his taxed costs. *Grell* v. *Levy*, 16 C. B. (N.S.) 73; 10 Jur. (N.S.) 210; 9 L. T. 721; 12 W. R. 378.

A letter from a client, wishing to change his solicitor for another solicitor, stating the amount of property in the suit and his own circumstances, and stating that the client is wholly unable to pay his solicitor's bill, and offering the conduct of the suit to the new solicitor, followed by a letter from the solicitor agreeing to act for the client in the suit, is not sufficient to constitute an agreement by the solicitor to look to the property for satisfaction of his costs, and to exonerate the client from liability. *Bryan* v. *Twigg*, 3 L. J., Ch. 114.

See also CHAMPERTY.

—— **To Pay Fixed or Exorbitant Sum.**]—Since the Attorney and Solicitors Act, 1870, a verbal agreement by a client to pay his solicitor a lump sum in discharge of past costs is not binding on the client. *Russell, In re*, 54 L. J., Ch. 948; 30 Ch. D. 114; 52 L. T. 794; 33 W. R. 815.

An attorney, executor to will, refusing to prove will, unless a large stated allowance was given to him, and which was agreed to, suing for the allowance it was refused him by the court. *Pomfret* v. *Murray*, 9 Mod. 230.

A petition was presented by a member of the provisional committee to compel a solicitor, who had received a gross sum of money under an agreement, in full of all demands, from the acting committee, to deliver a bill, costs, &c., for the purpose of taxation. Order made. *Bass, Ex parte, Stephen, In re*, 4 Railw. Cas. 723.

If an attorney pendente lite prevail on a client to agree to an exorbitant reward, the court will either set it aside entirely, or reduce it to the standard of those fees to which he is properly entitled. *Sanderson* v. *Glass*, 2 Atk. 296.

An agreement by a solicitor to take a gross sum from his client in lieu of costs is not void, though regarded by the court with jealousy. *Whitcombe, In re*, 8 Beav. 140; 14 L. J., Ch. 19.

The settlement of a solicitor's bill by the client for a fixed sum is valid, and will not be disturbed by the court when it has been entered into fairly, and with proper knowledge on both sides. *Stedman* v. *Collett*, 17 Beav. 608; 18 Jur. 457.

In the absence of a plea of no signed bill, delivered, it is competent to an attorney to rely upon a contract for a specific sum for business to be done, without producing a bill and shewing charges fair and reasonable amounting to or exceeding the stipulated sum. *Searth* v. *Rutland*, L. R. 1 C. P. 642.

But an agreement beforehand between a solicitor and his client to pay a specific sum in lieu of costs is illegal. *Brady, in re*, 15 W. R. 632.

An agreement between client and attorney, for the latter to be paid a lump sum in case of success attending some services of a professional character which the latter was retained to perform, is void. *Philby* v. *Hazle*, 8 C. B. (N.S.) 647; 29 L. J., C. P. 370; 7 Jur. (N.S.) 125; 2 L. T. 433; 8 W. R. 611.

Agreement by a solicitor to receive a fixed sum for costs for business hereafter to be done is not binding on the client, who is, notwithstanding payment under it, entitled to an order for the delivery of a bill of costs, and its taxation. *Newman, In re*, 30 Beav. 196.

A preliminary agreement between a solicitor and his client on obtaining a loan on mortgage, no bill of costs having been delivered, illegal, and the delivery of the bill and taxation ordered more than twelve months after completion of the transaction and payment of the balance to the client. *Cawley, In re*, 18 W. R. 1125.

—— **Fixed Sum or out of Property Recovered.**]—In the course of a protracted litigation B. had become indebted to his solicitor in 9,377*l.* (as was alleged), of which 4,696*l.* had been paid out of pocket. The solicitor agreed to accept 3,500*l.* in full for his costs, unless the client recovered the estate, in which case the client agreed to pay the full sum of 9,377*l.* The client did not dispute the validity of the agreement until seven years after, when the litigation had been successful. The court upheld the agreement. *Moss* v. *Bainbridge*, 18 Beav. 478. Affirmed, 6 De G. M. & G. 292.

—— **To Transact Legal Business at Annual Salary.**]—The solicitor of the city of London entered into an agreement with the corporation to transact their legal business at a fixed annual salary, including all emoluments, he being bound to account for all his receipts and payments, and to hand over to the corporation all costs recovered by him in excess of his disbursements and salary. By the agreement, he was also precluded from transacting business for any other client:—Held, that this agreement was not opposed to the 6 & 7 Vict. c. 73. s. 32, or to the policy of the law. *Galloway* v. *London Corporation*, 36 L. J., Ch. 978; L. R. 4 Eq. 90; 16 L. T. 407; 15 W. R. 1032.

—— **Not to Charge Extra Costs.**]—If an attorney as next friend employed to bring an action uses language to his client which leads him to believe that, in the event of his recovering, he will not have to pay extra costs, then, although such extra costs are unexpectedly heavy, he cannot recover them. *Collins* v. *Brook*, 1 F. & F. 407; 4 H. & N. 270; 28 L. J., Ex. 143.

—— **To Charge only Costs out of Pocket.**]—An attorney who undertakes to conduct a suit upon the terms that he is not to be paid unless it succeeds, is not entitled upon failure of the suit to recover money paid out of pocket. *Turner* v. *Tennant*, 10 Jur. 429, n.

An attorney, on being retained to conduct a cause, gave his client the following undertaking:—"Should the damages or costs not be recoverable in this action, I shall charge you costs out of purse only." The plaintiff obtained a verdict with damages and costs, but the defendant obtained his discharge under the Insolvent Debtors Act, and the plaintiff only received a dividend of about 7*s.* in the pound on the amount of his judgment:—Held, that the attorney was not limited by his undertaking to costs out of pocket only. *Stretton, In re*, 14 M. & W. 806; 3 D. & L. 278; 15 L. J., Ex. 16.

An attorney undertook a prosecution for perjury on the defendant's behalf, and agreed not to charge him full costs, except money out of pocket. He disbursed a large sum towards carrying on the proceedings, but, by negligence, pre-

ferred a defective indictment, and, in consequence, the prosecution failed:—Held, that he could not recover for the disbursements. *Lewis* v. *Samuel*, 8 Q. B. 685; 15 L. J., Q. B. 218; 10 Jur. 429.

An agreement to charge costs only out of pocket does not preclude taxation. *Ransom, In re*, 18 Beav. 220.

An attorney gave to his client, who had commenced an action, the following undertaking: "I undertake to carry on this action on having the cash provided for costs out of pocket; such costs not to exceed 15*l.*, including counsel's fees; not any witnesses' expenses":—Held, that this limited his right to costs to 15*l.* *Moon* v. *Hall*, 17 C. B. (N.S.) 760; 11 L. T. 274; 13 W. R. 83. See *Jones* v. *Read*, 5 A. & E. 529; 1 N. & P. 18; 5 D. P. C. 216; 6 L. J., K. B. 9.

A client, when he retained a solicitor, expressed himself dissatisfied with the usual mode of remunerating solicitors, but no definite arrangement was made as to any other mode of remuneration. Subsequently, the solicitor, in a letter to the client, stated that "until I have the pleasure of seeing you, and of finally making some general and well understood arrangement with you on the subject of costs, it shall be understood on my part, that, beyond costs out of pocket, I have no claim upon you personally." No arrangement was ever made, though the subject was often alluded to by the solicitor:—Held, that this did not amount to a concluded agreement by the solicitor to claim nothing as of right but costs out of pocket. *Wilson* v. *Emmett*, 19 Beav. 233.

—— **Payment only in Case of Success.**]—It is a good defence to an action on a solicitor's bill that he undertook to perform the business on the principle of "no cure, no pay." *Tabram* v. *Horne*, 1 M. & Ry. 228; 6 L. J. (O.S.) K. B. 24; 31 R. R. 321. S. P., *Ashford* v. *Price*, 3 Stark. 185; D. & R., N. P. C. 48; 25 R. R. 787.

—— **Agency Terms.**]—G., a solicitor, agreed to conduct the defence to a suit of S., a solicitor, upon terms that if the case of S. failed he would accept usual agency fees. The case of S. failed entirely from the two letters which had been subsequently, though not at the time of the agreement, communicated to G., who continued to conduct the defence without observation. G. had sent in his bill of costs, made out as between solicitor and client. Taxation ordered upon the scale of agency charges only. *Gedye, In re*, 23 Beav. 347.

A., a solicitor, being one of three mortgagees, arranged with another solicitor B., to "act as his agent" in the matter of the mortgage, on agency terms. B. accordingly acted, and sent in his bill prepared as between solicitor and client, which was paid by the mortgagees. B. allowed A. 100*l.* as his share of the profits. After this, on the application of the second incumbrancers, the bill was taxed:—Held, that the taxing master was right in taxing it on the principle of solicitor and agent, for the agreement between A. and B. was valid, though it inured to the benefit of the mortgagees; and that the bill was properly taxable, at the instance of the second incumbrancers, as between them and B. *Taylor, In re*, 18 Beav. 165; 23 L. J., Ch. 857; 18 Jur. 666; 2 W. R. 249.

—— **Where Costs have been Prepaid.**]—Y. retained B., a solicitor, to conduct for him a suit in chancery. He afterwards borrowed a sum of money from B. upon mortgage, paying, however, out of the sum advanced, B.'s bill of costs due in respect of the suit up to that time, upon the agreement, that if any part of those costs should be afterwards decreed to be paid in the suit, B. would repay the amount to Y. Afterwards Y. became bankrupt, and obtained his certificate; and afterwards an order in the suit was made for the taxation of the costs of all the parties, and then an order for their payment, and under that order B. received his taxed costs out of a fund in court. In an action by the assignees of Y. for this amount:—Held, that the prepayment to B. of his bill of costs was a good consideration for the agreement to repay them in the event which had occurred; that the right of action on behalf of Y. passed to the assignees; and that they were entitled to recover the amount. *Morgan* v. *Taylor*, 5 C. B. (N.S.) 653; 28 L. J., C. P. 178; 5 Jur. (N.S.) 791; 7 W. R. 285.

An attorney being consulted by a client, who was under a charge of criminally assaulting a female child of tender years, obtained from the client 200*l.* to do the best he could for him, but with an understanding that no account of the transaction should be kept or rendered. Having succeeded in procuring his discharge, he was called upon after a lapse of nearly six years to deliver a bill of costs. The court refused to order him to do so, but referred the whole matter to the master, who in the result discharged the rule, but without costs. *Vann, In re*, 15 C. B. 341; 3 C. L. R. 126.

—— **Between Solicitor and Unqualified Person.**]—An agreement by a solicitor to give to an unqualified party a share of profits arising from business in which he was employed through the intervention of the latter, is not illegal. *Gordon* v. *Dalzell*, 15 Beav. 351; 21 L. J., Ch. 206; 16 Jur. 186.

See also UNQUALIFIED PRACTITIONERS, post, col. 1752 et seq.

Where a father, who never was duly qualified, pursuant to the 53 Geo. 3, c. 127, after carrying on for some years the business of a proctor conjointly with his son, who was duly qualified, retired, and his son granted him an annuity, payable out of the capital or profits of the business, in consideration of his retiring, and giving up his share in the profits:—Held, that it was not illegal to grant the annuity in consideration of the father ceasing to do that which was illegal; and that the fact that the annuity was to be paid out of the profits of the business, did not make the transaction illegal, within the 53 Geo. 3, c. 127, s. 8, but that the grant was voluntary, and that the consideration was not good against the son's creditors for value. *Eddison* v. *Rothery*, 10 Jur. (N.S.) 943; 11 L. T. 134; 12 W. R. 1138.

Solicitors' Act, 1870—In Writing—Signature.]—A document containing the terms of an agreement as to the amount of costs payable by a client to his solicitor, signed by the client only, is not an agreement in writing within s. 4 of the Solicitors Act, 1870. *Raven, In re, Pitt, Ex parte*, 45 L. T., 742; 30 W. R. 134.

A cash account containing an item for "costs as agreed" does not, where it is admitted that there was an antecedent verbal agreement constitute an agreement in writing within s. 8 of the Solicitors' Remuneration Act, 1881. *Baylis, In re*, 65 L. J., Ch. 612; [1896] 2 Ch. 107; 74 L. T. 506; 44 W. R. 533—C. A.

A document containing the terms of an agreement as to the amount of costs payable by a client to his solicitor, assented to by the client, but signed by the solicitor only, is not an "agreement in writing" within the Solicitors Act, 1870, s. 4, and the solicitor may be required to deliver a detailed bill of costs, to be taxed in the ordinary way. *Lewis, In re, Munro, Ex parte*, 45 L. J., Q. B. 816; 1 Q. B. D. 724; 35 L. T. 857; 24 W. R. 1017.

An agreement in writing between a solicitor and his client as to payment of costs is not valid by the Solicitors Act, 1870, s. 4, unless it is signed by both parties. *Ib.*

The solicitor for the plaintiff settled an action, in which the plaintiff had obtained judgment, but the defendants had appealed, on the terms of the payment by the defendants of 210*l.* damages and 120*l.* for his costs. He explained the terms of the settlement to the plaintiff, and paid the plaintiff 210*l.* The plaintiff then signed a document in the following terms: "Received from T." (the solicitor) "the sum of 210*l.*, being the amount of damages received on my behalf from the defendants, and, having regard to the fact that he has settled with them for a sum less than that to which he would have been entitled for costs, if they had been unsuccessful, I hereby agree to allow the sum paid by me to him on account of costs as an equivalent for the abatement he has made to the defendants." The sum thus paid amounted to 55*l.* 16*s.* The solicitor afterwards delivered to the plaintiff a cash account containing on the credit side 330*l.* and 55*l.* 16*s.*, in all 385*l.* 16*s.*, on the debit side 210*l.*, and "amount of agreed costs" 175*l.* 16*s.*, i.e. 120*l.* and 55*l.* 16*s.*, in all 385*l.* 16*s.*: —Held, that the plaintiff was not entitled to an order for taxation, for the document constituted an agreement in writing between solicitor and client within the meaning of s. 4 of the Solicitors Act, 1870, and the transaction amounted to payment between solicitor and client within the meaning of s. 41 of 6 & 7 Vict. c. 73. Dictum in *Lewis, In re, Munro, Ex parte* (1 Q. B. D. 724) disapproved. *Thompson, In re, Baylis, Ex parte*, 63 L. J., Q. B. 187; [1894] 1 Q. B. 462; 70 L. T. 238; 42 W. R. 462.

A solicitor delivered a bill of costs and threatened legal proceedings. On receiving no answer he wrote to a third person, who informed the client of the contents of the letter. The client then wrote to the solicitor: "I will send you a cheque for the whole amount": —Held, that this letter did not constitute an agreement between solicitor and client within s. 4 of the Solicitors Act, 1870, so as to deprive the client of his right to taxation. *Pontifex* v. *Farnham*, 62 L. J., Q. B. 344; 5 R. 149; 68 L. T. 168; 41 W. R. 238.

—— **When Writing not Necessary.**]—An agreement by an attorney with a client "to charge him nothing if he lost the action, and to take nothing for costs out of any money that might be awarded to him in such action," need not be in writing. *Jennings* v. *Johnson*, L. R. 8 C. P. 425.

—— **Opinion of Court.**]—The opinion of the court under s. 4 of the Solicitors Act, 1870, cannot be taken before money is payable under the agreement. *Solicitor, In re*, 45 L. J., Ch. 47; 1 Ch. D. 573; 24 W. R. 38.

—— **Application to set aside—Summons.**]—Since the Judicature Act, 1873, an application in the queen's bench division under s. 8 of the Solicitors Act, 1870, to set aside an agreement between a solicitor and his client as to costs may be made by a summons in chambers. *Howell Thomas, In re*, 62 L. J., Q. B. 474; [1893] 1 Q. B. 670; 5 R. 387; 68 L. T. 759; 41 W. R. 524.

—— **Business done in Police Court and Quarter Sessions.**]—Business done by a solicitor in a police court or a quarter sessions is not "done in any court" within the meaning of s. 8 of the Attorneys and Solicitors Act, 1870; and therefore the jurisdiction to enforce or set aside an agreement made under that act for the payment of a sum exceeding 50*l.* in respect of such business is vested in the high court, or a judge thereof. *J. H. Jones, In re*, 65 L. J., Ch. 191; [1896] 1 Ch. 222; 73 L. T. 543; 44 W. R. 146; 60 J. P. 7—C. A.

—— **No Action—Client Preventing Work being done.**]—A declaration alleged that by an agreement in writing between the plaintiff, who was an attorney, and the defendant, it was agreed that the defendant should be prepared to sell certain gas works, and that the plaintiff should be employed to carry out the sale, and be paid a commission of 4*l.* per cent. on the purchase-money in lieu of costs. Breach, that the defendant would not permit the plaintiff to carry out the sale, and had refused to pay any commission. Plea, that the agreement was for services to be done by the plaintiff as the defendant's attorney and solicitor within the meaning of the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), of which s. 8 enacts that "no action shall be brought upon any such agreement": —Held, that the plea was bad, and the action maintainable, for s. 8 was intended to prevent actions to recover the remuneration agreed upon in lieu of costs when the work had been done, and did not apply to an action for refusing to allow the attorney to do the work and earn the remuneration. *Rees* v. *Williams*, 44 L. J., Ex. 116; L. R. 10 Ex. 200; 32 L. T. 462; 23 W. R. 550.

Solicitors Remuneration Act, 1881.]—A mortgagor wrote to his solicitor as follows, "I hereby request and instruct you to raise, or endeavour to raise, for me the sum of 300*l.*, at 10 per cent. per annum, on the security of all my estate and interests under the will and in the property of the late T. S., and I hereby undertake to pay your costs (which I agree at 20*l.*, exclusive of costs out of pocket) incurred, or to be incurred, in or about doing what is necessary in your opinion for the purpose of carrying out these instructions." The solicitor carried out the mortgage, in which he acted as solicitor for the mortgagor and mortgagee, and he retained out of the money advanced 20*l.* for costs, including the mortgagee's costs. The mortgagor subsequently took out a summons that the solicitor might be ordered to deliver to him a bill of costs and charges claimed by the solicitor to be due or paid or to have been deducted by him out of the mortgagee's money: —Held, first, that the letter constituted an agreement within the Solicitors' Remuneration Act, 1881, s. 8, sub-s. 1, and although the remuneration agreed to was with reference, so far as the mortgagee's costs were concerned, to matters in which the solicitor

was not engaged as solicitor for the mortgagee, yet he was engaged to do business for him as solicitor, and therefore the relation of solicitor and client was created within the meaning of s. 1, sub-s. 3; secondly, that in the absence of evidence impeaching the agreement, there ought not to be a reference for taxation under s. 8, sub-s. 4. *Palmer, In re*, 59 L. J., Ch. 575; 45 Ch. D. 291; 62 L. T. 778; 38 W. R. 673—C. A.

Sect. 8, sub-s. 2, of the Solicitors' Remuneration Act, 1881, applies to non-contentious as well as to contentious business; and under that section no valid agreement as to costs can be made unless it be in writing. *West, King and Adams, In re, Clough, Ex parte*, 61 L. J., Q. B. 639; [1892] 2 Q. B. 102; 67 L. T. 57; 40 W. R. 644.

—— **Signature—Sufficiency of.**]—An agreement for remuneration under sub-ss. 1 and 2 of s. 8 of the Solicitors' Remuneration Act, 1884, is sufficiently signed if signed by the person who seeks to repudiate it, and need not be signed by both parties. *Perrett, Ex parte, Frape In re*, 62 L. J., Ch. 473; [1893] 2 Ch. 284; 2 R. 411; 68 L. T. 558; 41 W. R. 417—C. A.

"Fair and Reasonable."]—A solicitor agreed to conduct certain bankruptcy proceedings on the terms that his costs should not exceed 10*l*. In the course of the proceedings his clients left him and employed other solicitors, and he sent in a bill of costs for a larger amount than 10*l*. The county court judge sitting in bankruptcy declared the agreement to be void, because it did not contain a provision that the solicitor originally employed might conduct the bankruptcy proceedings to an end:—Held, that the order was wrong on the ground that the agreement was fair and reasonable, and that the solicitor could have gained no advantage if he had been allowed to prosecute the proceedings in bankruptcy to a conclusion, since under no circumstances could he have obtained costs beyond the amount of 10*l*. out of the estate. *Payton, Ex parte, Owen, In re*, 52 L. T. 628; 2 Morrell, 87.

On 13th March, a client instructed a solicitor to act on his behalf in the completion of the purchase of a tea and coffee business for 500*l*. A number of letters were written, and, according to the solicitor's statement, between twenty and thirty interviews held, and other business done. On 31st March the client and his solicitor signed a memorandum of agreement, that the bill of costs (without being made up to date) should be 42*l*. The client was a gentleman's valet and alleged that he acted in ignorance and under pressure in coming to the agreement:—Held, that under the circumstances the bargain was unfair and unreasonable, and must be set aside. *Mearns* v. *Knapp*, 37 W. R. 585.

Where an agreement as to costs is signed by the client and he adduces evidence showing that the agreement is unfair and unreasonable, it is competent to the court upon a summons for taxation by the client, although payment has been made under the agreement, to make an order for taxation, and to direct the taxing-master to certify whether or not the agreement is unfair and unreasonable. Dictum in *Palmer, In re* (45 Ch. D. 291), approved. *Perrett, Ex parte, Frape, In re*, supra.

An agreement as to the remuneration of a solicitor, to be "fair and reasonable" within the meaning of the Solicitors Act, 1870, must be "fair" in the sense of having been fairly obtained, and "reasonable" in the sense of being reasonable in its terms. *Cathcart, Ex parte, Stuart, In re*, 62 L. J., Q. B. 623; [1893] 2 Q. B. 201; 4 R. 506; 69 L. T. 334; 41 W. R. 614—C. A.

A solicitor made an agreement in writing with his client under which the client was to pay him 5 per cent. on all costs taxed off a certain bill of costs; the remuneration which the solicitor would receive under the agreement was five times more than what he would receive for the work done apart from the agreement:—Held, that the terms thereof were not reasonable, and the agreement must be set aside. *Ib.*

—— **Charges covered by Scale Fee—Taxation.**]—Where a taxing-master, in deciding as to the validity of an agreement for costs, found that it was fair and reasonable, and allowed, in addition to the scale fee, the costs of freeing from incumbrances property sold, the court refused to interfere with this decision. *Purcell, In re* (27 L. R. Ir. 375), considered. *Frape, In re, Perrett, Ex parte*, 63 L. J., Ch. 678; [1894] 2 Ch. 290; 8 R. 274; 71 L. T. 80; 42 W. R. 475.

Payment of Interest to Solicitor.]—A client, by letter, undertook to pay his solicitor interest on balance appearing against him from time to time, upon the principle of annual rests:—Held, that the agreement was unilateral and not binding; and that even if it had been duly signed by both parties, it was not such an agreement as could be enforced between solicitor and client, being entered into while that relation was subsisting between them. *Moss* v. *Bainbrigge*, 18 Beav. 478. *But see* 6 De G. M. & G. 292.

An agreement of the assignee to allow the solicitor interest on the amount of his bill of costs does not bind the bankrupt's estate; nor does the resolution of creditors, at a meeting held for this purpose, bind those who are absent. *Phillips, Ex parte*, 1 Deac. 368; 2 Mont. & Ayr. 526.

A contract by a client to pay interest on costs will be binding if it is made with full knowledge, sufficient advice, and necessary warning. *Shannon* v. *Casey*, Ir. R. 8 Eq. 307.

An agreement between a solicitor and a client without the intervention of any other solicitor, to allow the solicitor interest on his bill of costs, cannot be maintained independently of subsequent acquiescence, unless it appears that he informed the client that the law allowed no such charge. *Lyddon* v. *Moss*, 4 De G. & J. 104; 5 Jur. (N.S.) 637; 7 W. R. 433.

But where the relation of solicitor and client had ceased after such an agreement had been made, and the client subsequently (having in the meantime had proper advice upon the subject of the agreement) entered into a second agreement with the solicitor in part founded on the former, which she did not seek to impeach till fourteen years after its date:—Held, that there had been such delay and acquiescence as to preclude any title to relief. *Ib.*

Taxation of Costs.]—Where an agreement has been made for the remuneration of a solicitor and the solicitor alleges that the remuneration was for non-professional work, the persons chargeable cannot obtain the common ex parte order for the delivery and taxation of the bill of costs. The Solicitors' Remuneration Act, 1881, s. 8, has made no difference in the practice in this respect. *Inderwick, In re*, 25 Ch. D. 729; 50 L. T. 221; 32 W. R. 541.

Upon a petition for taxation, the court has no

jurisdiction to determine the construction of a disputed special contract as to costs. *Thompson, In re*, 8 Beav. 237 ; 14 L. J., Ch. 137 ; 9 Jur. 169.

An agreement between a solicitor and his client, an illiterate person, for payment of costs (taken at a given amount) does not preclude taxation. *Ingle, In re*, 21 Beav. 275 ; 25 L. J., Ch. 169 ; 1 Jur. (N.S.) 1059.

—— **Jurisdiction before Solicitors Act, 1870.**]—The jurisdiction as to taxation given by the Solicitors Act, 1843, extends only to the ascertainment by the ordinary rules of practice of the quantum payable by one party to the other. It does not authorise the court to determine whether a special agreement exists as to the mode of taxation, or the manner in which the costs, charges, and expenses are to be settled and paid. *Rhodes, In re*, 8 Beav. 224 ; 14 L. J., Ch. 97.

Upon a petition for taxation, the court has no jurisdiction to determine the construction of a disputed special contract as to the costs. *Thompson, In re*, 8 Beav. 237; 14 L. J., Ch. 137; 9 Jur. 169.

A solicitor acted for clients under a special agreement as to costs, which was doubtful :—Held, that the court had no jurisdiction to determine the construction and effect of the special agreement on petition. *Beale, In re*, 11 Beav. 600.

The court has no authority, upon a petition by a client against his solicitor, to give relief founded on a special agreement. *Alexander* v. *Anderdon*, 6 Beav. 405.

In proceeding under the Solicitors Act, 1843, the court is not authorised to interfere with a special agreement between solicitor and client, the legal effect of which is to alter the ordinary relation between solicitor and client, to supersede the authority or discretion of the court, by giving to either party more or less than is warranted by the rules of the court, or by providing for the settlement and payment of the bill in a special manner. *Eyre, In re*, 2 Ph. 367 ; 17 L. J., Ch. 277.

An agreement was signed between a solicitor and his clients by which the former was to take a sum agreed on, in full of all demands. An order of course afterwards obtained for the taxation of his bill was discharged for irregularity. *Mackrill, In re*, 11 Beav. 42.

Settlement of a bill of costs between a solicitor and client upon a special arrangement precludes an order being made upon petition for taxation ; the agreement must first be set aside by suit before the matter can be re-opened. *Whitcombe, In re*, 8 Beav. 140 ; 14 L. J., Ch. 19.

A solicitor entered into a special agreement with his client for interest on his bill, with annual rests, and for a charge on the estate recovered :—Held, that this was not a proper case for an order of course for taxation, and such an order was discharged. *Moss, In re*, 17 Beav. 59.

An agreement to charge only costs out of pocket does not preclude a taxation. A solicitor in 1849 agreed to charge sums out of pocket only, provided the client was unable to recover the proper costs in the business. A taxation was ordered of a bill for business in 1853 in the usual terms, and without determining any question as to the agreement. *Ransom, In re*, 18 Beav. 220.

Where there is an agreement by a solicitor with his client to charge only costs out of pocket, the master will, under the common order in equity for taxation, have regard to such agreement. *Philp, In re*, 2 Giff. 35 ; 29 L. J., Ch. 866 ; 6 Jur. (N.S.) 1024.

Where a common order for taxation had been obtained, and an application for its discharge was made on the ground of the existence of a special agreement as to the costs, the court refused to discharge it, the solicitor having before the order improperly refused a copy of the agreement to the client, who was an illiterate person. *Ingle, In re*, 21 Beav. 275 ; 25 L. J., Ch. 169 ; 1 Jur. (N.S.) 1059.

Agreement to pay Costs.]—An agreement to pay costs is an agreement to pay taxed costs ; and a third party paying a solicitor's bill of costs, in order to compromise a suit, stands in the same situation with respect to the right of claiming taxation as the solicitor's client. *Vincent* v. *Venner*, 1 Myl. & K. 212 ; 2 L. J., Ch. 49.

Costs out of Fund—Implied Condition.]—An agreement with an attorney, that he shall get his costs out of the fund in the suit, implies the condition that he is continued in the conduct of the suit until there is a fund in court available for costs. *Hollings* v. *Booth*, 2 F. & F. 220.

—— **Condition.**]—A company was being promoted for the building of a railway, and for the purchase, in connection therewith, of a certain canal. The promoters and a firm of solicitors came to an agreement, afterwards adopted by the company, by which the solicitors consented to give their services gratis "in the event of the application to parliament failing, or the capital not being raised," but in the event of these two conditions being fulfilled, they were to be paid the customary professional charges for work done. An act of parliament was obtained incorporating the company, and providing for the transfer to it of the canal, and authorising the construction of the railway. The capital was not to exceed eight million pounds, and the company was authorised to resolve that the canal undertaking and capital necessary for it should be a separate undertaking, with a separate capital. This course was adopted by the company, and the canal capital fixed at one and a quarter million. This amount was raised, but the rest of the capital of the company was not raised. In an action by the solicitors to recover the customary professional charges for work done by them :—Held, that the raising of the canal capital was not a raising of "the capital," and that the conditions of the contract made between the promoters and the solicitors not having been fulfilled, the solicitors were not entitled to succeed in the action. *Nichols* v. *North Metropolitan Ry. and Canal Co.*, 71 L. T. 836—C. A. Affirmed 74 L. T. 744—H. L. (E.)

Enforcing — Solicitor not Party.]— In proceedings to recover an estate, A. became greatly indebted to his solicitor; an agreement was entered into between A. and his brother B., by which A. agreed to relinquish his interest in the estate to B., in consideration of B. undertaking to pay the costs already incurred, with interest :—Held, that solicitor being no party to the agreement, could derive no benefit from it. *Moss* v. *Bainbrigge*, 18 Beav. 478. *See* 6 De G. M. & G. 292.

Next Friend of Infant.]—A person who signs an authority for the use of his name as next friend of an infant, becomes primâ facie liable to pay the infant's solicitor's bill of costs, as well as those of the other side. *Flower, In re*, 19 W. R. 578.

If for any cause he disputes this liability, the solicitor may nevertheless obtain the common order for taxation against him without mentioning that fact, for the defence cannot be raised in the process of taxation, but requires independent proceedings to be taken to enforce it. *Ib.* S. P., *Hawkes* v. *Cottrell*, 3 H. & N. 243 ; 27 L. J., Ex. 369.

Dispute as to Agreement constituting Agency or Partnership.]—A bill in equity alleged a particular contract as to agency, but charged that the defendant pretended that the contract was one of partnership, and that upon either construction he was liable to account, and prayed for discovery of all matters of business relating to the agency ; that he might deliver his bills of costs for taxation, and for an account. Demurrer overruled. *Ward* v. *Lawson*, 42 L. J., Ch. 273 ; L. R. 8 Ch. 65 ; 21 W. R. 88.

When there is an agreement as to costs, which only goes to the extent of the charges to be paid, the master may take that into consideration, and a bill in equity is not the proper remedy ; but where the agreement goes farther, and there is, on the face of the bill, a dispute as to whether the agreement was one of agency or of partnership, a bill will be sustained. *Ib.*

Charge by Memorandum.]—A client wrote a letter to her solicitors authorising them to sell the property of hers of which they were legal mortgagees by transfer, and to pay off the money due thereon, and on the transfer to them, and "all expenses due to you" :—Held, that this memorandum gave the solicitors no charge in respect of their general bill of costs not relating to the mortgage. *Champney* v. *Burland*, 19 W. R. 913—L.JJ.

Guaranteeing Payment.]—Where A. guaranteed the payment to B. (an attorney) within six months of "all costs for business done for C., or which B. may thereafter do in reference to or arising out of the affairs of C.," the delivery of a bill of such costs by B. to C. before the end of the six months is not a condition precedent to B.'s bringing an action on the guarantee against A. ; and in such an action, therefore, an equitable plea alleging the non-delivery of a bill of such costs by B. to C. before the end of the six months, and want of notice to the defendant, before the same period, of the amount of such costs, is bad and no answer to the action. *Reece* v. *Cox*, 16 L. T. 327.

After Verdict by Consent.]—Where, by consent of parties, a verdict is taken for a sum named for damages, and also all costs to which the plaintiff had been put relating to the subject-matter of the cause, as between attorney and client, without being subject to taxation, that agreement is to pay such a sum for costs as would be considered fair and reasonable on taxation in a liberal way, and not by the ordinary rule. *Young* v. *Waller*, 16 M. & W. 446.

Taxation.]—*See* infra, TAXATION.

II. BILL OF COSTS.

a. DELIVERY OF BILL.

1. Signature.

Necessary to Maintain Action.]—A solicitor cannot recover for professional charges where a certain sum has been agreed on, without delivering a signed bill of costs pursuant to 6 & 7 Vict. c. 73, s. 37. *Wilkinson* v. *Smart*, 33 L. T. 573 ; 24 W. R. 42.

Solicitor brings a bill for his fees. Plea of statute, 3 Jac., that the plaintiff had not signed his bill, good plea. *Norris* v. *Bacon*, 1 Vern. 312. S. P., *Pritchard* v. *Draper*, 1 Russ. & M. 191 ; Taml. 332.

When Unnecessary.]—An Irish attorney suing in England a person domiciled in England for business done in the Irish courts need not deliver a signed bill. *Kernaghan* v. *Wadeson*, 3 C. L. R. 764.

An attorney who is appointed clerk to commissioners under a town improvement act, at a fixed yearly salary, need not deliver a signed bill of costs for business done by him as such clerk. *Bush* v. *Martin*, 2 H. & C. 311 ; 33 L. J., Ex. 17 ; 9 Jur. (N.S.) 851 ; 8 L. T. 509 ; 11 W. R. 1078.

Where a solicitor has taken a mortgage from his client to secure the payment of costs, he may maintain a bill for foreclosure though no bill of costs has been delivered. *Thomas* v. *Cross*, 5 N. R. 148 ; 10 Jur. (N.S.) 1163 ; 11 L. T. 430 ; 13 W. R. 166.

It is not necessary that an attorney should deliver a signed bill of costs a month before action, where the defendant had been admitted an attorney after the bill became due, but before commencement of the action. *Windsor* or *Winsor* v. *Herbert*, 7 M. & W. 375 ; 9 D. P. C. 237 ; 10 L. J., Ex. 132 ; 5 Jur. 730.

What Sufficient.]—A bill signed by one of two attorneys in partnership, thus : "For self and Robert Owen. James H. Dixon," is a sufficient signature. *Owen* v. *Scales*, 2 D. (N.S.) 304 ; 10 M. & W. 657 ; 12 L. J., Ex. 26 ; 6 Jur. 1000.

A solicitor furnished to his client a bill of costs not signed by the former ; an arrangement having taken place, the solicitor agreed to accept a smaller sum, and wrote the following memorandum at the foot of his bill of costs : "The amount of these costs are settled for A. B." :—Held, a sufficient subscription. *Allen* v. *Murphy*, 9 Ir. C. L. R. 305.

The signature of the name of a firm without the christian names of the members is sufficient to a bill of costs ; and the name of the firm may be used for recovery of the partnership debts after the dissolution of the partnership. *Smith* v. *Brown*, 1 C. & J. 542 ; 1 Tyr. 486 ; 5 Car. & P. 94 ; 9 L. J. (O.S.) Ex. 151.

A bill signed with the name of a firm is not invalidated by the fact that it contains items for work done when the firm was differently constituted, and which cannot be recovered under the particular signed bill. *Pilgrim* v. *Hirschfeld*, 9 L. T. 288 ; 12 W. R. 51.

Where a solicitor, whose right hand was paralysed, had his hand guided over his name, appended to a bill of costs, by a clerk who had written the name :—Held, to be a sufficient compliance with the provisions of s. 37 of the Attorneys and Solicitors Act, 1843. *Angell* v. *Tratt*, 1 Cab. & E. 118.

—— **Letter accompanying Bill.**]—A bill of costs for professional work done in part by one firm of solicitors and in part by another firm who have succeeded to the practice of the first firm, is properly signed and delivered so as to enable the new firm to sue for and recover the

whole costs, if, though itself unsigned, it is delivered together with a letter signed by the new firm referring to the bill. Professional work was done by a firm, which consisted at first of R. & P., and afterwards of P. & G., practising under the name of R., P. & G., the business and debts of R. & P. having been transferred to R., P. & G. Bills for the costs of the whole work were delivered unsigned, but inclosed with a letter signed by R., P. & G. referring to the bills: —Held, that the bills were properly signed and delivered to enable R., P. & G. to sue for and recover the whole amount, as to the earlier items, as assignees of R. & P.; as to the latter items, in their own right. *Penley* v. *Anstruther*, 52 L. J., Ch. 367; 48 L. T. 664.

Delivery of a bill of costs unsigned, but accompanied by a letter signed by the solicitor, and referring to the bills, held a sufficient compliance with the 6 & 7 Vict. c. 73, s. 37. *Bush, In re*, 8 Beav. 66; 14 L. J., Ch. 6.

Third Party cannot raise Defence.]—The person entitled to raise the defence that there was no signed bill delivered one month before action, is the client of the solicitor, and a person, not being the client, who has made himself responsible under an agreement to pay costs, is not "a party to be charged therewith" within the meaning of s. 37, and is therefore not entitled to raise the defence, but such a person is entitled, under s. 38, to have the bill of costs taxed. *Greening* v. *Reeder*, 67 L. T. 28; 40 W. R. 623.

Pleading.]—Where a bill has been taxed, and the master has made his allocatur, a judge will not allow the defendant to plead that no signed bill has been delivered in addition to pleas of nunquam indebitatus and payment. *Whalley* v. *Glover*, 3 Car. & K. 13.

The defence that no proper bill duly signed has been delivered, must be specially pleaded. *Lane* v. *Glenny*, 2 N. & P. 258; 7 A. & E. 83; 1 W. W. & H. 479; 6 L. J., K. B. 218; 1 Jur. 475. *Robinson* v. *Rowland*, 6 D. P. C. 271; 1 W. W. & H. 74; 2 Jur. 136.

Or the plaintiff need not prove the delivery of the bill. *More* v. *Dent*, 1 M. & Rob. 462.

To a declaration against several contractors, for work and labour as an attorney, and for money paid, one pleaded that the action was commenced after 6 & 7 Vict. c. 73, and was for the recovery of certain fees, charges and disbursements, claimed by the plaintiff to be due, in respect of business done as an attorney, as in the first count mentioned; and that the plaintiff did not, one calendar month before action, deliver unto the defendant, he being the party to be charged therewith, or send by the post to, or leave for him at his counting-house, office of business, dwelling-house or last known place of abode, a signed bill of costs:—Held, that the plea was good, and sufficiently negatived a delivery of a signed bill in compliance with the statute. *Tate* v. *Hitchins*, 7 D. & L. 123; 7 C. B. 875; 18 L. J., C. P. 256; 14 Jur. 20.

Availability of Unsigned Bills.]—A solicitor may sue out a commission upon a debt for costs, without having delivered a bill signed. *Howell, Ex parte*, 1 Rose, 312.

So, he may prove his bill under a commission, without delivering a signed bill. *Eicke* v. *Nokes*, M. & M. 303.

An attorney may set off a claim for costs notwithstanding no signed bill has been delivered. *Brown* v. *Tibbits*, 11 C. B. (N.S.) 855; 31 L. J., C. P. 206; 6 L. T. 385; 10 W. R. 465. S. P., *Harrison* v. *Turner*, 10 Q. B. 482; 16 L. J., Q. B. 295; 11 Jur. 817.

—— **Consideration for Promissory Note.**]—It is no answer to an action on a promissory note, that the note was given in respect of an attorney's bill not previously delivered pursuant to the statute. *Jeffreys* v. *Evans*, 3 D. & L. 52; 14 M. & W. 210; 14 L. J., Ex. 363.

Waiver of.]—The provisions of s. 37 of the 6 & 7 Vict. c. 73, for the authentication by signature of a solicitor's bill of costs, are intended for the protection of the client only; and therefore where a bill has been delivered without such authentication, that circumstance is no objection to an application by the client for its taxation. *Pender, In re*, 2 Ph. 69; 16 L. J., Ch. 25; 10 Jur. 891.

A solicitor who delivers an unsigned bill is bound by it; but his client may either treat it as a nullity or waive the want of signature, and adopt it; though, after such waiver, the client cannot treat the bill as non-delivered. *Gedye, In re*, 14 Beav. 56; 20 L. J., Ch. 410; 15 Jur. 851.

Where parties on taxation agree to waive delivery of a signed bill, primâ facie they waive the operation of the statute as to payment of the costs of taxation. *Gerrard* v. *Arnold*, 6 D. P. C. 336.

In a suit instituted by a solicitor for payment of costs due to him from a client, it appeared by the answer that he had not delivered a signed bill conformably to the act of parliament. A bill duly signed was subsequently delivered, and that fact was put in issue by a supplemental bill. Semble, the defect in title of the plaintiff, as it stood at the institution of the suit, was not cured; but held, that the objection, not having been urged at the original hearing, could not be taken at the hearing on further directions. *Pritchard* v. *Draper*, 1 Russ. & M. 191; Taml. 332.

2. To Whom.

Party to be Charged.]—Whether, in an action for business done by an attorney, there has been a sufficient bill, and delivery thereof unto the party to be charged therewith, depends upon the circumstances of each case. *Gridley* v. *Austen*, 16 Q. B. 504; 18 L. J., Q. B. 337; 13 Jur. 680.

An attorney proved the delivery of his bill to the defendant, accompanied by the following letter to him: "As Mrs. H. has left your house, I beg to hand you my account, which I hope will be found satisfactory." Mrs. H. was a relation of the defendant, and the business done had reference to procuring a separation between her and her husband:—Held, not a sufficient delivery to the party to be charged. *Ib.*

The delivery of a a solicitor's bill of costs, on which to found a taxation of it, must be a delivery to the party chargeable with the payment of it; that is, to the client. Where, therefore, a bill of a mortgagee's solicitor was delivered to the solicitor of the mortgagor for taxation:—Held, to have been an improper delivery for the purpose. *Abbatt, In re*, 4 L. T. 576.

A bill, in which no name of a client as chargeable was introduced, was forwarded by post

inclosed in a letter signed by the attorney and charging the defendant, and requesting a cheque for the amount:—Held, that the letter and bill must be taken in connection and read together; and that this was a sufficient delivery. *Taylor* v. *Hodgson*, 3 D. & L. 115; 14 L. J., Q. B. 310; 10 Jur. 355.

A signed bill of costs, headed in the matter of business, but not addressed to anyone, was inclosed in an envelope and sent by post to the client:—Held, a sufficient delivery to the party to be charged therewith. *Lucas* v. *Roberts*, 3 C. L. R. 987; 11 Ex. 41; 24 L. J., Ex. 227; 1 Jur. (N.S.) 527; 3 W. R. 415.

No particular form of heading being prescribed by the statute as essential to an attorney's bill, if the bill is sent with a letter, and the party to whom it is sent knows that it is intended to charge him, it is sufficient. *Champ* v. *Stokes*, 6 H. & N. 683; 30 L. J., Ex. 242; 7 Jur. (N.S.) 607; 4 L. T. 334.

A bill of costs, in order to comply with the statute, must clearly point out on the face of it, or by some writing connected with it, the party or parties to be charged. *Kiernan* v. *Brereton*, 17 Ir. C. L. R. 203.

It is not a sufficient delivery of a bill of costs for the attorney to shew it to the party charged, and then to take it away again, unless the attorney shewing it intends to leave it with the party, and merely takes it back at his request. *Phipps* v. *Daubney*, 2 L. M. & P. 180; 16 Q. B. 514; 20 L. J., Q. B. 273; 15 Jur. 797—Ex. Ch.

—— **At Solicitor's Office.**]—A person who had no place of business of his own directed communications to be addressed and sent to him at his attorney's office, where he occasionally called and wrote his letters. A bill of costs was addressed and left there for him more than a month before action brought thereon, yet he did not actually receive it till a fortnight before action:—Held, that there was evidence for the jury that the bill of costs was properly left there a month before action. *Spier* v. *Bernard*, 8 L. T. 396.

To Solicitor.]—In an action on a bill against a member of the provisional committee of a railway company, it appeared that G. P., the attorney of the company, employed the plaintiff, another attorney, to do work for the company. The plaintiff sent his bill, headed "Northampton, Lincoln and Hull Railway, to R. D., debtor," by the post, to G. P. The bill was afterwards shewn to the defendant, who said that he had before seen a bill like it:—Held, first, that the bill sufficiently charged the defendant. *Phipps* v. *Daubney*, 2 L. M. & P. 180; 16 Q. B. 514; 20 L. J., Q. B. 273; 15 Jur. 797—Ex. Ch.

Held, secondly, that there was evidence for the jury that the bill was delivered to the defendant. *Ib.*

In an action against an acting member of a provisional committee of a projected railway company, for work done for the company as a local attorney and solicitor, it was shewn that a bill of the costs and charges sued for had been sent by him to the general solicitor of the company, who, more than a month before action brought, laid it before a meeting of the provisional committee at which the defendant was present:—Held, a sufficient delivery of the bill to the party to be charged therewith. *Eggington* v. *Cumberlege*, 1 Ex. 271; 5 Railw. Cas. 113; 16 L. J., Ex. 283; 11 Jur. 932.

On a sale of mortgaged property by the mortgagors, the mortgagees' solicitors rendered services for which they were entitled to be paid by the mortgagors, and the mortgagors' solicitors, acting on behalf of their clients, undertook to pay those charges:—Held, that the mortgagors' solicitors were acting within the scope of their employment in obtaining the bill, and it could not now be withdrawn on the ground that it had been improperly delivered in being sent to the solicitors, and not to the clients. *Kellock, In re*, 56 L. T. 887; 35 W. R. 695.

To Servant.]—Delivery of his bill of costs by an attorney to the servants of his client at his dwelling-house is sufficient. *M'Gregor* v. *Keiley*, 2 D. & L. 635; 3 Ex. 794; 18 L. J., Ex. 391.

To Agent.]—Delivery of a bill of costs to an agent of the client, appointed for that purpose, held sufficient. *Bush, In re*, 8 Beav. 66; 14 L. J., Ch. 6.

Solicitors to trustees delivered to the manager of an asylum carried on by the trustees as part of the trust estate, certain bills of costs for work done for the trustees:—Held, that delivery to the manager was not in the absence of proof that he was authorised to receive bills for the trustees, delivery to the trustees. *Layton, Steele & Co., In re*, 38 W. R. 652.

Constructive Delivery to Third Party.]—R. and B. acted jointly in a sale of copyholds to which their respective clients were entitled, B. having the conduct of the sale. The purchaser required the property to be enfranchised, and wrote to B. asking him to arrange for the enfranchisement, and undertaking to pay his charges and the expenses. R. made out his bill of costs against his own clients, sent it to B., who sent it to the purchaser. The purchaser obtained an order for taxation of this bill on the usual petition of course by a third party. On motion by R. to stay all further proceedings under this order:—Held, that the common form allegation in a petition of course, that the solicitor "delivered to your petitioners his bill of fees and disbursements," is a material allegation which is not satisfied by a merely constructive delivery; that in the circumstances of this case there had been no delivery to the purchaser; and that the order had been irregularly obtained, and must be discharged. Practice of the taxing-masters as to service of the orders to tax stated. Delivery and constructive delivery to third parties liable to pay discussed and considered. *Robertson, In re*, 58 L. J., Ch. 832; 42 Ch. D. 553; 62 L. T. 38; 38 W. R. 170.

In Case of Several Joint Contractors.]—It is sufficient to deliver a bill of costs to one of several joint contractors. *Mant* v. *Smith*, 4 H. & N. 324; 28 L. J., Ex. 234.

Where an attorney is retained jointly by several parties to defend a suit against each, the delivery of a bill of costs to one is sufficient to entitle him to maintain a joint action against all for his costs. *Oxenham* v. *Lemon*, 2 D. & R. 461; 1 L. J. (O.S.) K. B. 133. S. P., *Finchett* v. *How*, 2 Camp. 276; *Crowder* v. *Shee*, 1 Camp. 437; 10 R. R. 722.

In an action against two, a plea by one, that

no bill had been delivered to him, or left at his dwelling-house, is bad. *Kiteley* v. *Scofield*, 6 Jur. 1059.

In an action against three, who were promoters of a company, it appeared that the attorney sent to one of them, in a letter, a bill headed, "To the promoters of the Lancashire Cotton Mill Company" :—Held, a sufficient delivery. *Mant* v. *Smith*, supra.

In an action against one of the members of a provisional committee for work done as an attorney, the defendant pleaded that no signed bill had been delivered. A signed bill had been delivered to another member of the same committee at his place of business, and the defendant was appointed a committee-man after part of the work had been done :—Held, not such a delivery as to render him liable. *Edwards* v. *Lawless*, 5 Railw. Cas. 357 ; 6 D. & L. 105 ; 6 C. B. 329 ; 17 L. J., C. P. 293.

A bill in such case should be delivered either at the office of the company, or at least to some person who can reasonably be considered to represent the committee. *Ib.*

—— **Office of Business.**]—In 1845, certain persons, one of whom was the defendant, formed themselves into a committee for establishing a railway company. They took offices in Moorgate street, where a brass plate was put up, with the name of the company engraved thereon. In November, 1845, the company was provisionally registered. In January, 1846, the scheme was abandoned, and the defendant interfered no further with it. A sub-committee was afterwards appointed (by whom it did not appear), for the purpose of ascertaining and arranging the claims upon the committee-men ; and in September, 1846, the plaintiff, a local attorney, and agent to the company, delivered a signed bill at the office in Moorgate street, addressed to "The Provisional Committee of the Company" :—Held, by Wilde, C.J., and Williams, J., that this was not a sufficient delivery at the office of business of the defendant, to charge him. Per Coltman, J., and Maule, J., that it was. *Blandy* v. *De Burgh*, 6 C. B. 623 ; 6 D. & L. 412 ; 5 Railw. Cas. 361 ; 18 L. J., C. P. 2 ; 12 Jur. 1005.

3. Practice.

Proof.]—A bill with an indorsement upon it, "March 4th, 1815, delivered a copy to C. D.," which indorsement was proved to be in the handwriting of a deceased clerk of the attorney's (whose duty it was to have delivered a copy of the bill) and proved to have existed at the time of the date, is evidence to prove the delivery of the bill. *Champneys* v. *Peck*, 1 Stark. 404.

Day of Delivery.]—The day on which a bill is delivered is not to be reckoned as one of the days of the month given to the client. *Blunt* v. *Haslop*, 2 D. P. C. 982 ; 8 A. & E. 577 ; 3 N. & P. 553 ; 7 L. J., Q. B. 216.

Order for Delivery of Bill—Jurisdiction.]—The jurisdiction to order delivery of a bill is independent of, and not ancillary to, the jurisdiction to order taxation ; nor does the absence of "special circumstances" necessarily preclude an order to deliver a bill for the purpose of seeing whether it was properly taxable or not. *West, King and Adams, In re, Clough, Ex parte*, 61 L. J., Q. B. 639 ; [1892] 2 Q. B. 102 ; 67 L. T. 57 ; 40 W. R. 644.

Under s. 396 of the Victorian Common Law Procedure Act, the court has power to order delivery of his bill by an attorney, whether or not it has been paid, and whether or not it is one which it would have jurisdiction to refer to taxation. [See 6 & 7 Vict. c. 73, ss. 37 and 41.] *Duffett* v. *McEvoy*, 54 L. J., P. C. 25 ; 10 App. Cas. 300 ; 52 L. T. 633—P. C.

The jurisdiction given by s. 37 of the Solicitors Act, 1843, to order delivery of a solicitor's bill of costs where no part of the business charged for has been transacted in any court of law or equity, was given to the Lord Chancellor and Master of the Rolls as judges of the court of chancery, and was transferred to the high court of justice by s. 16 of the Judicature Act, 1873. The judges of the queen's bench division, therefore have jurisdiction to order delivery of a bill of costs in such a case ; though the application for delivery ought to be made in the chancery division (Lord Esher, M.R., dissenting). *Pollard, In re*, 57 L. J., Q. B. 273 ; 20 Q. B. D. 656 ; 59 L. T. 96 ; 36 W. R. 515—C. A. Reversing 52 J. P. 85.

Delay in applying for delivery of a bill will not relieve the solicitor from the obligation to deliver a bill where he has in his possession the necessary materials. *Baylis, In re*, 65 L. J., Ch. 612 ; [1896] 2 Ch. 107 ; 74 L. T. 506 ; 44 W. R. 533—C. A.

—— **No Action Pending.**]—Order, without cause in court, upon general jurisdiction over solicitor, that he shall deliver his bill for purposes of getting from him title deeds deposited with him for suffering recoveries, &c. *Uxbridge (Earl), Ex parte*, 6 Ves. 425.

—— **When it will be made.**]—The court, upon the application of the defendant, ordered the plaintiff's attorney to deliver his bill, though, upon the settlement of the action, it had been expressly agreed between the attorneys of the respective parties, that, on certain accommodation being given to the defendant, the plaintiff's attorney should receive 60*l.* as an ascertained amount of costs between attorney and client. *Tanner* v. *Lea*, 4 Man. & G. 617 ; 5 Scott (N.R.) 237.

P., under the pressure of legal proceedings taken against him by M. & Co. as attorneys for the National Bank of Scotland, entered into an agreement to pay 200*l.* to M. & Co. for their costs. It was alleged by P. that this payment, and a further payment to the National Bank, were made upon the terms that the bank should exhaust their remedies on certain acceptances given by third persons before taking proceedings against P., and that the bank was acting in violation of the agreement. P. thereupon applied that M. & Co. should be ordered to deliver to him a copy of their bill of costs in the matter of such proceedings. The court refused to grant the application. *Morris, In re, Pooley, Ex parte*, 27 L. T. 554 ; 21 W. R. 192.

—— **Illegal Retainer—Champerty.**]—A solicitor cannot set up the illegality of his retainer on the ground of maintenance and champerty against his client invoking the jurisdiction of the court to compel him to deliver a bill of costs and cash account for taxation. *Thomas, In re, Jaquess* v. *Thomas*, 63 L. J., Q. B. 572 ; [1894] 1 Q. B. 747 ; 9 R. 299 ; 70 L. T. 567—C. A.

—— **Order or Petition.**]—An ex parte order for the delivery of a bill of costs discharged with

costs; the allegation of the professional employment being denied by the solicitor. *Eldridge, In re*, 12 Beav. 387.

Where a solicitor's bill of costs, or the delivery of documents in his possession is required on other grounds than those relating to taxation, the application may be made by way of petition, notwithstanding the general order of 17th April, 1867. *Justice, In re*, 16 W. R. 821.

A bill by a country solicitor against a London solicitor, alleging that he had made a special agreement with the plaintiff to transact certain business for him on agency terms, and charging that the defendant falsely pretended that the agreement was one not for agency but for partnership in the particular business. The bill charged that, on either construction of the agreement, the plaintiff was entitled to an account, and prayed that the defendant might deliver his bills of costs as the plaintiff's agent, and also for a general account of all dealings and transactions between them. The defendant demurred, on the ground that the proper remedy of the plaintiff was by petition under 6 & 7 Vict. c. 73, s. 37:—Held, that the demurrer ought to be overruled. *Ward* v. *Lawson*, 42 L. J., Ch. 273; L. R. 8 Ch. 65; 21 W. R. 88.

—— **Against whom.**]—Summary order upon a petition under the 6 & 7 Vict. c. 73, s. 37, against assignees in bankruptcy of a country solicitor, who had employed a land agent to deliver their bills of costs, and against the agent to deliver his bill of costs and petitioner's papers in his possession. *Walton, In re*, 4 Kay & J. 78.

Such petitions should be intituled, in the matter of both solicitors; but a petition in the matter of a solicitor need not be intituled, in the matter of the act. *Ib.*

—— **Undertaking to Deliver.**]—A solicitor, on payment of his costs, undertook to deliver his bill, but he neglected. On a petition presented more than twelve months after, the court, under its general jurisdiction, ordered the delivery with costs. *Foljambe, In re*, 9 Beav. 402.

A solicitor of a mortgagor ordered, upon petition, to deliver to a mortgagee a copy of his bill of costs, in pursuance of his undertaking. *Bailey, In re*, 34 Beav. 392.

—— **After Payment.**]—A gross sum was paid to a solicitor in discharge of his claim, but no bill of costs was delivered:—Held, that the client was entitled to have a bill of costs delivered. *Blackmore, In re*, 13 Beav. 154; 15 Jur. 784.

The solicitor of trustees and executors received payment of his bill of costs out of the estate:—Held, that a residuary legatee was entitled to have a copy of the bill delivered on payment of the costs of it. *Ib.*

Enforcing Delivery.]—An order to deliver a bill of costs within fourteen days after notice was served on June 30th, without the indorsement as to liability to attachment. The order was again served, properly indorsed, on July 19th:—Held, that an attachment might issue for disobedience to it. *Gregg, In re*, and *Prance, In re*, 39 L. J., Ch. 107; L. R. 9 Eq. 137; 23 L. T. 234; 18 W. R. 589.

An attachment will not be granted against an attorney for disobedience to a rule of court ordering him to deliver his bill within a time named, unless a demand is first made on him for his bill by one of the persons to whom he is by the rule ordered to deliver it. *Catlin, In re*, 6 D. & L. 566; 7 C. B. 136. S. P., *Baster, In re*, 7 D. & L. 296.

On motion for an attachment for non-delivery of an attorney's bill to a party pursuant to rule of court, the affidavit should be made by the party himself; that of a third person is insufficient. *Potter* v. *Buck*, 8 D. P. C. 872.

An action does not lie against an attorney for disobedience of the order of a judge for delivery of his bill of costs. An attachment is the proper remedy. *Dent* v. *Basham*, 9 Ex. 467; 2 C. L. R. 989; 23 L. J., Ex. 161; 18 Jur. 295; 2 W. R. 201.

The proper mode of enforcing the delivery of a solicitor's bill is to serve the order with a proper indorsement, under the 23rd Consolidated Order, r. 10; and upon default, an attachment will issue as of course. *Bowen, In re*, 9 Jur. (N.S.) 612; 11 W. R. 607.

A party in a cause, who has obtained and served, according to the 12th Amended Order of August, 1841, an order that his solicitor shall deliver his bill of costs within a month, which is disobeyed, is entitled under the 15th Order of August, 1841, to enforce obedience by the writ of attachment. *Lane* v. *Oliver*, 2 Hare, 97; 12 L. J., Ch. 144; 6 Jur. 1080.

The proper mode of enforcing the delivery of a solicitor's bill is to serve the order with a proper indorsement, under the 12th Amended Order of the 11th April, 1842, and upon default being made, an attachment will go as of course. *Belton, In re*, 25 Beav. 368.

Where an attorney was arrested for not obeying a judge's order directing him to deliver his bill of costs, and also an account of all moneys received by him on account of his client, and he prayed to be discharged out of custody on the delivery of a bill and cash account, verified only by his clerk, who swore that the account gave credit for all sums received, as he was informed and believed (no affidavit verifying the account being made by the defendant himself), the court refused to discharge the defendant immediately out of custody, but directed the bill of costs and account to be referred to the master, who should report on what terms the defendant should be discharged. *Reg.* v. *Weston*, 8 Jur. 1122.

A solicitor was ordered to deliver his bill for taxation. Upon a motion to commit for the non-delivery, he swore he had no documents nor memoranda from which he could make out his bill. The court made no order on the motion. *Ker, In re*, 12 Beav. 390.

4. Alteration and Amendment of Bill.

After Delivery and before Taxation.] — A solicitor who has delivered his bill to the person chargeable therewith cannot afterwards avoid taxation by withdrawing it and delivering an amended bill, even though the person chargeable sent back the original bill, with suggested alterations, which were partly acquiesced in. *Heather, In re*, 39 L. J., Ch. 781; L. R. 5 Ch. 694; 18 W. R. 1079.

An alteration of a bill referred for taxation cannot be made after it is brought in for taxation. *Davis* v. *Dysart (Earl)*, 21 Beav. 124. Affirmed, 8 De G. M. & G. 33; 25 L. J., Ch. 322; 2 Jur. (N.S.) 219; 4 W. R. 268.

Except by consent. *Catlin, In re*, 18 Beav. 519.

Upon an application to tax a paid bill, the solicitor will not be permitted to add to any under-charges contained therein, but the taxation must be had on the bill as delivered and paid. *Wells, In re*, 8 Beav. 416; 14 L. J., Ch. 215; 9 Jur. 820.

A solicitor, having delivered his bill, is bound by it, and the taxation must be on that bill; he is not entitled as of course to reduce his demand, or to reserve the power of adding to the charges. *Carven, In re*, 8 Beav. 436; 14 L. J., Ch. 372.

A solicitor having knowingly, in his bill of costs, fixed the rate of his charges for business, cannot afterwards, on a taxation, be allowed to increase it. *Walters, In re*, 9 Beav. 299.

Application of a solicitor, after an order for taxation, to withdraw a non-taxable item from his bill, refused. *Blakesley and Beswick, In re*, 32 Beav. 379.

After a bill has been referred for taxation erroneous overcharges inserted by mistake cannot be withdrawn. *Christy, Ex parte, Barrow, In re*, 3 Mont. & Ayr. 104; 2 Deac. 131; 6 L. J., Bk. 68. *But see* infra.

A bill of costs having been made out by a solicitor in the expectation that it would not be taxed, leave was given to present a petition to amend. *Andrew, In re*, 17 Beav. 510; 23 L. J., Ch. 129; 17 Jur. 1145; 2 W. R. 46.

A solicitor, after delivering his bill, may, before being served with an order for taxation, withdraw it, and substitute another bill of a reduced amount. *Chambers, In re*, 34 Beav. 177; 34 L. J., Ch. 292; 5 N. R. 298; 11 Jur. (N.S.) 230; 11 L. T. 726; 13 W. R. 375.

—— **Unsigned Bill.**]—A solicitor cannot, after delivery of a bill of costs, and objection taken to the amounts of the charges therein contained, even though the bill be unsigned, withdraw the bill from taxation, and substitute another in which the charges are reduced. *Jones, In re, King, Ex parte*, 54 L. T. 648.

Lump Sum in Bill Delivered.] — Solicitors having brought in, under an order for taxation, a bill of costs containing an item in a lump sum of 1,000*l.* for the costs, charges, and expenses of an action, it was held that the agreement to pay this sum was invalid, because it was not in writing:—Held, that they were entitled to bring in for taxation a bill containing the particulars of these charges, so long as the charges did not exceed 1,000*l.* *Russell, In re*, 55 L. T. 71—C. A. S. P., *Kellock, In re*, 56 L. T. 887; 35 W. R. 695.

A solicitor who has included in his bill a lump or gross sum, may, on taxation, supply a detailed statement shewing how the sum is made up, and the master may allow such of the items contained in the detailed statement as are proper, not exceeding in the aggregate the gross sum originally charged; but the master can in no case allow more than the original amount. *Tilleard, In re*, 32 Beav. 476; 32 L. J., Ch. 765; 9 Jur. (N.S.) 1217; 8 L. T. 142; 11 W. R. 476.

Condition for Withdrawal.]—A solicitor may, when sending in his bill of costs to his client, reserve to himself the right to withdraw or alter it on condition, provided the condition is fully and clearly stated to the client; but if the solicitor has sent in his bill without any condition, or with a condition which he could not fairly impose, he cannot afterwards withdraw it or send in an amended bill. *Thompson, In re*, 55 L. J., Ch. 138; 30 Ch. D. 441; 53 L. T. 479; 34 W. R. 112—C. A.

Omissions through Error or Mistake.]—By error and mistake, some items were omitted from, and others undercharged and overcharged in a bill referred for taxation. On petition by the executor of the solicitor, liberty was given to insert the omitted items, and increase those undercharged; but he was not allowed to decrease the overcharges. *Whalley, In re*, 20 Beav. 576.

Pending a taxation, leave given, upon special application, to carry in an additional bill for specified items of under-charge and omission, arising from error and mistake. *Walters, In re*, 9 Beav. 299. And see *Id.* 302, n. S. P., *Marshall* v. *Oxford*, 5 Sim. 456.

A solicitor cannot, upon objection being taken to the charges made in a bill of costs delivered by him, withdraw it and substitute another, unless the charges objected to were inserted upon misrepresentation or by mistake, or accident, and unless such circumstances can be proved, the original and not the substituted bill must stand for taxation. *Heather, In re* (L. R. 5 Ch. 694), followed. *Chambers, In re* (34 Beav. 177), explained. *Holroyde and Smith, In re*, 43 L. T. 722; 29 W. R. 599; 45 J. P. 437.

b. Contents of Bill.

Scandalous Matter.]—The general jurisdiction of the court to prevent proceedings before it being made the vehicle of scandal or impertinence extends to a bill of costs delivered, and, accordingly, entries in a bill of costs which contain scandalous matter will be ordered to be struck out. *Miller, In re, French, In re, Love* v. *Hills*, 54 L. J., Ch. 205; 51 L. T. 853; 33 W. R. 210.

What is Sufficient.]—A bill of costs is sufficient if it gives such information as would enable the client to obtain advice as to the taxation of the bill; and it is not necessary that an attorney, whom the client may consult as to the expediency of having the bill taxed, should be able to say, without further inquiry, whether the charges are fair and reasonable. *Haigh* v. *Ousey*, 7 El. & Bl. 578; 26 L. J., Q. B. 217; 3 Jur. (N.S.) 634; 5 W. R. 523. See *Cooke* v. *Gillard*, infra.

The 6 & 7 Vict. c. 73, s. 37, in inquiring that a signed bill of costs should be delivered previously to an action by an attorney, means a bill so drawn out that all the items are charged in a taxable shape. *Philby* v. *Hazle*, 8 C. B. (N.S.) 647; 29 L. J., C. P. 370; 7 Jur. (N.S.) 125; 2 L. T. 433; 8 W. R. 611.

A bill is sufficient, if it gives sufficient materials for obtaining advice as to taxation. *Keene* v. *Ward*, 7 D. & L. 334; 13 Q. B. 515; 19 L. J., Q. B. 46; 14 Jur. 65.

A bill containing entries of various attendances, charges, and disbursements, but with a lump sum, only charged at the end of the bill, is not a sufficient signed bill, on which to found an action within 6 & 7 Vict. c. 73, s. 37. *Wilkinson* v. *Smart*, 33 L. T. 573; 24 W. R. 42.

Name of Court and Cause.]—A bill, delivered under 2 Geo. 2, c. 23, s. 23, must have stated the name of the court in which the business was transacted, and also the name of the cause,

Lewis v. *Primrose*, 6 Q. B. 265 ; 13 L. J., Q. B. 269 ; 8 Jur. 982.

So, under 6 & 7 Vict. c. 73, a bill must shew in what court the business was done. *Englehart* v. *Moore*, 15 M. & W. 548 ; 4 D. & L. 60 ; 15 L. J., Ex. 312.

And the name of every suit in which the business charged for was done. *Ivimey* v. *Marks*, 16 M. & W. 843 ; 4 D. & L. 109 ; 17 L. J., Ex. 165 ; 11 Jur. 355.

Such a bill is an entire thing ; and if the same bill blends charges for work done in a court of equity with charges for work apparently done in a court of common law, without pointing out which, the client cannot judge or be advised whether he should refer the whole bill for taxation ; and the charges in the same bills for equity business, though correctly stated, cannot be recovered. *Ib.*

A bill must shew the court and the cause in which the business referred to in it, or the greater part thereof, was done. *Martindale* v. *Falkner*, 2 D. & L. 600 ; 2 C. B. 706 ; 15 L. J., C. P. 91 ; 10 Jur. 161.

But where a bill contains items applicable to proceedings in the superior courts, but does not contain any statement from which it can be inferred in which of those courts the business was transacted, the bill is to be presumed to be a compliance with the act, unless the party charged thereby proves that any further information was practically required for the purpose of taxation, or shews that the name of the court in which business was done would have been of use to him. *Cooke* v. *Gillard*, 1 El. & Bl. 26 ; 22 L. J., Q. B. 90 ; 17 Jur. 137. Overruled by *Roy* v. *Turner*, 4 W. R. 126.

A bill is not in compliance with 7 & 8 Vict. c. 73, unless it furnishes reasonable information shewing in what cause each item charged for has been transacted. *Dimes* v. *Wright*, 8 C. B. 831 ; 7 D. & L. 292 ; 19 L. J., C. P. 137.

A bill must contain, in express terms, or by reasonable inference, a statement of the name of every cause, and of every court in which any part of the business charged has been transacted. *Sargant* v. *Gannon*, 7 C. B. 742 ; 6 D. & L. 691 ; 18 L. J., C. P. 220.

Where a bill contains items for proceedings such as would take place in the superior courts, it is not necessary that it should shew in which of these courts the business took place. *Haigh* v. *Ousey*, supra.

An attorney wrote to the plaintiff, also an attorney, instructing him to serve an inclosed writ of summons in an action of P. *v.* B., and to inform the defendant when he had done so, with an account of his charges. The plaintiff wrote in reply a letter headed P. *v.* B., informing the defendant that the writ had been served pursuant to his instructions, and that the charges were as below, enumerating the items. There was a similar correspondence respecting the service of notice of declaration in the same cause : —Held, that the plaintiff's letters, by reference to the writ, gave the necessary information as to the court in which the business had been done, and were, therefore, in accordance with the spirit of 6 & 7 Vict. c. 73, s. 37, within the decided cases. *Cosens* v. *Graham*, 12 C. B. 398 : 21 L. J., C. P. 206 ; 16 Jur. 952.

A bill delivered shewed that a judgment had been recovered by the London and Westminster Bank against the Yorkshire Bank ; that writs of scire facias were issued against the defendant and other shareholders of the latter bank ; that they were consolidated ; and that one of them, not naming which, was tried, and to one of the items, the technical name of the original cause in which the judgment was recovered was stated : —Held, that the proceedings were sufficiently specified. *Anderson* v. *Boynton*, 7 D. & L. 25 ; 13 Q. B. 308 ; 19 L. J., Q. B. 42 ; 14 Jur. 14.

Omission to Specify some Items.]—The omission sufficiently to specify one or more items does not disentitle an attorney from recovering that portion of the bill which is unobjectionable. *Haigh* v. *Ousey*, supra.

Where a substantial part of a bill of costs is improperly set out and described, the whole bill is not bad, but the solicitor can recover only those items that are properly described. Where, therefore, in a bill of costs for 51*l.* 16*s.* 6*d.*, a lump charge of 38*l.* 10*s.* was made for a number of items lumped together, and the remaining items, amounting to 13*l.* 6*s.* 6*d.*, were properly described, it was held that the solicitor could recover upon those items that were properly described. Dicta in *Haigh* v. *Ousey*, (7 El. & Bl. 578) followed. *Blake* v. *Hummell*, 1 Cab. & E. 345 ; 51 L. T. 430.

Where attorneys bring an action to recover the amount of their signed bill of costs, which bill contains some items which they are not entitled to recover, the action may be maintained for the residue. *Pilgrim* v. *Hirschfeld*, 9 L. T. 288 ; 12 W. R. 51.

—— **Extra Costs.**]—An attorney's bill, which contains, amongst other items, certain extra costs, not mentioning the taxed costs, is bad, even though, in an action on the bill, the jury find that the attorney has no claim for extra costs. *Pigot* v. *Cadman*, 1 H. & N. 837 ; 26 L. J., Ex. 134 ; 5 W. R. 353.

Propriety of Items of Charge.]—A payment for probate duty made by a solicitor on behalf of his client is a "disbursement" within the meaning of s. 37 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), and is properly included in his bill of costs. *Lamb, In re*, 58 L. J., Q. B. 455 ; 23 Q. B. D. 5 ; 37 W. R. 506.

As to what items of disbursement are properly included in a bill of costs. Legacy and probate duties, estimated at 140*l.*, were payable in order to make available certain funds in court. The solicitor, at the request of the client, engaged to pay them, and took a charge on the funds for 140*l.* and interest. The duties, amounting to 78*l.* only, were paid by the solicitor :—Held, that the sum formed a proper item in his account on the taxation of his bill of costs. *Bedson, In re*, 9 Beav. 5 ; 15 L. J., Ch. 153. See *Haigh, In re*, 12 Beav. 307 ; 19 L. J., Ch. 79 ; 14 Jur. 340.

An attorney employed to defend an action, and receiving from his client the debt and costs, for the purpose of being paid over to the plaintiff, is not entitled to make that sum an item in his bill, so as to increase the amount of it. *Woollison* v. *Hodson*, 2 D. P. C. 360.

When there are matters in a bill which have no relation to business as an attorney,—as money advanced to the client—the master, upon reference to him, should strike those items out, and proceed to tax the rest. *Wardle* v. *Nicholson*, 1 N. & M. 355 ; 4 B. & Ad. 469 ; 2 L. J., K. B. 76.

An attorney is entitled to recover money lent,

without reference to his business of attorney. *Mowbray* v. *Fleming*, 11 East, 285; 10 R. R. 508.

He is not bound to insert in his bill the amount paid to a proctor employed by him for his client. *Franklin* v. *Featherstonhaugh*, 3 N. & M. 779; 1 A. & E. 475; 3 L. J., K. B. 163.

Items of the costs taxed in two actions, and paid by the attorney, and for which he had received no specific payment from his client, are properly inserted in the bill, and need not be in the cash account. *Harrison* v. *Ward*, 4 D. P. C. 39; 1 H. & W. 353.

A client was liable to a solicitor for the costs of procuring the execution of a lease by her tenant, but which the tenant was to bear. The amount not having been paid when the order to tax was made:—Held, that the charge was properly included in the bill of costs of the solicitor against his client. *Cutlin, In re*, 18 Beav. 513.

A charge in a solicitor's bill "for attending a great many times" is too vague, and on taxation will not be allowed. *Pender, In re*, 10 Beav. 390.

London Agent and Country Client.]—The charges of a London agent are properly included in the bill of costs, and not as a disbursement in the cash account, which the country solicitor delivers to his client; and such charges should be set out in detail, and not as a lump sum. *Pomeroy and Tanner, In re*, 66 L. J., Ch. 158; [1897] 1 Ch. 284; 75 L. T. 625; 45 W. R. 245.

c. Taxation.

1. Jurisdiction.

High Court—County Court.]—By the combined operation of the Solicitors Act, 1843, s. 37, and the Judicature Act, 1873, s. 16, as modified by the County Courts Act, 1856, s. 36, the costs as between solicitor and client in a county court action in which the claim exceeds 20*l.* may be taxed in the high court of justice; consequently, the costs as between solicitor and client in a county court administration action may be taxed in the chancery division. *Worth, In re*, 50 L. J., Ch. 262; 18 Ch. D. 521; 44 L. T. 462; 29 W. R. 371.

In what Court.]—The court had no jurisdiction to order the taxation of a solicitor's bill of costs, for business done in a cause in the court of great sessions in Wales, where there is no detention of title deeds, nor any other matter besides costs in dispute. *Partridge, Ex parte*, 2 Mer. 500; 3 Swan. 398.

The court of a revising barrister is not "a court of law" within the Solicitors Act, so as to exclude the jurisdiction of this court to order the taxation of a bill containing items for business done in that court. *Andrew, In re*, 17 Beav. 510; 23 L. J., Ch. 129; 17 Jur. 1145; 2 W. R. 46.

District Registry.]—When an administration decree directed accounts and inquiries to be taken in the district registry, and ordered that upon the result being reported the action should be heard in London on further consideration, the court refused to allow the costs of the action to be taxed in the district registry. *Irlam* v. *Irlam*, 24 W. R. 949.

Except under very special circumstances the costs of actions commenced and carried on in a district registry ought to be taxed in London. *Day* v. *Whittaker*, 25 W. R. 767.

A company, having its registered office in Liverpool, had employed a solicitor living at Sheffield to take certain legal proceedings in London. The company obtained from the registrar of the Liverpool district registry an order on a petition of course for delivery and taxation of the solicitor's bill of costs:—Held, that the registrar had exceeded his authority, and that the order must be discharged. *Porrett, In re*, 60 L. J., Ch. 396; [1891] 2 Ch. 433; 64 L. T. 752; 39 W. R. 531—C. A.

2. What Costs Taxable.

Under the Statute.]—The Solicitors Act, 1843, does not authorise the taxation of every pecuniary demand or bill of solicitor for every species of employment, in which he may happen to be engaged. *Allen* v. *Aldridge*, 5 Beav. 401; 13 L. J., Ch. 155; 8 Jur. 435.

A bill may be taxed, though no part of the business was transacted in any court of law or equity; but such business must be connected with the profession of an attorney or solicitor, business in which the attorney or solicitor was employed, because he was an attorney or solicitor, or in which he would not have been employed if he had not been an attorney or solicitor, or if the relation of attorney or solicitor and client had not subsisted between him and his employer. *Ib.*

If a solicitor retains money received by him in his character of solicitor, for the use of his client, his bill is taxable, though it contains no charges for business done in a court of law or equity. Semble, items in a solicitor's bill for preparing and settling a bill in equity, will render the solicitor's bill taxable, though the bill in equity was never filed. *Barker, In re*, 6 Sim. 476.

Steward of Manor.]—The fees of the steward of a manor, who is a solicitor, but acts in the character of steward only, are not taxable under the 6 & 7 Vict. c. 73. *Allen* v. *Aldridge*, supra.

Fees for holding a court-leet as steward of a manor are taxable. *Luxmore* v. *Lethbridge*, 5 B. & Ald. 898; 1 D. & R. 511.

Agency.]—The court has jurisdiction to order an agent's bill of costs to be referred for taxation, on the application of the solicitor who employed him; and in a case where the amount of the bill exceeded the amount of moneys received by the agents in that character, and retained by them, by a sum of 1*l.* 10*s.* 10*d.* only, the taxation of the bill was ordered, upon payment or tender of that sum to the solicitor of the agents. *Jones* v. *Roberts*, 8 Sim. 397; 7 L. J., Ch. 156; 2 Jur. 30.

This court has authority to refer for taxation the bill of costs of a solicitor who acts as agent for another. *Toghill* v. *Grant*, 2 Beav. 261; 9 L. J., Ch. 298.

The court possessed no jurisdiction to compel the taxation of an agency bill, either at common law, or under the 2 Geo. 2, c. 23, and 12 Geo. 2, c. 13, even where a suit was pending against the client for the recovery of the amount. *Cardale* v. *Bull*, 4 Q. B. 611; 7 Jur. 847.

But since the Solicitors Act, 1843, a bill for work done by one attorney, as agent for another, is taxable. *Smith* v. *Dimes*, 7 D. & L. 78; 4 Ex. 32; 19 L. J., Ex. 60; 13 Jur. 518; contra,

Simons, In re, 2 D. & L. 500 ; 14 L. J., Q. B. 41 ; 9 Jur. 227 ; and *Simons, In re*, 3 D. & L. 156 ; 14 L. J., Q. B. 296; but these cases are untenable.

Notwithstanding the definition of the word "client" in s. 3 of the Attorneys and Solicitors Act, 1870, that act does not apply to accounts between country solicitors and town agents. *Ward* v. *Eyre*, 49 L. J., Ch. 657; 15 Ch. D. 130; 43 L. T. 525 ; 28 W. R. 712.

Conveyancing.]—The court has jurisdiction to order taxation of solicitor's bill and delivery up of papers, upon payment of the costs so taxed, although no part of such costs has been incurred in respect of any suit, but are for conveyancing and other general business. *Rice, In re*, 2 Keen, 181 ; 6 L. J., Ch. 291 ; 1 Jur. 351. S. P., *Smith's Trustees, In re*, Fl. & K. 627.

Business not in Court.]—The bill of costs of a mortgagee's solicitor, for business done in relation to the mortgage, and the sale of the mortgaged estate, is taxable at the instance of the mortgagor, under the 6 & 7 Vict. c. 73, though no part of the business may have been transacted in any court of law or equity. *Lees, In re*, 5 Beav. 410 ; 13 L. J., Ch. 151. See *Allen* v. *Aldridge*, supra.

Delivery—Correlative Right.]—The rights of a party to have a signed bill delivered and to have it referred for taxation are correlative. *Curling* v. *Sedger*, 6 Scott, 678.

Unsigned Bill.]—An attorney's bill may be referred to taxation, though not signed by him, or inclosed in a letter signed by him, and referring to it. *Young* v. *Walker*, 16 M. & W. 446. S. P., *Pender, In re*, 2 Ph. 69 ; 16 L. J., Ch. 25 ; 10 Jur. 891.

Election Business.]—A court for the registration of voters is not a court within 6 & 7 Vict. c. 73, s. 37, and therefore the jurisdiction of the court of chancery to tax a solicitor's bill of costs for electioneering business is not ousted if the bill contains an item for business done in such a court. *Andrew, In re*, 17 Beav. 510 ; 23 L. J., Ch. 129 ; 17 Jur. 1145 ; 2 W. R. 46.

The charges of solicitors employed as election agents are taxable. *Osborne, In re*, 25 Beav. 353 ; 27 L. J., Ch. 532 ; 4 Jur. (N.S.) 296 ; 6 W. R. 401.

Where, for a parliamentary election, a solicitor was employed as canvassing agent, other persons being employed as legal agents :—Held, that his bills were not liable to taxation. *Oliver, In re*, 36 L. J., Ch. 261 ; 15 W. R. 331.

A solicitor, who was appointed returning officer for the election of a school board under the Elementary Education Act, 1870, sent in a bill of his charges in the form of a solicitor's bill of costs, including both the election charges proper and attendance at the board after the election was over :—Held, that, as he had by the form of his bill of costs constituted himself solicitor to the board, the bill was liable to taxation. *Jones, In re*, 41 L. J., Ch. 367 ; L. R. 13 Eq. 336 ; 20 W. R. 395.

Bill in Parliament.]—In a bill of 344*l.*, only 3*l.* 3*s.* 7*d.* was for business not connected with soliciting a new bill in parliament :—Held, that, notwithstanding the 10 & 11 Vict. c. 69, and 12 & 13 Vict. c. 78, a court of equity was not deprived of its jurisdiction to order taxation. *Strother, In re*, 3 Kay & J. 518 ; 26 L. J., Ch. 695 ; 3 Jur. (N.S.) 736 ; 5 W. R. 797.

A bill by solicitors employed by a committee in soliciting and opposing bills in parliament, procuring evidence, and employing surveyors, and receiving moneys only on account of their bill of costs, praying an account and payment of the balance due to him :—Held, to amount to a bill for taxation and payment, and demurrer allowed. *Allison* v. *Herring*, 9 Sim. 593.

No jurisdiction for taxing a solicitor's bill of costs for obtaining an act of parliament. *Wheeler, Ex parte*, 3 Ves. & B. 21.

Taxation of a solicitor's bill in the House of Lords, only through the recognisance. *Id.*

Looking up Old Deeds.]—When one solicitor asks another to look up some old deeds in his possession, and offers to pay his costs, the bill for these costs is taxable. *Bowen, In re*, 41 L. J., Ch. 327 ; 20 W. R. 395.

Solicitor Employed to Transfer Stock—Distringas.]—An attorney employed to transfer stock found that a distringas had been entered at the bank to prevent the transfer. He thereupon made several inquiries respecting the transactions on behalf of his client, and prepared a notice to the solicitor of the bank to file a bill in consequence of the writ being entered :—Held, that his charges were not taxable items between him and his client, it not appearing that the distringas originated in any suit, or that the business had reference to any proceeding in a court. If the distringas had been in a suit, the steps taken by the attorney would have formed taxable items. *Nicholas* v. *Hayter*, 2 A. & E. 348.

Preparing Securities.]—A defendant, who had borrowed money of the plaintiff, was, by an agreement, to which the plaintiff's attorney was the attesting witness, to pay the expenses of that agreement, and of the various securities, including a warrant of attorney :—Held, that the plaintiff's attorney, who had prepared those securities, was compellable to deliver his bill to the defendant to be taxed. *Painter* v. *Linsell*, 6 Bing. (N.C.) 197 ; 8 D. P. C. 250 ; 9 L. J., C. P. 151.

Lands Clauses Act—Costs already Paid—No Order as of Course.]—An order for the taxation of the costs of conveyances under s. 83 of the Lands Clauses Consolidation Act, 1845, cannot be obtained where the costs have been paid. *Somerville, Ex parte, S. E. Ry., In re*, 52 L. J., Ch. 438 ; 23 Ch. D. 167 ; 48 L. T. 416 ; 31 W. R. 518.

Criminal Business.]—C., an attorney in London, employed B., also an attorney in London, to defend a person indicted at Cambridge for bribery at an election there in 1841 and 1842. B. delivered to C. two bills of costs, and in 1847 he delivered copies of the bills duly signed :—Held, that the bills were taxable. *Billing* v. *Coppock*, 1 Ex. 15 ; 5 D. & L. 126 ; 16 L. J., Ex. 265.

A charge for business done at the Central Criminal Court is taxable. *Curling* v. *Sedger*, 4 Bing. (N.C.) 743 ; 6 Scott, 678; 6 D. P. C. 759 ; 8 L. J., C. P. 71.

Quarter Sessions.]—A charge for business done at the quarter sessions is taxable. *Sylvester* v.

Webster, 9 Bing. 388; 2 M. & Scott, 506; 1 D. P. C. 708; 2 L. J., C. P. 24. S. P., *Clarke* v. *Donovan*, 5 Term Rep. 694; 1 Esp. 137.

Retainer of Bill.]—Bills of costs assumed to be taxable in equity where the solicitor had retained them in his possession, and declined to produce them. *Loughborough, In re*, 23 Beav. 439.

Other Cases.]—So, for prosecuting an extent. *Rex* v. *Collingridge*, 3 Price, 280.

There was no law to tax an attorney's bill of costs for working a country commission of bankruptcy, and, therefore, he was not bound under 2 Geo. 2, c. 23, s. 23, to deliver his bill one month before he brought an action to recover the amount of it. *Harpur* v. *Williams*, 9 D. P. C. 618; 2 Man. & G. 815; 3 Scott (N.R.) 97; 10 L. J., C. P. 189; 5 Jur. 342.

A charge for preparing a warrant of attorney renders a bill taxable. *Painter* v. *Linsell*, 8 Scott, 453; 8 D. P. C. 250.

Procuring an appearance to be entered by a proctor in the Consistory Court before 20 & 21 Vict. c. 77, s. 96, was not a taxable item. *Marris, In re*, 2 A. & E. 582.

A charge for serving subpœnas is not a sufficient item to enable the court to refer a bill to taxation. *Presidder* v. *Smith*, 1 W., W. & H. 51; 2 Jur. 205.

Drawing an affidavit of debt and getting it sworn is a taxable item. *Winter* v. *Payne*, 6 Term Rep. 645.

A dedimus potestatem is a sufficient item to enable the court to refer an attorney's bill for taxation. *Prickett, Ex parte*, 1 Bos. & P. (N.R.) 266.

Proceeding before Lord Chancellor as exercising the visitatorial power upon a royal foundation, is not within 2 Geo. 2, c. 23, s. 23, to taxation of bill of costs. *Dann, Ex parte*, 9 Ves. 547.

The costs incurred by trustees in paying money into court under the Trustees Relief Act, and also the costs of their appearing on paying it out, are subject to taxation. *Hue's Estate, In re*, 27 Beav. 337; 28 L. J., Ch. 893; 5 Jur. (N.S.) 1235; 7 W. R. 562.

Costs in a cause must be submitted to taxation. *King* v. *King*, 1 Jur. (N.S.) 972.

Costs of a sequestration as between solicitor and client will not be taxed. *Shapland, In re, Hunt, Ex parte*, 23 W. R. 40.

3. By whom Order obtained.

Solicitor.]—Taxation of costs not ordered on application of solicitor himself. *Sayers* v. *Walond*, 1 Sim. & S. 97.

A solicitor has no absolute statutory right to have the amount of his charges ascertained by taxation. *Ditton, Ex parte, Woods, In re*, 13 Ch. D. 318; 42 L. T. 161; 28 W. R. 402—C. A.

Solicitor to Guardians—Taxation by Clerk of the Peace.]—When a solicitor is employed by the guardians of the poor, the taxation of his bill of costs by the clerk of the peace under the Poor Law Amendment Act, 1844, is not final and conclusive against him, and he is entitled to an order for taxation as between solicitor and client, under the Solicitors Act, 1843. *Southampton Union* v. *Bell*, 21 Q. B. D. 297; 59 L. T. 181; 36 W. R. 924; 52 J. P. 567.

Married Woman.]—In every case where a married woman seeks to tax a solicitor's bill, for business in respect to her separate estate, she must apply by her next friend. *Waugh, In re*, 15 Beav. 508; 21 L. J., Ch. 567.

The next friend will be liable for the costs of the order and taxation, but not for the amount of the bill. *Ib.*

A married woman, having obtained an order to tax without the intervention of a next friend, was ordered to give security, and in default the order was to be discharged. *Ib.*

Where a married woman employs a solicitor, and makes her separate estate liable, she is, though not personally liable, a "party chargeable," within the meaning of s. 37 of the 6 & 7 Vict. c. 73. *Waugh* v. *Waddell*, 16 Beav. 521; 1 W. R. 206.

A husband became liable for bills of costs due from his wife dum sola, and from her former husband, to a solicitor:—Held, that, though the relation of solicitor and client did not exist between the solicitor and the second husband, yet that the latter was entitled to a taxation of the bills of costs. *Waring* v. *Williams*, 2 Beav. 1.

Separate Retainers—Proceedings on behalf of All.]—Where a solicitor is retained separately by a number of persons to take proceedings on behalf of all, each is entitled to have the whole bill of costs taxed, although each such person has only to pay a proportion of the entire amount, without serving any person except the solicitor; but the court will endeavour to secure a taxation at which all the parties interested are present in order to avoid any subsequent application to tax. *Salaman, In re*, 63 L. J., Ch. 664; [1894] 2 Ch. 201; 7 R. 540; 70 L. T. 772; 42 W. R. 530—C. A.

Persons Jointly Liable.]—Where any part of solicitor's bill relates to business done in this court, the whole may be taxed, although part of the business was for other persons jointly with the person applying. *Margerum* v. *Sandiford*, 3 Bro. C. C. 233.

A bill of costs having been incurred by A. and B. jointly, and an action having been brought against them for the recovery of the amount, the court refused to direct a taxation, and to stay the proceedings at law, on the undertaking of A. alone to pay what might be found due. *Chilcote, In re*, 1 Beav. 421.

Bill of costs incurred by two persons, ordered to be taxed on the application, and upon the undertaking of one. *Lockhart* v. *Hardy*, 4 Beav. 224.

A solicitor was employed by two persons, A. and B.; an order of course for taxation was obtained by A. alone, on the allegation that the solicitor was employed by A. It was discharged for irregularity. *Perkins, In re*, 8 Beav. 241; 14 L. J., Ch. 168; 9 Jur. 220.

One of three petitioning creditors may apply for taxation without the others joining in the application. *Watts, Ex parte*, 1 Deac. 588; 2 Mont. & Ayr. 621; 5 L. J., Bk. 31.

Where a solicitor is retained by two persons jointly, an application for taxation by one, in the absence of the other, should not be made as of course. *Lewin, In re*, 16 Beav. 608; 1 W. R. 269.

Upon an application by one of several persons interested for the taxation of a bill of costs of considerable amount, the court in determining

his right to taxation will not regard the amount of his interest. *Dawson, In re*, 28 Beav. 605.

An order of course to tax a solicitor's bill incurred by three persons, obtained on application of two of them, is irregular. *Ilderton, In re*, 33 Beav. 201.

Taxation ordered where a solicitor was retained by more than one defendant to a suit, and the application to tax the solicitor's bill of costs was made by one of such defendants. *Ford, Ex parte, Colquhoun, In re*, 5 De G. M. & G. 35; 23 L. J., Ch. 515; 2 Eq. R. 304; 2 W. R. 286.

A shareholder and member of the management committee of a provisionally registered railway company:—Held, entitled to an order, on petition, for delivery and taxation, after payment of the bills of the solicitors employed by such committee. *Stephen, In re*, 2 Ph. 562.

A solicitor was employed by three partners. He brought an action against them for his bill of costs, and, representing one, he obtained judgment against him by default:—Held, that this did not prevent the others from obtaining an order for taxation:—Held, also, that an application for taxation by the two was regular, the third not concurring, but that he ought to be served with the petition. The taxing-masters have jurisdiction to determine questions of retainer. *Hair, In re*, 10 Beav. 187; 16 L. J., Ch. 163; 11 Jur. 139.

"Assignee" of Costs.]—Whether an assignee of costs due to a solicitor is such an "assignee" of the solicitor as is, under s. 37 of the act 6 & 7 Vict. c. 73, entitled to obtain a taxation of the costs, quære. *Ward, In re*, 54 L. J., Ch. 508; 28 Ch. D. 719; 33 W. R. 783.

Client—Town Agent.]—The bill of town agent of attorney cannot be ordered to be taxed on motion of client. *Wildbore* v. *Bryan*, 8 Price, 677.

Volunteer.]—A mere volunteer under no previous liability does not, by paying a solicitor's bill, acquire a right to tax it. *Becke, In re*, 5 Beav. 406; 13 L. J., Ch. 157; 8 Jur. 505.

Outlaw.]—An outlaw cannot, for his own benefit, move to have an attorney's bill taxed. *Maunder, In re*, 6 Q. B. 867. S. P., *Ford, In re*, 1 B. C. Rep. 88; 10 Jur. 757.

Trustee in Bankruptcy.]—When the client of a solicitor becomes bankrupt, and the solicitor does not prove for the amount of his bill in the bankruptcy, the assignee cannot obtain an order to tax without giving an undertaking to pay the whole amount of the bill. *Elmslie, In re*, L. R. 9 Eq. 72.

The trustee in bankruptcy of a mortgagor is entitled to an order to tax, under 6 & 7 Vict. c. 73, the bill of costs of the solicitor of the mortgagee incurred in selling the property under a power of sale. *Marsh, In re* (15 Q. B. D. 340), distinguished. *Allingham, In re*, 55 L. J., Ch. 800; 32 Ch. D. 36; 54 L. T. 905; 34 W. R. 619—C. A.

Bankrupt.]—A fiat was sued out on the 7th June, by an attorney against his debtor for the amount of his bill of costs, and the bankrupt was shortly afterwards discharged under the Insolvent Act, having inserted the amount of the attorney's bill in his schedule. The bankrupt passes his last examination, and on the 4th December petitions for an order to tax the attorney's bill, with a view of superseding the fiat, on the ground of the insufficiency of the petitioning creditor's debt:—Held, that the bankrupt could not, after lying by so long, and after his previous admission of the debt, apply for such an order. *Gingell, Ex parte* and *In re*, 2 Deac. & C. 546; 2 L. J., Bk. 22.

A bankrupt is not during the bankruptcy a party interested in the estate in the hands of the trustee in bankruptcy so as to entitle him after his discharge, and although his creditors have been paid in full, to demand delivery and taxation of a bill of costs paid by the trustee out of estate under 6 & 7 Vict. c. 73 (The Solicitors Act, 1843), ss. 39, 40. *Leadbitter and Harvey, In re*, 48 L. J., Ch. 242; 10 Ch. D. 388; 39 L. T. 286; 27 W. R. 267.

Order for taxation obtained by an insolvent debtor of a bill of costs incurred prior to his insolvency, discharged with costs. *Halsall, In re*, 11 Beav. 163.

Administrator of Administrator.]—An administrator employed a solicitor to recover debts due to his intestate, and gave him a power of attorney, under which he received moneys, and acted generally; out of the moneys so received he retained sufficient to pay his costs, which had never been furnished to the administrator nor taxed, but after his death they were furnished to his executor, who approved of them:—Held, on petition, that the administrator de bonis non of the intestate was entitled to have the bill of costs referred for taxation, and would have been equally entitled had there been actual payment to, instead of retention by, the solicitor. Semble, secus, if he had refused the offer of taxation previously, where the question properly arose. *Langford* v. *Mahony*, 2 Con. & L. 317; 4 Dr. & War. 81; 5 Ir. Eq. R. 569.

Directors of Company.]—A solicitor and agent of a company retained parliamentary agents on behalf of the company; the bill of costs being delivered to the solicitor: the directors held not to be the proper persons to obtain the order for taxation. *Sudlow, In re*, 11 Beav. 400; 18 L. J., Ch. 182.

Person Liable to Pay (s. 38).]—A party agreeing to pay the costs of the attorney of another, as between attorney and client, is entitled to have the attorney's bill taxed. *Sadler* v. *Palfreyman*, 3 N. & M. 599; 1 A. & E. 717; 3 L. J., K. B. 179.

A person, who is the real plaintiff in a cause, but who is obliged to sue in the name of another, may apply to have his attorney's bill in the cause taxed. *Masters, In re*, 4 D. P. C. 18; 1 H. & W. 348.

A solicitor was employed by the tenant for life of certain trust funds to prepare a deed appointing new trustees, and on that occasion certain deeds and documents relating to the trust property were handed over to the solicitor for the tenant for life. The deed was approved of, on behalf of the trustees, by separate solicitors. The solicitor furnished the tenant for life with bills of costs, which included costs due for other services rendered to the tenant for life, as well as for preparing the said deed. He claimed a lien on the deeds and documents till all these costs were paid. The trustees presented a petition for an order to compel the solicitor to furnish them with a bill of the costs due by

them as such trustees, and to have them taxed, and for an order that, when they were paid, he should deliver up to them all the deeds and documents in his possession:—Held, that the trustees were not parties chargeable with the costs within the meaning of the 12 & 13 Vict. c. 53, s. 2, and that the petition was not sustainable. *Cusack, In re*, 21 L. R., Ir. 493.

A suit having been instituted in the county court to establish the will of M. by C., the executor, the widow and daughter of the deceased opposed, with the result that a compromise was effected, by which certain legacies were abated, and the residue of the assets, after payment of the costs of both parties, was to be divided between the widow and daughter. E., the solicitor for the executor, furnished an account to H., the solicitor for the widow, in which he claimed three bills of costs, including one for 52*l.* for untaxed miscellaneous costs. The widow objected, and, on the suggestion of H., E. moderated his bill by deducting 5*l.*, and sent a cheque to the widow for her share, after deducting the costs. She again objected, and after some correspondence, within twelve months after the delivery of the bill, moved for an order for taxation:—Held, that the widow, as "the person liable to pay," was entitled under s. 3 of the Solicitors (Ireland) Act, 1849 (which corresponds to s. 38 of the Solicitors Act, 1843), to have the costs taxed. *Early, In re*, [1897] 1 Ir. R. 6—C. A.

A client having withdrawn from a litigation, his solicitor agreed to take one-third of his bill in full discharge, if the suit (which was to be carried on for the benefit of another party) failed; and the client agreed to pay the remaining two-thirds, if it succeeded. The court refused eight years afterwards, when the suit had succeeded, to open the transaction by ordering a taxation of the bill. *Moss, In re*, 17 Beav. 340.

Where an attorney is retained by a surveyor acting under the Highway Act, 5 & 6 Will. 4, c. 50, the parties who contribute to a rate out of which the attorney's bill is paid are not "persons liable to pay the bill," so as to entitle them to apply for its taxation. *Barber, In re*, 3 D. & L. 244; 14 M. & W. 720; 15 L. J., Ex. 9; 9 Jur. 976.

A defendant in an action agreed, through his solicitor, to pay the plaintiff's solicitor a fixed sum for his costs and for his trouble in promoting a composition between the defendant and his creditors. Within twelve months of the payment of the amount the defendant took out a summons for the delivery by the plaintiff's solicitor of a bill of his costs. Semble, that the defendant was not a party "chargeable" within 6 & 7 Vict. c. 73, so as to be entitled to make the application. *Heritage, In re*, 47 L. J., Q. B. 509; 3 Q. B. D. 726; 38 L. T. 509; 26 W. R. 633.

Where one party is chargeable with a solicitor's bill, and another party, for reasons of his own, pays the bill, the party paying the bill has, under 6 & 7 Vict. c. 73, s. 38, the same right to taxation which the party originally chargeable would otherwise have had; and this right of taxation is not limited to any transaction which may have occurred in the premises between himself and the solicitor; but the bill which he has paid is the bill which he has a right to have taxed. *Newman, In re*, 36 L. J., Ch. 843; L. R. 2 Ch. 707; 17 L. T. 128; 15 W. R. 1189.

—— **Between Party and Party.**]—A person liable to pay costs as between party and party is not entitled to a reference for taxation under the third-party clause (s. 38) of the Attorneys Act, 1843. *Cowdell, In re*, 52 L. J., Ch. 246; 31 W. R. 335.

—— **Compromise of Proceedings.**]—A creditor's petition to wind up a company having been withdrawn on payment of the debt, the solicitors for the company undertook by letter with the petitioning creditor's solicitors "to pay all proper costs and charges incident to and recoverable under such petition, such costs, in case of difference, to be taxed." The amount of the costs not being agreed upon, the company obtained, ex parte, an order to tax under the third-party clause (s. 38) of the Attorneys and Solicitors Act, and served it on the solicitors of the petitioning creditors:—Held, on motion to discharge the order, that the undertaking was a personal undertaking to pay the costs, such costs being costs as between party and party; that the 38th section of the act had reference only to the taxation of costs as between solicitor and client; that the order, therefore, was irregular, and must be discharged with costs to be paid by the company. *Hartley, In re* (30 Beav. 620), considered and explained. *Grundy, Kershaw & Co., In re*, 50 L. J., Ch. 467; 17 Ch. D. 108; 44 L. T. 541; 29 W. R. 581.

A. and B. compromised a suit, B. agreeing to pay A.'s costs, and any question on this was to be referred to an arbitrator, who was named. A.'s solicitor delivered his bill of costs to B.:—Held, that B. was entitled to a taxation by an order of course. *Hartley, In re*, 30 Beav. 620.

P., being sued by N. for a debt, compromised the matter on certain terms, and consented to pay N.'s attorneys, M. & Co., their costs of the action, agreed at 200*l.* No bill of costs was delivered. On appeal against a refusal of the master to order delivery of M. & Co.'s bill of costs to P. for the purpose of taxation under 6 & 7 Vict. c. 73. s. 38:—Held, that the statute did not apply to such a state of circumstances, and that the master was therefore right in refusing to make the order. *Morris, In re, Pooley, Ex parte*, 27 L. T. 554; 21 W. R. 192.

A railway company having taken lands occupied by D.'s tenant, and the parties not agreeing to the compensation offered, steps were taken for holding an inquisition, in which one solicitor acted for D. and the tenant, but the company afterwards acceded to the valuation made for the tenant. A verdict was taken by consent for D., and the company gave a written undertaking to pay any sum to which the solicitor was entitled as solicitor for D. and his tenants, on same being ascertained by the proper officer under their act of incorporation. They took a conveyance from D., the costs of which and of making title were taxable in chancery under their act. The costs of ascertaining the compensation for the tenants should properly, under it, have been settled with their claim by justices of the peace, and the costs of an inquisition were taxable in a law-court. The solicitor, having furnished a separate bill of costs for D. and the tenants, to which the company objected, petitioned for taxation, and to enforce payment:—Held, that the costs of D. only could be taxed or enforced in this court, and that the undertaking gave no jurisdiction as to the costs of the tenants. *Drogheda (Marquis) v. Great Southern and Western Ry.*, 12 Ir. Eq. R. 103.

A party who, by agreement, has paid the

bill of costs of another party, cannot apply for a taxation. *Langford* v. *Nott*, 1 Jac. & Walk. 291.

A party liable under a bond of indemnity for the costs of another, having, on a compromise, paid what the solicitor stated to be the amount of them, is entitled afterwards to have the bill taxed. *Balme* v. *Paver*, Jac. 305 ; 23 R. R. 73.

Semble, it cannot be made one of the terms of the compromise of a suit, that the solicitor's bill should be paid without taxation. *Id.*, Jac. 307 ; 23 R. R. 75.

An agreement to pay costs is an agreement to pay taxed costs, and a third party paying a solicitor's bill of costs, in order to compromise a suit, stands in the same situation with respect to the right of claiming taxation as the solicitor's client. *Vincent* v. *Venner*, 1 Myl. & K. 212 ; 2 L. J., Ch. 49.

—— **Order of Course.**]—Under ordinary circumstances, an order for taxation may be obtained as of course by third parties "liable to pay." *Bracey, In re*, 8 Beav. 338.

The taxation under s. 38 of the act 6 & 7 Vict. c. 73, or the "third party liable clause," is by order of course. *Straford, In re*, 16 Beav. 27.

After payment, an ex parte order for taxation is irregular ; and the same rule applies where the payment is made by a mortgagee, and the taxation is at the instance of the mortgagor, as the party ultimately liable to pay. *Carew, In re*, 8 Beav. 150 ; 14 L. J., Ch. 100.

In taking a transfer of two mortgages, there was included in the amount secured on the estate a sum for costs incurred by the mortgagor and mortgagees on account of the estate :—Held, that the transferee could not have the bill for these costs taxed on an ordinary summons. *Forsyth, In re*, 34 Beav. 140 ; 2 De G. J. & S. 509 ; 11 Jur. (N.S.) 615 ; 12 L. T. 687 ; 13 W. R. 932.

Semble, that the general jurisdiction of the court over a solicitor will not be exercised on an ordinary summons for taxation. *Ib.*

—— **Service of Petition.**]—A petition for taxation, under the "third-party clause" of the 6 & 7 Vict. c. 73, must be served upon the "party chargeable" in a case where the bill of costs is not taxable as between the party chargeable and the solicitor. *Baker, In re*, 32 Beav. 526 ; 2 N. R. 151 ; 8 L. T. 566 ; 11 W. R. 792.

Upon a petition by a mortgagor to tax the bill of the mortgagee's solicitor, after payment, the mortgagee must be served. *Ib.*

A second mortgagee presented a petition to tax the bill of costs of the first mortgagees' solicitor, which had been paid out of the produce of the sale of the mortgaged estate :—Held, that the first mortgagees must be served with the petition. *Jessop, In re*, 32 Beav. 406.

—— **Special Circumstances.**]—On a petition for taxation under the third-party clause of the Solicitors Act, where the party immediately chargeable has paid the solicitor, and the third party liable has repaid him, it is not necessary to prove pressure. *Turner, In re, Burton, Ex parte*, 4 W. R. 805.

A solicitor to a railway company provisionally registered brought an action against three of the managing directors for the amount of his bill of costs, and recovered judgment. An order was afterwards obtained for winding up the company under the act, and a petition was then presented by the official manager for taxing the solicitor's bill, under the stat. 6 & 7 Vict. c. 73, on the ground of excessive charges :—Held, that the court could not be called upon to examine the items of a bill to ascertain their correctness, and that an allegation of excessive charges was not such a special circumstance as to bring the case within s. 38 of the act. Petition dismissed. *Vardy, In re*, 20 L. J., Ch. 325.

Where on transfer of a mortgage the transferee has paid the amount claimed and accepted a deed which recites that a certain sum is due to the original mortgagee for costs, and contains an assignment of that sum as well as of the principal and interest, he cannot afterwards obtain an order for taxation of the mortgagee's solicitor's bill. *Gold, In re*, 24 L. T. 9 ; 19 W. R. 343.

When once a mortgagor has paid the bill of costs, he cannot, as between himself and the solicitor of the mortgagee, have it taxed, except under special circumstances ; but as between himself and the mortgagee, he may have it taxed, under the third-party clause in 6 & 7 Vict. c. 73, s. 38. *Abbott, In re*, 4 L. T. 576.

Semble, a third party who applies, under s. 38 of 6 & 7 Vict. c. 73, for taxation of a bill after payment, must shew such special circumstances as would support an order for taxation on the application of the person originally chargeable. *Dickson, In re*, 26 L. J., Ch. 89 ; 3 Jur. (N.S.) 29 ; 5 W. R. 108. See *Massey, In re*, 8 Beav. 458.

—— **Taxation as between Solicitor and his Client.**]—The taxation (under the 6 & 7 Vict. c. 73) of a solicitor's bill, at the instance of a third party "liable to pay," is regulated by the relations existing between the solicitor and his client, and not as between the solicitor and such third party. *Fyson, In re*, 9 Beav. 117. S. P., *Vincent* v. *Venner*, 1 Myl. & K. 212 ; 2 L. J., Ch. 49.

Under 6 & 7 Vict. c. 73, s. 38, the third party stands in the position of the client ; and if the client is not entitled to a taxation against the solicitor, neither is the third party entitled to a taxation either as against the solicitor or as against the client. But he may be entitled to have a taxation as against the client in a suit. *Massey, In re*, 34 Beav. 463 ; 6 N. R. 195 ; 34 L. J., Ch. 492 ; 11 Jur. (N.S.) 594 ; 12 L. T. 519 ; 13 W. R. 797. S. P., *Smith, In re*, 32 W. R. 408 ; contra, *Dawson, In re*, 8 W. R. 554.

A mortgagor who has paid his mortgagee's solicitor's bill may yet tax it, in the same way as the mortgagee might have done. If the latter has, as between the solicitor and himself, bound himself, then the mortgagor cannot tax the bill as against the solicitor, but only in diminution of the amount due to the mortgagee, who must in that case be before the court. But if the case is one in which the bill can be taxed by the mortgagee as against the solicitor, the mortgagee need not be before the court. *Baker, In re*, 32 Beav. 526 ; 2 N. R. 151 ; 8 L. T. 566 ; 11 W. R. 792. And see *Jessop, In re*, 32 Beav. 406.

An agreement for the purchase of land, at a price to be fixed by arbitration, contained a clause that a local board should pay all the costs of the reference to arbitration. The arbitration took place, and the purchase was completed :—Held, that, by taking the usual third-party order

for taxation under s. 38 of the act, the local board had precluded themselves from taking any objection to the bill of costs, which could not have been taken by the vendors; and that, though by the agreement the board were only bound to pay reasonable costs, they could not, on taxation, object to anything authorised by the vendors as unreasonable. *Holliday and Godlee, In re*, 58 L. T. 301.

The rule that under the third-party clause in the 6 & 7 Vict. c. 73, s. 38, taxation is to be made as between the solicitor and person who is immediately liable to pay him, is to be taken with the exception that a trustee is to be personally responsible to the solicitor for the payment of items not necessary for the execution of the trust, and such items will be disallowed on taxation by a third party. *Brown, In re*, 36 L. J., Ch. 842; L. R. 4 Eq. 464; 16 L. T. 729; 15 W. R. 1030.

Therefore the master having, in taxing a paid bill of costs at the instance of a cestui que trust, disallowed certain items as not chargeable against the trust estate:—Held, that though such items would have been allowed as between the solicitor and his client, the trustee, the court would not in that case interfere with the discretion of the master. *Ib.*

Upon paying off a mortgage, the bill of the mortgagees' solicitor, though objected to, was paid in full, the solicitor undertaking "to refund" so much of "the mortgagees' law charges" as might be "found to be in excess of what they were entitled to receive":—Held, that the court would enforce the undertaking, upon petition, by ordering a taxation, and that it was to be as between the mortgagor and mortgagees. *Fisher, In re*, 18 Beav. 183.

A mortgagor has not a right to have the bills of the mortgagee's solicitor taxed upon different principles from those which would be applied to the taxation of the same bill upon the petition of the mortgagee. *Jones, In re*, 8 Beav. 479.

Where a mortgagor seeks the taxation of the bill of the mortgagee's solicitor, it must be looked at, not as between the mortgagor and the solicitor, but as between the solicitor and his client, the mortgagee. *Barrow, In re*, 17 Beav. 547.

W., on the 31st of May, 1865, agreed in writing to take a lease from G. and T., and to pay their costs of the agreement and of the lease and counterpart, and incidental thereto. W. paid the bill, and afterwards applied for taxation against the solicitors. An order was made to tax the bill, "upon the terms of the agreement dated the 31st May, 1865":—Held, that this reference to the agreement was erroneous, for that the order must be to tax the bill which W. had paid, without anything to limit the bill to that which would be the proper bill as between G. and T. and W. *Newman, In re*, 36 L. J., Ch. 843; L. R. 2 Ch. 707; 17 L. T. 128; 15 W. R. 1189.

—— **Deductions.**]—Where a solicitor's bill includes charges for services in respect of which the third party taxing it is not liable, a corresponding deduction must be made as between the solicitor and such third party from the amount of the scale fee chargeable upon the whole transaction. *Negus, In re*, 64 L. J., Ch. 79; [1895] 1 Ch. 73; 13 R. 85; 71 L. T. 716; 43 W. R. 68.

Party Interested.]—A bankrupt who has obtained his discharge and who has become entitled to the surplus of his estate, all the creditors having been paid in full, is not entitled, under s. 39 of the Solicitors Act, 1843, to obtain the taxation of a bill of costs paid by the trustee in the bankruptcy. The trustee in bankruptcy does not stand in the position of a trustee for the bankrupt. *Leadbitter and Harvey, In re*, 48 L. J., Ch. 242; 10 Ch. D. 388; 39 L. T. 286; 27 W. R. 267—C. A.

An action will not lie by a cestui que trust against the solicitor of his trustees for taxation of a bill of costs paid by the trustees, the proper remedy being by application, under s. 39 of the Solicitors Act, 1843. *Spencer, In re, Spencer* v. *Hart*, 51 L. J., Ch. 271; 45 L. T. 645; 30 W. R. 296—C. A. See *Jackson, In re, Boughton-Leigh* v. *Boughton-Leigh*, 58 L. J., Ch. 387; 40 Ch. D. 495; 60 L. T. 589; 37 W. R. 282.

A cestui que trust cannot obtain an order for the separate taxation of a solicitor's bill, but he has the right to attend the taxation of the trustees and can raise, as between himself and the trustees, the question of retainer. *Story, In re, Marwick, Ex parte*, 1 L. T. 16; 8 W. R. 15.

—— **Special Order.**]—A. B., who claimed some property, conveyed it to trustees, upon trust for carrying on the litigation and payment of the costs, &c. The trustees employed a solicitor, and they raised a sum of money upon A. B.'s notes, drawn for the purpose, which they placed in the solicitor's hands. A. B. alone obtained an ex parte order for taxation; it was discharged for irregularity. *Mobbs, Ex parte*, 8 Beav. 499.

On a taxation under s. 39 of the Solicitors Act, 1843, or third party interested clause, the application is special. *Straford, In re*, 16 Beav. 27.

—— **Parties.**]—A trustee is not a proper party to a petition presented by a cestui que trust for the delivery and taxation of bills of costs paid by a trustee. *Mole, In re*, 22 L. J., Ch. 455.

Whether the taxation, at the instance of a cestui que trust, of a bill of costs which has been long since settled and paid by trustees out of a trust fund, ought to take place as against the solicitor, or as against the trustees for the purpose of justifying their payment, quære. *Grove* v. *Sansom*, 1 Beav. 297.

—— **After Payment.**]—Where a cestui que trust seeks to tax the solicitor's bill paid by his trustee, on the ground of overcharge, he must allege and prove specific items. *Bennett, In re*, 8 Beav. 467; 14 L. J., Ch. 403.

It is not necessary, where a cestui que trust applies for taxation of bills paid by trustees or executors, to shew that there are fraudulent overcharges. *Drake, In re*, 22 Beav. 438.

Where a bill of costs against executors contained charges to a considerable extent beyond what would have been allowed them in their accounts with the testator's estate:—Held, that it was a proper case of taxation at the instance of the persons beneficially interested, after payment by the executors. *Dickson, Ex parte*, 8 De G. M. & G. 655; 26 L. J., Ch. 89; 3 Jur. (N.S.) 29; 5 W. R. 108.

Application by residuary legatee more than twelve months after payment, for the taxation of a solicitor's bill against the executor, refused, notwithstanding there had been some agreement

between the legatee and solicitor, and that payment had afterwards been made behind the back of the legatee. *Rees, In re*, 12 Beav. 256.

The bill of trustees was delivered on the 27th November, and on the 10th December paid, after some deductions, by the solicitor of the cestui que trust, as he alleged, under protest. A petition for taxation, presented by the cestui que trust in January following, was dismissed with costs. The general rule is, that a paid bill is not to be referred for taxation, and special circumstances and grounds are required to take a case out of this rule. *Neate, In re*, 10 Beav. 181.

Where a solicitor's bill has been paid by a trustee, the cestui que trust cannot, after the expiration of twelve months from payment, obtain a taxation as against the solicitor, although he had no notice of the payment until after the twelve months had expired, semble. *Downes, In re*, 5 Beav. 425; 13 L. J., Ch. 159.

The lapse of twelve calendar months after payment of a bill of costs precludes taxation under the Solicitors Act. This rule applies where payment is made by trustees, &c., and the application for taxation is made, under the 38th section of the 6 & 7 Vict. c. 73, by a party "liable to pay." *Massey, In re*, 8 Beav. 458.

Twelve months after payment of a bill of costs by trustees to their solicitor, it cannot be taxed upon the application of their cestui que trust. *Press, In re*, 35 Beav. 34.

Semble, a third party who applies under s. 39 of the Solicitors Act, 1843, for taxation after payment, must shew such special circumstances as would support an order on the application of the person originally chargeable. *Dickson, In re*, 26 L. J., Ch. 89; 3 Jur. (N.S.) 29; 5 W. R. 108.

Quære, whether the provision in s. 41 of the Solicitors Act, 1843, as to the necessity of shewing "special circumstances" on an application for taxation of a bill of costs after payment, applies in the case of an application by a cestui que trust under s. 39 for taxation of a bill paid by trustees. *Chowne, In re*, 52 L. T. 75—C. A.

—— **Order when made.**]—The court will make an order for taxation under the third-party clause, contained in s. 39 of the 6 & 7 Vict. c. 73, although the petitioners may be actuated by personal feelings to present the petition, and their interest in the matter is very small. *Dawson, In re*, 6 Jur. (N.S.) 878; 2 L. T. 286; 8 W. R. 554.

Taxation ordered, at the instance of cestuis que trustent, of a bill incurred in respect of a trust estate by trustees, both being now dead; but any balance due from the solicitor was ordered to be paid into court, to a separate account, and not to the petitioners. *Hallett, In re*, 21 Beav. 250.

—— **Mortgagee of Client joining in Application—Client's Bankruptcy—Submission to Pay.**]—The mortgagee of moneys due to a client from his former solicitors who joins in an application against the former solicitors for the delivery of bills of costs, cash account, and taxation, will not, on the bankruptcy of the client, be entitled to the order, except upon joining with the client in the submission to pay what may be found due to the solicitors upon the taxation. *Battams and Hutchinson, In re*, 66 L. J., Ch. 394; [1897] 1 Ch. 699; 76 L. T. 385; 45 W. R. 458.

4. Effect of Death of Parties.

Order against Solicitor's Representatives.]—In an action on an attorney's bill by his executors, the court, before the Solicitors Act, 1843, had no power to refer the bill for taxation, though it contained taxable items. *Williams* v. *Griffith*, 10 M. & W. 125; 2 D. (N.S.) 281; 11 L. J., Ex. 341.

In a suit for an account by the assignees of a bankrupt against the executor of the solicitor to the commission, bills of costs, for which the executor takes credit, as against the sum due from his testator to the bankrupt's estate, will, on motion, be referred for taxation. *Stephens* v. *Davis*, 6 L. J. (O.S.) Ch. 66.

This court has no authority to order the personal representatives of a deceased solicitor to have his costs taxed, even though they are in possession of the client's deeds. *Turkington* v. *Kiernan*, 9 Ir. Eq. R. 447.

The court has no authority, under the 2 Geo. 2, c. 23, to make an order against the personal representatives of a deceased solicitor that the solicitor's bills of costs shall be taxed. *Maddeford* v. *Austwick*, 3 Myl. & C. 423; 7 L. J., Ch. 304; 3 Jur. 668.

A solicitor, who was one of the executors of a testator, paid himself out of the assets a bill for business done for the testator. Twenty-six years after the death of the testator, and ten years after the death of the solicitor, a decree was made directing the usual accounts of the testator's personal estate. The executor of the solicitor, in bringing in his accounts under the decree, inserted the bill of costs as one of his items of discharge: — Held, that although as between solicitor and client the bill was no longer subject to taxation, yet as against the executor the persons beneficially interested were entitled to question its amount as an item of discharge, but that an order referring it for taxation was not proper, the right course being to direct the taxing-master to state whether any items objected to were fair and proper to be allowed, and to what amount. *Allen* v. *Jarvis*, L. R. 4 Ch. 616; 21 L. T. 280; 17 W. R. 943.

Revivor of Order to Tax.]—A representative of a person who had obtained an order to tax a bill can revive it only on an undertaking to pay. *Murphey* v. *Balderston*, 2 Atk. 114.

Where there was a decree with costs against three persons, and during the progress of the taxation one of them died, it was held, the master was regular in proceeding with the taxation and making his certificate, notwithstanding the two survivors objected that the suit was abated. *Meredyth* v. *Hughes*, 3 Y. & J. 188.

Pending a taxation, both the solicitor and client died, the reference was revived, and the taxation continued between the representatives. *Whalley, In re*, 20 Beav. 576.

Pending a taxation, the solicitor died:—Held, that his executors might revive the proceeding against their client by an ex parte order. *Waugh, In re*, 29 Beav. 666; 30 L. J., Ch. 796; 9 W. R. 775.

A client may apply ex parte against an executrix of a solicitor deceased to revive an order for the taxation of the solicitor's bill of costs. *Nicholson, In re*, 29 Beav. 665; 30 L. J., Ch. 796; 9 W. R. 774.

Costs incurred after but before Notice of Client's Death.]—The costs incurred by a solicitor

after his client's death were disallowed upon taxation, notwithstanding that the solicitor could not and did not know of the death of his client when the costs were incurred. *Pool* v. *Pool*, 58 L. J., P. 67; 61 L. T. 401.

Action by Solicitor's Representatives.]—After an order for the taxation of a solicitor's bill, staying proceedings at law till the report, the solicitor having died before a report, and no measures having been taken for continuing the taxation, his administratrix, proceeding at law against the client, was held not to have committed a contempt. *Houlditch* v. *Houlditch*, 1 Swan. 58; 1 Wils. Ch. 17.

5. Whether Common or Special Order Required.

Within One Year from Delivery of Bill.]—Under the 6 & 7 Vict. c. 73, any party entitled to an order for taxation may obtain it as of course, and without special directions, within one month after delivery; and with such special directions as the court may order to be imposed, after the expiration of one month from the delivery, but not after verdict, writ of inquiry, or payment. In those cases a special order made upon special circumstances, to be proved to the satisfaction of the court, is required. *Becke, In re*, 5 Beav. 406; 13 L. J., Ch. 157; 8 Jur. 505.

After the expiration of a month from the delivery of a bill of costs, and before the expiration of twelve months, an order of course may be obtained for its taxation. *Holland* v. *Gwynne*, 8 Beav. 124.

Terms of taxation, after the expiration of one month from the delivery of the bill. *Bromley, In re*, 7 Beav. 487; 13 L. J., Ch. 320.

An application to tax a bill within a year of its delivery should be made by common order, and not by special summons, although a payment may have been made on account. *Woodard, In re*, 18 W. R. 37.

Trustee—Cestui que Trust.]—A. B., who claimed some property, conveyed it to trustees, upon trust for carrying on the litigation and payment of the costs, &c. The trustees employed a solicitor, and they raised a sum of money upon A. B.'s notes, drawn for the purpose, which they placed in the solicitor's hands. A. B. alone obtained an ex parte order for taxation; it was discharged for irregularity. *Mobbs, Ex parte*, 8 Beav. 499.

Notice.]—An order referring a solicitor's bill for taxation may be made without notice in either of the two first classes of cases provided by 6 & 7 Vict. c. 73, s. 37. *Gaitskell, In re*, 1 Ph. 576; 14 L. J., Ch. 450; 9 Jur. 909.

The decision in *Gaitskell, In re* (1 Ph. 576), in which it was held that applications for the taxation of bills in the second class of cases, provided for by s. 37 of 6 & 7 Vict. c. 73, do not require notice confirmed. *Pender, In re*, 2 Ph. 69; 16 L. J., Ch. 25; 10 Jur. 891.

Joint Retainer—Application by some Clients only.]—*See* supra, col. 1558.

Doubtful Case—Consent.]—In a doubtful case, the client should apply to the solicitor for his consent to an order of course. *Taylor, In re*, 15 Beav. 145.

Suppression of Material Facts.]—The rule, in these matters, that on application for orders of course all material facts must be stated, is to be strictly adhered to. *Winterbottom, In re*, 15 Beav. 80. See *Abel, In re*, 15 W. R. 730; *Inderwick, In re*, 54 L. J., Ch. 72; 25 Ch. D. 279; 50 L. T. 221; 32 W. R. 541—C. A.

Where a client has obtained ex parte the common order to tax a solicitor's bill of costs, but has allowed the order to die out, he cannot under s. 37 of the Solicitors Act of 1843, obtain ex parte a second common order to tax in precisely the same terms, suppressing the fact that he had obtained the former order. *Webster, In re*, 60 L. J. Ch. 338; [1891] 2 Ch. 102; 64 L. T. 250; 39 W. R. 535. S. P., *Taylor, Sons and Tarbuck, In re*, 63 L. J., Ch. 290; [1894] 1 Ch. 503; 8 R. 170; 70 L. T. 161; 42 W. R. 329.

A. agreed to take a lease and to pay the expenses. The lease was prepared by the lessor's solicitor, who delivered his bill, made out as against the lessee. The lessee obtained an order to tax the bill on an allegation that he, the lessee, had employed the solicitor, which, being contrary to the fact, the order was discharged, but without costs, the matter in difference being very small. *Gabriel, In re*, 10 Beav. 45.

An ex parte order for the delivery of a bill of costs discharged with costs; the allegation of the professional employment being denied by the solicitor. *Eldridge, In re*, 12 Beav. 387.

Order of course for taxation discharged, on the ground of the case being misstated upon the petition for the order. *Carven, In re*, 8 Beav. 436; 14 L. J., Ch. 372.

An order of course for costs, suppressing the fact that a bill of discovery was a cross-bill, was discharged for irregularity. *Watts* v. *Penny*, 11 Beav. 435; 18 L. J., Ch. 150; 13 Jur. 578.

A client agreed to pay his solicitor three guineas a day, in addition to the usual charges of a solicitor, for his travelling and other expenses. The court, being of opinion that, under the common order of taxation, the master would take the agreement into consideration:—Held, that its suppression, in obtaining an ex parte order, was not irregular. *Eyre, In re*, 10 Beav. 569; 2 Ph. 367; 17 L. J., Ch. 277.

Order of course for taxation discharged on the ground of the suppression of an alleged previous reference to arbitration, though the fact was disputed. *De Feuchères* v. *Dawes*, 11 Beav. 46.

Order for taxation, made upon affidavit of service, discharged with costs; the petition having misrepresented the case, and the real facts being found not to warrant the order. *Rees, In re*, 12 Beav. 256.

A. B. employed a solicitor in the matter of a mortgage, and there was a dispute between them whether he was not also liable for the costs of legal proceedings taken in the name of a third party. A. B. obtained ex parte at the rolls an order for taxation. He stated, however, the mortgage transaction alone, and suppressed the other matters. It was discharged on the ground of the suppression. *Walker, In re*, 14 Beav. 227.

An order of course for taxation discharged on the ground of the suppression of the fact that there had been a previous order of the queen's bench for taxation, upon terms which had not been complied with, and a subsequent application to the exchequer for taxation, which had been refused. *Gedye, In re*, 15 Beav. 254; 21 L. J., Ch. 430.

Upon an arbitration between A. and B., A.'s

costs were directed to be paid by B., and were moderated by the arbitrator, and paid. A. afterwards obtained an order of course to tax his solicitor's bills of costs, suppressing these facts. The order was discharged. *Winterbottom, In re*, 15 Beav. 80.

An order of course was obtained for the taxation of two bills of costs. One had been paid, and the fact had been suppressed. The court discharged the order altogether. *Hinton, In re*, 15 Beav. 192.

In December an account was signed by a client, one item of which was the amount of a bill of costs previously delivered. The balance was paid over a month after. Four months afterwards the client, suppressing settlement, obtained an order of course to tax. It was discharged. *Holland, In re*, 19 Beav. 315 ; 2 W. R. 514.

A client applying for the common order to tax a bill of costs ought to disclose the existence of an agreement respecting its payment, although the contents may not be known. *Ingle, In re*, 21 Beav. 275 ; 25 L. J., Ch. 169 ; 1 Jur. (N.S.) 1059.

A client obtained an order of course for the taxation of his solicitor's bill. A special agreement existed between them, which ought to have been mentioned on the application ; but this was in the possession of the solicitor, who refused to furnish a copy. The court declined to discharge the order, though irregular. *Ib.*

In an action by a client against his solicitor, the latter pleaded his bill by way of set off. The client obtained an order for the delivery of the bill, and suffered himself to be nonprossed :—Held, that it was not necessary to state these circumstances in an ex parte application in chancery for taxation. *David, In re*, 30 Beav. 278.

After Payment.]—Where a bill of costs has been paid, the client ought not to obtain an order of taxation as of course. *Howell* v. *Edmunds*, 6 L. J. (O.S.) Ch. 29 ; 4 Russ. 67.

But where a bill had been paid pending the suit, and under some degree of pressure practised by the solicitor towards the client, the court refused to discharge an order for taxation, obtained subsequently as of course. *Ib.*

An order of course, obtained by a client for the taxation of his solicitor's bill of costs after payment thereof, discharged. *Sayer* v. *Wagstaff*, 12 L. J., Ch. 496.

After payment of a bill, an order for taxation is not to be obtained as of course, even by a party liable to pay the same. *Becke, In re*, 5 Beav. 406 ; 13 L. J., Ch. 157 ; 8 Jur. 505.

A solicitor's bill having been partly taxed and paid, an order, obtained as of course, referring the bill generally for taxation, was discharged with costs. The conduct of the solicitor cannot be adduced in support of such an order ; and the costs of affidavits upon that subject were ordered to be paid as between solicitor and client. *Clutton* v. *Pardon*, Turn. & R. 301 ; 24 R. R. 68. And see *Gretton* v. *Leyburne*, Turn. & R. 407.

After payment, an ex parte order for taxation is irregular. And the same rule applies where the payment is made by a mortgagee, and the taxation is at the instance of the mortgagor, as the party ultimately liable to pay. *Carew, In re*, 8 Beav. 150 ; 14 L. J., Ch. 100.

After payment an order of course for taxation is irregular. *Winterbottom, In re*, 15 Beav. 80. And see *Cattlin, In re*, 8 Beav. 121.

A summons taken out to tax a bill paid eight years ago is not the proper course ; a person wishing to tax such a bill must shew a special case and proceed by petition. *Woodard, In re*, 17 W. R. 1006.

An order for the taxation of the costs of conveyances under s. 83 of the Lands Clauses Consolidation Act, 1845, cannot be obtained where the costs have been paid. Such an order for taxation cannot be sustained as an order of course under the Attorneys Act. *Somerville, Ex parte, S. E. Ry., In re*, 52 L. J., Ch. 438 ; 23 Ch. D. 167 ; 48 L. T. 416 ; 31 W. R. 518.

Order for taxation of a solicitor's bill under the circumstances, after a settlement, upon the common petition, without stating the objectionable items. *Jones* v. *Powys*, 10 L. J., Ex. Eq. 49.

—— **Retainer of Amount.**]—Application for taxation of a solicitor's bill of costs, on the ground that the solicitor has improperly retained in account a sum of money in satisfaction of his bill, must be made by summons in chambers. *May, In re*, 34 Beav. 132 ; 5 N. R. 297 ; 34 L. J., Ch. 236 ; 11 Jur. (N.S.) 149 ; 11 L. T. 658 ; 13 W. R. 777.

The solicitor to the fiat having delivered his bill of costs, and retained the amount of it before the end of 1850, was discharged in July, 1851. No application for taxation was made before October, 1852 :—Held, that it was not consistent with safety or propriety to direct taxation in a summary way, even if the court had jurisdiction to do so. But semble per Lord Cranworth, that the court had no such jurisdiction. *Pemberton, Ex parte*, 2 De G. M. & G. 960 ; 22 L. J., Bk. 76.

A solicitor, acting on behalf of mortgagees, sold the mortgaged premises, and on the 27th June, 1850, he retained the amount of his bill of costs out of the proceeds of the sale. On the 29th June, 1850, he sent a copy of the bill to the solicitor of the mortgagor, and on the 27th June, 1851, the mortgagor applied for an order for taxation :—Held, that the taxation might have been had upon the common order ; but that he must pay the costs beyond the costs of the common order. *Steele, In re*, 20 L. J., Ch. 562.

The amount of a bill of costs was included in a settled account between a solicitor and client, and retained by the solicitor out of moneys in his hands :—Held, that the court had not jurisdiction upon petition under the 6 & 7 Vict. c. 73, to open the account and order taxation, and that it could not be done by bill. *Barwell* v. *Brooks*, 8 Beav. 121.

A mortgagee's solicitor retained the amount of his bill of costs out of the produce of the sale of the mortgaged estate, and he charged the amount in an account delivered to the mortgagor :—Held, that an order for taxation within twelve months might be obtained as of course ; and a special petition having been presented for that object, the order was made, but the petitioner was ordered to pay the costs. *Bignold, In re*, 9 Beav. 269.

After Order to change Solicitor.]—An order for the taxation and payment of a bill (after a previous order to change the attorney), cannot be made upon an ex parte application. *Gillow* v. *Rider*, 15 C. B. 729 ; 3 C. L. R. 263.

Third Party liable to Pay—Sect. 38.]—*See* supra, col. 1560.

Third Party Interested—Sect. 39.]—*See* supra, col. 1566.

Settlement of Action—Costs agreed.]—Where an action was settled on terms, one of which was that the defendant should pay the plaintiff's costs, which were agreed at 45*l.*, the defendant is not entitled to the common order for taxation. *Hulbert and Crowe, In re*, 13 R. 442; 71 L. T. 748.

After Order in Action.]—A., the next friend of infants in a suit, employed B. as solicitor therein and in other matters. An order was made, in the suit, for the taxation and payment to B. of his costs of suit. Before this had been done, A. obtained, ex parte, an order to tax B.'s bill in all the matters in which he had been employed for A.:—Held, that the order was regular. *Fluker, In re*, 20 Beav. 143.

After Action on Bill.]—A solicitor delivered a bill of costs with a cash account at the foot, which shewed a balance due to him larger than the amount of the bill, and then brought an action for the whole amount:—Held, that, under the circumstances, the common order to tax was improper, and that a special application must be made. *Yetts, In re*, 3 N. R. 598; 33 Beav. 412.

Useless Proceedings.]—Where a defendant obtains an order to tax on the usual undertaking he will not be allowed to dispute his liability on the ground that the work done was useless. *Walker* v. *Rogers*, 5 L. J., Ex. 249.

Reckless Proceedings.]—A client presented a special petition for the taxation of his solicitor's bill, complaining that he had taken reckless proceedings, and praying that the costs of them might be wholly disallowed on taxation. A special petition was held to be unnecessary, and the petitioner was ordered to pay the costs of it. *Atkinson, In re*, 26 Beav. 151.

Payment of Balance.]—Special applications for delivery and taxation of a bill, and for payment over to the applicant of the balance of the cash account, must be made by summons, and not by petition. *Edmonds, In re*, 25 L. T. 152; 19 W. R. 1048.

Special Agreement—Non-professional Work.]—Where an agreement has been made for the remuneration of a solicitor, and the solicitor alleges that the remuneration was for non-professional work, the person chargeable cannot obtain the ex parte order for the delivery and taxation of the bill of costs. The Solicitors' Remuneration Act, 1881, s. 8, has made no difference in the practice in this respect. *Inderwick, In re*, 54 L. J., Ch. 72; 25 Ch. D. 279; 50 L. T. 221; 32 W. R. 541—C. A.

—— **Agency Charges.**]—The taxation of the bill of costs of the agent of a solicitor, upon the footing of a special agreement requiring the master to depart from the ordinary rules of taxation, cannot be obtained upon petition. *Smith, In re*, 4 Beav. 309.

Messrs. S., solicitors, promised, by letter, to conduct the professional business in which F. might be concerned, "personally or otherwise," upon the terms of receiving agency charges. F. was a solicitor, but he had omitted to take out his certificate. At that time he was interested in a suit which he had procured to be instituted against himself, for the purpose of administering the estate of a testatrix, whose executor he was, and in whose estate he was beneficially interested. Upon the completion of this business, Messrs. S. obtained the whole of the money belonging to F. out of court; they repudiated the letter, and insisted upon their right to costs as between solicitor and client; they also refused all accounts, and never delivered any bill of costs. Upon a bill by F.:—Held, that the letter was a valid agreement; that Messrs. S. were not entitled to higher charges because F. was uncertificated; that his being uncertificated was immaterial, as such an agreement was legal if made with any client; that the transaction was such that it could not be taxed under the common order; and that it was necessary to file a bill and abandon the common order which had been obtained for taxation: and a reference was directed to the taxing-master to tax the bill of costs as between principal and agent. *Foley* v. *Smith*, 20 L. J., Ch. 621.

A bill was filed by a country solicitor against his town agents for an account of cash transactions between them.—Held, that as the account might have been obtained under the common order for taxation, the bill must be dismissed. *Harvey* v. *Mayhew*, 2 W. R. 128.

In general, a solicitor cannot obtain the taxation of his agent's costs without bringing the amount into court; but, under special circumstances, that condition will be dispensed with or the amount limited. *Smith, In re*, 4 Beav. 309.

An order for the taxation of an agent's bill cannot be obtained as of course by a solicitor, nor can the rule for bringing the amount of the agent's bill into court upon such application be dispensed with, except under special circumstances. *Lees* v. *Nuttall*, 2 Myl. & K. 284; 4 L. J., Ch. 124.

A solicitor cannot obtain the taxation of his agent's bill without bringing the amount into court. *Ostle* v. *Christian*, Turn. & R. 324.

Prior Bill withdrawn.] — Where solicitors delivered a first bill which was afterwards withdrawn, the clients should, instead of obtaining the common order to tax, obtain a special order on petition raising the question as to the right of the solicitors to withdraw their bill. *Thompson, In re*, 55 L. J., Ch. 138; 30 Ch. D. 441; 53 L. T. 479; 34 W. R. 112—C. A.

Waiver of Irregularity.]—Order for taxing a bill of costs, entitled in the cause, if obtained by the party to the cause, regular under the general jurisdiction. But a person not a party in the cause, must apply ex parte under the statute 2 Geo. 2, c. 25, s. 22. Such an irregularity would be waived by proceeding under the order. *Bignol* v. *Bignol*, 11 Ves. 328.

Held, distinguishing *Byrch, In re* (8 Beav. 124), *Law and Gould, In re* (21 Beav. 481), *Warell, In re* (22 Beav. 634), and *Yetts, In re* (33 Beav. 412), that under the circumstances, there being nothing more to come to the solicitor, and the only question between the parties being whether he had been exactly paid or overpaid, there was no irregularity in obtaining the common order to tax:—Held, by the court of appeal, that, after the letter of the clients disclaiming any intention to dispute the other bills, no valid objection could be taken to the common

order to tax the one bill only. *Ward, In re*, 65 L. J., Ch. 595; [1896] 2 Ch. 31; 74 L. T. 567; 44 W. R. 484—C. A.

An irregular order for taxation may be waived, but it must be done in some clear and unequivocal manner. *Mackrill, In re*, 11 Beav. 42.

A client, on a special petition, obtained an order for taxation. The taxation having been completed, the client presented a petition for the consequential directions. The solicitor then objected, that the common order would have been sufficient, and he asked the costs beyond those of a common order:—Held, that the objection came too late. *Hair, In re*, 11 Beav. 96.

On petition to confirm the master's report, after reference to tax a bill of costs, it is too late to object that the petition to tax ought not to have been a special one. *Cox, Ex parte*, 17 L. J., Ch. 247.

Application to Discharge for Irregularity.]—Where the common order for the taxation of a solicitor's bill of costs has been obtained ex parte, and the solicitor applies to discharge it. on the ground that the order ought to have been obtained on special application, the court will not enter into the merits, further than to decide on the regularity of the order, and will not, even if the facts warrant it, then make a special order for taxation; such order must be the subject of another application by the client. *Gregg* v. *Taylor*, 1 Beav. 123; 8 L. J., Ch. 98.

An order of course for taxation cannot be supported on merits as a special order, upon the occasion of a motion to discharge it. *Grove* v. *Sansom*, 1 Beav. 297.

Where Retainer Disputed.]—C., with others, guaranteed payment to the extent of their respective subscriptions of the expenses of an application for an act of parliament. T., who acted as the solicitor in the matter, brought an action against C. for the amount of his bill of costs. C. paid into court the amount subscribed by him, and pleaded to the action. Subsequently C. presented a petition. and obtained an order of course for taxation. The petition did not contain a submission to pay, nor the order any direction to the taxing-master to state the amount due from C. to T. On a motion to discharge this order with costs:—Held, that an order on a petition presented under such circumstances was not of course; that where taxation was asked and the retainer disputed, a special application and order were necessary. *Thargood, In re*, 2 Eq. R. 1152; 19 Beav. 541; 23 L. J., Ch. 952; 18 Jur. 821; 2 W. R. 682.

In equity, the client, in prosecuting the common order for taxation, may object, on the ground of want of retainer, to any items of the bill except those as to which he has admitted the retainer by his petition. The practice is different at law. *Bracey, In re*, 8 Beav. 266; 14 L. J., Ch. 299; 9 Jur. 417.

The question of retainer can be raised on a common order to tax as to particular items or heads; but not as to the whole of a bill of costs. A bill of costs was divided into general costs and costs relating to a particular matter. On a common order to tax:—Held, that the whole of the latter, except two small items, having been incurred without authority, were properly taxed off. *Herbert, In re*, 56 L. J., Ch. 719; 34 Ch. D. 504; 56 L. T. 522; 35 W. R. 606.

Where a client obtains the common ex parte order for the taxation of a solicitor's bill of costs, he cannot dispute his retainer to the extent of the whole of the bill, though he may do so in respect of particular items in the bill, the practice being to require the client on his application for the order to make an admission of the retainer; but where a solicitor obtains the common ex parte order the client is not bound by the allegation of retainer contained in the petition, and consequently may object to every item in the bill on the ground of there having been no retainer. Consequently it is no objection to the common order when obtained by a solicitor that he knew that the clients disputed his retainer as to the whole bill. *Jones, In re*, 56 L. J., Ch. 720; 36 Ch. D. 105; 57 L. T. 26; 35 W. R. 649.

An isolated transaction is the proper subject of a separate bill of costs, and, on the taxation of such a bill together with others, the client cannot dispute the retainer unless the order for taxation has reserved the question. *Frape, In re, Perrett, Ex parte*, 63 L. J., Ch. 678; [1894] 2 Ch. 290; 8 R. 274; 71 L. T. 80; 42 W. R. 475.

A person who signs an authority for the use of his name as next friend to an infant, becomes primâ facie liable to pay the infant's solicitor's bill of costs, as well as those of the other side. If for any cause he disputes this liability, the solicitor may nevertheless obtain the common order for taxation against him without mentioning that fact, for the defence cannot be raised in the process of taxation, but requires independent proceedings to be taken to enforce it. *Flower, In re*, 19 W. R. 578.

Where a judge at chambers, in the exercise of his discretion in referring an attorney's bill for taxation, reserves to the client liberty to question the retainer and restraining the attorney from bringing an action upon the bill pending the reference, the court will not interfere without strong ground for so doing. *Pyne, in re*, 5 C. B. 407.

6. Practice.

Order—Form of.]—The order of course for taxation is to refer to business in which the solicitor "has been employed," not to fees, &c., which "he claims to be due." *Smith, In re*, 19 Beav. 329.

Upon a petition for taxation, the solicitor offered to repay the matters of overcharge therein specified. The offer was not accepted. Taxation ordered treating the specified items of overcharge (upon their repayment by the solicitor), as omitted from the bill. *Cattlin, In re*, 23 Beav. 412.

In ordering the taxation of a bill claimed against two, the court gave both liberty to question the retainer, and directed the master to distinguish by and to whom each sum found due was to be paid. *Kitton, In re*, 35 Beav. 369.

In making an order for taxation under the Solicitors Act (6 & 7 Vict. c. 73), s. 38, it is discretionary with the court whether or not to add the order for the delivery up of papers. *Jarman, Ex parte*, 46 L. J., Ch. 485; 4 Ch. D. 835.

—— **When Varied or Discharged.**]—A solicitor delivered to his client a bill of costs incurred in pending suits, in which he afterwards, with his client's knowledge, incurred further costs. While the suits were still pending, the client obtained an order of course for taxation and delivery up

of papers, whereupon the client delivered a bill for the further costs. On a motion to discharge the order, on the ground that the solicitor had a lien on the papers for further costs:—Held, that the order should be amended so as to include both bills. *Jarman, Ex parte*, supra.

Semble, that the proper form of order in such a case would be a simple order for taxation, without ordering the papers to be delivered up. *Ib.*

Where it appears that an attorney has been overpaid by his client, but the usual clause, requiring the attorney to refund any sum found to have been overpaid, is omitted in the order for taxation, the court will not afterwards supply the omission. *Peace* v. *Jones*, 8 D. P. C. 14.

An order of course was obtained for the taxation of a solicitor's bill of costs, and the taxation was commenced and virtually completed:—Held, that an application to vary such order, on the ground of an alleged mistake appearing on the face of it, ought to have been made directly the mistake was discovered, and not delayed until after the virtual completion of the taxation. *Tibbitts, In re*, 30 W. R. 177.

In October, 1839, a client obtained an order to tax his solicitor's bill. He commenced the taxation in January, 1840, and proceeded therein to a very considerable extent. A year and a half after, and before the report, the client applied to vary the order:—Held, that after his acquiescence, he came too late to alter the order, and too early to correct any erroneous principle, acted on by the master. *Tarbuck* v. *Tarbuck*, 4 Beav. 149.

By a decree made in a suit by a client against his solicitor, it was referred to the taxing-master to tax the defendant's bills of costs, and to the master in ordinary to take an account of all dealings and transactions between the plaintiff and the defendant. The plaintiff afterwards applied, on motion, to have the whole account taken by the taxing-master:—Held, that this was such an alteration of the decree as could not, without consent, be ordered on motion. *King* v. *Savery*, 25 L. J., Ch. 564; 2 Jur. (N.S.) 431; 4 W. R. 471.

A motion on behalf of a person who had obtained an order for the taxation of his solicitor's bill of costs, to discharge that order, and to have it declared that his solicitor was incapable of acting as such under the 39 Geo. 3, c. 90, and consequently not entitled to claim his bill of costs, was held to be open to objection (if properly taken) for irregularity; the court considering that such an application ought to have been made by petition. *Chambers, Ex parte, Wilton, In re*, 2 Keen, 497; 9 L. J., Ch. 200; 2 Jur. 489.

In a plaint in a county court, the defendant pleaded a set-off for work done as an attorney. Before the day of hearing the plaintiff obtained a judge's order to tax the bill. The judge of the county court, on the hearing, allowed the set-off. The court refused to rescind the order for taxation. *Cooper, Ex parte*, 14 C. B. 663.

—— **Effect of — Other Relief.**]—An order obtained on petition by the client against the solicitor for a taxation of his costs as between solicitor and client, upon an undertaking to pay the balance:—Held, under the circumstances, not to be a bar to the more extended relief the client was entitled to. *Gomley* v. *Wood*, 3 Jo. & Lat. 678; 9 Ir. Eq. R. 418.

Security for Costs.]—A petitioner, in a matter under the Solicitors Act (12 & 13 Vict. c. 53), resident out of the jurisdiction, was ordered to give security for the costs in the matter, and a balance claimed to be due to the respondent. *Cornwall, In re*, 15 L. R., Ir. 144.

Taxation of a bill was directed on the terms of paying a sum of money into court. The fund accumulated:—Held, that the solicitor was not entitled to the stock and the benefit of the accumulations, but that the whole must be sold, and the produce applied in part discharge of the bill. *Smith, In re*, 9 Beav. 342.

Service of Proceedings.]—Personal service on a solicitor of proceedings under a taxation dispensed with, and service by placing under his door substituted. *Templeman, In re*, 20 Beav. 574.

A summons to tax a bill of costs, not being a writ of summons within the meaning of Ord. XI. r. 1, leave to serve it out of the jurisdiction will not be granted. *Brandon, Ex parte, Bowron, In re*, 54 L. T. 128; 34 W. R. 352.

Solicitor taking Partner.]—C. acted as solicitor for X., and before his bill was paid he took P. into partnership. X. then paid the bill by cheque to the order of C. and P. and received an acknowledgment in their joint names, but in P.'s handwriting. He then took out an order to tax the bill as against C. and P. They then wrote to him informing him that C. alone was interested in the bill, and requested him to get the order altered so as to be against C. alone, but this he declined to do:—Held, that the order must be discharged, C. consenting to an order against himself alone. *Curnot, In re*, 40 L. J., Ch. 608.

Petition—Form of.]—London solicitors, acting for country solicitors, duly authorised, obtained an order for taxation of costs. The names of the London solicitors were indorsed on the petition for taxation as principals. The order for taxation was discharged, on the motion of the client, without costs. *Scholes, In re*, 55 L. J., Ch. 626; 32 Ch. D. 245; 54 L. T. 466; 34 W. R. 515.

It is no objection to a petition to tax the solicitor's bill, that it contains allegations reflecting on the conduct of the solicitor; for if such allegations are improper, they may be referred for scandal. *Wells, Ex parte*, 1 Deac. 69.

A petition for the taxation of a bill of costs, which sufficiently sets forth special circumstances for taxation, need not mention the specific items which are objected to. *Andrews, Ex parte*, 13 L. J., Ch. 222; 8 Jur. 327.

In a petition to tax, it is not necessary to specify all the items objected to. *Dawson, In re*, 28 Beav. 605.

Petition or Summons.]—The application by mortgagors to tax the bill of the mortgagees' solicitors ought to be made by summons, and not by petition, but it can be dealt with under Ord. LXX. r. 1, on the terms that the petitioners should pay the difference between the costs of a petition and those of an adjourned summons. *Kellock, In re*, 56 L. T. 887; 35 W. R. 695.

Special applications for delivery and taxation of a bill, and for payment over to the applicant of the balance of the cash account, must be made by summons, and not by petition. *Edmonds, In re*, 25 L. T. 152; 19 W. R. 1048.

An application to tax an attorney's bill ought

to be made at chambers. *Bassett* v. *Giblett*, 2 D. P. C. 650.

Bills of costs will be ordered to be taxed upon petition, and a bill is not necessary, unless it be to set aside securities obtained from the client. *Hamilton* v. *Brewster*, 2 Moll. 407.

Order to Stay pending Taxation.]—A railway company was ordered to be wound up. A claim was made before the master, but not prosecuted. One contributory agreed to pay all debts proved before the master, and thereupon an order was made to stay all proceedings under the winding-up order. In the same matter two solicitors obtained an order for the taxation and payment of their bills of costs. The taxation was commenced, and had not concluded when the order to stay proceedings was made:—Held, that the solicitors were entitled to proceed with the taxation of their bills of costs. *Clifton, Ex parte, Dover, Deal, and Cinque Ports Ry., In re*, 24 L. J., Ch. 83; 3 W. R. 8.

Jurisdiction of Master.]—The master has no power to inquire into the fact whether the business charged for was agreed to be done for costs out of pocket. *Evans* v. *Taylor*, 2 D. P. C. 349.

—— **When Costs Unnecessary.**]—A solicitor inserted an inaccurate statement in the particulars of a sale, which he attempted to cover by a condition. An intending purchaser refused to complete on discovering the inaccuracy, but counsel advised the vendor's solicitor that the condition in question bound the purchaser, and advised a summons under the Vendor and Purchaser Act, which was accordingly taken out; the chief clerk and court of first instance agreed with counsel, but the court of appeal reversed their decision, and held that the said condition could not get rid of the positive statements in the particulars, so that the purchaser could not be compelled to complete. In the taxation of the vendor's costs as between him and the solicitor, the taxing-master disallowed the solicitor his costs in connection with the abortive attempt at a sale and with the summons, and the court affirmed his disallowance. *X., In re*, 54 L. T. 634.

A solicitor employed in the sale of an estate knew that the title deeds were in the possession of an adverse party; he, however, proceeded to prepare and obtain the execution of the conveyance and memorial. The sale went off in consequence of the absence of the title deeds. He was disallowed the costs of the proceeding, and, the deed being a cloud on the title, he was also ordered to deliver it without being paid the costs thereof. *Potts* v. *Dutton*, 8 Beav. 493.

An order was made for the division and transfer of a fund in court, but before it could be completed the fund became altered, and the solicitor presented a petition for a similar object:—Held, that it could not be considered as unnecessary, it appearing that the solicitor using his best exertions was unable to act on the first order, by reason of a difficulty as to the legacy duty; the solicitor was therefore allowed the costs upon taxation. *Bedson, In re*, 9 Beav. 187; 15 L. J., Ch. 189; 10 Jur. 213.

Costs of proceedings in a cause, after the object of it had, with the knowledge of the solicitor, been otherwise obtained, not to be allowed on a taxation between solicitor and client, except under special circumstances. *Langford* v. *Mahony*, 3 Jo. & Lat. 97.

The taxing-master has, under the Solicitors Act, 6 & 7 Vict. c. 73, a discretion to disallow costs he may think unduly claimed. The disallowance of the whole costs of an action of replevin, where replevin was clearly the wrong remedy, is a proper exercise of that discretion. *Clark, In re*, 1 De G. M. & G. 43; 21 L. J., Ch. 20; 15 Jur. 1047.

Although the master has no jurisdiction to determine whether acts done by the attorney were useful, he may determine what were necessary. *Heald* v. *Hall*, 2 D. P. C. 163. S. P., *Williams* v. *Nicholas*, 1 D. (N.S.) 841.

—— **To Disallow Items caused by Negligence.**]—The taxing-master in taxing a bill of costs between a solicitor and his client has power to disallow the costs of proceedings in an action conducted by the solicitor which were occasioned by the negligence or ignorance of the solicitor. But if the negligence goes to the loss of the whole action, he ought not to disallow them, but to leave the client to bring an action for negligence against the solicitor. *Massey and Carey, In re*, 53 L. J., Ch. 705; 26 Ch. D. 459; 51 L. T. 390; 32 W. R. 1008—C. A.

Where there appears to be negligence or ignorance of the law on the part of an attorney, which creates unnecessary costs, the court will order the costs to be disallowed on taxation, without prejudicing his right to bring an action for them. *Cliff* v. *Prosser*, 2 D. P. C. 21.

But the master had no jurisdiction to disallow items on the ground that, in respect of the business to which they refer, the attorney was guilty of negligence. *Matchett* v. *Parkes*, 9 M. & W. 767; 1 D. (N.S.) 924; 11 L. J., Ex. 287. S. P., *The Papa de Rossie*, 3 P. D. 160; 27 W. R. 367.

—— **Compromise.**]—On a reference for taxation the taxing-master has no jurisdiction to judge of the propriety of a compromise entered into on behalf of the client, which the client has taken no proceedings to impeach. *Catlin, In re*, 18 Beav. 511.

—— **General Account.**]—Under the common order for taxing a solicitor's bill, the master is bound to take a general account of receipts and payments by the solicitor, as agent to the client. *Russel* v. *Buchanan*, 9 Sim. 167; 7 L. J., Ch. 210; 2 Jur. 610.

The direction in the common order to tax a solicitor's bill that he should give credit for all sums of money by him received of or on account of the client must be read as included and confined to all moneys which the solicitor in his character of solicitor or agent of the client has received for or on account of, or is legally or equitably liable to pay over to such client, and against which, if sued for by the client, the solicitor could set off his costs when taxed. *Le Brasseur and Oakley, In re, Terrell, Ex parte*, 65 L. J., Ch. 763; [1896] 2 Ch. 487; 74 L. T. 717; 45 W. R. 87—C. A.

If the client should be a barrister, and fees be owing to him in respect of a matter upon which he has been retained by the solicitor, the solicitor would not, under the direction in question, have to give credit for any moneys which he might have received from his client in the matter upon which the barrister was retained, and not allocated by such client to the purpose of paying the barrister's fees, such fees not being recoverable in an action by the barrister either from the solicitor or the lay client. *Ib.*

Under the common order for taxing a solicitor's bill, the master ought to take an account of sums received by the solicitor for his client, in the character of solicitor, and which are connected with the items of the bill. But the master ought not to take under that order a general account between the parties; and consequently the decision to the contrary in *Russel* v. *Buchanan* (9 Sim. 167, 175) was erroneous. *Cooper* v. *Ewart*, 15 Sim. 564; 2 Ph. 362; 16 L. J., Ch. 417.

An account of all the dealings and pecuniary transactions of a solicitor not connected with the bills of costs, cannot be obtained upon a petition for the taxation of costs, the account directed on petition being limited to moneys paid or duly appropriated towards satisfaction of the bills. *Smith, In re*, 4 Beav. 309.

Where the taxing-master has received no special directions from the court in regard to payments made by a client to his solicitor, it is his duty to confine himself to simple payments plainly proved to have been made on account of the bill of costs. *Smith, In re*, 9 Beav. 182; 15 L. J., Ch. 238.

Under the common order for the taxation of costs, the master is not authorised to take an account of pecuniary matters between the parties which are foreign to the bill of costs; but secus, where moneys are paid by the client on account of the bill of costs, or where, by agreement between the solicitor and client, the moneys which come to the hands of the solicitor are to be applicable to the payment of the bill of costs. *Jones* v. *James*, 1 Beav. 307; 3 Jur. 310.

The court has no jurisdiction, in directing the taxation of a solicitor's bill of costs, to order any account of dealings between the parties, in which the solicitor did not act as such, even though the latter has given credit for such items in the bill of costs. *Sneyd* v. *Conroy*, 8 Ir. Eq. R. 469.

A bill of costs, nearly the whole of which had been paid, contained items unconnected with professional employment, as for a horse, &c.:—Held, that the solicitor ought, in taxation, to have credit for such items (if due), although they had not become due to him in the character of solicitor. *Waring* v. *Williams*, 2 Beav. 1.

Under an order to tax, the master may take an account of the receipts of the solicitor on account of interest received by him; but he cannot charge him with the profits made from moneys of his clients in his hands. *Savery, In re*, 13 Beav. 424.

—— **Special Contract.**]—Upon a petition for taxation, the court has no jurisdiction to determine the construction of a disputed special contract as to costs. *Thompson, In re*, 8 Beav. 237; 14 L. J., Ch. 137; 9 Jur. 169.

Affidavits.]—Upon a motion to tax a bill, the court will not take notice of its contents, unless verified by affidavit, or the rule has been drawn up on reading the bill. *Wilton, In re*, 13 L. J., Q. B. 17; 7 Jur. 1133.

In a proceeding by summons for taxation, it is not necessary to specify palpable overcharges by affidavit. *Brady, In re*, 15 W. R. 632.

If, in the judgment of the taxing-master, there be ground to suspect that an arrangement has been made between solicitors in the cause, by which a portion of the profits of the bill of costs is to be paid to another, it is in the discretion of the taxing-master to require affidavits from the solicitors as evidence of the facts; and, if such an arrangement should appear, the bills of costs ought to be taxed as in case of agency. *Deere* v. *Robinson*, 7 Hare, 283; 19 L. J., Ch. 405.

The usual order for taxation empowers the master to examine the solicitor as to what money he had received only; but, upon proper affidavits, the court will order him to be examined as to his disbursements. *Anon.*, Mos. 331.

Special direction given on an order for taxation, that if the solicitor should be unable to establish any of the charges by reason of the death of his clerk, or the absence of the books and papers delivered to the client, the taxing-master should report specially thereon. *Watts, In re*, 7 Beav. 491.

Cross-examination.]—A solicitor may be cross-examined on an affidavit made by him in support of a bill of costs under an order for taxation, and it is the duty of the examiners to take such examination. *Flux, Argles and Rawlins, In re*, 44 L. J., Ch. 375.

On a taxation between solicitor and client, the master, after perusing an affidavit of the solicitor and an affidavit of the client denying the facts, refused to allow the solicitor to submit an affidavit in reply, or to cross-examine the client:—Held, that under such circumstances, the master should allow further evidence, and should take viva voce evidence under the powers given him by Ord. LXV. r. 27, sub-r. 26. *Brown, Ex parte, Evans, In re*, 35 W. R. 546.

Irregularity—Waiver.]—An order for taxation was to be void, unless the master made his report in a fortnight, or certified that further time was necessary. The time elapsed without such certificate, and the parties afterwards attended several times before the master without objecting:—Held, that the irregularity had been waived, and an order was made for the master to proceed in the taxation. *Field, In re*, 16 Beav. 593.

On the 21st July the master proceeded ex parte in a taxation in the absence of the client, who had not been served with a warrant to proceed on that day. A warrant was afterwards served for the 31st July, subscribed "to complete the taxation." The client did not attend; but the master, being informed of the former irregularity, re-taxed so much of the bills as had been taxed on the 21st:—Held, that the client, not having attended the warrant of the 31st, could not set up the irregularity of the 21st. *Mourilyan, In re*, 11 Beav. 48.

Non-appearance—Effect of.]—Where an order is made at the instance of a solicitor for taxation of his bill, the client not appearing to oppose the summons, the latter cannot subsequently object that the items in the bill are not taxable. *Johnson, In re*, 1 Jur. (N.S.) 1140; 4 W. R. 89.

A party does not attend a taxation by writing letters to the taxing-master. *Upperton, In re*, 30 W. R. 840.

Party in Contempt.]—A party to whom costs are awarded may proceed in the taxation, notwithstanding he may be in contempt. *Newton* v. *Ricketts*, 11 Beav. 67.

Omitting to Tax.]—Action on an attorney's bill. Verdict for the plaintiff, subject to taxation of the bill within the first five days of the ensuing term. The defendant having omitted to tax the bill within that time:—Held, that the plaintiff was entitled to sign judgment, and tax his costs.

Tucker v. *Nech*, 4 Bing. (N.C.) 113; 6 D. P. C. 23; 5 Scott, 393; 3 Hodges, 242.

Where an attorney has been seven years without getting his bills taxed, after an order so to do, and they are lost in the meantime in the master's office, the court will not allow it to go again to the master. *Yea* v. *Yea*, 2 Anstr. 494.

Agency Charges.]—A solicitor agreed to undertake the defence of another solicitor upon agency charges. On special petition, a taxation of his bill was ordered "having regard to the agreement." *Gedye, In re*, 23 Beav. 347.

A solicitor agreed to conduct the defence of another solicitor upon agency terms, in case of the defence being unsuccessful. On entering into the agreement, the latter suppressed from the former the existence of a material correspondence, which was a principal ground of a decree being made against him. But the solicitor, after the discovery, still continued the defence without objection:—Held, that he was not released from the contract. *Ib.*

A., a solicitor, being one of three mortgagees, arranged with another solicitor, B., to "act as his agent" in the matter of the mortgage, on agency terms. B. accordingly acted, and sent in his bill prepared as between solicitor and client, which was paid by the mortgagees. B. allowed A. 100*l.* as his share of the profits. After this, on the application of second incumbrancers, the bill was taxed:—Held, that the taxing master was right in taxing it on the principle of solicitor and agent, for the agreement between A. and B. was valid, though it inured to the benefit of the mortgagees; and that the bill was properly taxable, at the instance of the second incumbrancers, as between them and B. *Taylor, In re*, 18 Beav. 165; 23 L. J., Ch. 857; 18 Jur. 666; 2 W. R. 249.

The solicitor of a defendant in the cause, and who is himself a defendant in the same cause, and appears by a second solicitor, cannot be allowed more than one bill of costs, if it appears that the second solicitor has, either before or after his retainer, agreed to allow his client, the first solicitor, a portion of the profits of his costs in the cause. *Deere* v. *Robinson*, 7 Hare, 283; 19 L. J., Ch. 405.

Agency charges for work done by a London firm of solicitors as agents for a country firm—two partners out of three in each firm being the same—were disallowed on taxation:—Held, that it having been the practice of the chancery taxing-masters for forty or fifty years not to treat cases of two firms having certain partners in common as agency cases at all, the court could not overrule the practice, and the charges were properly disallowed. *Borough Commercial and Building Society, In re*, 63 L. J., Ch. 365; [1894] 1 Ch. 289; 7 R. 75; 70 L. T. 51; 42 W. R. 161—C. A.

A. employed B., a writer to the signet, as his law agent in Scotland; and on the recommendation of B., he employed C. as his solicitor in England. By a private agreement between B. and C., the latter arranged to allow the former half the profits of the business transacted by him for A. Upon a taxation of C.'s bill, A. presented a petition, claiming the benefit of the agreement between B. and C., but it was dismissed with costs. *Gordon* v. *Dalzell*, 15 Beav. 351; 21 L. J., Ch. 206; 16 Jur. 186.

A bill in equity alleged a particular contract as to agency, but charged that the defendant pretended that the contract was one of partnership, and that upon either construction he was liable to account, and prayed for discovery of all matters of business relating to the agency; that he might deliver his bills of costs for taxation, and for an account. Demurrer overruled. *Ward* v. *Lawson*, 42 L. J., Ch. 273; L. R. 8 Ch. 65; 21 W. R. 88.

When there is an agreement as to costs, which only goes to the extent of the charges to be paid, the master may take that into consideration, and a bill in equity is not the proper remedy; but where the agreement goes further, and there is, on the face of the bill, a dispute as to whether the agreement was one of agency or of partnership, a bill will be sustained. *Ib.*

Same Solicitor employed for several Parties.]—It is the settled practice in the office of the taxing-master in chancery, where in a suit two or more parties have employed the same solicitor in taxing his bill of costs, to allow against each of his clients only such client's proportion of the general costs of the suit, notwithstanding that each client may be liable at law for all the costs upon the joint retainer. *Ford, Ex parte, Colquhoun, In re*, 5 De G. M. & G. 35; 23 L. J., Ch. 515; 2 Eq. R. 304; 2 W. R. 286.

A solicitor was separately retained by more than one defendant to a suit, and upon the application of one of such defendants his bill of costs was ordered to be taxed; the taxing officer allowed, as against the defendant on whose application the taxation was ordered, only a proportionate part of the charges of proceedings which were common to all those defendants, although those charges were not increased by the proceedings having been taken on behalf of all such defendants:—The certificate of the taxing-master was affirmed. *Ib.*

Where several Bills.]—A solicitor was employed by a testator in his lifetime, and by his executors and trustees after his death; the latter having applied for a taxation of the bills subsequent to the death:—Held, that the solicitor was, on this application, entitled to have a taxation of all the bills. *Dalby, In re*, 8 Beav. 469.

An order for the taxation of a solicitor's bill, on the undertaking of A. to pay the same, does not extend to a bill of costs, for which A. is liable jointly with B. *Collins* v. *Price*, 4 L. J., Ch. 94.

A. was individually indebted to a solicitor for costs in a cause, and A. and B. were jointly indebted to the same solicitor for costs relating to other business. A. obtained an order for the taxation of the solicitor's bill of costs in the cause, and all other suits, causes, and matters wherein he had been employed by A.; and it was ordered that all proceedings against A. should be stayed. The solicitor afterwards arrested A. and B. for their joint account:—Held, that such proceeding was not a breach of the order. *Ib.*

A., B. and C. were defendants in the cause, against whom the bill was dismissed with costs. B. and C. acted as the solicitors of A., and appointed D. to act as their own solicitor in the same cause. After the retainer, an agreement was entered into between B. and D., whereby D. agreed to allow B. and C. a portion of the profits of his bill of costs:—Held, that the agreement

constituted D., in substance, an agent for B. and C., and that the separate bills of costs of B. and of C. and D. were properly taxed as a joint bill, and that all such costs as would not have been allowed in a case of agency were properly disallowed. *Deere* v. *Robinson*, 7 Hare, 283; 19 L. J., Ch. 405.

Where a solicitor has been retained for and undertaken a particular business, his bill of costs for carrying that business through to its conclusion is but one bill. *Stokes* v. *Trumper*, 2 Kay & J. 232; 3 W. R. 503, 615.

An assignee of costs cannot obtain an order of course to tax one bill of costs out of several, even if that bill only has been assigned to him. An order to tax one bill out of several alone can only be obtained by means of a special application. *Ward, In re*, 54 L. J., Ch. 508; 28 Ch. D. 719; 33 W. R. 783.

A solicitor delivered on the same day a cash account accompanied by seven bills of costs, amounting in all to 260*l.*, in respect of which he received 210*l.* on account, leaving a balance of 50*l.* due to him. The solicitor afterwards wrote stating that he did not intend to claim payment of this balance. The clients then obtained an order of course to tax one of the bills delivered. Their solicitor subsequently wrote to the solicitor saying that the other bills were agreed to, and there was not any dispute with regard to them:—Held, that the seven bills were separate bills, and not one bill for the purposes of taxation, and the client had a right to tax any one of them. *Ward, In re*, 65 L. J., Ch. 595; [1896] 2 Ch. 31; 74 L. T. 567; 44 W. R. 484—C. A.

A client, who had employed a solicitor in several matters, obtained an order of course for the taxation of the costs of one matter only, with the direction that, on payment, the solicitor should deliver all the papers belonging to the client. It was discharged with costs for irregularity. *Holland* v. *Gwynne*, 8 Beav. 124.

Solicitor employed in a suit, and a prosecution arising thereout, delivered two bills. The surviving plaintiffs obtained an order for the taxation of the bills, submitting to pay what was due. On the taxation of their said bills before the taxing-master, they disputed their retainer in the prosecution. The master having completed the taxation, they presented a petition praying that they might be ordered to pay the first bill only, and that, if necessary, the master's certificate, and the order for taxation, might be varied. The petition was dismissed with costs. *Springall, In re*, 8 Beav. 63; 14 L. J., Ch. 12.

A solicitor delivered four bills, the last of which and the cash account shewed upon the whole a large balance due to him. He brought an action to recover the balance, whereupon the client obtained an order of course to tax the last bill and to stay the action in the meantime. The order was held irregular, and was discharged with costs. *Yetts, In re*, 33 Beav. 412; 3 N. R. 598.

A solicitor claimed five bills of costs against his client. The client obtained an order of course to tax two only. It was discharged with costs. *Law, In re*, 21 Beav. 481.

An order for taxation of two out of four bills of costs, and the delivery up of the papers, discharged, but without costs, the solicitor having attended the master without having objected, and not having applied to discharge the order until six weeks after notice of it. *Wavell, In re*, 22 Beav. 634.

Part of Bill.]—Under the Solicitors Act, 1843, the court has no power to direct that one item or one branch of a bill of costs delivered shall be taken and remitted to the taxing-master for examination. But, apart from the terms of the statute, the court has jurisdiction to direct that part of a bill should be taxed, where the circumstances make it right that such jurisdiction should be exercised, upon such terms as would prevent any injustice being done. *Storer* v. *Johnson and Weatherall*, 60 L. J., Ch. 31; 15 App. Cas. 203; 62 L. T. 710; 38 W. R. 756—H. L. (E.)

Where an action was brought to recover an attorney's bill for several distinct businesses, as to some part of which the client disputed his liability on account of the negligence of the attorney, but the other part was not disputed; the court refused to order the master to tax the disputed part of the bill separately from the rest, a judge's order to tax having been before obtained on the usual terms. *Jones* v. *Roberts*, 2 D. P. C. 656; 4 Tyr. 310.

Items barred by Statute of Limitations.]—The plaintiff being dissatisfied with his solicitor (the defendant), instructed other solicitors, and signed in 1888 a document by which he authorised and requested the new solicitors to obtain and receive from the defendant all deeds and other documents belonging to the plaintiff in the possession, custody, or power of the defendant as the plaintiff's solicitor, and also to obtain and receive from the defendant an account of his dealings and transactions with the plaintiff's land, &c., "since he was appointed my solicitor many years ago, or for such other period as you may think fit." And the plaintiff thereby authorised and requested the defendant to deliver up to the new solicitors all such deeds, &c., and such account as aforesaid. The new solicitors wrote to the defendant, sending him a duplicate of this document, and requesting him to comply with it. On the 4th of July the plaintiff issued an originating summons against the defendant, asking for the delivery and taxation of the defendant's bill of costs and the delivery up of deeds, &c., and not containing any submission by the plaintiff to pay what should be found due on the taxation. On the 31st of July an order was made for the delivery to the plaintiff by the defendant of "a bill of his fees and disbursements in all suits, causes, or other matters of business in which he has been employed as the attorney or solicitor for the applicant," for a reference to the taxing-master to tax "the said bill," and for payment of the sum certified to be due from the plaintiff to the defendant, or the defendant to the plaintiff. Liberty was given to the plaintiff to pay into court 350*l.*, and upon doing so his documents were to be given up to him by the defendant, and the defendant's lien was to attach to the sum paid in. On the taxation of the bill delivered under this order the taxing-master struck out certain items (without considering their propriety) on the ground that, having regard to their dates, they were barred by the Statute of Limitations. On a summons to review the taxation:—Held, that the object of the order of the 31st of July was to ascertain the amount of the costs for which the defendant had a lien, and that it was the duty of the taxing-master to tax all the items of the bill, without regard to the Statute of Limitations. *Curwen* v. *Milburn*, 42 Ch. D. 424; 62 L. T. 278; 38 W. R. 49—C. A.

Where a client has obtained the common order for taxation of the bill of costs of a solicitor which contains a submission to pay what should appear to be due on the taxation, the taxing-master is right in taxing statute-barred items, and the client is bound under his submission to pay such items when taxed. A client desiring to raise the question of the Statute of Limitations in respect of any items in a bill of costs should obtain a special order. *Margetts, In re*, 65 L. J., Ch. 479; [1896] 2 Ch. 263; 74 L. T. 309; 44 W. R. 462.

Costs.]—The court, though it refuses the petition for taxation does not always give the costs. *Thompson, In re*, 8 Beav. 237; 14 L. J., Ch. 137; 9 Jur. 169.

A special petition was presented for the taxation of two bills; it succeeded only as to one, as to which the order might have been obtained as of course. The petitioner was ordered to pay all the costs. *Barwell* v. *Brooks*, 8 Beav. 121.

Where an order for taxation had been obtained as of course, for which a special application ought to have been made, the Lord Chancellor discharged the order with costs. *Harris* v. *Start*, 4 Myl. & C. 261.

A client presented a special petition for the taxation of his solicitor's bill, complaining that he had taken reckless proceedings, and praying that the costs of them might be wholly disallowed on taxation. A special petition was held to be unnecessary, and the petitioner was ordered to pay the costs of it. *Atkinson, In re*, 26 Beav. 151.

A solicitor ordered to pay the costs of a special petition rendered necessary by his refusal to consent to the common order for delivery of his bill and for its taxation. *Adamson, In re*, 18 Beav. 460. And see *Cattlin, In re*, 8 Beav. 121.

Where a special petition for the taxation of a bill of costs was occasioned by breach of arrangement on the solicitor's part, he was ordered to pay the costs of the petition. *Bailey, Ex parte, Cattlin, In re*, 3 Jur. (N.S.) 33.

A mortgagee's solicitor retained the amount of his bill of costs out of the produce of the sale of the mortgaged estate, and he charged the amount in an account delivered to the mortgagor:—Held, that an order for taxation within twelve months might be obtained as of course; and a special petition having been presented for that object, the order was made, but the petitioner was ordered to pay the costs. *Bignold, In re*, 9 Beav. 269.

A party applying for a special order for taxation in a case in which he might have obtained the common order, must pay the costs. *Bracey, In re*, 8 Beav. 266; 14 L. J., Ch. 299; 9 Jur. 417.

Summons for Payment.]—Where an order for taxation of a bill of costs has been made on the solicitor's own petition, he cannot obtain payment of the amount certified to be due to him by summary proceedings, but must bring an action. *Debenham and Walker, In re*, 64 L. J., Ch. 859; [1895] 2 Ch. 430; 13 R. 631; 73 L. T. 115; 43 W. R. 699.

Course of proceeding to compel payment of a balance found due, on taxation, from a client to his solicitor. *Stocken* v. *Dawson*, 7 Sim. 547.

Where a balance is found on taxation due from the client, payment must be first demanded before applying for the four-day order, which when served and payment refused, the order for commitment is granted without notice, but on affidavit of the service of the order, and demand and refusal. *Ib.*

The order on a solicitor for payment to his client of a sum found due on taxation, requires personal service; but it appearing that the solicitor absented himself to avoid service, an order for substituted service was made. *Lloyd, In re*, 10 Beav. 451.

On ordering taxation of a bill of costs in respect of a trust estate, the court will not direct any money found due from the solicitor to be paid to the cestuis que trustent, for the solicitor would have no indemnity against a breach of trust. *Hallett, In re*, 21 Beav. 250.

An order was made for taxation, nominally, on the petition and undertaking of A. and others. The certificate was made ten years after, and an order was then made on A. to pay. A. applied to discharge the order for payment, shewing that the order had been obtained without his authority, and during his absence from England:—Held, that while the order for taxation stood, the order for payment was regular. *Thompson, In re*, 25 Beav. 246.

—— **Execution — Service of Order and Certificate.**]— A. obtained a common order for taxation of the costs of his former solicitor, B., the order directing payment by A. to B. of the amount of the taxed costs within twenty-one days after the service of the order and of the certificate of taxation. The order and certificate were served, not on A. personally, but on the solicitor then acting for him in the taxation. A. failed to pay the amount within twenty-one days after service of the order and certificate on the solicitor, and B. applied for the issue of a writ of fi. fa. against A. for the amount, but the officer of the court refused to issue the writ, on the ground that A. had not been personally served with the order and certificate:—Held, that B. might have the writ at his own risk, without service of the order and certificate on A. personally. *Solicitor, In re*, 33 W. R. 131.

—— **Sequestration.**] — The effect of Ord. XLIII. r. 7, is to alter the old chancery common practice under which payment of costs, where no time was fixed, was enforced by subpœna, upon proof of service of which and of non-payment a writ of sequestration might issue as of course, and to substitute for the subpœna the leave of the court or a judge to issue a writ of sequestration, no four-day order being necessary. *Lumley, In re, Cuthcart, Ex parte*, 63 L. J., Ch. 435; [1894] 2 Ch. 271; 7 R. 179; 70 L. T. 780; 42 W. R. 401—C. A.

—— **Attachment of Solicitor.**]—A solicitor may be imprisoned for default in payment of a balance ordered to be paid on a common order to tax his bill of costs. *Rush, In re*, 39 L. J., Ch. 159; L. R. 9 Eq. 147; 18 W. R. 331.

Default by a solicitor in payment of the balance found due from him to his client upon taxation, under the common order in chancery, is default in payment of a sum of money, when ordered to be paid by a solicitor in his character of an officer of the court, and an attachment may be issued against him. *White, In re*, 23 L. T. 387; 19 W. R. 39.

Under an order to tax made in 1873, a balance

was found due from a solicitor in respect of moneys received by him, and ought to have been paid within twenty-one days from the 21st August, 1875 :—Held, that the case was governed by Rules of Court, 1875, Ord. XLIV. r. 2, and that an attachment for nonpayment could not be issued without notice to the solicitor. *Anon.*, 1 Ch. D. 445.

Default by a solicitor in payment of a bill of costs found on taxation to be due by him to another solicitor whom he had employed to act for him, is "default by a solicitor in payment of a sum of money, when ordered to pay the same in his character of an officer of the court making the order," within the Debtors Act, 1869, s. 4, sub-s. 4, and an attachment may be issued against him. *Barfield, In re*, 24 L. T. 248 ; 19 W. R. 466.

—— **Costs.**]—A solicitor, from whom a sum was found due, ordered to pay all the costs of proceedings to compel payment. Whether it is necessary, in demanding payment by attorney, to leave a copy of the power of attorney, semble not. *Dufaur and Blakeney, In re*, 16 Beav. 113.

7. More than Twelve Months after Delivery.

a. *How Reckoned.*

For the purposes of an application for taxation, a bill of costs, of which a substantial item is a lump sum for London agent's charges, is not a complete bill, and the twelve months allowed do not begin to run till details of the charges are given. *Pomeroy and Tanner, In re*, 66 L. J., Ch. 158 ; [1897] 1 Ch. 284 ; 75 L. T. 625 ; 45 W. R. 245.

b. *What are Special Circumstances.*

Charges Apparently Excessive.]—The "special circumstances" which, under 6 & 7 Vict. c. 73, s. 37, allow a solicitor's bill of costs to be referred for taxation, although twelve months have elapsed since it was delivered to the client, are not merely pressure and overcharge, or overcharge amounting to fraud. A judge has a discretion in ordering the bill of costs to be taxed, if it contains items unreasonably large, or charges requiring explanation, or gross blunders. *Boycott, In re* (29 Ch. D. 571), commented on. *Norman, In re, Bradwell, Ex parte*, 55 L. J., Q. B. 202 ; 16 Q. B. D. 673 ; 54 L. T. 143 ; 34 W. R. 313—C. A.

Charges in a bill apparently excessive, and alleged to be overcharges :—Held, special circumstances sufficient to authorise the court, under 6 & 7 Vict. c. 73, s. 37, to direct the bills to be taxed more than twelve months after delivery, although one item complained of was sworn to be a mistake. *Hook, In re*, 3 Giff. 372 ; 8 Jur. (N.S.) 875; 5 L. T. 502 ; 10 W. R. 116.

Charges in the bill, which primâ facie appear excessive, are a sufficient special circumstance. *Robinson, In re*, 37 L. J., Ex. 11 ; L. R. 3 Ex. 4 ; 17 L. T. 179 ; 16 W. R. 110.

Where neither a case of pressure is proved against a solicitor, nor improper items of charge shewn by a third party applying for an order to tax the bill, the application will be refused. *Evans, In re*, 15 L. J., Ch. 115.

Overcharge amounting to Fraud.]—The charge by a mortgagor's solicitor to his client of a scale fee for "negotiating loan" in addition to the procuration fee according to the scale paid to mortgagee's solicitor, is an overcharge amounting to fraud so as to entitle the client to an order to tax on application more than a year after delivery of the bill ; especially when coupled with the fact that the solicitor by whom the overcharge was made had not complied with his client's instructions to get the bill taxed. *Pybus, In re*, 56 L. J., Ch. 921 ; 35 Ch. D. 568 ; 57 L. T. 362 ; 35 W. R. 770.

The court will not after a lapse of twelve months go into questions of excessive charge, unless it can be proved that there are items of gross overcharge amounting to fraud. *Elmslie, In re, Tower Subway Co., Ex parte*, 42 L. J., Ch. 570 ; L. R. 16 Eq. 326 ; 28 L. T. 731 ; 22 W. R. 54.

To entitle a client to an order for taxation of his solicitor's bill of costs after the expiration of twelve months from its delivery, he must shew either pressure or gross overcharge, amounting to what a court of equity designates as fraud. But it is not necessary to shew both. *Strother, In re*, 3 K. & J. 518 ; 26 L. J., Ch. 695 ; 3 Jur. (N.S.) 736 ; 5 W. R. 797.

An application for taxation of a bill made fourteen months after its delivery and before payment refused, there being no sufficient "special circumstances." *Harper, In re*, 10 Beav. 284.

A country solicitor, with an office in town, conducting personally the business which would originally be transacted by a London agent, is not entitled to charge for letters passing between the two offices, but such charges are not "overcharges amounting to fraud," so as to induce the court to refer the bill more than twelve months after delivery. *Harle, In re*, 19 L. T. 305 ; 17 W. R. 21.

The London agents had charged the country solicitor with fees to counsel which had not yet been paid, but the country solicitor had not supplied them with sufficient funds to pay the fees :—Held, that the charge was not a circumstance sufficient to justify a taxation. *Nelson, In re*, 54 L. J., Ch. 998 ; 30 Ch. D. 1 ; 53 L. T. 415 ; 33 W. R. 645.

Possession of Papers.]—The possession of the papers in a cause is not a sufficient special circumstance to warrant the taxation of a bill delivered more than twelve months. *Gedye, In re*, 14 Beav. 56 ; 20 L. J., Ch. 410 ; 15 Jur. 851.

Completeness of Bill disputed.]—J. S. was the sole solicitor employed by a railway company to obtain an act of parliament, and he was to employ, on his own responsibility, a local agent. J. S. employed A. B., another solicitor, as his agent for collecting evidence. In November, 1846, J. S. delivered his bill of costs to the company, but it did not include A. B.'s costs, and the company declined to consider the bill until those costs were included. In December, 1847, J. S. brought an action for his costs, and the company, in January, 1848, presented a petition for the taxation of his bill :—The court held, that, under the circumstances, the petitioners, notwithstanding that twelve months had elapsed since the delivery of the bill, were entitled to have the bill taxed. *Bagshawe, In re*, 2 De G. & Sm. 205 ; 12 Jur. 510.

Continuance of Relation.]—Taxation ordered upon an application made after the expiration of twelve months after delivery of a bill of costs, on the ground of the continuance of the relation of solicitor and client subsequently to the delivery of the bill. *Anon.*, 16 W. R. 749.

A petition was presented for taxation of forty-six bills of costs delivered by a solicitor to his client at intervals between 1833 and 1857, and comprising items of unsettled accounts between them. The petition contained allegations of improper charges, and was presented more than twelve months after the delivery of the last bill: —Held, that the improper charges being proved, the delay in presenting the petition was no bar to an order for taxation, especially when the relationship of solicitor and client existed up to a period within twelve months preceding the presentation of the petition. *Nicholson, In re, Johnson, Ex parte*, 3 De G. F. & J. 93; 30 L. J., Ch. 585; 7 Jur. (N.S.) 434; 4 L. T. 167; 9 W. R. 441.

The continuation of the relationship of solicitor and client is not of itself such a special circumstance that the court will on account of it order the taxation of a bill of costs twelve months after it has been delivered. *Elmslie, In re, Tower Subway Co., Ex parte*, 42 L. J., Ch. 570; L. R. 16 Eq. 326; 28 L. T. 731; 22 W. R. 54.

Disbursements—Complete Bill — Particulars of Agency Charges.]—Upon an application to tax a bill of costs after the expiration of twelve months from the date of the delivery of the bill, on the ground that certain items for agency charges are treated as disbursements, and no particulars of them are given, it must appear on the face of the bill that the applicant has not been furnished with such detailed information as will enable him to form a fair opinion as to whether he ought to proceed upon a taxation or not. When such items taken together do not represent a substantial part of the whole bill, the court will hesitate to order a taxation on the ground that the bill is incomplete; but when such items bear a substantial proportion to the amount due under a separate heading in a particular matter which forms a part of the whole bill, the court will not limit an order for taxation to the particular matter, but will regard the whole bill as incomplete and taxable. *Pomeroy and Tanner, In re*, 76 L. T. 149.

Facts known to Client—Time.]—The special circumstances under which a judge may, by 6 & 7 Vict. c. 73, s. 37, refer an attorney's bill for taxation after verdict, must, in general, be circumstances newly come to the knowledge of the party, and, upon learning which, he must apply promptly to the court. *Whicher, In re*, 13 M. & W. 549; 3 D. & L. 407; 14 L. J., Ex. 78.

The special circumstances requisite to warrant referring an attorney's bill to taxation after twelve months, need not be circumstances brought to the knowledge of the client after the expiration of the twelve months, so as to account for the delay. *Robinson, In re*, 37 L. J., Ex. 11; L. R. 3 Ex. 4; 17 L. T. 179; 16 W. R. 110.

Taxation of a solicitor's bill for parliamentary business ordered under the 37th section of the 6 & 7 Vict. c. 73, upon a petition presented more than twelve months from the delivery of the bill, on the ground of gross overcharges, amounting to what the court designates as fraud, coupled with misrepresentation by him in accounting for one of the items overcharged, notwithstanding the client knew of the circumstances, and had another legal adviser within a month of the delivery of the bill, and might reasonably have availed himself of these circumstances to present his petition within the twelve months. *Strother, In re*, 3 Kay & J. 518; 26 L. J., Ch. 695; 3 Jur. (N.S.) 736; 5 W. R. 797.

Where special circumstances are relied upon as a ground for taxation after the prescribed time they must be such as the client could not have reasonably availed himself of sooner. Semble, that mere overcharge is not a special circumstance within the meaning of the Solicitors Act. *Barnard, In re*, 2 De G. M. & G. 359; 17 Jur. 53.

Action Pending.]—The mere fact that an action is pending upon an attorney's bill does not give a judge or the court jurisdiction to refer the bill for taxation after the lapse of a year, without special circumstances. *Cowdell* v. *Neale*, 1 C. B. (N.S.) 332; 26 L. J., C. P. 37; 2 Jur. (N.S.) 1248.

Where a party does not apply for the taxation of a bill of costs within a month after the bill is delivered, but waits till an action is brought against him, and then makes terms and obtains time from the attorney, these are such special circumstances as will induce the court not to refer a bill for taxation. *Wilton, In re*, 13 L. J., Q. B. 17; 7 Jur. 1133.

Late Delivery of Bill.]—Taxation ordered of an unpaid bill of costs, eighteen months after its delivery, the "special circumstances" being that it was delivered long after application for it, on the eve of the client going abroad, and contained substantial overcharges not acquiesced in. *Williams, In re*, 15 Beav. 417.

Offer to take Smaller Amount.]—Where an action has been brought by an attorney for 68*l.*, balance of untaxed costs, more than twelve months after the delivery of the bill thereof, and it appeared that before action the attorney had offered to take 40*l.* in full:—Held, that it was a proper case for a reference for taxation, and the special circumstances were sufficient. *Hughes* v. *Murray*, 9 L. T. 93.

Application by Trustee or Executor.]—A petition for taxation (presented more than twelve months after the bill of costs was furnished) by one of two trustees behind the back of his co-trustee was refused, although the solicitor had commenced an action against the petitioner alone. *M'Cay, In re*, 15 L. T. 101.

In an action by an executor to administer the estate of his testator, a firm of solicitors carried in a claim for the sum of 22*l.* 3*s.* 1*d.* as the balance due to them upon certain bills of costs delivered by them to the testator more than twelve months before his death, to which bills the testator had made no objection in his lifetime, and in respect of which he had paid 200*l.* on account. The executor alleged that some of the charges were unreasonable. The chief clerk after looking at the bills determined to refer them to the taxing-master, and the claimants objecting to this, the case was adjourned into court:—Held, that although, as no special circumstances were alleged, a taxation under the Solicitors Act could not be ordered, and the retaining the bill for twelve months without objection was primâ facie evidence of its being reasonable, the executor was not estopped from

disputing any of the items, and that it ought to be referred to the taxing-master to inquire and state whether any and which of the particular items to which the executor objected were fair and proper to be allowed, and to what amount respectively. *Anderson* v. *May* (2 Bos. & P. 237) observed upon. Form of order in *Allen* v. *Jarvis*, (L. R. 4 Ch. 616) adopted. *Park, In re, Cole* v. *Park*, 58 L. J., Ch. 547; 41 Ch. D. 326; 61 L. T. 173; 37 W. R. 542—C. A.

After Winding-up Order.] — Three months after the solicitor to a company had delivered his bill the company was ordered to be wound up. Subsequently he delivered a further bill to the official liquidator. More than twelve months elapsed, and the solicitor carried in a claim for payment of both bills:—Held, that both bills must be referred for taxation before they could get paid. *Marseilles Extension Ry. and Land Co., In re, Evans, Ex parte*, 40 L. J., Ch. 197; L. R. 11 Eq. 151; 23 L. T. 647; 19 W. R. 379.

Fund paid into Court—Lien on.]—If a fund on which a solicitor has a lien for costs is paid into court within a year after his bill has been delivered, on payment of the fund out of court the owner of the fund has a right to have the bill taxed, although more than a year may have elapsed since it was delivered. *De Bay* v. *Griffin*, L. R. 10 Ch. 291; 23 W. R. 737.

B. acted as attorney for G. in an action which resulted in G.'s recovering a large sum. A bill was filed by persons claiming through G. to establish their equitable title to that sum, and in February, 1871, the defendant in the action paid the sum recovered into court to the credit of the cause in which B. was a defendant in respect of his lien. In March, 1871, B. delivered his bill of costs in the action to G. In December, 1873, the suit was compromised and the fund distributed, except a sum kept in court to answer B.'s claims:—Held, that B. was not entitled to have his bill of costs paid out of the fund without taxation, however the case might have stood, if his bill had been delivered at such a time that G.'s right to tax it would have been lost before the fund was paid into court. *Ib.*

c. *Series of Bills.*

Successive Bills in same Matter—Natural Break in the Proceedings.]—Where a solicitor is retained by one of the parties to a litigation of a complicated nature, which may last a considerable time, the retainer does not necessarily constitute one entire contract, so as to prevent the solicitor from sending in a bill of costs and demanding payment thereof until the litigation is concluded; but in such a case there may be such breaks in the proceedings as will entitle the solicitor to send in his bills of costs up to that date and to demand payment, and the right of the client to apply for an order to tax that bill will run from the date when the bill is sent in, and not from the date when the final bill is delivered. *Snell, Ex parte, Romer and Haslam, In re*, 62 L. J., Q. B. 610; [1893] 2 Q. B. 286; 4 R. 486; 69 L. T. 547; 42 W. R. 51—C. A.

But where a solicitor who was retained in an arbitration sent in to his client successive bills of costs, without reference to any break in the proceedings, each bill being accompanied by a cash account carrying down a balance from the previous account, it was held that each bill was not a separate bill of costs, but only parts of one entire bill, and that the right to tax the whole ran from the date when the final part was delivered. *Ib.*

A solicitor having delivered successive bills of costs relating to the same suit and on the same retainer, and having received from his client payments on account, though not in discharge of any one bill, sent a signed letter to the client, stating that he should increase some of his former charges, and containing a list of additions to certain items in his previous bills:—Held, that, under the circumstances of the case, the letter, being a correction of the earlier bills, must be treated as bringing them down as one entire bill to that date, and that taxation of the whole must be directed, though most of them had been delivered more than twelve months before the application. *Cartwright, In re*, 42 L. J., Ch. 735; L. R. 16 Eq. 469; 28 L. T. 891; 21 W. R. 891.

The retainer and employment of a solicitor in such a matter as a bankruptcy, an administration, or a winding-up, do not constitute an entire contract so as to deprive the solicitor of his right to payment, except for costs out of pocket, till the whole matter is completed, and successive bills of costs in such a matter are not necessarily to be treated as one bill brought down to the date of the latest delivery. *Hall and Barker, In re*, 47 L. J., Ch. 621; 9 Ch. D. 538; 26 W. R. 501.

Therefore, where solicitors had been retained to act for a trustee in bankruptcy, and also to protect the interests of a creditor, who subsequently by arrangement with the other creditors took over the bankrupt's estate, and they delivered a bill of costs up to a certain date, with an intimation that there were then and would still be some further items, and delivered a second bill of costs incurred after the date to which the first bill came down; on an application by the creditors to tax both bills, more than twelve months after the delivery of the first:—Held, that they must be treated as separate bills, and that the second bill only could be taxed. *Ib.*

A solicitor delivered to the directors of an abortive railway company his bill of costs, No. 1. It was perused by an experienced solicitor, named by the solicitor retained, at the request of the directors, and items were taxed off, leaving 275*l.* 5*s.* 5*d.* as the amount due. The directors paid 200*l.* on account, leaving a balance of 75*l.* 5*s.* 5*d.* due. An order to wind up the company under the Winding-up Acts was obtained, and the solicitor claimed a lien on the papers for his costs. He delivered a bill of costs, No. 2, commencing with the balance of 75*l.* 5*s.* 5*d.*, amounting to 233*l.* 9*s.* 10*d.* On the petition of the official manager, seeking the taxation of the solicitor's bills of costs, No. 1 and No. 2, it appeared that the bill of costs No. 1 had been duly delivered more than twelve months before the date of the petition to tax:—Held, that bill No. 1 could not be taxed, except under special circumstances, which did not exist in this case; and the court ordered bill No. 2 to be taxed, directing the master not to investigate the accuracy of the balance of bill No. 1, with which bill No. 2 commenced, further than to ascertain that that balance had not in fact been paid. *Quilter, Ex parte*, 4 De G. & Sm. 183.

Country Solicitor and London Agent.] — London solicitors acted as agents in London for a country solicitor during the years 1877 to 1884

inclusive. The agency was terminated in 1884. During the period of the agency the London agents delivered to the country solicitor, generally once a year but sometimes oftener, detailed bills of the charges which they claimed against him in each of the actions or other matters in which they had acted for him. They also delivered to him a cash account for each year, in which he was credited with all payments made by him to them, and all moneys received by them on his behalf, and was debited with all payments made by them to him or on his behalf, and with the gross amounts of the several bills of charges which had been delivered. The balance appearing to be due from him on each account but the last was carried on to the next account. Some of the actions continued during several years, and one of them (*Rhodes* v. *Jenkins*) continued during the whole period of the agency, and was not then concluded. After the close of the agency the country solicitor claimed a taxation of the whole of the bills:—Held, by Pearson, J., that only those bills which had been delivered within twelve months could be taxed, and that the earlier bills must be treated as having been settled in account and thus paid. Held, by the court of appeal, that the bills of costs in *Rhodes* v. *Jenkins* (to which the appeal was limited), notwithstanding the fact that all the costs in it had not yet been taxed, being in fact separate bills could not be treated as one continuous bill at the option of the country solicitor. *Nelson, In re*, 54 L. J., Ch. 998; 30 Ch. D. 1; 53 L. T. 415; 33 W. R. 645—C. A.

8. Within Twelve Months after Payment.

a. *What is Payment.*

Bill of Exchange or Promissory Note.]—By the word "payment," in 6 & 7 Vict. c. 73, is meant a payment in money, and the section is not complied with by the delivery of a bill of exchange or a promissory note. *Harries, In re*, 1 D. & L. 1018; 13 M. & W. 3; 13 L. J., Ex. 259; 8 Jur. 453. S. P., *Peach, In re*, 2 D. & L. 33; 13 L. J., Q. B. 249.

A client gave to his solicitor bills of exchange for the amount due in respect of a bill of costs, and the solicitor gave a receipt "in settlement." Some of the bills were dishonoured at maturity:—Held, that, in the absence of proof by the solicitor (on whom the onus lies) that the parties intended that the bills should be taken as payment in any event, this did not amount to payment so as to deprive the client of his right to have the bill of costs taxed. *Snell, Ex parte, Romer and Haslam, In re*, 62 L. J., Q. B. 610; [1893] 2 Q. B. 286; 4 R. 486; 69 L. T. 547; 42 W. R. 51—C. A.

A client gave his solicitor a promissory note, and signed a memorandum of settlement; the court was strongly inclined to think that under the circumstances it ought to be deemed to amount to payment. *Harper, In re*, 10 Beav. 284.

And see PAYMENT.

Sum retained for Costs.]—A retainer of a sum of money by a solicitor out of moneys received for his client, is not a payment of his bill by the client. *Brady, In re*, 15 W. R. 632.

A solicitor retained the amount of his bill out of moneys in his hands belonging to the client, and the client, on receiving the balance of the moneys, but before the bill had been delivered, signed an account in which the total amount of the costs was an item, and gave a receipt for the balance:—Held, that there had been no payment of the bill within the meaning of 6 & 7 Vict. c. 73, s. 41; and that the client was entitled to have the bill taxed more than a year after the retainer of the costs and the signature of the account. *Street, In re*, 39 L. J., Ch. 495; L. R. 10 Eq. 165; 22 L. T. 429. S. P., *West, King and Adams, In re, Clough, Ex parte*, 61 L. J., Q. B. 639; [1892] 2 Q. B. 102; 67 L. T. 57; 40 W. R. 644.

A solicitor, acting on behalf of mortgagees, sold the mortgaged premises, and on the 27th June, 1850, he retained the amount of his bill of costs out of the proceeds of the sale. On the 29th June, 1850, he sent a copy of the bill to the solicitor of the mortgagor, and, on the 27th June, 1851, the mortgagor applied for an order for taxation:—Held, that the taxation might have been had upon the common order; that the petition was presented in time; that it could scarcely be considered a payment of the bill of costs until the petitioner had the means of knowing the amount of the surplus, and that he was entitled to taxation, but that he must pay the costs beyond the costs of the common order. *Steele, In re*, 20 L. J., Ch. 562.

A settlement of account between a client and his solicitor and a retention of some of the client's moneys in the solicitor's hands is payment of a bill of costs. *Falls, In re*, 29 L. R., Ir. 1.

The retention and appropriation of money under an agreement to look for payment only to the property in litigation is not such a payment of the bill of costs as, under the 6 & 7 Vict. c. 73, will supersede the taxation, especially when the client is illiterate and without professional assistance. *Ingle, In re*, 21 Beav. 275; 25 L. J., Ch. 169; 1 Jur. (N.S.) 1059.

From February, 1874, to August, 1879, S. had acted as the solicitor and man of business of B., a married woman, and during this period had wound up her former husband's estate, collected her rents, and managed her estates, lent her money, and negotiated mortgages for her. In the course of these transactions the various items of receipts and payments on her behalf, including costs and professional charges, were entered in a book of accounts kept by S. Copies of these accounts were sent to B. from time to time, and one of the mortgages by B. to S. contained a recital that they had been gone through and settled. In August, 1879, when a mortgage was negotiated from a third person of sufficient amount to pay off B.'s debt to S., the accounts were gone through and explained to B., when S. retained the amount due to him for advances, and for his costs and professional charges, out of the mortgage money, and carried the balance to her credit in the book of accounts. B. thereupon signed the account. S. continued to act for B. as before down to the end of 1885. B. had no independent advice when she signed the account in August, 1879. On an application of B. and her husband for the delivery and consequent taxation of bills of costs from February, 1874, to August, 1879:—Held, following *Street, In re* (L. R. 10 Eq. 165), that there had been no payment within the meaning of 6 & 7 Vict. c. 73, s. 41, and that B. was entitled to an order for delivery of proper bills of costs for the period required, and a consequent taxation, notwithstanding the lapse of time and the signature by B. of the accounts. *Stogdon, In re, Baker, Ex*

parte, 56 L. J., Ch. 420; 56 L. T. 355; 51 J. P. 565.

A solicitor delivered to his client a bill of costs together with a cash account, shewing in favour of the client a balance of 1*l.* 18*s.* 1*d.* The client, upon applying for such balance, was by inadvertence paid 1*l.* 16*s.* only:—Held, that there had been no payment of the bill, and that the client was entitled to the common order for taxation. *Angore, In re*, 46 L. T. 280. Reversed in C. A., 26 S. J. 417.

Security Given.]—Where a bill has been delivered and security given for the amount, that is equivalent to payment, for the purpose of precluding taxation without special circumstances. *Turner, Ex parte, Boyle, In re*, 5 De G., Mac. & G. 540; 24 L. J., Ch. 71; 2 W. R. 617.

Before Bill delivered.]—When a client has paid his solicitor's bill under pressure before the delivery of the bill he is entitled to have it taxed at any time before the expiration of a year. *Fielder, In re, Bailey, Ex parte*, 40 L. J., Ch. 615; 25 L. T. 56.

To constitute payment of a bill of costs such as will preclude taxation after 12 months under s. 41 of the Solicitors Act, 1843, a proper bill with items must be delivered; a cash account debiting the client with a lump sum for costs is insufficient. *Baylis, In re*, 65 L. J., Ch. 612; [1896] 2 Ch. 107; 74 L. T. 506; 44 W. R. 533—C. A.

A solicitor who pays himself by retention of moneys of his client, and does not deliver a bill of costs, cannot treat that retention as payment; and such retention will not be referred to a bill subsequently delivered under an order of the court. *Hitchcock* v. *Stretton* (61 L. J., Ch. 529; [1892] 2 Ch. 343) disapproved of. *Ib.*

A firm of solicitors retained, out of money in their hands belonging to their client, the amount of their costs for professional work. They kept a running account with the client, crediting him with money received, and debiting him from time to time with the amount of the costs. The accounts were from time to time balanced, and signed by the client as having been "settled and approved" by him, but no bills of costs were then delivered. Four years after the last settlement of accounts the client brought an action for an account. The solicitors then delivered their bills of costs. At the trial the plaintiff abandoned his claim for an account, but contended that he was entitled to have the bills taxed:—Held, that the payment made was referable to the bills subsequently delivered, that the case came within s. 41 of 6 & 7 Vict. c. 73, and, there being no special circumstances, the court would not direct taxation. *Stogdon, In re* (56 L. J., Ch. 420), discussed and explained. *Hitchcock* v. *Stretton*, 61 L. J., Ch. 529; [1892] 2 Ch. 343; 66 L. T. 707; 40 W. R. 555.

Time of.]—When the bill was delivered on the 14th October, 1842, for which the client gave his note on the 3rd November, and which was paid on the 17th in the same year, and, on the 15th November, in the following year, a petition for taxation was presented, which was answered on the 16th and served on the 21st; the day of hearing was the 24th:—Held, that the bill was to be considered as paid on the 17th November, 1842, and the application for taxation as made at the latest on the 16th November, 1843, and therefore made within the twelve months, according to s. 41 of the statute. *Sayer* v. *Wagstaff*, 5 Beav. 415; 13 L. J., Ch. 161. Affirmed 14 L. J., Ch. 116; 8 Jur. 1083.

Under Protest.]—A protest upon payment of a bill of costs has no effect. *Browne, In re*, 15 Beav. 61. Affirmed 1 De G. M. & G. 322; 21 L. J., Ch. 442. See *Harrison, In re*, 10 Beav. 57; 16 L. J., Ch. 170; 11 Jur. 197.

b. *Special Circumstances.*

Not to be Extended.]—The cases of taxation after payment are not to be extended. *Browne, In re*, 16 Beav. 61. Affirmed 1 De G. M. & G. 322; 21 L. J., Ch. 442. S. P., *Mash, In re*, 15 Beav. 83; *Barrow, In re*, 17 Beav. 547; 18 Jur. 181; 2 W. R. 109.

Onus of Proof.]—Payment of a bill of costs is primâ facie an admission of its correctness, and the client is bound to prove "special circumstances" to authorise its taxation. *Harding, In re*, 10 Beav. 250; 16 L. J., Ch. 288.

Discretion of Court.]—The court, on an application under s. 39, has a discretion as to ordering taxation, even where special circumstances are shown. *Chowne, In re*, 52 L. T. 75—C. A.

It is a matter in each case for the discretion of the court or a judge; and where there are special circumstances the court of appeal will not readily overrule the decision of the court below as to their sufficiency. *Cheesman, In re*, infra.

No Rigid Rule.] — There is no rigid rule defining the special circumstances in which an order will be made to tax a solicitor's bill of costs after payment. *Cheesman, In re*, 60 L. J., Ch. 714; [1891] 2 Ch. 289; 64 L. T. 602; 39 W. R. 497—C. A.

But semble that the court has a discretion to order taxation where a bill contains items unreasonably large or charges requiring explanation, or gross blunders. *Norman, In re, Bradwell, Ex parte*, 55 L. J., Q. B. 202; 16 Q. B. D. 673; 54 L. T. 143; 34 W. R. 313—C. A.

Conditional Payment.]—A client who pays his solicitor's bill of costs, expressly subject to his "right to tax," which payment, by cheque, is accepted and retained by the solicitor without reference to such condition, may tax the bill after such payment, as such a condition constitutes "special circumstances" under s. 41 of 6 & 7 Vict. c. 73. *Love, Ex parte, Williams, In re*, 65 L. T. 68.

Needless Overcharges.]—Where a considerable portion of a bill of costs is for business which, in the exercise of an honest and fair discretion, ought never to have been transacted, the court, although there be no serious amount of pressure, will order a taxation after payment. *Barrow, In re*, 17 Beav. 547; 18 Jur. 181; 2 W. R. 109.

Verbal Agreement for Costs between Solicitor and Client.]—E., a client, instructed his solicitors to effect an arrangement with his creditors, and handed over to them 100*l.* for that purpose. By verbal agreement the costs of these proceedings were taken at 63*l.* odd, and the balance retained in the solicitors' hands. The arrangement failed, and E. filed a petition in bankruptcy. The

trustees in bankruptcy thereupon demanded the above balance to be paid over to them, which E.'s solicitors did; but they also asked for the bill of the costs in the previous proceedings to be delivered, which the solicitors declined to do:—Held, that, under the provisions of s. 41 of the Solicitors Act, 1843, there was jurisdiction to make an order for the delivery of a bill for purposes of taxation, on the ground that there had been no valid agreement in writing for the amount of the costs as required by s. 8, sub-s. 2 of the Solicitors' Remuneration Act, 1881, which applied to non-contentious as well as contentious business. *West, King and Adams, In re, Clough, Ex parte*, 61 L. J., Q. B. 639; [1892] 2 Q. B. 102; 67 L. T. 57; 40 W. R. 644.

No Fraud or Undue Pressure.]—A defendant in an action agreed, through his solicitor, to pay the plaintiff's solicitor a fixed sum for his costs and for his trouble in promoting a composition between the defendant and his creditors. Within twelve months of the payment of the amount the defendant took out a summons for the delivery by the plaintiff's solicitor of a bill of his costs:—Held, that no fraud or undue pressure upon the defendant having been established, there were no special circumstances within 6 & 7 Vict. c. 73, ss. 37, 38, 40, 41, to warrant the application. *Heritage, In re*, 47 L. J., Q. B. 509; 3 Q. B. D. 726; 38 L. T. 509; 26 W. R. 633.

Refusal to produce Bill.]—Order made for taxation of bills of costs after payment, where the solicitor had produced them, on the execution of a mortgage, out of the produce of which they had been paid, but had taken them back immediately, and afterwards refused to produce them. *Loughborough, In re*, 23 Beav. 439.

It is not necessary to specify items of overcharge upon a petition for taxation after payment, in a case in which the solicitor, by retaining the bill of costs, and refusing to produce them, prevents the client pointing out the overcharges. *Ib.*

Refusal to accept Legal Charges.]—A solicitor delivered his bill of costs to his client, made out in double columns, one being the amount allowed on taxation, which he refused to accept when tendered. The client then paid the larger sum to obtain his papers:—Held, notwithstanding the payment, that he was entitled to an order to tax the bill, as he had been constrained to pay the larger sum by the refusal of the solicitor to accept what he himself had stated that he was legally entitled to. *Tosland, Ex parte, Lett, In re*, 1 N. R. 8; 31 Beav. 488; 32 L. J., Ch. 100; 8 Jur. (N.S.) 1119; 7 L. T. 303; 11 W. R. 15.

Opportunity for Examination of Bill.]—Where a client intends to pay a bill of costs at the meeting to complete a matter, the mere fact of the bill being then delivered, and of his paying it, without having had an opportunity of examining it, will not alone be sufficient to entitle the client to a taxation, but such a circumstance forms a material consideration. *Abbott, In re*, 18 Beav. 393; 23 L. J., Ch. 955; 2 W. R. 379.

Where a solicitor pressed for the amount of his bill, but offered an opportunity of taxation, and apprised his client that it would be difficult to have the bill taxed after payment, and the client chose to pay without taxation, and afterwards applied to have the bill taxed without shewing overcharges amounting to fraud:—Held, that the application ought to have been dismissed with costs. *Turner, Ex parte, Boyle, In re*, 5 De G. M. & G. 540; 24 L. J., Ch. 71; 2 W. R. 617.

Pendency of Indictment.]—Where a charge of felony is pending against the managing clerk of a solicitor, on the trial of which the bonâ fides and legality of the charges in a professional bill of costs delivered by the solicitor to his client, the prosecutor, at a period anterior to the charge of felony, may directly affect the question of the accused's guilt or innocence, the court will, on the application of the solicitor, order such bill to be referred to taxation, notwithstanding that it had been settled in account between the parties some months before. *Fisher, In re*, 42 L. T. 261.

Solicitor not giving Information.]—Solicitors to trustees delivered to their clients bills of costs for work done for them as trustees, which were paid without taxation, the solicitors not having informed their clients that if administration proceedings were subsequently brought and the bills were moderated in those proceedings, the trustees would have to pay out of their own pockets the amounts by which the bills were reduced on moderation. It was admitted that the amounts charged were honest and not excessive:—Held, that the fact of the solicitors not having given such information to their clients was not a special circumstance justifying taxation after payment. *Layton, Steele & Co., In re*, 38 W. R. 652.

Payment by Retainer of Costs.]—Where a solicitor of trustees received payment out of the estate, the court, notwithstanding there was not such pressure or such allegations and proof of overcharges as have been usually relied on in such cases, ordered the taxation of a solicitor's bill after payment. *Blackmore, In re*, 13 Beav. 154; 15 Jur. 784.

Next of Kin — Administrator — Adoption of Services by Client.]—A solicitor undertook, without retainer, certain investigations as to who were the next of kin of an intestate. These investigations were adopted and paid for by the administrator for whom the solicitor subsequently acted. A summons was taken out by another of the next of kin for taxation of the solicitor's bill of costs, to which the solicitor consented. The taxing-master was to be at liberty to state special circumstances. The taxing-master disallowed the costs of these preliminary investigations. On an application by the solicitor to be allowed such costs, the court directed that, subject to the amount overpaid being paid into court, there should be an inquiry as to what costs, if any, ought to be allowed the solicitor for the investigations (the majority of the next of kin being willing that they should be allowed), such order to be served on the next of kin. The court was, however, of opinion that, under s. 41 of the Attorneys and Solicitors Act, 1843, it had jurisdiction, even in the absence of such willingness on the part of the next of kin, to make the above order, inasmuch as on the finding of the taxing-master there were "special circumstances" within the meaning of that enactment:—But held, on appeal, that the judgment must be varied by striking out the direction for immediate payment into court, the solicitors undertaking to repay any sum which might be disallowed as the result of the inquiry. *Hill, In re*, 55 L. J., Ch. 871; 55 L. T. 456—C. A.

Solicitor, Son of One Executor.]—Executors retained the son of one of them to act as their solicitor in the administration of the estate, and the solicitor's bills, or some of them, were paid by credit being given to the son in accounts between him and his father:—Held, that this fact was not such a special circumstance as would warrant an order for the delivery and taxation of the son's bills of costs, upon a petition presented under the 6 & 7 Vict. c. 73, ten years after the payment, even if that interval did not exclude the jurisdiction to make such an order. *Shackell, Ex parte*, 2 De G. M. & G. 842; 17 Jur. 793.

Legatee—Executor.]—Taxation ordered at the instance of a legatee, of a bill of the executor's solicitor, for the amount of which a mortgage had been given by them. *Drake, In re*, 22 Beav. 438.

Compromise of Claim for Costs.]—A compromise of a solicitor's claim for costs, if effected under circumstances of pressure upon the client, does not oust the jurisdiction of the court to tax the bills upon petition. *Stephen, In re*, 2 Ph. 562.

"Pressure"—Power of Sale.]—W. employed F. as his solicitor from 1855 to 1859, and became indebted to him for costs and cash advances. In 1858 W. gave to F. a security upon his furniture, farming stock, &c., to secure all moneys due or to become due, with an immediate power of sale. In January, 1859, F. sent in to W. an unsigned bill of costs and cash account, and in March pressed for payment, and threatened to enforce his security. W. then employed another solicitor, and a correspondence went on till May. F., on 17th May, gave notice that if the money were not paid on that day he should take possession under his security, and he accordingly did so. W. then paid the amount under protest. The bill of costs contained items to a considerable amount subsequently in date to the security, and overcharges were shewn. Many of the vouchers for the items in the cash account, though applied for, had not been produced till the day of payment:—Held, that W. was entitled to an order for taxation. *Foster, In re, Walker, Ex parte*, 2 De G. F. & J. 105; 29 L. J., Ch. 625; 6 Jur. (N.S.) 687; 2 L. T. 553; 8 W. R. 620.

—— **To obtain Deed.**]—Taxation ordered after payment under protest, the payment being insisted on, as a condition for parting with a deed necessary to complete a purchase. *Tryon, In re*, 7 Beav. 496.

Special circumstances are usually pressure, as where an immediate payment is required at a time when it would be very inconvenient to the party paying that any delay should occur in the completion of the business; and, secondly, error or overcharge in the bill; if the overcharges evidence fraud, very slight, if any, circumstances are necessary to induce the court to order a taxation. *Harding, In re*, 10 Beav. 250; 16 L. J., Ch. 288.

Where a bill is paid in order to obtain possession of deeds, and an intention is at the same time expressed to have the bill taxed, an order will be made to refer the bill for taxation. *Dearden, In re*, 9 Ex. 210; 2 C. L. R. 308; 23 L. J., Ex. 14; 17 Jur. 993; 2 W. R. 18.

—— **Refusal to complete.**]—On the day fixed for the completion, at a solicitor's office, of the sale of a mortgaged property belonging to a former client, the solicitor delivered to the former client, who was in somewhat embarrassed circumstances, his bill of costs. The client and his new solicitor attended, and in order to prevent the postponement of the completion, allowed the solicitor to retain the amount of his bill, but under protest. The bill contained overcharges to a considerable amount:—Held, that the bill was paid under circumstances of pressure, and that it must be taxed. *Pugh, Ex parte, Briscoe, In re*, 1 De G. J. & S. 673; 8 L. T. 586; 11 W. R. 762.

It is a "special circumstance" within the meaning of the 6 & 7 Vict. c. 73, where a solicitor produces his bill at the time appointed for the settlement of a transaction, and refuses to complete except on payment thereof. *Bennett, In re*, 8 Beav. 467; 14 L. J., Ch. 403.

It is a "special circumstance" within the 6 & 7 Vict. c. 73, where, on paying off a mortgage, a solicitor produces his bill and insists on payment as a condition for immediate completion, though items are objected to, and a taxation will be directed after payment, if there are apparent overcharges. *Wells, In re*, 8 Beav. 416; 14 L. J., Ch. 215; 9 Jur. 820.

If a solicitor has refused to allow certain deeds to be executed until his bill of costs is paid, and the bill is paid under protest, and the deeds executed, this may constitute such a "special circumstance" as to induce the court to tax the bill under 6 & 7 Vict. c. 73. *Andrews, Ex parte, Clement, In re*, 13 L. J., Ch. 222; 8 Jur. 327.

Where the alleged pressure consisted in the refusal to allow the execution of a reconveyance, which was required without delay to make a good title to a purchaser, except on payment of the bill of the mortgagee's solicitor—taxation after payment refused. *Dolman, In re*, 2 W. R. 447.

—— **Action Pending.**]—A foreclosure action having been commenced, and judgment for foreclosure having been obtained but not made absolute, the mortgagee, on the 19th June, 1882, paid the mortgagee's solicitor 263*l.*, which was alleged to be due for principal, interest, and costs. There was no taxation or delivery of the bill of costs. In February, 1883, the mortgagee took out a summons for delivery and taxation of the bill of costs:—Held, that, even if there had been payment to the solicitor within the meaning of the Solicitors Act, 1843, the mere pendency of the foreclosure action did not amount to pressure so as to entitle the mortgagee to taxation. *Griffith Jones & Co., In re*, 53 L. J., Ch. 303; 50 L. T. 434; 32 W. R. 350—C. A.

—— **No pressing Need.**]—Mortgagees for 2,000*l.* were proceeding to sell the mortgaged estates. On the 1st of September, S., the mortgagor's solicitor, wrote to B., the mortgagee's solicitor, informing him that he had found a transferee, and proposing to complete the transfer on the 3rd. B. wrote back proposing the 10th for completion, and afterwards postponed the appointment to the 13th. His bill of costs, which amounted with surveyor's charges to more than 450*l.*, was received by S. on the 9th. On that day S. wrote to B., saying that the bill of costs appeared excessive, and would require to be carefully gone into, but did not propose to postpone the completion. On the 12th S. took

with him a written protest against the bill, and had two interviews with B., at which arrangements were made for completion. S. did not mention the subject of costs at either interview, but deposed that he had intended to do so at a third appointment on the same day, which B. did not keep. On the 13th the parties met, the transfer was completed, and the bill of costs paid, B. refusing to part with the deeds unless it was paid. S. delivered his written protest, and it appeared that B. expressed willingness to reconsider his bill if any item were shewn to be erroneous, but said nothing to the effect that it was to be treated as open to taxation. The mortgagor applied for taxation, alleging pressure and overcharge, but not referring to any particular items of overcharge:—Held (dissentiente, Bowen, L.J.), that the order for taxation should not be made, for that as the shortness of the interval between the delivery of the bill and the time fixed for completion did not arise from any act of the mortgagee's solicitor, but was owing only to the desire of the mortgagor for speedy completion, there was no pressure such as to justify taxation, though the case would have been otherwise if the mortgagee had been pressing for an early settlement. *Boycott, In re*, 55 L. J., Ch. 835; 29 Ch. D. 571; 52 L. T. 482; 34 W. R. 26—C. A.

On the day appointed for "paying off" a mortgage the solicitor of the mortgagee refused to part with the title deeds until payment of his bill of 18*l.*, which had been delivered two days previously. It was paid under protest. The court refused a taxation, no pressing necessity for the title deeds appearing, and no items of overcharge being distinctly shewn. *Finch, In re*, 16 Beav. 585; 1 Eq. R. 109.

—— **Obtaining Payment by Cheque.**]—The solicitor of a mortgagee, at a meeting to execute the mortgage deeds, by directing the solicitor of the mortgagor to draw cheques on account of the money to be advanced for the payment of divers bills of costs owing to him, across which he required the mortgagee to sign her name at the back, at once withdraws his protection, and subjects the client and mortgagee to constraint and undue influence amounting to pressure, which, notwithstanding payment, will render the bills liable to taxation. *Abbott, In re*, 18 Beav. 393; 23 L. J., Ch. 955; 2 W. R. 379.

—— **No Facilities for Taxation.**]—To constitute a case for taxation of costs after payment, on the ground of undue pressure, the pressure must have been of such a kind as to have rendered it impossible or difficult to have the costs taxed before payment, in the ordinary course. *Browne, In re, Jefferies, Ex parte*, 1 De G. M. & G. 322; 21 L. J., Ch. 442.

To support such a petition on the ground of extravagant and improper charges, the allegations directed to that point must be specific, and must be such as to amount to evidence of fraud. *Ib.*

There is no general rule as to how much pressure will entitle a party to have a solicitor's bill taxed after payment. But if reasonable facilities for taxation have been refused at the last moment, when it has become imperative to the party to obtain immediately the papers to which the solicitor's lien applied, and the party has consequently paid the bill, that is a special circumstance which, coupled with items of apparent overcharge, will justify the court in directing taxation after payment. *Newman, In re*, 36 L. J., Ch. 843; L. R. 2 Ch. 707; 17 L. T. 128; 15 W. R. 1189.

It is no argument against taxation in such a case that the effect produced upon the party by the pressure arises out of his own conduct or private affairs. *Ib.*

A cestui que trust agreed that her trustee, if he acted as solicitor in a suit, should receive full costs. A bill was delivered on the 18th February, and on the 8th March the solicitor ceased to act. After discussion as to the amount, and having received other professional advice, the client paid the bill on the 22nd May, a deduction being made therein. On an application being made within twelve months, the court refused to order a taxation. *Wyche, In re*, 11 Beav. 209.

A mortgagor presented a petition, praying that certain bills of costs, which had been paid under certain special circumstances, might be taxed. The petition stated that a meeting was appointed for the completion of a transfer of mortgages and payment of the money, and that the solicitor of the mortgagees presented four bills of costs, two of which were agreed upon, and the others, which related to matters between the mortgagees and their solicitor, not; but as a postponement of the settlement might be serious to the mortgagor, it was agreed that they should be paid by him. The bills contained improper and exorbitant charges, and the petition specified items of overcharge:—Held, that as the statements and evidence shewed a case of great and unnecessary pressure, and as the bills, which were between the solicitor and other parties, contained items which could not be duly examined at the time, there was sufficient reason on either ground to induce the court to make the order. *Kinneir, In re, Price, Ex parte*, 5 Jur. (N.S.) 423; 7 W. R. 175.

If payment be made under pressure, the circumstance of pressure alone is enough to induce the court to order a taxation. *Ib.*

Payment of a solicitor's bill, delivered at the last moment of settling a mortgage, being insisted on without any opportunity of examination being afforded, is a "special circumstance" within the meaning of the Solicitors Act. *Jones, In re*, 8 Beav. 479.

A bill of costs was delivered on the day appointed to complete the transfer of a mortgage. It was objected to, but the solicitor of the mortgagee refused to complete until payment. The mortgagor paid it, but it was afterwards ordered to be taxed. *Phillpotts, In re*, 18 Beav. 84; 2 W. R. 3.

The single fact that, upon a transfer of a mortgage, a mere draft bill of costs of the mortgagee's solicitor is, for the first time, produced and then paid, is not of itself, without proof of pressure or fraud, a sufficient "special circumstance" to authorise taxation after payment; nor is that fact sufficient, coupled with overcharges which are not so gross as to evidence fraud. *Fyson, In re*, 9 Beav. 117.

A meeting was appointed to settle important matters on the 23rd August, and the costs were to be paid by A. B. The bill of costs was delivered the evening before, and payment was then insisted on, though the bill was objected to. Upon evidence of overcharge, taxation was ordered after payment. *Elmslie, In re*, 12 Beav. 538.

A bill of costs, settled and paid after examina-

tion, discussion and abatement made by the solicitor, referred for taxation under the circumstances, but on the terms of the client admitting the cash payments contained in the settled account. *Nokes* v. *Warton*, 5 Beav. 448.

A., the mortgagee's solicitor, sent a reconveyance to B., the mortgagor's solicitor, for execution, unstamped. On the 23rd August B. delivered his bill of costs, which was objected to; and on the 10th September A. applied to B. for the loan of the deed to get it stamped, on his undertaking to return it, which was refused; and on the 18th September the mortgage and bill were paid. The mortgagee afterwards applied for a taxation, and the pressure relied on was, that he had been compelled to pay the bill, in order to get the reconveyance stamped, and avoid the penalties. He also alleged overcharges, which were not clearly made out. The application was refused, with costs. *Hubbard, In re*, 15 Beav. 251.

A mortgagee's solicitor would not part with the deeds until payment of his bill of costs, which had been delivered to the mortgagor's solicitor a month previously:—Held, that this was not a sufficient case of pressure to induce the court to order a taxation. *Jones, In re*, 8 Beav. 479.

A tenant having an option of purchase of the fee at a given price on the terms of his paying all the vendor's costs, gave notice in December, 1882, of his exercise of the option, and stated that he should not require an abstract of title. The time for completion was the 25th of March, 1883, but it was arranged for the tenant's convenience that the completion should be six weeks earlier, and that the property should be conveyed in two lots. He sent his draft conveyances for perusal before the end of December. On the 2nd of February, 1883, the vendor's solicitors sent in their bill of costs, in which they charged 30*s.* per cent on the purchase-money of each lot. The purchaser's solicitors objected to these charges, but the vendor's solicitors refused to allow completion unless they were paid, and on the 14th of February the purchaser paid them under protest, and completed the purchase. After this he applied for taxation of the bill:—Held, that, having regard to the dates, there was no pressure, and that there was no overcharge amounting to fraud, and that there were, therefore, no special circumstances to authorise taxation after payment. *Lacey and Son, In re*, 53 L. J., Ch. 287; 25 Ch. D. 301; 49 L. T. 755; 32 W. R. 233—C. A.

A mortgagee's solicitor delivered his bill to the mortgagor nearly three weeks before the day of settlement. At the meeting the bill was objected to, but the solicitor refused to complete without full payment, and the mortgagor paid it under protest:—Held, that this was not sufficient to authorise a taxation, although there might be some overcharges. *Harrison, In re*, 10 Beav. 57; 16 L. J., Ch. 170; 11 Jur. 197.

Petition to tax a bill of costs, paid without pressure nine days after its delivery, dismissed with costs. *Drew, In re*, 10 Beav. 368.

In March, 1847, a railway company agreed to purchase some property, and to pay the vendor's costs. In May, 1847, possession was delivered. The bill of costs of the vendor's solicitor was delivered on the 13th June, 1848, and a meeting, to complete the purchase, took place between the solicitors on the 20th June, when objections were then made to the bill. It was then paid, under protest, and with an intimation that it would be taxed, and a petition for taxation was presented a few days after:—Held, that there was not sufficient evidence of pressure to open the matter by ordering a taxation. *Welchman, In re*, 11 Beav. 319.

Where a mortgagee had instituted a suit for foreclosure, and an arrangement had been made for a transfer, and the bill of costs was not delivered until the day appointed for completion, but was not paid until fourteen days after, the court refused to order a taxation, no overcharges being satisfactorily proved. The court considered that the mortgagee ought to have obtained an order to stay the suit, on payment of the mortgage and the deposit of the amount claimed for costs. *Towle, In re*, 30 Beav. 170; 3 L. T. 283.

Taxation of a bill paid under protest, on the ground of overcharges, and that the solicitor had refused to part with the title deeds until payment, refused with costs, it not appearing how long the bill had been delivered before payment. *Mash, In re*, 15 Beav. 83.

Pressure and Overcharges.]—The rule of the court is, that to obtain a taxation after payment there must either be both overcharge and pressure, or overcharge so gross as to amount to fraud. *Hubbard, In re*, 15 Beav. 251. And see *Browne, In re, Jefferies, Ex parte*, 1 De G. M. & G. 322; 21 L. J., Ch. 442.

A solicitor is not bound to do that on the undertaking of the opposite solicitor, which the latter is not entitled to as of right. *Ib.*

After a solicitor's bill had been paid, an order for the taxation of it will not be made, unless special circumstances—as overcharges such as amount to fraud, or which are accompanied by pressure—can be shewn, which, in the opinion of the judge, appear to make it proper that the bill should be taxed. *Munns and Longden, In re*, 50 L. T. 356.

To obtain the taxation of a bill of costs after payment, the petitioner must allege and prove specific items of overcharge, even if the payment has been made under protest and upon pressure. *Thompson, In re*, 8 Beav. 237; 14 L. J., Ch. 137; 9 Jur. 169. Contra *Dearden, In re*, 9 Ex. 210; 2 C. L. R. 308; 23 L. J., Ex. 14; 17 Jur. 993; 2 W. R. 18.

Petition by mortgagor for taxation of the mortgagee's solicitor's bill, presented five months after it had been discharged by retainer, dismissed with costs, on the ground that it neither alleged any circumstances of pressure nor any specific item of overcharge. *Dunt* v. *Dunt*, 9 Beav. 146.

Taxation ordered of a paid bill of a mortgagee's solicitor in a mixed case of pressure and of improper items. *Rance, In re*, 22 Beav. 177.

A mortgagee took legal proceedings against the mortgagor whereby expenses were being incurred. The mortgagee's solicitor delivered his bill on the 25th December, and the parties met to complete a transfer on the 29th December. The bill contained a charge for an abstract, which was more than double what it ought to have been, but the solicitor refused to reduce it, and the bill was paid. It did not appear that any proposal had been made to settle the matter, and postpone the question of costs. The court, considering that there had been both pressure and overcharge, ordered a taxation. *Ib.*

It requires a very special case to induce the

court to order taxation after payment, the court being reluctant to open a matter deliberately settled. The rule is, that there must be both pressure and overcharges or items in the bill itself of such a nature as to amount to what is vaguely called fraud. Definition of the term "fraudulent items." *Barrow, In re*, 17 Beav. 547; 18 Jur. 181; 2 W. R. 109. S. P., *Abbott, In re*, 18 Beav. 393; 23 L. J., Ch. 955; 2 W. R. 379.

Taxation after payment ordered, on proof of pressure, and on shewing grounds for thinking that the bill would be considerably reduced on taxation. *Sladden, In re*, 10 Beav. 488.

Where payment of a bill of costs has been obtained by undue pressure, a taxation may be directed on proof of overcharge, without shewing that such overcharges are so gross as to amount to fraud. *Wells, In re*, 8 Beav. 416; 14 L. J., Ch. 215; 9 Jur. 820.

Proof of overcharge alone is insufficient to obtain the taxation of a paid bill; but it is a necessary ingredient. *Stirke, In re*, 11 Beav. 304.

When a bill of costs is paid, the onus of proving overcharges is thrown on the client. *Towle, In re*, 30 Beav. 170; 3 L. T. 283.

Where an account, comprising bills of costs, is settled and paid as between a solicitor and client, and no surprise or fraud is practised, the court will not direct a taxation of the bill, though it appears to contain items which would be disallowed or reduced on taxation, unless it appears that the overcharges are in themselves so extravagant and improper, as under the circumstances to be considered fraudulent. *Massie* v. *Drake*, 4 Beav. 433.

Upon the settlement of an account between a solicitor and his client, a sum of 75*l.* was retained by the solicitor, by consent, to answer particular costs not then ascertained. The court limited the taxation to such particular costs. *Ib.*

To obtain an order for taxation of a bill of costs which has been paid, it must be shewn that there has been undue pressure and overcharge, or overcharge amounting to fraud. *Foster, In re, Walker, Ex parte*, 2 De G. F. & J. 105; 29 L. J., Ch. 625; 6 Jur. (N.S.) 687; 2 L. T. 553; 8 W. R. 620. S. P., *Harding, In re*, 10 Beav. 250; 16 L. J., Ch. 288.

Overcharge amounting to Fraud.]—Unless overcharge amount to fraud the court will not refer bills of costs for taxation after payment. *Turner, Ex parte*, 5 De G. M. & G. 540; 24 L. J., Ch. 71; 2 W. R. 617.

Even without pressure, items of overcharge are enough to render the circumstances special, under s. 41 of the 6 & 7 Vict. c. 73. *Kinnear, In re, Price, Ex parte*, 5 Jur. (N.S.) 423; 7 W. R. 157.

It is not sufficient, in order to exclude taxation, to shew that no objection was made at the time to the payment either of particular items or of the whole bill. *Ib.*

On application by a residuary legatee to tax a bill of costs of the solicitors of the executors after payment, no case of pressure or actual fraud was made out, nor of very gross overcharge, but various items were of a considerably greater amount than would have been allowed to the executors in a suit to administer the estate:—Held, that taxation had been rightly ordered, for that overcharges of this nature were overcharges amounting to fraud, within the technical meaning of the term. *Dickson, In re*, 26 L. J., Ch. 89; 3 Jur. (N.S.) 29; 5 W. R. 108.

An overcharge not warranted by the scale under the general order of the Solicitors' Remuneration Act, 1881, will be sufficient to constitute "special circumstances" justifying taxation after payment under s. 41 of the Solicitors Act, 1843. *Eley, In re*, 56 L. J., Ch. 905; 37 Ch. D. 40; 57 L. T. 253; 36 W. R. 96.

Where the client being desirous of raising a sum, his solicitors agreed to obtain it, if the amount of their bills might be included and settled, which the client consented to on condition of their taking his acceptance for the bills, on being furnished with all of them, and which had not been delivered, and the acceptance was sworn to have been received in lieu of payment:—Held, that in the absence of any circumvention or oppression, the acceptance of payment under such circumstances was not such a special circumstance as to entitle the client to taxation after payment. The overcharges complained of and explained not being proved to such an extent as to amount to fraud, it was not sufficient that there were some overcharges which might have been disallowed on taxation. *Currie, In re*, 9 Beav. 602; 10 Jur. 976.

Taxation of a solicitor's bill refused after a security given, payment and acquiescence; some charges, though improper, not being so gross as to amount to fraud. *Plenderleath* v. *Fraser*, 3 Ves. & B. 174.

An attorney's bill of costs settled and paid, or after judgment in action, not to be referred for taxation of course; as it may be upon a special case of fraud or improper charges, notwithstanding payment, a release, judgment, or other security. *Langstaffe* v. *Taylor*, 14 Ves. 262.

Common Mistake.]—Where a fee was paid under a common mistake of the solicitor and client that the scale under the Solicitors' Remuneration Act applied, the court refused to accede to an application for an order for taxation. *Glaseodine and Carlyle, In re*, 52 L. T. 781—C. A.

Unnecessary Charges.]—On the occasion of the payment of a mortgage debt by the mortgagor, the mortgagee's solicitor delivered his bill of costs, which was paid by the mortgagor. The bill contained items to the amount of 10*l.* for the preparation of a bill of foreclosure against the mortgagor, which was never filed:—Held, that the preparation of the bill of foreclosure being, under the circumstances, unnecessary and improper, the charges were of such a nature as to induce the court to allow taxation after payment, although there had been no pressure or surprise. *Barrow, In re*, 17 Beav. 547; 18 Jur. 181; 2 W. R. 109.

Trifling Overcharges.]—Though the court will open a solicitor's bill, and order taxation, after several years and a security given, or even payment upon gross errors, fraud, or undue pressure, yet where nothing appeared but a trifling inaccuracy, and under other favourable circumstances, the court would not restrain proceedings upon a security obtained while business was depending. *Cooke* v. *Setree*, 1 Ves. & B. 126.

Petition to tax a bill of costs after payment, on the ground of trifling overcharges, dismissed with costs. *Drake, In re*, 8 Beav. 123.

Where overcharges of only 2*l.* or 3*l.* were shewn, and no pressure or fraud was proved, taxation was refused. *Chowne, In re*, 52 L. T. 75—C. A. S. P., *Walsh, In re*, 12 Beav. 490.

A mortgagor, without giving six months' notice, requested the mortgagee to accept payment and to transfer the mortgage. The transfer being executed, the mortgagee's solicitors refused to deliver it or the title deeds to the mortgagor without payment of their bill of costs. The mortgagor's solicitor objected to items amounting to less than 9*l.* in all, but paid the full amount in order to obtain the deeds: — Held, that the above were not such special circumstances as to subject the bill to taxation after payment. *Barton, Ex parte*, 4 De G. M. & G. 108; 22 L. J., Ch. 670.

Semble, that one of the special circumstances required is overcharge, and that an item objected to, not because the business was not done, or because the charge was excessive, but because the liability to pay it is disputed, is not such an overcharge as to be sufficient ground for taxing a paid bill. *Ib.*

Charges for attendances to the extent of eight on one day, are not sufficient to open a paid bill. *Towle, In re*, 30 Beav. 170; 3 L. T. 283.

Time of Application.]—A petition being presented for the taxation of a solicitor's bill:—Held, that the application was to be considered as to be made at the latest at the time of answering the petition, and not at the time of service of the petition, or the day appointed for hearing. In case of accidental delay in the office, the period may be carried further back. *Sayer* v. *Wagstaff*, 5 Beav. 415; 13 L. J., Ch. 161. Affirmed, 14 L. J., Ch. 116; 8 Jur. 1083.

A solicitor delivered his bill of costs on the 14th October, 1842, for which his client, on the 3rd November, 1842, gave his promissory note, which was paid on the 17th November, 1842. On the 15th November, 1843, the client presented a petition for the taxation of the bill, which was answered on the 16th, and was served on the 21st. The day appointed for hearing was the 24th:—Held, first, that the bill must be considered as paid on the 17th November, 1842; and, secondly, that the application for taxation must be considered as made at the latest on the 16th November, 1843; and consequently, that the application for taxation had been made within twelve months, according to s. 41 of 6 & 7 Vict. c. 73. *Ib.*

Application for taxation after payment should be made speedily. *Barrow, In re*, supra.

Where a bill of costs was delivered on the completion of a purchase, to which the solicitor was a party, and he refused to complete the purchase without payment: — Held, that the circumstances were evidence of pressure, and justified taxation after payment, notwithstanding five months had elapsed before the presentation of the petition. *Pugh, In re, Briscoe, Ex parte*, 1 De G. J. & S. 673; 8 L. T. 586; 11 W. R. 762.

An unexplained delay of nine months after payment in the presentation of a petition for taxation on such grounds:—Held, fatal to the application. *Jeffries, Ex parte. Browne, In re*, 1 De G. M. & G. 322; 21 L. J., Ch. 442.

A mortgagee's solicitor's bill was delivered at the completion of the mortgage transaction, and the amount retained, after objection. A petition presented eleven months afterwards, for taxation, was refused, although the bill contained an objectionable item of 20*l.* for procuration money. *Bayley, In re*, 18 Beav. 415; 2 W. R. 404.

Affidavit.]—After a bill of costs paid, and a receipt in full taken, the client is not entitled to an order to tax the costs, merely swearing they never had been taxed; he must shew specific error. *Mahon* v. *Scanlan*, 2 Moll. 388.

A petition for the taxation of a bill of costs set forth special circumstances sufficient in themselves to obtain an order for taxation, but the affidavits in support of it mentioned some of the items which were objected to, all of which were explained by the solicitors to the satisfaction of the court. The petition was dismissed. *Andrews, Ex parte, Clement, In re*, 13 L. J., Ch. 222; 8 Jur. 327.

Order — What Bills.] — A solicitor's bill of costs paid under pressure, and protested against, referred for taxation. Protest, combined with other circumstances, may be a ground of reference of a bill of costs for taxation. Where there is evidence of pressure, the court will, if necessary, direct a general reference for taxation, although in the petition for taxation some only of the items of the bill of costs may be objected to. *Wilkinson, Ex parte, Alcock, In re*, 2 Colly. 92; 9 Jur. 720.

A bill of costs was delivered by the solicitor in 1809, and shortly afterwards paid by the client; between that time and March, 1817, four other bills were delivered, and various payments were made on account. In November, 1817, a sixth bill was delivered, when the client paid the general balance due on the bills of costs, at the same time stating that he would insist on having the bills taxed. An application for taxation to a judge at law in 1818, and an application to the court of king's bench in 1819, failed, from circumstances not involving the merits of the question. Some attempts at a compromise were made from time to time, and the client was obliged, on three or four occasions, to leave England, in order to attend to urgent business in foreign countries; but at length, in 1824, a motion was made to have the bills referred for taxation, supported by evidence that some of the items of charge were improper. The court ordered that the bill last delivered should be taxed generally, and that the five antecedent bills should be referred to the master, with a direction that the client should deliver to the solicitor a schedule of the items complained of, and that the master should exercise as large a discretion as he might think fit, with respect to the evidence on which he should proceed in forming his judgment concerning these items. *Scougall* v. *Campbell*, 3 Russ. 545.

Several bills were delivered in, settled, and paid, in the course of a long cause, and a receipt in full given; at the end of the cause the client moved to refer them all for taxation. The order was discharged. *Pistor* v. *Dunbar*, 1 Anstr. 186; 3 R. R. 561.

A bill of costs was settled by retainer; a second and subsequent bill was also settled in the same way:—Held, on an application to tax the second bill only, that the solicitor could not insist on having both taxed. *Gregg, In re*, 30 Beav. 259; 31 L. J., Ch. 632; 10 W. R. 127.

A petition was presented for taxation of a paid bill of costs, alleging specific items of overcharge. The solicitor thereupon offered to repay the amount of such items and the costs. The petitioner did not accede to this, but brought the petition to a hearing. The court ordered the taxation of the bill, treating these items as omitted. *Catlin, In re*, 23 Beav. 412.

9. More than Twelve months after Payment.

Jurisdiction.]—The lapse of twelve months between the payment of a bill of costs and the presentation of a petition for its taxation precludes taxation under the act. *Harper, In re*, 10 Beav. 284.

Quære, whether a bill can be ordered to be taxed above a year after payment unless fraud can be shewn. *Pemberton* v. *Tyther*, 1 W. R. 86.

The court has no power to refer a bill of costs for taxation, when such bill has been paid more than twelve calendar months before the application has been made to the court to refer. *Binns* v. *Hey*, 1 D. & L. 661 ; 13 L. J., Q. B. 28 ; 7 Jur. 1154.

An application to tax must be within twelve calendar months after payment. *Wilton, In re*, 13 L. J., Q. B. 17 ; 7 Jur. 1133.

Where twelve calendar months have elapsed since payment of a solicitor's bill of costs by his client, such bill, although not signed by the solicitor, is prohibited by 6 & 7 Vict. c. 73, s. 41, from being referred to taxation. *Sutton and Elliott, In re*, 52 L. J., Q. B. 752 ; 11 Q. B. D. 377 ; 49 L. T. 436—C. A.

An account settled between a client and her solicitor, including arranged bills of costs, decreed to be opened and the bills referred for taxation in an action instituted nearly two years after such settlement, on the grounds of undue influence, and that the charges were improper and excessive, and that much of the business done was unnecessary, and ought not to have been done. *Watson* v. *Rodwell*, 48 L. J., Ch. 209 ; 11 Ch. D. 150 ; 39 L. T. 614 ; 27 W. R. 265—C. A.

A preliminary agreement between a solicitor and his client on obtaining a loan on mortgage, no bill of costs having been delivered, is illegal, and the delivery of the bill and taxation were ordered more than twelve months after completion of the transaction and payment of the balance to the client. *Cawley, In re*, 18 W. R. 1125.

A solicitor lent his client 200*l.* on a promissory note. The note was made out for 210*l.*, the addition being alleged to be for costs on the transaction :—Held, that the client was not precluded from requiring a bill of costs, shewing how the sum of 10*l.* was made up, by the lapse of nearly three years and subsequent money transactions between the parties. *Ib.*

Within twelve months after payment of a bill of costs a client presented a petition for its taxation ; but the petition having specified no items of overcharge, no order could be made. The twelve months having then expired, the court refused to allow the petition to stand over for the purpose of amendment, by specifying the items. *Barwell* v. *Brooks*, 7 Beav. 345.

Bills of costs examined after a long period, and even after payments made. *Newman* v. *Payne*, 2 Ves. J. 202 ; 4 Bro. C. C. 350.

Taxation of solicitor's bill, after payment and lapse of several years, refused. *Waters* v. *Smith*, 1 Jur. 375.

A solicitor delivered a general estimate of costs due to him, without specifying the particulars. The client signed a memorandum agreeing to the statement, and requesting A. (to whom he had given his acceptance) to pay the amount. A bill filed by the client more than three years afterwards, to obtain a delivery and taxation of the bill of costs, was dismissed with costs. *Turner* v. *Hand*, 27 Beav. 561.

A solicitor's bill of costs had been delivered, after the death of the client, to the solicitors employed by his representatives, and paid by them after investigation ; and some, but not all, of the papers of the deceased client were delivered up. An application, made three years after, for the taxation of the bill, without referring to any specific errors, but alleging generally that the bill contained exorbitant charges, was refused. *Horlock* v. *Smith*, 2 Myl. & C. 495 ; 6 L. J., Ch. 236 ; 1 Jur. 302.

Where a client has paid his solicitor's bill without pressure, and with full means of examining it before payment, and afterwards seeks to open the bill and refer it for taxation, he must state, in his petition, and prove to the satisfaction of the court, specific errors of such a character as amount to evidence of fraud. A general allegation of improper charges will not be sufficient. *Ib.*

A mere primâ facie error in such a bill will not authorise the court to refer it for taxation. *Ib.*

The circumstance, that a solicitor has omitted to give his client credit for certain items with which he ought to have been credited, will be a ground for a distinct inquiry what sums the solicitor has received which ought to be set off against the amount of the bill ; but will not, of itself, be a ground for referring the whole bill for taxation. *Ib.*

Principles of the court with respect to the taxation of a solicitor's bill after payment. *Ib.*

—— **Unsigned Bill.**]—A bill of costs, though unsigned, is within s. 6 of 12 & 13 Vict. c. 53 (similar to 6 & 7 Vict. c. 73, s. 41), and cannot be referred for taxation more than twelve months after payment. *Falls, In re*, 29 L. R., Ir. 1.

Application by Third Parties.]—The administratrix, with the will annexed, of a testatrix, who was also tenant for life under the will, employed a solicitor in relation to the administration of the estate, and, as was alleged, paid his bill of costs out of moneys forming part of the capital of the estate. More than twelve months after the payment of the bill some of the beneficiaries, as plaintiffs, took out an originating summons against the administratrix, as defendant. The summons was intituled in the matter of the estate of the testatrix, and also in the matter of the solicitor, and it was served on him, but he was not named as a defendant. The summons asked for a reference of the bill to taxation, and that in taxing the costs the master might certify what amount was properly chargeable against the capital of the trust estate, and what amount was properly payable by the defendant personally, as tenant for life ; and that, if it should appear that the bill was overpaid, the solicitor might be ordered to repay the amount certified to be overpaid to the defendant. It was suggested that the bill contained items which were not properly chargeable against the capital of the trust estate, and that the solicitor knew that he was being paid out of the capital of the trust estate, and had notice of the breach of trust at the time when he received payment :—Held, that the lapse of more than twelve months since payment was a bar to its taxation :—Held, also, on the authority of *Spencer, In re* (51 L. J., Ch. 271), that, even if the solicitor had been made a defendant to the summons, the relief asked against him could not have been obtained. Whether

any relief could have been obtained against him, quære. *Jackson, In re, Boughton-Leigh* v. *Boughton-Leigh*. 58 L. J., Ch. 387; 40 Ch. D. 495; 60 L. T. 589; 37 W. R. 282.

10. After Action Brought.

After Action.]—A bill of costs having been incurred by A. and B. jointly, and an action having been brought against them for the recovery of the amount, the court refused to direct a taxation and to stay the proceedings at law, on the undertaking of A. alone, to pay what might be found due. *Chilcote, In re*, 1 Beav. 421.

A client obtained an order of course to tax after action brought, but before notice of it, and the order did not provide for the costs of the action:—Held, that this was not irregular, and a motion to discharge it was refused with costs. *Farington, In re*, 33 Beav. 346.

A solicitor brought an action at law for the recovery of his bill of costs. The client contested the retainer, and while the action was pending, obtained an order of course to tax the bill of costs; but the order contained no submission to pay what, upon taxation, should be found due. Upon motion to discharge the order as irregular:—Held, that the court had jurisdiction to make such an order; but that in such a case the facts ought to be brought specially before the court, which would make a special order, according to the circumstances of the case. The court made a special order; and in case the respondent should refuse to take it, directed the order of course to be discharged, but without costs. *Thurgood, In re*, 19 Beav. 821; 23 L. J., Ch. 952; 18 Jur. 821; 2 W. R. 682.

Where a defendant after action brought applies for taxation, he cannot deny liability unless the order expressly provides therefor. *Baker* v. *Merryweather*, 2 Car. & K. 737.

After Verdict.]—Solicitor may proceed to tax his costs after a verdict at law, with a view to commence an action in his own name for the amount, after a final settlement between the parties by arbitration without his concurrence, notwithstanding an injunction to stay execution. *Brooks* v. *Bourne*, 1 Price, 72.

After Judgment.]—A solicitor to a railway company, provisionally registered, brought an action against three of the managing directors for the amount of his bill of costs, and recovered judgment. An order was afterwards obtained for winding up the company under the act, and a petition was then presented by the official manager for taxing the solicitor's bill, under the statute 6 & 7 Vict., c. 73, on the ground of excessive charges:—Held, that the court could not be called upon to examine the items of a bill to ascertain their correctness, and that an allegation of excessive charges was not such a special circumstance as to bring the case within the 38th section of the act. Petition dismissed with costs. *Vardy, In re*, 20 L. J., Ch. 325.

A solicitor was employed by three partners. He brought an action against them for his bill of costs, and, representing one, he obtained judgment against them by default:—Held, that this did not prevent the others from obtaining an order for taxation: Held, also, that an application for taxation by the two was regular, the third not concurring, but that he ought to be served with the petition. The taxing-masters have jurisdiction to determine questions of retainer. *Hair, In re*, 10 Beav. 187; 16 L. J., Ch. 163; 11 Jur. 139.

A judgment at law which is not final does not preclude an order of course for taxation. *Gedye, In re*, 15 Beav. 254; 21 L. J., Ch. 430.

After final judgment, signed by an attorney and solicitor, in an action upon his bills of costs, there can be no reference for taxation under the 6 & 7 Vict. c. 73, except under special circumstances, although there has been no verdict nor writ of inquiry executed in the action. *Barnard, In re*, 2 De G. M. & G. 359; 17 Jur. 53.

Semble, that after the question of taxation of a solicitor's bill of costs has been adjudicated upon in an action, a special petition to this court to tax the costs, under the 6 & 7 Vict. c. 73, s. 37, cannot be entertained. *Ib.*

Semble, that after judgment in an action for costs the special jurisdiction to direct taxation given by the 6 & 7 Vict. c. 73, is gone. *Ib.*

Costs after judgment in an action for them, not referred for taxation. Otherwise, on a special case of fraud or improper charges. *Langstaffe* v. *Taylor*, 14 Ves. 262.

11. After Security given or Settlement.

Security.]—Bill may be taxed after bond and mortgage given as security for same. *Aubrey* v. *Popkin*, Dick. 403.

Court will order attorney's bill to be taxed, though he has a mortgage to secure payment. *Walmesley* v. *Booth*, 2 Atk. 29. S. P., *Plenderleath* v. *Fraser*, 3 Ves. & B. 175.

A solicitor being indebted to A., and having a demand against B., a client, prevailed on B. to give A. a bond for 3,000*l*., as part satisfaction of the costs due from B. A. knew that the sum claimed from B. was due for costs, but had no notice the costs had not been taxed. Taxation decreed. *Harrison* v. *Wiltshire*, 9 Sim. 255; 2 Jur. 679.

Refusal to order the taxation of a solicitor's bills of costs, the amount of which had been secured by a deed in the year 1819, although the suit was then pending; the client's affairs having since the year 1822 (when that solicitor died), been in the hands of another solicitor, and there being no proof of such dealings between the solicitor and client, or of such errors or improper charges in the bill, as could amount to evidence of fraud. *Waters* v. *Taylor*, 2 Myl. & C. 526; 6 L. J., Ch. 245; 1 Jur. 375.

Where an attorney had taken a mortgage from his client for his bill of costs in preparing that and another mortgage, and the client, before the attorney's mortgage was executed, assented to the bill, but afterwards, on coming to redeem, questioned its accuracy; the court directed the master to examine the bill, with a view to ascertain the reasonableness of the charges, without entering into evidence as to whether the business charged for had been actually done. *Wragg* v. *Denham*, 2 Y. & Coll. 117; 6 L. J., Ex. Eq. 38.

Costs ordered to be taxed fourteen years after security given for the payment of them, it appearing that the costs had not been paid, although payments had been made on account of them; that the security had been given pendente lite, and while the relation of attorney and client existed between the parties; no account having been settled between them, the client being

then in embarrassed circumstances, some oppression having been used towards him by the attorney; but the vouchers having been given up to the client, it was ordered that the bills of costs should be primâ facie evidence of the business done, and the reasonableness of the charge, with liberty to the client to surcharge and falsify. *Fowler* v. *Moore*, 2 Jones, 415.

Solicitor having taken a judgment of his client for 400*l.* whilst cause was depending, also several extraordinary charges appearing in his bill, bill though adjusted and allowed seventeen years ago, referred to be taxed, and judgment and other securities to be delivered up. *Drapers' Co.* v. *Davis*, 2 Atk. 295.

Where a bond and warrant of attorney, on which judgment was entered, were given twenty-seven years ago for costs due to a solicitor, the court, upon an allegation that these costs had never been taxed or settled, refused to refer them for taxation at the instance of the surety of the client, and against the executor of the executor of the solicitor, who had died twenty years before. *Maxwell* v. *O'Dell*, Sau. & Sc. 194.

A client executed a mortgage to his solicitor for a specified sum, being the amount at which past costs in a suit had been estimated, without the bills having been delivered, the solicitor undertaking to deliver the bills by a certain time, which he did. Four years afterwards the client changed his solicitor, and obtained an order for taxation of subsequent costs, but declined the offer of the solicitor to have the costs secured by the mortgage included in the taxation, and obtained the order without prejudice to any question as to those costs. Two years afterwards, the client filed a bill against the solicitor, to have the latter costs investigated and the account between the parties re-opened, but did not allege any specific overcharge or error:—Held, that the application was precluded by length of time and acquiescence. *Blagrave* v. *Routh*, 8 De G. M. & G. 620; 26 L. J., Ch. 86; 3 Jur. (N.S.) 399; 5 W. R. 95.

Though the court will open a solicitor's bill, and order taxation after several years, and a security given, or even payment, upon gross errors, fraud or undue pressure, where nothing appeared but a trifling inaccuracy and under other favourable circumstances, the court would not restrain proceedings upon a security obtained while business was depending. *Cook* v. *Setree*, 1 Ves. & B. 126.

Settlement.]—A settlement of a bill of costs during the continuance of the suit, while the client has no professional adviser, except the solicitor himself, is not a bar to its taxation. *Crossley* v. *Parker*, 1 Jac. & Walk. 460.

An account settled between a client and her solicitor, including arranged bills of costs, decreed to be opened and the bills referred for taxation in an action instituted nearly two years after such settlement, on the grounds of undue influence, and that the charges were improper and excessive, and that much of the business done was unnecessary, and ought not to have been done. *Watson* v. *Rodwell*, 48 L. J., Ch. 209; 11 Ch. D. 150; 39 L. T. 614; 27 W. R. 265—C. A.

Admission of Balance.]—Where the client was in the power of his solicitor, and without the means or proper assistance, for obtaining any effective examination of the bills, which consisted of general items, and were otherwise not sufficiently explanatory, and the solicitor appeared to be driving the client into a bargain on unequal terms, the relation of the attorney and client still continuing, the court held that the latter was not precluded from an order for reference for taxation by the circumstances of an admission of the balance and payment of the settled account. *Nokes* v. *Warton*, 5 Beav. 448.

Agreement.]—Agreement between a solicitor and his client, an illiterate person, for payment of his bills (taken at a given amount) solely out of the produce of some property, the subject of the suit:—Held, not to preclude taxation. *Ingle, In re*, 21 Beav. 275; 25 L. J., Ch. 169; 1 Jur. (N.S.) 1059.

12. Scale of Taxation.

Parliamentary or Chancery.]—Under the common order to tax a solicitor's bill, the taxing-masters would tax a bill for parliamentary business upon the scale of parliamentary allowances. *Sudlow, In re*, 11 Beav. 400; 18 L. J., Ch. 182.

The promoters of a tramway company obtained a provisional order from the board of trade authorising the construction of the tramway under the Tramways Act, 1870. Their solicitors sent in their bill of costs:—Held, that the bill must be taxed according to the chancery and not the parliamentary scale. *Morley, In re*, L. R. 20 Eq. 17; 32 L. T. 524; 23 W. R. 532.

Higher or Lower.]—An action for the recovery of large estates, the statement of claim in which set up a case of concealed fraud to avoid the operation of the Statute of Limitations, was dismissed without costs. The taxing-master in taxing the costs of the plaintiff as between the solicitor and a person who had guaranteed their payment, taxed them on the lower scale as coming within Ord. VI. r. 1:—Held, that the fact of the issue of fraud being raised was not a sufficient reason for directing the costs to be taxed on the higher scale, but that, to take the case out of the general rule that the costs of an action for the recovery of land are to be taxed on the lower scale, the solicitor must shew that the case was one requiring extra skill or labour. *Terrell, In re*, 22 Ch. D. 473; 47 L. T. 588; 31 W. R. 208—C. A.

—— **Appeal.**]—An appeal will lie from a decision by a judge under Rules of the Supreme Court (Costs), August, 1875, Ord. VI. r. 3, as to the taxation of costs on the higher or lower scale; but where he has exercised his discretion, the court of appeal will not interfere unless he has proceeded on a wrong principle or made a manifest slip. *Ib.*

County Courts Act.]—Sect. 36 of the County Court Act, 1856, which fixes a limit to costs, as between solicitor and client, in actions where not more than 20*l.* is claimed, applies to county court actions only. *Copp, In re, Drew, Ex parte*, 50 L. J., Q. B. 233; 6 Q. B. D. 607; 44 L. T. 48; 29 W. R. 390—C. A.

The scale of costs and charges in actions in the county court under 20*l.* framed in pursuance of 38 & 39 Vict. c. 50, s. 8, does not prevent a solicitor from recovering charges other than those specified in the scale for work done out of court before and after the commencement of an action, although there has been no agreement in writing for further costs under 19 & 20 Vict. c. 108, s. 36. *Druiff* v.

Joel, Emanuel, In re, 51 L. J., Q. B. 490; 9 Q. B. D. 408; 30 W. R. 735.

The appendix to the county court rules, 1886, contains a scale of costs as between solicitor and client where the amount recovered exceeds 2*l*., and does not exceed 10*l*., and provides that no other costs are to be allowed where the amount claimed does not exceed 10*l*., unless the judge certifies under s. 5 of the County Courts (Costs and Salaries) Act, 1882. The plaintiff having commenced an action in a county court for 10*l*., consulted solicitors with reference to it, who, after taking various steps to investigate the claim, recommended a settlement, which the plaintiff refused to accept. The solicitors then returned the papers to the plaintiff, who proceeded with the action in person:—Held, that upon the taxation of the solicitors' bill for the services rendered by them, it was a question for the master whether the solicitors had, in fact, acted in the conduct of the action, and that if they appeared to have so acted, they could recover no other costs than those specified in the appendix. *Emanuel, In re* (9 Q. B. D. 408) considered. *Dod, Longstaffe and Co., In re, Lamond, Ex parte*, 57 L. J., Q. B. 503; 21 Q. B. D. 242; 59 L. T. 467.

—— **Higher or Lower Scale.**]—On taxation as between solicitor and client of the costs of a county court action in which the amount claimed exceeded, but that recovered was less than 10*l*., the master has a discretion to allow costs on the higher scale. *Langlois and Biden, In re*, 60 L. J., Q. B. 123; [1891] 1 Q. B. 349; 63 L. T. 816; 39 W. R. 181—C. A. Reversing 55 J. P. 183.

A solicitor commenced an action in the high court for a client, and conducted it through certain stages. Ultimately, upon his client's instructions, he obtained an order under s. 65 of the County Courts Act, 1888, by which the action was remitted for trial to a county court. He then ceased to act for his client. The action was conducted in the county court by another solicitor, and verdict and judgment were obtained for the full amount claimed:—Held, that the solicitor's bill of costs up to the date of the order remitting the action to the county court did not fall within the provisions of s. 118 of the County Courts Act of 1888 as to taxation. *Boydell* v. *Millar*, 60 L. J., Q. B. 251; 64 L. T. 299; 39 W. R. 335.

The provisions of s. 118 of the County Courts Act, 1888, as to taxation, do not apply to costs incurred in the high court up to the date of an order remitting to the county court an action commenced in the high court. *Boydell* v. *Millar* (60 L. J., Q. B. 251) approved. *Cubison* v. *Mayo*, 65 L. J., Q. B. 267; [1896] 1 Q. B. 246; 74 L. T. 65; 44 W. R. 473; 60 J. P. 212—C. A.

13. What Sums Allowed.

a. *Solicitors' Remuneration Act.*

i. Election as to Scale.

Time for—"Before undertaking any Business."]—The solicitors of the assigns of a lease of copyhold land wrote to P., the copyholder, asking for renewed leases to their clients under a covenant in the original lease. On the 25th of July, P.'s solicitors wrote to the solicitors of the applicants stating that P. had called on them with the letter, and that the matter therein referred to should have their attention, and asking for evidence of the title of the applicants. The evidence required was furnished. Some delay took place in consequence of the necessity of P. being admitted, and obtaining a licence to demise. On the 16th of October, P.'s solicitors were informed by the steward of the manor that P. could be admitted, and that licence to demise would be given. On the 19th of October, P.'s solicitors gave him written notice of their election to be remunerated according to the old system as modified by Schedule II. to the rules under the Solicitors' Remuneration Act. In the books of the solicitors was an entry under that date "instructions for drawing new leases," but there was no evidence as to the circumstances under which it was made. On the 21st of October P.'s solicitors sent to the applicant draft leases. The leases were granted, and the lessees, who were bound to pay the costs of the lessor's solicitors, insisted that the remuneration must be according to the scale in Schedule I.:—Held, that the election on the 19th of October was too late, for that the business had been undertaken on the 25th of July, and that the taxation must be according to the scale. *Allen, In re*, 56 L. J., Ch. 487; 34 Ch. D. 433; 56 L. T. 6; 35 W. R. 218—C. A.

The notice of election under r. 6 of the General Order to the Solicitors' Remuneration Act, 1881, must be given by the solicitor before he undertakes any business at all in the particular matter for his client. After having done any work in the matter for which he could charge his client if the scale under the order did not apply, it is too late for him to elect. *Allen, In re* (supra) followed. *Hester* v. *Hester*, 56 L. J., Ch. 247; 34 Ch. D. 607; 55 L. T. 862; 35 W. R. 233; 51 J. P. 438—C. A.

A solicitor who acted for a mortgagee in relation to the mortgaged property received from the solicitors of the persons entitled to the equity of redemption a request that the mortgagee would sell under his power of sale, and in pursuance of this he, without any express authority from his client, did work in relation to the contract for sale for which if authorised he would apart from the rules, under the Solicitors' Remuneration Act, have been entitled to be paid, and which would be covered by the scale fee. The sale was completed:—Held, that a notice of election to be remunerated according to the old system, which was given by the solicitor after work of the above description had been done, was too late, although given before the contract was signed, for that as the client had ratified his proceedings he stood in the same position as if he had received previous authority, and must be treated as having undertaken the business as soon as he did any work of the above description. *Ib.*

Where money is paid into court under statutes incorporating s. 80 of the Lands Clauses Consolidation Act, 1845, the solicitor for the vendor may entitle himself to detailed charges, provided that he signifies his election "before undertaking the business." *Bridewell Hospital and Metropolitan Board of Works, In re*, 57 L. T. 155.

The notice of election under r. 6 of the General Order under the Solicitors' Remuneration Act, 1881, as to remuneration for conveyancing business arising in an action, must be given by the solicitor before he undertakes such conveyancing business. After having done any work in the matter which would properly be covered by the scale charge, e.g. discussed with the

client the mode of scale and questions relating to the title, it is too late for him to elect. *Allen, In re* (34 Ch. D. 433), and *Hester* v. *Hester* (34 Ch. D. 607) followed. *Metcalfe, In re, Metcalfe* v. *Blencowe*, 57 L. J., Ch. 82; 57 L. T. 925; 36 W. R. 137.

The expression "undertaking any business" in r. 6 of the Order, means not merely accepting the retainer, but rather entering upon the work, that is, doing something for which the solicitor is entitled to make a charge, whether such charge is or is not covered by the scale fee under the Order. *Stewart, In re*, 41 Ch. D. 494; 60 L. T. 737; 37 W. R. 484.

What is.]—Sending in a bill of costs in the old form cannot be treated as an election by the solicitors to charge according to Schedule II. of the Order. *Fleming* v. *Hardcastle*, 52 L. T. 851; 33 W. R. 776.

Notice of Election — To whom given.]—Semble, where a solicitor is acting for several trustees, notice of election must be given to them all. *Hester* v. *Hester*, supra.

Where notice of election under the rule has been properly given by a solicitor to his client, a first mortgagee, it is binding on a subsequent incumbrancer and also on the mortgagor. *Ib.*

Where, under a lease containing a power of renewal, the assigns are liable to pay the costs of a new lease, the only person to whom any notice of election under r. 6 need be given by the lessor's solicitor is the lessor himself; the assigns not being "clients" of the solicitor within s. 1, sub-s. 3, of the Solicitors' Remuneration Act, 1881, so as to make any notice to them necessary. *Allen, In re*, 56 L. J., Ch. 6; 34 Ch. D. 423; 55 L. T. 630; 35 W. R. 100; 51 J. P. 325.

Pending Business — Right to Elect.] — The right of a solicitor under r. 6 of the general order, in pursuance of the Solicitors' Remuneration Act, 1881, to elect that his remuneration shall be according to the old system as altered by Schedule II., may be exercised as to business pending at the time when the order came into operation, and in such case the election may be made after the time when the order came into operation, but must be made before any further work is done by the solicitor to which the scale charges under the order would apply. *Love, In re, Hill* v. *Spurgeon*, 58 L. J., Ch. 272; 40 Ch. D. 637; 60 L. T. 254; 37 W. R. 475. S. P., *Stewart, In re*, supra.

The judgment in an administration action contained no general direction for the sale of the testator's real estate, but under various separate orders made in the action, and before the order under the Solicitors' Remuneration Act came into operation, sales and leases of parts of such estates were directed or sanctioned. After the order came into operation, the plaintiff's solicitor gave him notice that in all matters relating to the estate he proposed to charge according to the old system as altered by Schedule II. In determining the sufficiency of this notice, it was held that the separate transactions ought in the taxation of the costs to be treated and dealt with as separate matters, and that the business ought not to be deemed to be "undertaken" until the time arose at which the solicitor had done some work after the order came into operation, which would be covered by the scales under the general order. *Ib.*

Winding-up — Duty of Liquidator.] — On receiving notice from the solicitor, whom he has employed to act for him in the winding-up, that he elects to be paid for his work under Schedule II., and not according to the scale charge under the general order made in pursuance of the Solicitors' Remuneration Act, 1881, it is the duty of the official liquidator, in order to discharge his duty of protecting the assets of the company, to obtain the direction of the judge in chambers as to whether he ought to continue to employ a solicitor who requires payment on the more expensive footing. *United Kingdom Land and Building Association, In re*, 58 L. J., Ch. 132; 40 Ch. D. 471; 60 L. T. 694; 37 W. R. 486.

ii. In what Cases Applicable.

a. Generally.

"Conveyancing Business" — "Other Business."]—Solicitors who transact conveyancing business in an action will, under the Solicitors' Remuneration Act, 1881, and the general order of August, 1882, be allowed taxed costs and charges for such business according to the scales set forth in the schedules to the general order. The proper construction of the language of s. 2 of the Solicitors' Remuneration Act, 1881, is that it refers to conveyancing matters which take place in an action as well as to those out of court, and that the exception is only from "other business" not being conveyancing business, and accordingly where the taxing-master had disallowed certain charges made for conveyancing business in an action, and under the scales of charges contained in the schedules to the general order of August, 1882, he was directed to review his taxation. *Stanford* v. *Roberts*, 53 L. J., Ch. 338; 26 Ch. D. 155; 50 L. T. 147; 32 W. R. 404; 48 J. P. 692.

The words of s. 2, "not being business in any action or transaction in any court or in the chambers of any judge or master," apply only to the "other business" mentioned immediately before, i.e. to business not being conveyancing business, and do not exclude from the scale conveyancing business done under the direction of the court. *Merchant Taylors' Co., In re*, 54 L. J., Ch. 867; 30 Ch. D. 28; 52 L. T. 775; 33 W. R. 693—C. A.

Whole of Business must be done.]—A tenant having an option of purchase of the fee at a given price on the terms of his paying all the vendor's costs, gave notice of the exercise of the option, and stated that he should not require an abstract of title, and sent in his draft conveyances for perusal. The vendor's solicitors sent in their bill of costs, in which they charged 30*s.* per cent. on the purchase-money of each lot, considering that this was the proper charge under the Solicitors' Remuneration Act, 1881, which provides that amount of remuneration to a vendor's solicitor "for deducing title to freehold, copyhold or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale if any)":—Held, that the case was governed by the new rules, but that the bill was framed on an erroneous footing, for that the ad valorem remuneration authorised by Schedule I. was chargeable only where the whole of the business in respect of which it was imposed, viz. the deducing title and perusing and completing conveyance was

done; that here, as there was no deducing of title, but only perusal and completion of the conveyance, Schedule I. did not apply, but that under the general order, Schedule II. r. 2 (c), the solicitor's remuneration was to be regulated by the old system as modified by Schedule II. *Lacey & Sons, In re*, 53 L. J., Ch. 287; 25 Ch. D. 301; 49 L. T. 755; 32 W. R. 233—C. A.

Under a provision contained in a will the testator's sons took the real estate at a valuation, and took over the assets and liabilities of his business, the sons giving a mortgage to the trustees to secure the purchase-money. The same solicitors acted for all parties in preparing the necessary deeds, and charged full vendors' and purchasers' costs, and also mortgagors' and mortgagees' costs under the scale:—Held, that they were only entitled to remuneration under Schedule II., for, as they had not "investigated and deduced title," the scale charge did not apply. *Keeping and Gloag, In re*, 58 L. T. 679.

In July, 1881, W. instructed his solicitors to prepare a building agreement with form of lease to be granted on completion set out in the schedule. In June, 1883, the premises having been completed, W. gave further instructions for a lease, which, as prepared, was, except as to parties, a verbatim copy of that contained in the schedule. In November, 1883, the solicitors delivered their bill of costs, in which under date July, 1881, were various items amounting to 17*l.* in relation to preparing the agreement; and under date June, 1883, "to costs of preparing, engrossing, executing, and completing lease and counterpart, as per Schedule I. of Solicitors' Remuneration Act, 59*l.* 10*s.*" On taxation this item was objected to, on the ground that the act did not apply, as the substantial part of the work done was previous to the 1st of January, 1883, and had been already charged for in the costs of preparing the agreement. The taxing-master disallowed the objection, but deducted 20*l.* from the 59*l.* 10*s.*, and directed a detailed bill of costs in relation to the preparation of the lease to be brought in. This bill was delivered, but was not taxed. On summons to review taxation:—Held, that the taxing-master ought to have taxed the detailed bill for the actual preparation of the lease, and not have allowed the ad valorem scale even to the extent he did; that the ad valorem scale applied only where the solicitor had substantially done the work specified in Schedule I.; that as the scale charges did not apply, the taxing-master ought to have taxed their charges in accordance with r. 2, sub-s. (c), and Schedule II. *Hickley, In re*, 54 L. J., Ch. 608; 52 L. T. 89; 33 W. R. 320. See also *Wilson, In re*, and *Wood* v. *Calvert*, post, cols. 1628, 1629.

Part of Work done before Act.]—Negotiations for a lease were carried on through the lessor's solicitor for two years before the rules under the Solicitors' Remuneration Act, 1881, came into operation. After they came into operation terms were come to, and a lease executed. The solicitor in his bill charged for the negotiations, and also charged the amount fixed by Schedule I. Part II. to the rules, as remuneration "for preparing, settling, and completing lease and counterpart." The taxing-master disallowed all the items for negotiations. The solicitor appealed:—Held, that though the business had been commenced before the rules came into operation, the taxation must be conducted according to the rules, the solicitor not having declared his election to the contrary. *Field, In re*, 54 L. J., Ch. 661; 29 Ch. D. 608; 52 L. T. 480; 33 W. R. 553; 49 J. P. 613—C. A. *And see preceding case.*

In June, 1882, D. contracted to sell a piece of land for 375*l.* upon the terms of the purchaser paying to the vendor "all reasonable and proper costs" of making and verifying his title and executing the conveyance. In January, 1883, the general order under the Solicitors' Remuneration Act, 1881, came into operation. That order provides that the costs of the vendor's solicitor, with respect to such a sale, shall be according to an ad valorem scale of 30*s.* per cent. (see Schedule I. Part I). In April, 1883, D. (who had previously employed a country solicitor) transferred the business to a London solicitor. In March, 1884, the London solicitor sent in his bill of costs to the purchaser's solicitor made out on the old system. The purchaser's solicitor objected that the bill ought to be made out according to the scale prescribed by the general order. On a summons by the purchaser for a declaration to this effect:—Held, that the costs payable by the purchaser were regulated by that order. *Denne and Secretary of State for War, In re*, 54 L. J., Ch. 45; 51 L. T. 657; 33 W. R. 120. See also *Fleming* v. *Hardcastle*, post, col. 1626.

Business Completed before Order.] — The general order under the Solicitors' Remuneration Act, 1881, is by virtue of s. 7 of the act, applicable to business completed before the order came into operation. *Stewart, In re*, 41 Ch. D. 494; 60 L. T. 737; 37 W. R. 484.

Act not Applying.]—In taxation between solicitor and client, cases for counsel to advise trustees whether they should require a release from their cestui que trusts on their discharge, statements for the information of the client as to the investment of the trust funds, and the prudence of changing it, or directions to the trustees signed by the client, consenting to the change of investment, and directing a new investment, are not included in Schedule II. of the general order to the Solicitors' Remuneration Act, 1881, but are taxable under the scale of fees prior to that act. *O'Hagan, Ex parte*, 19 L. R., Ir. 99.

A solicitor who was employed by a Board of Guardians to prepare a scheme for the erection of cottages under the Labourers (Ireland) Act, 1883, furnished his bill of costs, in which he charged fees of five guineas each for attendances and journeys in connection with the business. The taxing officer having reduced these charges to the amount that would have been allowed prior to the passing of the Solicitors' Remuneration Act, 1881:—Held, that even assuming such business to come within the act (which semble it does not) the scale of taxation applicable was that which existed at the time of the passing of the act, and not any higher one prescribed by the General Order of 1884. *Strange, Ex parte*, 21 L. R., Ir. 529.

Solicitors to Town Commissioners prepared sanitary regulations, collectors' and contractors' bonds, and warrants of attorney for their clients:—Held, by O'Brien, J., that such items were not within Schedule II. r. 2, Gen. Ord. 16th April, 1884, made in pursuance of the Solicitors' Remuneration Act, 1881, s. 2, but should be taxed under the scale of fees prior to that act:

—Held, by Johnson, J., that such items were properly taxable under the scale settled by Schedule II., above referred to. *Atkinson, In re*, 24 L. R., Ir. 182.

Conveyancing—"Other Documents."]—The words "other documents" in the heading to Schedule II. to the General Order, made under the Solicitors' Remuneration Act, 1881, mean other documents ejusdem generis with deeds and wills. An agreement for the execution of sewage works, made between a contractor and a board of town commissioners, though not a deed, is "conveyancing business" within the meaning of s. 2 of the Solicitors' Remuneration Act, 1881, and is taxable under the scale settled by Schedule II. of the above-mentioned General Order. *Caruth, Ex parte*, 25 L. R., Ir. 478.

In the taxation of costs under Schedule II. of the general order of the Solicitors' Remuneration Act, 1881, headed "Instructions for drawing, &c., deeds, wills, and other documents," cases for the opinion of counsel are included in the words "other documents." *Mahon and Sayer, In re*, 62 L. J., Ch. 65; [1893] 1 Ch. 507; 2 R. 337, n.; 68 L. T. 189; 41 W. R. 37.

Extraordinary Cases—Discretion of Taxing-Master.]—Under Schedule II. of the general order under the Solicitors' Remuneration Act, 1881, prescribing a charge of 10*s.* for an "ordinary" attendance, and giving the taxing-master power in "extraordinary cases" to increase or diminish that charge "if for any special reasons he shall think fit," it is a question for the discretion of the taxing-master whether or not a case is "extraordinary," as being more simple or more difficult than a normal fair average case. In extraordinary cases, where the taxing-master increases or diminishes the "ordinary" charge, he must have special reasons for so doing, but he is not bound to state his special reasons till he formally answers the objections to his taxation. *Mahon and Sayer, In re*, 62 L. J., Ch. 448; [1893] 1 Ch. 507; 2 R. 337; 68 L. T. 189; 41 W. R. 257—C. A.

In an administration action, to which mortgagees of leaseholds were not parties, the plaintiffs obtained an order to sell the leaseholds, and that the money should be paid into court. The order was made without the knowledge of the mortgagees. The plaintiffs wrote to the mortgagees sending draft particulars and conditions of sale as settled by the conveyancing counsel to the court "for your perusal." The mortgagees undertook to concur in the sale on condition that their mortgage debt and costs and expenses were provided for out of the proceeds of sale in court, and they returned the conditions approved. The taxing-master disallowed the fees charged at the rate of 1*s.* a folio for perusing the conditions of sale, but allowed a fee of one guinea for reading them. One of the grounds of disallowance was that conditions of sale were not such documents as were intended by the word "documents" in Schedule II. of the general order made in pursuance of the Solicitors' Remuneration Act, 1881. On summons to vary the taxing-master's certificate:—Held, that (while not deciding that conditions of sale did not come within the word "documents") this was an extraordinary case where the taxing-master had a discretion. *Rees, In re, Rees* v. *Rees*, 58 L. T. 68.

Taxation by Third Party—Deduction from Scale Fee.]—Where a solicitor's bill includes charges for services in respect of which the third party taxing it is not liable, a corresponding deduction must be made as between the solicitor and such third party from the amount of the scale fee chargeable upon the whole transaction. *Negus, In re*, 64 L. J., Ch. 79; [1895] 1 Ch. 73; 13 R. 85; 71 L. T. 716; 43 W. R. 68.

β. Sale of Land, &c.

Land out of the Jurisdiction.]—The general order made in pursuance of the Solicitors' Remuneration Act, 1881, does not apply to a sale of land situate outside the jurisdiction. Therefore, on such a sale, the costs of the vendor's solicitor are not chargeable according to the scale in Schedule I., Part I., but are regulated by the old system as altered by Schedule II. *Greville's Settlement, In re*, 58 L. J., Ch. 256; 40 Ch. D. 441; 60 L. T. 43; 37 W. R. 150.

"Conveyances of Property"—Grant of Easement.]—Grants by way of sale of rights and easements of laying and maintaining pipes in land are not "conveyances of property" within Schedule I., Part I., and consequently the scale is not applicable to solicitor's charges in respect of such grants. *Stewart, In re*, 41 Ch. D. 494; 60 L. T. 737; 37 W. R. 484.

—— **Sale of an Advowson in Gross.**]—The scale fee applies upon the sale of an advowson in gross, such property being freehold, and as such, within the meaning of Schedule I., Part I. to the general order made in pursuance of the Solicitors' Remuneration Act, 1881. *Stewart, In re* (41 Ch. D. 494), distinguished. *Earnshaw-Wall, In re*, 63 L. J., Ch. 836; [1894] 3 Ch. 156; 8 R. 558; 71 L. T. 173; 42 W. R. 567.

A deed creating an easement for the first time is not a sale and conveyance of property within the meaning of Schedule I., Part I., of the general order made in pursuance of the Solicitors' Remuneration Act, 1881, and consequently the scale charge does not apply to such a transaction. *Stewart, In re* (41 Ch. D. 494), and *Earnshaw-Wall, In re* (63 L. J., Ch. 836; [1894] 3 Ch. 154), explained and approved. *Sanders's Settlement, In re*, 65 L. J., Ch. 426; [1896] 1 Ch. 480; 74 L. T. 261; 44 W. R. 385—C. A.

Negotiating Sale—Conditional Contract.]—Rule 11 of Part I. of Schedule I. to the general order under the Solicitors' Remuneration Act, 1881, provides that "the scale for negotiating shall apply in cases where the solicitor of a vendor or purchaser arranges the sale or purchase, and the price and terms and conditions thereof, and no commission is paid by the client to an auctioneer, estate, or other agent":—Held, in a case where the contract for sale required the sanction of the court, and the sale was effected in accordance with the proposals submitted to the court, that the vendor's solicitor, who had brought the negotiations to the point at which his principal was free to give his consent, had arranged the sale. *Macgowan, In re, Macgowan* v. *Murray*, 60 L. J., Ch. 118; [1891] 1 Ch. 105; 63 L. T. 793; 39 W. R. 227—C. A. See *Fleming* v. *Hardcastle*, infra.

"Investigating Title."]—The corporation of London resolved to purchase the old bankruptcy

court, which, under s. 68 of the Bankruptcy Act, 1861, was vested in the public works commissioners, the purchase-money, 93,500*l.*, being payable out of funds in court under various acts, including the Lands Clauses Act, and representing lands of the corporation taken by certain public bodies. On applying to the commissioners the corporation were informed that the property was vested in the commissioners under the above section, and that they "did not agree to furnish any evidence of title," but would apply to the Lord Chancellor, under the section, for his authority to sell; and they subsequently wrote that the Lord Chancellor had authorised the sale by his secretary. The city solicitor, however, having regard to the terms of the section, required a written authority signed by the Lord Chancellor himself, which was duly obtained. The solicitor, having thus satisfied himself as to the commissioners' title, obtained, on summons in chambers, an order sanctioning the purchase, the chief clerk, upon the production of the Lord Chancellor's authority, and at the request of the solicitor, dispensing with the usual reference as to title. The purchase having been completed, the corporation carried in their solicitor's bill for taxation, containing a charge for 278*l.* 15*s.*, according to the scale in Schedule I. Part I., of the general order under the Solicitors' Remuneration Act, 1881, for "investigating title and preparing and completing conveyance." The taxing-master disallowed the charge on the ground that there had been no investigation of title, and that therefore the scale charge did not apply. On a summons by the corporation to review the taxation:—Held, that there had been an "investigation of title" within the terms of the general order, and that therefore the scale charge applied. *London Corporation, Ex parte*, 56 L. J., Ch. 308; 34 Ch. D. 452; 56 L. T. 13; 35 W. R. 210.

A lessee, with an option of purchasing the freehold of the land leased, gave notice of his desire to exercise the option. E. said he thought one of the lessors had money to lend, and communicated the lessee's desire to him. The lessee and lessor met and arranged between them that 800*l.* should be advanced upon mortgage of the property about to be purchased. E. acted as solicitor in reference to the mortgage and purchase. He did not ask for or inspect any abstract of title on behalf of the mortgagee, as the only title was that of the lessors, a copy of which had been given to the lessee. The purchase and mortgage were completed, and E. delivered a bill of costs, by which he charged the fees allowed by Schedule I. Part I., of the general order under the Solicitors' Remuneration Act, 1881, for investigating title and preparing mortgage. The bill was paid, and a summons was taken out after payment for taxation:—Held, that E. was not entitled to the scale fee for investigating title, as there had been no investigation. *Eley, In re*, 56 L. J., Ch. 905; 37 Ch. D. 40; 57 L. T. 253; 36 W. R. 96.

—— **Preparation of Contract—Negotiation—Completion.**]—Under the usual order of taxation of costs, charges, and expenses in an administration action, the solicitors sent in a bill of costs for conveyancing work done for the estate made out in the old way. It related to purchases by the trustees, the negotiations and most of the work for which was done before, but which was completed after, the act came into operation. The taxing-master allowed only costs according to the first schedule of the general order. One of the purchases was a purchase back by the trustees of surplus lands taken from them by a railway company, and the title was therefore taken without investigation, except as to a very small piece which had belonged to another owner; the solicitors, though acting for the purchasers, had prepared the contract for sale:—Held, that the scale applied, although part of the work was done before the act; that the title had substantially been investigated as far as was necessary, and therefore *Lacey, In re* (25 Ch. D. 301) did not apply, but that they were entitled to charge for preparation of the contract in addition to the scale charge, because the scale assumes the contract to be prepared by the vendor's solicitor, and they were entitled to 1 per cent. for negotiating the purchase as well as to the 1½ per cent. for completion. *Fleming* v. *Hardcastle*, 52 L. T. 851; 33 W. R. 776.

—— **Part of Money on Mortgage.**]—When part of the purchase-money is allowed to remain on mortgage of the property sold, the solicitor of the vendor mortgagee cannot charge the scale fees under Schedule I. Part I. of the general order under the Solicitors' Remuneration Act, 1881, for investigating the mortgagor's title. *Glascodine and Carlyle, In re*, 52 L. T. 781—C. A.

Deducing Title—Perusing and Completing Conveyance.]—See *Harris, In re*, post, col. 1629.

—— **Searches.**]—To entitle a solicitor to the percentage charges under Schedule I. Parts I. and II., of the general order under the Solicitors' Remuneration Act, 1881, he must have deduced title to the premises, and of such deduction of title, furnishing searches is an essential part. *Buckley, In re, Ferguson, Ex parte*, 21 L. R., Ir. 392.

Perusing Abstracts.]—Upon the construction of Schedule II. of the general order made in pursuance of the Solicitors' Remuneration Act, 1881, abstracts of title are not included in the words "deeds, wills, and other documents," the charge for perusing which is therein fixed at 1*s.* per folio; but the old scale of 6*s.* 8*d.* for perusal of every three brief sheets of eight folios each remains unaltered. *Parker, In re*, 54 L. J., Ch. 959; 29 Ch. D. 199; 52 L. T. 686; 33 W. R. 541.

Perusing Conveyance—Partition Action.]—In a partition action an order was made for the sale of the estate and payment of the costs of all parties out of the proceeds. The plaintiff, who was the owner of one-fourth of the estate, had the conduct of the sale, and his solicitor was paid his costs in accordance with r. 2, sub-s. (a), of the general order under the Solicitors' Remuneration Act, 1881:—Held, that the solicitors of the defendants, who were the owners of the other three-fourths of the estate, were entitled to be paid the costs of perusing the conveyance, and obtaining its execution by their clients, under r. 2, sub-s. (c). *Humphreys* v. *Jones*, 55 L. J., Ch. 1; 31 Ch. D. 30; 53 L. T. 482; 34 W. R. 1—C. A.

Vendor's Solicitor—Costs of Release of Incumbrance.]—The costs of obtaining the release of an outstanding incumbrance on property sold are not covered by the scale charge allowed to the solicitor for a vendor by Schedule I. Part I.

of the general order made under the Solicitors' Remuneration Act, 1881. *Emanuel, In re*, (33 Ch. D. 40), considered. *Purcell, In re*, 27 L. R., Ir. 375.

Subject to Incumbrances—Scale Charge, how ascertained.]—The property of a company in liquidation was sold by the solicitors of the official liquidator for 24,000*l.* (subject to a mortgage for 900*l.*), and after the satisfaction of the claims of former successive owners a sum of 1,750*l.* remainded for the official liquidator. The sale was confirmed by an order made in the liquidation, and the parties to the conveyance were the company, the official liquidator, the original owners, and certain intermediate purchasers who had claims for unpaid purchase-money. The solicitors on taxation included in their bill of costs scale charges as upon a sale for 24,900*l.* as follows: Negotiating, 102*l.* 5*s.*; deducing title, and completing, including contract, 107*l.* 5*s.* The taxing-master disallowed the negotiating fee, and only allowed the scale charge upon the 1,750*l.* On summons to review taxation:—Held, that the court could look not only at the contract, but at the substance of the transaction, and that, having regard to the whole of the matters with reference to the provisional contract coupled with the order, the liquidator's name was only used for the purpose of convenience, and that the taxing-master's decision was right. *Grey's Brewery Co., In re*, 56 L. T. 298.

Upon the sale by a trustee in bankruptcy of property belonging to the bankrupt subject to incumbrances, the solicitor of the trustee is entitled to be paid a percentage on the total amount of the purchase-money, and not simply on the value of the equity of redemption. *Harris, Ex parte, Gallard, In re*, 57 L. J., Q. B. 528; 21 Q. B. D. 38; 59 L. T. 147; 36 W. R. 592; 5 Morrell, 123.

Where property is sold by a second mortgagee to third persons subject to the prior incumbrance, the solicitor acting for the second mortgagee is—under r. 9 of Schedule I. to the general order under the Solicitors' Remuneration Act, 1881—entitled in calculating the scale charge for negotiating the sale and deducing title to add the amount of the prior incumbrance to the amount realised from the equity of redemption. *Fortescue* v. *Mercantile Bank of London*, 66 L. J., Q. B. 591; [1897] 2 Q. B. 236; 76 L. T. 645; 45 W. R. 529—C. A.

Under Lands Clauses Act.]—Money arising from the sale of land belonging to a corporation, and taken by a railway company under their statutory powers, was reinvested in land under the direction of the court. The solicitor of the corporation charged the ad valorem scale fee prescribed by the rules under the Solicitors' Remuneration Act, 1881, Schedule I. Part I, "for investigating title and preparing and completing conveyance":—Held, that the exception in Schedule I. Part I. r. 11, which provides that the scale shall not apply in cases of sales under the Lands Clauses Act, or any other private or public act under which the vendor's charges are paid by the purchaser, was not applicable to the case. *Merchant Taylors' Co., In re*, 54 L. J., Ch. 867; 30 Ch. D. 28; 52 L. T. 775; 33 W. R. 693—C. A.

Held, also, that as the purchaser's solicitor had had to do all the things which he would have had to do in a purchase not under the direction of the court, the case was not taken out of the scale by the fact that, in a purchase under the direction of the court, he did not incur as much responsibility as in a private purchase, and therefore, that the scale fee was properly chargeable. *Ib.*

The exception contained in r. 2 of Schedule I. Part I., of the general order, whereby in the case of sales under the Lands Clauses Act the scale is rendered inapplicable, extends only to vendors' costs and not to the costs of the purchasers. *Stewart, In re*, 41 Ch. D. 494; 60 L. T. 737; 37 W. R. 484.

—— **Perusal of Deeds.**]—Under an order to tax the costs awarded to the owner of lands compulsorily taken by a company, his solicitor is not entitled to 1*s.* per folio for perusing deeds referred to in the abstract of title furnished. The general order made in pursuance of the Solicitors' Remuneration Act, 1881, Schedule II., does not apply to such taxation. *Bann Navigation Act, In re, Olpherts, Ex parte*, 17 L. R., Ir. 168.

—— **Public Health Act, 1875.**]—The exception at the end of r. 11 of the general order under the Solicitors' Remuneration Act, 1881, excluding the application of the scale of costs "in case of sales under the Lands Clauses Consolidation Act, or any other private or public act under which the vendor's charges are paid by the purchaser," applies to the case of a sale by agreement by a tenant in fee to a local board for the purposes of the Public Health Act, 1875, although the agreement provides for the payment of costs over and above those covered by s. 82 of the Lands Clauses Consolidation Act, 1845. *Burdekin, Benson and Burdekin, In re*, 64 L. J., Ch. 561; [1895] 2 Ch. 136; 12 R. 243; 72 L. T. 639; 43 W. R. 534—C. A.

—— **Election as to Scale.**]—See *Bridewell Hospital and Metropolitan Board of Works, In re*, ante, col. 1618.

Sale by Auction—Some Work done by Surveyor.]—A trust estate in Yorkshire was ordered to be sold by the court, and the costs to be taxed. The appointment of an auctioneer was sanctioned in chambers, and also the appointment of a certain firm of surveyors. The property was sold. The taxing-master allowed a fee to the auctioneer for putting the property up for sale and knocking it down, which, according to the custom of the country, was the manner in which an auctioneer was paid there. He also allowed charges to the surveyors for dividing the property into lots, valuing it, preparing plans, and settling the reserves. The solicitors to the trustees claimed to be entitled to the scale charges allowed by the schedule to the Solicitors' Remuneration Act, 1881, for conducting the sale, and also to be allowed the fees which they had paid to the surveyors; the auctioneer's fee they proposed to pay themselves. The taxing-master disallowed the scale charges. The trustees took out a summons to review the taxation:—Held, that the solicitors were not entitled to the scale charges, inasmuch as some of the work which they ought to have done had been done by the surveyors, and their fees paid by the clients. *Wood* v. *Calvert*, 55 L. T. 53; 34 W. R. 732.

Property of a lunatic in Lancashire was put up for sale by auction under an order in lunacy, but was not sold. The solicitor charged 16*l.* 12*s.* 6*d.* remuneration according to the scale in the order under the Solicitors' Remuneration Act, 1881, on 8,300*l.*, the amount of the reserved prices. He also paid the auctioneer 5*l.* 5*s.*, which was allowed against the estate, and the surveyor's

bill of 40*l.* 3*s.* was allowed at 31*l.* 10*s.* against the estate, but the taxing-master disallowed the 16*l.* 12*s.* 6*d.*, and only allowed 2*l.* 2*s.* for instructing the auctioneer and surveyor, and 3*l.* 3*s.* for particulars, &c. His reasons were, first, that the solicitor had not in fact conducted the sale, the auctioneer and surveyor having done most of the work and been paid by the client; and secondly, that the scale did not apply, for that a commission had been paid to the auctioneer by the client within the meaning of r. 11 to Part I. of Schedule I. to the general order:—Held, that as the bill of the surveyor contained charges for various things which it was the duty of the person conducting the sale to do, the solicitor had not done the whole of the work for which the ad valorem remuneration was provided, and the scale did not apply. *Wilson, In re*, 55 L. J., Ch. 627; 29 Ch. D. 790; 53 L. T. 406—C. A.

—— **Payment to Auctioneer by Purchaser.**]—If the purchaser, in pursuance of a condition of sale, pays a fee to the auctioneer, the solicitor is not entitled to the scale fee for conducting a sale by auction. If the solicitor himself pays the auctioneer, the solicitor is entitled to the scale fee. *Cholditch* v. *Jones*, 65 L. J., Ch. 83; [1896] 1 Ch. 42; 73 L. T. 528; 44 W. R. 124; 59 J. P. 793.

—— **Conducting Sale—No Commission paid by Client to Auctioneer.**]—An agreement for sale of certain leasehold property was entered into whereby the purchasers, who were a public body, agreed to pay the vendor's solicitors' preliminary costs, and also the costs of title and conveyance, and the fees of the vendor's surveyor. A surveyor was employed, who, according to the vendor's solicitors' statement, merely valued the property, though it was alleged by the purchasers that he also negotiated the price. The purchasers, who had become owners of the reversion, did not require any abstract or copy of the vendor's lease to be furnished to them on being informed by the vendor's solicitors that the title consisted of the lease only. The purchase was completed, and the purchasers paid the fee of the vendor's surveyor. The vendor's solicitors sent in a bill of costs to the purchasers consisting of two items only, the first being the charge allowed by the scale in Schedule I. Part I. of the general order to the Solicitors' Remuneration Act, 1881, for negotiating a sale by private contract, and the second being the charge allowed by the same schedule for deducing title to leasehold property and perusing and completing conveyance. Upon taxation the taxing-master held that the vendor's solicitors were not entitled to costs calculated upon the scale in Schedule I. Part I., but to costs calculated under Schedule II. only:—Held, upon summons to review taxation, that the solicitors were not entitled to the scale charge for negotiating a sale by private contract, as the surveyor's fee was a commission to "an auctioneer or estate or other agent" within Schedule I. Part I. r. 11, of the general order, and that they were not entitled to the scale charge for deducing title and perusing and completing conveyance, as no title was deduced. *Harris, In re*, 56 L. T. 477.

Property was put up for sale by public auction, and sold in two lots. The auctioneer's commission was paid by the vendor. The solicitor employed by the vendor in connection with the sale, charged the scale fee provided by Part I. of Schedule I. to the general order of August, 1882, under the Solicitors' Remuneration Act, 1881, for "deducing title," &c.; and he also made various charges for work done by him previous to the sale, for which he claimed to be entitled under clause 2 (c) of the order. The taxing-master allowed the scale fee, but disallowed the other items, considering himself bound by *Emanuel, In re* (33 Ch. D. 40):—Held, that the solicitor was entitled under clause 2 (c) (in addition to the scale fee for deducing title), to charge in respect of work properly done by him in connection with the sale for which the auctioneer had not been paid. *Faulkner, In re*, 56 L. J., Ch. 1011; 36 Ch. D. 566; 57 L. T. 342; 36 W. R. 59.

On a sale by auction of property in Yorkshire, under an order made in an administration action, the chief clerk, previously to sale, settled a sum for auctioneer's fees. In accordance with the mode of business in Yorkshire the auctioneer merely offered the property for sale, and the solicitor having the conduct of the sale paid all other expenses of the auction, including those of preparing and distributing the particulars and conditions of sale, advertisements, printer's bills, and the costs of lithographed plans:—Held, that under the Solicitors' Remuneration Act, 1881, general order, Schedule I. Part I. r. 11, the solicitor was not entitled to scale fees for conducting the sale by auction. *Sykes, In re, Sykes* v. *Sykes*, 56 L. J., Ch. 238; 56 L. T. 425; 36 W. R. 234.

A solicitor employed in a sale of property by auction, where the auctioneer's commission was paid by the client, delivered a bill, in which he charged the scale fee for conducting the sale, and deducing the title, and mentioned items of solicitor's work not included in the scale fee for deducing the title. The taxing-master disallowed the fee for conducting the sale because of the auctioneer's charges being paid by the client, and did not allow any fee for items mentioned in the bill of solicitor's work not included in the scale fee for deducing the title, on the ground that the bill was made up on a wrong footing, and could not be altered by adding charges:—Held, that the taxing-master was right in disallowing the scale fee for conducting the sale, but that he ought to have allowed the solicitor a quantum meruit for solicitor's work done by him, and mentioned in his bill, and which was not covered by the scale fee for deducing title. *Peace and Ellis, In re*, 57 L. T. 753; 36 W. R. 61.

Part I. of Schedule I. to the general order of 1882, made in pursuance of the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), prescribes an ad valorem scale fee for conducting the sale of property by public auction, and r. 11 provides that "the scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer." Where the auctioneer's commission is paid by the client:—Held, that r. 11 does not deprive the solicitor of all remuneration for work done in respect of the conduct of the sale, but that under the general order, s. 2, sub-s. (c) he is entitled to a quantum meruit for such work, the remuneration to be regulated according to the old system as altered by Schedule II. *Faulkner, In re* (36 Ch. D. 566) approved. *Parker* v. *Blenkhorn*, 58 L. J., Q. B. 209; 14 App. Cas. 1; 59 L. T. 906; 37 W. R. 401—H. L. (E.)

—— **"Commission"—Lump Sum.**]—"Commission" in r. 11 of Schedule I. Part I. to the general order under the Solicitors' Remuneration Act, which provides that the scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer, includes a lump sum paid as remuneration to the auctioneer. *Wilson, In re* (29 Ch. D. 790), discussed. *Burd* v. *Burd*, 58 L. J., Ch. 170; 40 Ch. D. 628; 60 L. T. 228; 37 W. R. 428.

Where, in accordance with the usual practice in the North of England, a solicitor does all the work in connection with a sale by auction except taking the bids, and the auctioneer is paid a fixed sum for each lot sold, and a fixed sum for each lot unsold, such payments to the auctioneer constitute a "commission" within Part I. r. 11 of Schedule I. of the general order of 1882, and disentitle the solicitor to charge the scale fee allowed by that schedule "for conducting a sale of property by public auction." *Drielsma* v. *Manifold*, 63 L. J., Ch. 653; [1894] 3 Ch. 100; 7 R. 368; 71 L. T. 62; 42 W. R. 578—C. A.

—— **Payment of Commission.**]—Two small fees paid to valuers for reporting as to the sufficiency of the price were not within the provision as to commission. The provision as to commission applies to a sum for which the client is legally liable, although not actually paid, but it only applies to sums paid or payable as part of the negotiation. *Macgowan, In re, Macgowan* v. *Murray*, 60 L. J., Ch. 118; [1891] 1 Ch. 105; 63 L. T. 793; 39 W. R. 227—C. A.

S. employed H. as general agent with a view to developing an estate as a building property, on the terms of his having a commission of 2½ per cent. on the purchase-money of all lands sold during his agency, and on the capitalised value of the rents of all leases granted during the same period. An offer was made for purchase at a time when H. was too ill to attend at his office, and the negotiation was conducted by W., the solicitor of S., but H. was consulted repeatedly and gave advice as to the sale, which was ultimately completed. On completion H. was paid 2½ per cent. on the purchase-money. W., in his bill of costs, claimed the scale fee for negotiating the sale, which claim was resisted on the ground that the vendor had paid a commission to an estate agent:—Held, that if H. had not been called in at all in this transaction, the payment of the commission, which would in that case have been a payment entirely in respect of other work, would not have been a payment of commission within the rule, but that as H. had assisted in the negotiation, he was paid for his assistance by the commission, although the commission also covered other work; that a commission, therefore, had been paid within the meaning of the rule, and that the scale fee for negotiation ought not to be allowed. *Withall, In re*, 61 L. J., Ch. 14; [1891] 3 Ch. 8; 64 L. T. 704; 39 W. R. 529—C. A.

—— **Special Condition of Sale—Auctioneer's Fee to be paid by the Purchaser.**]—At a sale by auction, one of the conditions of sale provided that the respective purchasers should pay the auctioneer's fee (naming it):—Held, that, as the auctioneer's fee was indirectly "paid by the client" within the meaning of r. 11 of Schedule I. Part I. of the general order under the Solicitors' Remuneration Act, 1881, the vendor's solicitor was not entitled to charge the scale fee for "conducting" the sale, but only for a quantum meruit. *Cholditch* v. *Jones*, 65 L. J., Ch. 83; [1896] 1 Ch. 42; 73 L. T. 528; 44 W. R. 124; 59 J. P. 793.

—— **Attempted Sale—Subsequent Sale.**]—Where after an attempted sale by auction the sale is indefinitely postponed, the costs in respect of the attempted sale must be taxed under r. 2 (c) of the general order under the Solicitors' Remuneration Act, 1881. If the same solicitors afterwards were employed to effect a sale they would be paid on a quantum meruit, or otherwise the costs allowed would be deducted from scale costs. Schedule I. part I. r. 2 of the same order does not apply to such a case. *Smith, Pinsent & Co., In re*, 59 L. J., Ch. 590; 44 Ch. D. 303; 38 W. R. 685.

Schedule I. Part I. r. 2 of the general order to the Solicitors' Remuneration Act, 1881, applies only to cases where the attempted ineffectual sale and the subsequent effectual sale therein mentioned are conducted by the same solicitors. If there is a change of solicitors after an attempted ineffectual sale, the taxation of the costs of such sale must be made under general order, r. 2 (c). *Dean, In re, Ward* v. *Holmes*, 55 L. J., Ch. 420; 32 Ch. D. 209; 54 L. T. 266.

—— **Scale of Charges—Property sold in Lots.**]—Where property sold by auction is divided into different lots, the scale of charges to be paid to the vendor's solicitor, under the general order made under the Solicitors' Remuneration Act, 1881, Schedule I. Part I. is to be calculated upon the aggregate sum realised by the whole of the property, and not upon the value of each different lot, although the lots be held by the vendor under different titles and be sold to different persons. *Watson, Ex parte, Onward Building Society, In re*, 62 L. J., Q. B. 80; [1893] 1 Q. B. 16; 5 R. 19; 68 L. T. 443; 41 W. R. 107; 57 J. P. 439.

Re-sale of Part prior to Completion.]—Where a purchaser of land re-sells a part before completion, the purchaser's solicitor is entitled to charge the scale fee on the whole of the original purchase-money, if the purchase and re-sale are, in substance, separate and distinct transactions. *Read, In re*, 63 L. J., Ch. 831; [1894] 3 Ch. 238; 8 R. 489; 71 L. T. 189; 42 W. R. 601.

Under the like circumstances, the mere fact that the abstract delivered to the sub-purchaser is only a copy of the abstract delivered to the original purchaser, with the addition of the contract for the original sale and purchase, does not per se disentitle the solicitor to the original purchaser to charge the scale fee allowed to a vendor's solicitor, on the ground that there has been no deducing of title. *Ib.*

"Law Stationer's Charge."]—The cost of a plan, copied by a law stationer on a conveyance, is a "law stationer's charge" within the meaning of clause 4 of the general order made under the Solicitors' Remuneration Act, 1881. *Ib.*

Purchase of Plots of Land—Different Vendors—Mortgage.]—A solicitor acted for the purchaser of several small lots of land, all purchased at the same time, though not from the same vendor, at prices varying from 100*l.* to 10*l.* The lots were comprised in one mortgage, but each had a separate and distinct title, a separate

abstract for each being delivered :—Held, that the solicitor was entitled, under r. 8 in Schedule I., Part I. of the rules under the Solicitors' Remuneration Act, 1881, to the minimum charge of 5*l.* or 3*l.* for each lot, and was not restricted to one charge for the business as a whole. *Margetts, In re*, [1896] 2 Ch. 263 ; 74 L. T. 309 ; 44 W. R. 462.

γ. Leases.

Prior Agreement for—Scale Fee.]—The scale fee prescribed by Part II. of Schedule I. to the general order of August, 1882, under the Solicitors' Remuneration Act, 1881, to be paid to a lessor's solicitor "for preparing, settling, and completing lease and counterpart," includes the solicitor's remuneration for the preparation of a prior agreement for the lease, and the solicitor cannot charge for the preparation of the agreement in addition to the scale fee. *Emanuel, In re*, 55 L. J., Ch. 710 ; 33 Ch. D. 40 ; 55 L. T. 79 ; 34 W. R. 613 ; 51 J. P. 22—C. A.

Negotiations — "Business connected with Lease."]—An agreement for a lease provided that the lessor should at his own expense do certain repairs to the property and deliver possession to the lessee as soon as they were done, which was to be not later than a certain day, time to be of the essence of the contract, and that, on the lessor complying with these conditions, the lessor should grant, and the lessee accept, a lease in the form thereto annexed :—Held, that these stipulations did not relate to collateral matters, so as to make the agreement something more than a step towards the granting of the lease, but related only to the terms on which the lease was to be granted, and that the preparation of the agreement was "business connected with" the lease within the meaning of r. 2 of the general order, and could not be separately charged for. *Ib.*

The scale fee fixed by the orders made under the Solicitors' Remuneration Act, 1881, "for preparing, settling, and completing lease and counterpart," does not allow any additional fee to be charged in respect of the negotiations which lead up to, or for the preparation and completion of, the agreement which precedes the lease. *Field, In re* (29 Ch. D. 608), and *Emanuel, In re* (33 Ch. D. 40), approved. *Savery* v. *Enfield Local Board*, 62 L. J., Ch. 674 ; [1893] A. C. 218 ; 1 R. 160 ; 68 L. T. 722 ; 42 W. R. 33 ; 57 J. P. 581—H. L. (E.)

Having regard to r. 2, the amount fixed by Schedule I., Part II., includes the charges for negotiations prior to granting a lease. *Field, In re*, 54 L. J., Ch. 661 ; 29 Ch. D. 608 ; 52 L. T. 480 ; 33 W. R. 553 ; 49 J. P. 613—C. A.

The remuneration of a lessor's solicitor prescribed in the general order under the Solicitors' Remuneration Act, 1881, Schedule I., Part II., does not cover negotiations carried on by the solicitor as to the letting of the property with persons other than the person to whom the lease is ultimately granted. The solicitor is entitled to remuneration for such negotiations as business "which is not in fact completed" under r. 2 (c) of the same general order. *Field, In re* (29 Ch. D. 608), and *Emanuel, In re* (33 Ch. D. 40), distinguished. *Marten, In re*, 58 L. J., Ch. 478 ; 41 Ch. D. 381 ; 60 L. T. 555 ; 37 W. R. 497—C. A.

Lease or Agreement for Lease.]—"Agreements for leases" in Schedule I., Part II., means agreements for leases intended to be relied on as regulating the tenancy without any formal lease, and the scale fee is payable in respect of them. *Emanuel, In re*, supra.

An agreement in writing for a tenancy of less than three years' duration is either a lease or an agreement for a lease within the meaning of Schedule I., Part II., to the general order made in pursuance of the Solicitors' Remuneration Act, 1881. *Negus, In re*, 64 L. J., Ch. 79 ; [1895] 1 Ch. 73 ; 13 R. 85 ; 71 L. T. 716 ; 43 W. R. 68.

Building Lease—What is.]—Lease to a race committee of 135 acres, with a cottage thereon, for 99 years, at the yearly rent of 237*l.*, with a covenant by the lessees to expend upon the premises within twelve months 1,000*l.* at least, in good and sufficient improvements of a substantial and permanent character :—Held, not to be a building lease within the general order under the Solicitors' Remuneration Act, 1881. *Hogan's Estate, In re*, [1894] 1 Ir. R. 503.

Lease of a large dwelling-house, offices, and garden of about an acre in extent, for 99 years, at the yearly rent of 40*l.*, with covenants by the lessee to expend 300*l.* at least in good and sufficient improvements of a substantial and permanent character, and to keep the demised premises in good and substantial repair, with all buildings or fixtures thereon, and all gates, walls and improvements then being or thereafter to be executed during the term. The walls of the house were sound, but the roof, floors and ceilings were in bad condition, and would require at least the amount covenanted to be expended, and which the lessee proposed to expend thereon, to put the house in sound habitable repair :—Held, that such lease was a building lease within the general order. *Ib.*

In determining whether a lease is or is not a building lease within the general order, regard must be had to the circumstances of the contract, the subject-matter of the demise, and the nature and extent of the expenditure to be made. *Ib.*

—— **"Substantial performance" of Work.**]—Where a building agreement was entered into, and the general form of the lease settled, prior to the coming into operation of the Solicitors' Remuneration Act, 1881, the lessor's solicitor is not entitled to charge the scale fee for leases executed after the coming into operation of the act, although the form of lease, as settled, does not contain the names of the parties, the parcels, the plan, and the terms of a restrictive covenant. *Hickley, In re* (54 L. J., Ch. 608), applied. *Welby* v. *Still*, 64 L. J., Ch. 495 ; [1895] 1 Ch. 524 ; 13 R. 165 ; 72 L. T. 108.

Sale by way of Underlease.]—A sale of leasehold property, which is effected by means of an underlease for the residue of a long term less the last three days, is not a "conveyance or lease" within the meaning of r. 5 of the rules applicable to Part II. of Schedule I. of the general order under the Solicitors' Remuneration Act, 1881 (so as to entitle the solicitor having the conduct of the business both to a remuneration in respect of the rent, and also to a remuneration in respect of the money payment or premium). *Webb, In re, Still* v. *Webb*, 66 L. J., Ch. 163 ; [1897] 1 Ch. 144 ; 75 L. T. 478 ; 45 W. R. 170.

If such a sale is within the provisions entitling the solicitor to charge according to scale at all, it

is within Part I. of Schedule I., relating to sales, purchases and mortgages; but whether it is not "business the remuneration for which is not hereinbefore, or in Schedule I. hereto, prescribed" within clause 2 (c) of the general order (so that the remuneration is according to the old system as altered by Schedule II.), quære. *Ib.*

In Consideration of Rent and Premium—Negotiation Fee.]—In the case of a lease granted partly in consideration of a premium and partly of a rent, the lessor's solicitor is not entitled under the Solicitors' Remuneration Act, 1881, general order, Schedule I., Part II., r. 5, to charge, in addition to the scale fee on the rent and the fee for deducing title in respect of the premium, a further fee for negotiation. *Horn and Francis, In re*, 66 L. J., Ch. 15; [1896] 2 Ch. 797; 75 L. T. 370; 45 W. R. 72.

—— **Value of Shares.**]—A firm of solicitors were employed by a lessor to prepare for him a lease of certain property for twenty-one years to a company, the consideration for the lease being a rent of 80*l.*, and the issue of 400 shares of the nominal value of 10*l.* None of the company's shares had been sold, so that no market value had been placed upon them; and 200 of the 400 shares had not been issued. The solicitors charged the scale fee on the rent of 80*l.*, and also the scale fee for deducing title, perusing and completing the deed as upon a premium of 4,000*l.*, the amount of the nominal value of the 400 shares:—Held, that they were not entitled to make the latter charge, as the value of the shares could not be estimated, and r. 5, Part II., Schedule I., of the Remuneration Order, 1882, did not apply to such a case. *Hasties and Crawfurd, In re*, 36 W. R. 572.

—— **Minimum Fee.**]—Under the joint operation of Part I., r. 8, and Part II., r. 5 of Schedule I. to the general order under the Solicitors' Remuneration Act, 1881, the lessor's solicitor is entitled in the case of a lease at a premium, to the scale remuneration, carrying a minimum fee of 5*l.* or 3*l.*, as the case may be, in respect of the premium, in addition to the scale remuneration in respect of the rent. *Hellard and Bewes, In re*, 65 L. J., Ch. 550; [1896] 2 Ch. 229; 74 L. T. 457; 44 W. R. 475.

A lease was granted for a term of ninety years from September, 1883, in consideration of a rent of 50*l.* and a premium of 4,400*l.* No title was deduced. The lessor's solicitor, in his bill of costs, charged a scale fee of 14*l.* in respect of the rent, and a scale fee of 42*l.* in respect of the premium. The taxing-master disallowed the 42*l.* On a summons to review taxation:—Held, that the direction in r. 5 that (in addition to the scale fee for the rent) "there shall be paid a further sum equal to the remuneration on a purchase at a price equal to" the premium, was not meant to narrow the application of the rule only to a case in which, if the transaction had been a purchase at the price of the premium, the solicitor could have claimed the scale fee; and consequently, that the 42*l.* must be allowed. *Robson, In re*, 59 L. J., Ch. 627; 45 Ch. D. 71; 63 L. T. 372; 38 W. R. 556.

Lease at Rack Rent—Percentage.]—The 2*l.* 10*s.* scale fee in respect of each 100*l.* of rent exceeding 100*l.* and not exceeding 500*l.* allowed to the lessor's solicitor in respect of leases at a rack rent by the first scale in Part II. of Schedule I. of the general order under the Solicitors' Remuneration Act, is not a percentage fee, and is only payable in respect of each full 100*l.* of rent. The proper fee under this scale in respect of a rental of 350*l.* is therefore 12*l.* 10*s.*, and not 13*l.* 15*s.*, as no charge can be made in respect of the odd 50*l.* *McGarel, In re*, 66 L. J., Ch. 185; [1897] 1 Ch. 400; 76 L. T. 70; 45 W. R. 321—C. A.

δ. Mortgages.

Negotiating Fee.]—A solicitor mentioned to a borrower the name of a client of his as likely to lend. A mortgage was arranged without further action on the part of the solicitor, who then acted for both parties in the matter of the mortgage:—Held, that the solicitor was not entitled to a negotiating fee. *Eley, In re*, 56 L. J., Ch. 905; 37 Ch. D. 40; 57 L. T. 253; 36 W. R. 96.

"Perusing" Title Deeds.]—A solicitor making advances to a client upon the security of real property and perusing for that purpose the title-deeds of such property is not entitled to charge at the rate of 1*s.* per folio "for perusing" under Schedule II. of the general order of August, 1882, made in pursuance of the Solicitors' Remuneration Act, 1881. *Robertson, In re*, 19 Q. B. D. 1; 56 L. T. 859; 35 W. R. 833.

Investigating Title—Further Charges.]—The late Earl of A. mortgaged his life interest in the family estates to the E. Company for 192,000*l.* The trustees of the family estates, in exercise of a power conferred upon them by special act of parliament, mortgaged the fee-simple to the E. Company for 232,000*l.* for the purpose of paying off the debts of the late earl, and the previous mortgage was paid off out of this sum, the balance of 40,000*l.* only being actually advanced to the trustees. The same solicitor acted for the mortgagees on both occasions:—Held, that the statutory mortgage was not a further charge within r. 10 of Part I. of Schedule I. to the general order under the Solicitors' Remuneration Act, 1881, and that the solicitor was entitled to the scale fee for investigating the title in respect of the full amount of the mortgage. *Aylesford (Earl)* v. *Poulett (Earl)*, 60 L. J., Ch. 204; [1891] 1 Ch. 248; 64 L. T. 336; 39 W. R. 241—C. A.

"Deducing Title"—Leaseholds—Abstract of Title only setting out Leases.]—On a mortgage of leasehold property, the mortgagor's solicitor, by delivering an abstract of title which consists only of a statement of the leases under which the mortgagor holds, does not "deduce" title within the meaning of Schedule I., Part I. of the general order under the Solicitors' Remuneration Act, 1881, so as to entitle him to the scale fee provided by that order. *Wellby* v. *Still*, 63 L. J., Ch. 931: [1894] 3 Ch. 641; 8 R. 658; 71 L. T. 426; 43 W. R. 73.

"Mortgage Completed."]—Per Kekewich, J.: A deed whereby a company conveys its property to trustees to secure to the holders of a proposed issue of debentures the amount of their advances, though no debentures are issued, nor is any money raised thereon, is a mortgage. Per the Court of Appeal: Whether such a deed is or is not a mortgage—which, semble, it is not—it is not a "completed mortgage" within the meaning of clause 2 (a) of the general order under the

Solicitors' Remuneration Act, 1881, but is a "transaction not, in fact, completed" under sub-clause (c); and, consequently, the solicitor, who has on behalf of the trustees deduced title and prepared the deed, is not entitled, as mortgagee's solicitor, to the scale fee under Schedule I., Part I. of the Order, but only to costs in respect of the work actually done under Schedule II. *Bircham & Co., In re*, 64 L. J., Ch. 768; [1895] 2 Ch. 786; 12 R. 443; 73 L. T. 129; 43 W. R. 673—C. A.

Scale Fee — Charges Connected with Loan—Past Advance.]—The word "loan" in Schedule I., Part I. of the general order under the Solicitors' Remuneration Act, 1881, means "mortgage," and does not imply that there must necessarily be a fresh advance on the occasion of a mortgage. Accordingly, where a mortgage is effected by a solicitor to secure a past debt, the scale fee applies. *Aylesford* v. *Poulett* ([1891] 1 Ch. 248) applied. *D'Arcy* to *White*, 31 L. R. Ir. 142.

b. *In other Cases.*

Journeys and Attendances — Country Solicitor.]—Upon a summons by a solicitor for an order directing the taxing-master to review his taxation of a bill of costs:—Held, that the journeys of a country solicitor to town to attend counsel and otherwise to conduct the proceedings in an action ought to be allowed, where the solicitor had authority from his client to make these charges, but that such journeys to town ought not to be allowed simply on the principle that the country solicitor would probably be better acquainted with the subject-matter than his London agent. *Foster, In re* (8 Ch. D. 598), dissented from. *Storer, In re*, 53 L. J., Ch. 872; 26 Ch. D. 189; 50 L. T. 583; 32 W. R. 767.

Upon a summons by a solicitor for an order directing the taxing-master to review his taxation of a bill of costs as between solicitor and client:—Held, that the special fees and expenses of a country solicitor should be allowed in respect of attendances for consultation with counsel, and otherwise for the purpose of conducting proceedings in Dublin, when the solicitor having local knowledge in connection with the matter had been requested by his clients (a board of guardians) to attend personally in Dublin. *Cramsie & Greer, In re*, [1894] 1 Ir. R. 135.

Semble, that a country solicitor may contract with his client for special remuneration for his personal attendance in Dublin on the trial of an action or on a law argument. Such contract must be clearly shown to have been entered into by the client with full knowledge of its effect, and to be in itself just and reasonable. *New Ross Union* to *Colfer*, [1894] 2 Ir. R. 118.

Where it is the usage of the profession that certain business should be intrusted to an agent in London, a country solicitor will not be allowed to charge for his attendance in London, to perform that business, although his client has requested his attendance, unless the solicitor has first explained to his client, that, by the usage of the profession, such attendance is considered to be unnecessary. The comparison of an abstract of title with the title-deeds is business within this rule, and a country solicitor will not be allowed to charge for his personal attendance in London, in respect of such business. *Alsop* v. *Oxford (Lord)*, 1 Myl. & K. 564; 2 L. J., Ch. 174.

Generally, country solicitors are not allowed the costs of a journey to London to examine abstracts there, unless there be some specialty. *Tryon, In re*, 7 Beav. 496.

A considerable portion of a charge for attendance of a solicitor in town at the request of his client disallowed, on the ground that the solicitor had failed to prove that the whole time was required for the business. *Pender, In re*, 10 Beav. 390.

A country solicitor personally attending an appeal instead of employing his London agent, will be allowed the additional charges and expenses thereby occasioned. *Foster, In re, Dickens, Ex parte*, 8 Ch. D. 598; 26 W. R. 915.

Charges by a country solicitor, for attending the cause in London, to be allowed in some cases; but the circumstance of their being undertaken by the direction of the client, is not alone a sufficient ground for allowing them, as the solicitor himself is better able to judge of their necessity. *Crossley* v. *Parker*, 1 Jac. & Walk. 460.

A solicitor attending on a record for trial at assizes in a county where he does not usually practise is entitled upon taxation between solicitor and client, to 2*l.* 2*s.* for each day necessarily occupied, irrespectively of the number of days the cases may be actually at hearing, or of its being settled without a trial. The allowances Nos. 100 and 101 in the schedule to the general rules of 1854 as between solicitor and client, are not altered by the orders as to costs under the Judicature Act. *M'Namara* v. *Malone*, 18 L. R. Ir. 269.

—— **When Solicitor is Party to the Action.**]—An attorney who is party to a suit is not entitled to charge a guinea for attending the trial, though he acts as his own attorney, unless it appears that it was necessary that he should attend in person. *Leaver* v. *Whalley*, 2 D. P. C. 80.

—— **At Client's Residence.**]—A solicitor must produce a special authority for any attendance by him upon a client at the residence of the latter where correspondence would have sufficed. A general authority so to visit is insufficient. *Mortimer, In re*, Ir. R. 4 Eq. 96; 18 W. R. 367.

—— **Into Country.**]—A solicitor acting for a third mortgagee, negotiated for a transfer of the first mortgage, and had proceeded so far as to send the drafts. He took a journey into the country to complete the matter, which proved fruitless; and having previously received an intimation that the second mortgagee had already obtained a transfer of the first mortgage, the costs of the journey were, on taxation, disallowed, on the ground that, after that intimation, he ought to have obtained his client's sanction before incurring the expense. *Price, In re*, 9 Beav. 234.

—— **Abroad.**]—Costs of a journey to Paris to obtain the execution of a deed disallowed, beyond the expense of doing it through an agent. *Bevan, In re*, 20 Beav. 146.

A solicitor had a retainer to act generally for a company, and also a special retainer to conduct a chancery suit on behalf of the company. Being employed by another client to go to America, he collected information on behalf of the company in furtherance of their suit, but without special instructions from the company to do so. On his

return to England, he reported to the company what he had done, and they made use of the information he had obtained. He afterwards took three journeys to Paris to conduct negotiations for a compromise of the same suit, without instructions from the company, but with the knowledge of some of the directors, and on two of them he was accompanied by the chairman :—Held, that, under the special circumstances of the case, the solicitor was entitled to charge the company for his professional services in America, and also for his professional services and expenses on his journeys to Paris. *Snell, In re*, 5 Ch. D. 815 ; 36 L. T. 534 ; 25 W. R. 736—C. A.

—— **When allowed between Party and Party.**]—Where the taxing-officer has on party and party taxation allowed a sum in respect of an attendance, he is not justified in allowing a further charge in respect of the same attendance against the client. *Barnhill's Estate, In re*, 29 L. R., Ir. 396.

—— **Evidence of.**]—On taxation, as between solicitor and client, it is not necessary that the solicitor should prove attendances on his client by contemporaneous entries in his books, provided that he give other satisfactory evidence thereof. *Bray Electric Tramway, In re*, 23 L. R., Ir. 116.

—— **Form of Item.**]—A charge in a solicitor's bill "for attending a great many times" is too vague, and on taxation the charge will be disallowed. *Pender, In re*, 10 Beav. 390.

Counsel—Number of.]—Upon the taxation of costs, even as between solicitor and client, the rule is to allow only two counsel, or under special circumstances three. *Downing College Case*, 3 Myl. & C. 474.

Under a reference to the master to tax costs as between solicitor and client, he disallowed the fees to two out of five counsel, who appeared at the hearing :—Held, that the master was right. *Att.-Gen.* v. *Vigors*, 7 L. J., Ch. 214 ; 2 Jur. 508.

In the taxation of costs as between solicitor and client, the taxing-master had disallowed the costs of two counsel in several applications to the court. The master having used his discretion, and not proceeded on any general principles, a petition to review the taxation was dismissed with costs. *Friend* v. *Solly*, 10 Beav. 329 ; 11 Jur. 958.

The solicitor for the plaintiffs employed three counsel (two of whom were queen's counsel) to appear for his clients at the hearing of a cause ; and the master, in taxing the solicitor's bill as between solicitor and client, under an order obtained by one of the plaintiffs, disallowed the fees of the second counsel. The court referred it back to the master to review the report, there being nothing to show that it was unnecessary to employ more than two counsel. *Wastell* v. *Leslie*, 14 Sim. 84 ; 13 L. J., Ch. 368 ; 8 Jur. 1001.

In the absence of special circumstances, counsel allowed in a divisional court will be allowed in the court of appeal. *Barnhill's Estate, In re*, 29 L. R., Ir. 396.

—— **Solicitor not informing Client of Unusual Expense.**]—The rule laid down in *Blyth and Fanshawe, In re* (10 Q. B. D. 207), applies to the costs of employing a third counsel on the hearing of an appeal, the expense being an unusual one. Therefore, even if a solicitor has obtained his client's sanction to the employment of a third counsel on an appeal, the costs will not be allowed on taxation between solicitor and client, unless the solicitor has also explained to the client that the costs will probably not be allowed as between party and party, and that, even if he succeeds on his appeal, he may have to pay the costs of the third counsel himself. *Broad, In re*, 54 L. J., Q. B. 573 ; 15 Q. B. D. 420 ; 52 L. T. 888—C. A. Affirming 33 W. R. 749.

A brief to a fourth counsel at the trial of an action will be allowed against the client where special instructions have been given by the client to employ such fourth counsel, but not otherwise. *Lynch* v. *Chance*, 30 L. R., Ir. 278—C. A.

—— **Disallowed between Party and Party.**]—Primâ facie the costs of counsel disallowed between party and party should not be allowed as between solicitor and client. *Barnhill's Estate, In re*, 29 L. R., Ir. 396.

—— **Fees paid to.**]—An attorney is not entitled to charge his client with fees paid to counsel retained by the desire of his client on the trial of a cause before the under-sheriff, unless he expressly informed him that such fees would not be allowed on the taxation of costs against the opposite party. *Fox* v. *Cooper*, 2 Q. B. 937 ; 6 Jur. 128.

The special allowances and scale of fees mentioned in Rules of Supreme Court, 1883, Ord. LXV. r. 27, sub-s. 48, are applicable to all taxations, whether in an action in the supreme court, or under the common order, or under a special order obtained by a client against his solicitor under the jurisdiction given by the Solicitors Act, 1843. But Ord. LXV. r. 27, sub-s. 48, does not prevent the client from giving the solicitor authority, which may be expressed or implied, to employ a particular leader, and to give him such special fees by way of refresher or otherwise, though of far larger amount than the maximum fixed by sub-s. 48, as may be necessary to secure his services. And such authority having been shown by the evidence to have been clearly and distinctly given by the clients (a board of directors) to their solicitor :—Held, that the taxing-master was not precluded from allowing more than the maximum scale fee fixed by sub-s. 48, and that he must exercise his discretion as to the quantum, having regard to the authority given by the clients to their solicitor. *Harrison, In re*, 55 L. J., Ch. 768 ; 33 Ch. D. 52 ; 55 L. T. 72 ; 34 W. R. 645 ; 50 J. P. 372—C. A.

Unpaid counsel's fees cannot be recovered by a solicitor against his client. *Holmes* v. *Penny*, 9 Ex. 584 ; 2 C. L. R. 1004 ; 23 L. J., Ex. 132 ; 2 W. R. 256.

—— **Fees for Consultations.**]—Although the case was one of very great magnitude and complication, and occupied twenty-nine days, the court declined to interfere with the discretion of the taxing-master in disallowing extra fees paid by the solicitor to his counsel for consulations. *Harrison, In re*, supra.

Costs of a consultation between a new junior and the former junior, who had been promoted, allowed in a taxation as between solicitor and client. *Lucas* v. *Peacock*, 8 Beav. 1.

The expression "costs of the suit as between solicitor and client" means such costs as the

client would have to pay to his solicitor under the technical "costs of the suit." Where, therefore, a junior counsel requests and obtains a consultation with his leader in it, in order to settle the frame of the bill, the costs of that consultation must be allowed as between solicitor and client without reference to the result of the suit, or the fact whether or not the advice of the queen's counsel was acted upon. *Foster* v. *Davies*, 32 Beav. 624; 2 N. R. 350; 33 L. J., Ch. 185; 9 Jur. (N.S.) 741; 8 L. T. 626; 11 W. R. 813.

—— **Refresher Fees.**]—There is no recognised rule that where special fees have been paid to the leader the fees paid to his juniors must be according to the same rate; and, accordingly, in the absence of proof that the clients had authorised payment of special refresher fees to the junior counsel proportionate to those paid to the leader, the disallowance by the taxing-master of special refresher fees to the junior counsel was upheld. *Harrison, In re*, supra.

A refresher fee paid by a solicitor to counsel on an interlocutory motion will not be allowed against the client on solicitor and client taxation. *Lynch* v. *Chance*, 30 L. R. Ir. 278—C. A.

—— **Case for Opinion.**]—A fee to counsel for advising as to whether an ejectment will lie, and who are the necessary parties to be made plaintiffs, may in a proper case be allowed as between solicitor and client. *McNamara* v. *Malone*, 18 L. R., Ir. 269.

—— **Settling Affidavit.**]—Fee of counsel for settling a special affidavit for leave to amend disallowed in a taxation between solicitor and client. *Pender, In re*, 10 Beav. 390.

—— **Counsel at Chambers.**]—The Supreme Court Special Allowances, r. 14, that "as to counsel attending at judges' chambers, no costs thereof shall in any case be allowed unless the judge certifies it to be a proper case for counsel to attend," applies to taxation of costs between solicitor and client as well as between party and party. *Chapman, In re*, 52 L. J., Q. B. 75; 10 Q. B. D. 54; 47 L. T. 426—C. A. Affirming 31 W. R. 266.

The rule in question is made for the protection of clients, and the fact that the client has himself expressly authorised the attendance of counsel ought not of itself to induce the judge to certify that the case is a proper one for counsel to attend. *Ib.* See also *Holmes* v. *Penny*, 9 Ex. 584; 2 C. L. R. 1004; 23 L. J., Ex. 132; 2 W. R. 256.

Letters and Posting.]—Letters written by a solicitor to his client which are not properly required for the interests of the client in the business for which the solicitor is engaged will not be allowed on taxation. *Brady, In re*, 15 W. R. 632.

A country solicitor, with an office in town, conducting personally the business which would ordinarily be transacted by a London agent, is not entitled to charge for letters passing between the two offices. *Harle, In re*, 19 L. T. 305; 17 W. R. 21.

A solicitor is not entitled to charge a profit upon the addressing and posting of documents for his client. *Ditton, Ex parte, Woods, In re*, 13 Ch. D. 318; 42 L. T. 161; 28 W. R. 402—C. A.

Case for Opinion.]—On taxation between solicitor and client, the costs of a case laid before counsel for an opinion on a point decided by the decree disallowed, on the ground that the solicitor was not justified in endeavouring to reopen the question. *Newby* v. *Drew*, 12 Ir. Eq. R. 24.

Costs of a case laid before counsel as to a supplemental bill allowed as between solicitor and client. *Lucas* v. *Peacock*, 8 Beav. 1.

Affidavit.]—A solicitor is entitled to charge for the costs of the affidavit made by him on delivering up the papers under an order for taxation. *Catlin, In re*, 18 Beav. 514; 7 Jur. (N.S.) 669; 9 W. R. 756.

Abstract of Title.]—According to the practice under the 15 & 16 Vict. c. 86, s. 56, in cases of sale by the court, an abstract of title is submitted to counsel to prepare the conditions of sale. Counsel having made certain queries upon four sheets of the abstract, the vendor's solicitor charged 1*l.* 1*s.* for perusing the same, and 4*l.* 6*s.* 8*d.* for a second fair copy of the abstract for the purchaser's solicitor. The taxing-master disallowed the first item, and reduced the second to 13*s.* 4*d.*, which he allowed for recopying the four spoiled sheets of the abstract, to render it fit to be sent to the purchaser's solicitor. On a petition to review:—Held, that the taxing-master was right, and that they were matters entirely within the discretion of the taxing-master. *Rumsey, Ex parte*, 21 Beav. 40.

A second fair copy of abstract is not allowed, except under special circumstances, as where the notes of counsel render the copy laid before him wholly unfit to go to the purchaser. *Ib.*

The solicitor usually charges for drawing the conditions of sale, though they are really drawn by counsel, and he is thereby remunerated for the trouble of answering counsel's queries. *Ib.*

The costs of an abstract of a deed prepared to accompany a case submitted to counsel disallowed under the circumstances. *Pender, In re*, 10 Beav. 390.

The proper charges in respect of an abstract of title are 6*s.* 8*d.* per sheet for drawing and 3*s.* 4*d.* for copying. *Broadhurst* v. *Darlington*, 2 D. P. C. 38.

Where a vendor's attorney disclosed outstanding terms upon an abstract, although a marketable title might have been shown by taking it up at a subsequent date:—Held, that upon taxation of the attorney's costs he was entitled to be paid his charges incurred in getting in the outstanding terms. *Quicke, Ex parte*, 2 Scott, 184; 1 Hodges, 202.

Copies.]—Copy of a correspondence between the parties furnished to counsel as instructions for a bill, and partially inserted therein, disallowed on a taxation as between solicitor and client. *Stephens* v. *Newborough (Lord)*, 11 Beav. 403; 17 L. J., Ch. 332; 12 Jur. 319.

In instructing counsel to prepare pleadings, &c., a solicitor is bound to send only copies of deeds, and not the original deeds, which act would be a violation of his duty to his client. The costs of such copies will be allowed on taxation. *Beamish, In re*, 19 W. R. 740.

An attorney was not allowed his charges for attested copies of a will, which, by the conditions of sale, were to be given at the vendor's expense, such a condition not being unusual. *Quicke, Ex parte*, supra.

A solicitor, in carrying in a state of facts to obtain the master's approval of a contract to purchase, appended a long schedule thereto of the parcels proposed to be purchased. The taxing-master disallowed the charge for drawing, and only allowed for copying such schedule:—Held, that such disallowance was proper, although the master in ordinary had allowed attendances upon a number of warrants proportioned to the length of the state of facts, including the schedule:—Held, also, that the allowances in respect of these attendances were properly considered by the taxing-master as a compensation for other business actually transacted, and in respect of which he disallowed the charges. *Jones* v. *Lewis*, 1 De G. & Sm. 245; 11 Jur. 511.

Briefs.]—A petition was presented to compromise a suit which it was supposed would be unopposed, but, after the delivery of the briefs, an opposition was threatened. Further briefs being thereupon delivered, the costs thereof were allowed on taxation as between solicitor and client. *Stephens* v. *Newborough* (*Lord*), 11 Beav. 403; 17 L. J., Ch. 332; 12 Jur. 319.

The master having disallowed half the costs of preparing briefs, on the ground that the plaintiff's attorney had prepared them with unnecessary haste, the court declined to interfere. *Bucknall* v. *Boybell*, 7 Scott, 171.

Perusals.]—Taxation of costs between solicitor and client; solicitor's fee for perusing and signing approbation of a draft deed submitted for approbation of his client, who was to be an executing party. *Westby* v. *Greene*, 5 Ir. Eq. R. 449.

Under an order for taxation, 2*l.* 2*s.* was allowed to the solicitor then acting for the client for perusing the bill of his predecessor, it having led to a compromise. *Catlin*, *In re*, 18 Beav. 510.

Mortgagee's solicitor, at the time of the loan, perused the title-deeds, and was paid the costs therefor by the mortgagor. After the decree for sale in the mortgage cause, the same solicitor prepared the abstract of title under the 138th General Order, which, though deducing the title to the time of sale, did not contain any new deeds. The master having refused to allow the costs of perusing the deeds, the court refused to send back his taxation. *Scott* v. *King*, 7 Ir. Eq. R. 483.

Biddings were opened upon an advanced price on payment by the applicant of the costs properly incurred of the purchaser:—Held, that the costs of perusing the abstract and of the examination of the title, prior to the first purchase being confirmed, ought not to be allowed on taxation. *Raymond* v. *Lakeman*, 34 Beav. 584.

Unusual Costs—Shorthand Notes—Communication to Client.]—Where a solicitor proposes to incur unusual expense in the course of an action, such as taking shorthand notes of the evidence or procuring the attendance of experts and scientific witnesses, it is his duty to point out to his client that such expense might not be allowed on taxation as between party and party, and might therefore have to be borne by the client whatever might be the result of the trial. Therefore, where the solicitor had omitted such duty, he was not allowed on taxation as between solicitor and client the costs of shorthand notes of the evidence, although the client authorised him to employ a shorthand writer to take such notes and used and otherwise availed himself of them after they had been so taken. *Blyth and Fanshawe, In re, Wells, Ex parte*, 52 L. J., Q. B. 186; 10 Q. B. D. 207; 47 L. T. 610; 31 W. R. 283—C. A.

Money out of Pocket.]—Under the usual taxation order, a solicitor is entitled, in the absence of negligence or improper conduct, to be allowed all moneys paid out of pocket. *Page, In re*, 32 Beav. 487; 9 Jur. (N.S.) 1116; 8 L. T. 231; 11 W. R. 584.

Where, upon the sale of some property, an auctioneer employed by the solicitor deducted the amount of his commission, which was at the usual rate:—Held, that, in the absence of improper conduct, the solicitor was entitled to be allowed the amount in account, although the rate of commission was higher than that allowed in chambers. *Ib.*

Where a party sues in formâ pauperis, his solicitor is entitled to charge disbursements for paper and parchment, but not for law stationers' charges for copying. *Holmes* v. *Penny*, 9 Ex. 584; 2 C. L. R. 1004; 23 L. J., Ex. 132; 2 W. R. 256.

Where a solicitor makes against his client any charge not authorised in the usual and regular mode of proceeding, the burden of the proof is upon the solicitor; and in a case where for the interest of a client the solicitor had advanced money to put in the answer of a co-defendant, it was disallowed on the ground that it was not clearly made out that the client authorised or acquiesced in it. *Pender, In re*, 10 Beav. 390.

Expedition money, paid by a solicitor to a stationer or writing clerk employed in the registrar's office, disallowed upon taxation. A gratuity paid to the clerks of the accountant-general's office was disallowed to the solicitor on taxation, as was also a fee paid upon bespeaking an order for transfer which could not be made available. *Bedson, In re*, 9 Beav. 187; 15 L. J., Ch. 189; 10 Jur. 213.

Costs of registry searches, although directed by counsel, refused, under the circumstances, to be allowed the solicitor on a taxation between solicitor and client. *Langford* v. *Mahony*, 3 Jo. & Lat. 97.

Costs of obtaining Act of Parliament.]—An act of a railway company provided that the company should pay the costs of obtaining the act and preparatory thereto:—Held, that the solicitor's costs as to parts of the original scheme, which were abandoned before the passing of the act, were properly included. *Tillcard, In re*, 32 L. J., Ch. 765; 8 L. T. 587; 11 W. R. 764—L.J.

14. Costs of Taxation.

Deductions of One-sixth.]—On taxation of costs, the court cannot make the attorney pay the costs of the taxation, unless for improper items in the bill, amounting to a sixth. *Yea* v. *Yea*, 2 Anstr. 494.

Where bill reduced one-sixth part, solicitor pays costs of taxation. *Hatherway, Ex parte*, 2 Madd. 329.

In a suit for the administration of the estate of a testator, a solicitor carried in a claim for his bills of costs, which, on taxation, were reduced by more than one-sixth:—Held, that the solicitor

ought to pay the costs of the taxation. *Silvertop* v. *Ramsay*, 1 Beav. 434.

Where in a matter relating to an infant, upon a reference to the master to ascertain what lien the solicitor of the father of the infant had upon the several documents, &c., in his possession, for costs incurred in the lifetime of the father, the costs claimed were reduced upon taxation by more than one-half:—Held, that the solicitor should pay his own costs of the taxation, as well as those incurred by the guardian of the infant in reducing the amount of the costs claimed. *Lawler, In re*, Fl. & K. 73; 3 Ir. Eq. R. 102.

Where under an order referring it to the master to tax bills of costs furnished by the solicitor in pursuance of the statute, and staying an action which had been brought by him at law for recovery of the same, the client undertaking to pay whatever balance should be found due, the master reported that more than one-sixth had been struck off from each upon taxation:—Held, that the solicitor should pay his own costs of the taxation, as well as those incurred by the client. *Bower* v. *Nagle*, Fl. & K. 78; 3 Ir. Eq. R. 105.

Where a writ was indorsed, pursuant to the rule of court in that behalf, with a certain amount of debt and costs, and that amount, together with 5*s.* more, was paid within the four days prescribed by the rule, and more than one-sixth of the costs, including the 5*s.*, was disallowed on taxation:—Held, not within the rule, and therefore the defendant was not entitled to the costs of taxation under it. *Ward* v. *Gregg*, 5 D. P. C. 729; W. W. & D. 351.

Less than One-sixth Disallowed.]—If a less sum than one-sixth is taken off on taxation, the plaintiff's attorney will not be entitled to the costs of taxation if he has wilfully inserted any item which he must know ought not to have been charged. *Holderness* v. *Barkworth*, 3 M. & W. 341; 6 D. P. C. 392; 1 H. & H. 21; 7 L. J., Ex. 107; 2 Jur. 490.

The court disallowed an attorney his costs of taxation where his bill had been reduced by nearly one-sixth (20*l.* 8*s.* 4*d.* being taken off a bill of 160*l.* 18*s.* 2*d.*), though the charges were made bonâ fide. *Hodge* v. *Bird*, 6 Man. & G. 1020; 7 Scott (N.R.) 993; 1 D. & L. 956; 13 L. J., C. P. 87; 8 Jur. 317. S. P., *Mortimer, In re*, Ir. R. 4 Eq. 96; 18 W. R. 367.

Though not a sixth deducted from bill, circumstances having given sufficient ground of suspicion for necessity of taxation, costs of taxation were refused to solicitor. *Webb* v. *Stone*, 1 Anstr. 260.

Where the solicitor was guilty of great delay in bringing in his bills, the court will not give him his costs of the taxation, although less than one-sixth part is taken off. *Yea* v. *Yea*, 2 Anstr. 589.

Nonpayment by Client.]—An attorney must pay the costs of taxation, if more than one-sixth is taxed off, although the client has not paid the amount of the taxed costs. *Neale* v. *Postlethwaite*, 8 D. P. C. 100.

Rule not applying to Bankruptcy.]—There is no practice in bankruptcy by which a creditor reducing the bill of the trustee's solicitor by more than one-sixth is entitled to the costs of the taxation, and the Solicitors Act, 1843, ss. 37 and 39, does not apply. *Marsh, Ex parte, Marsh, In re*, 54 L. J., Q. B. 557; 15 Q. B. D. 340; 53 L. T. 418; 34 W. R. 620; 2 Morrell, 232—C. A.

Rule of taxation is adopted in bankruptcy: if more than one-sixth is deducted, solicitor pays costs of taxation. *Westall, Ex parte*, 3 Ves. & B. 141.

Form of Order.]—Where an unsigned bill, delivered by an attorney, was, with his consent, referred to taxation, at which he attended, when more than a sixth was struck off, the court, under its general jurisdiction, ordered him to pay the costs of taxation, although the order contained no undertaking on the part of the client to pay the amount found to be due. *Peters* v. *Sheehan*, 1 D. (N.S.) 943; 10 M. & W. 213; 12 L. J., Ex. 177; 6 Jur. 739.

A judge's order referring an attorney's bill to taxation reserved to the client the right of disputing his liability to the whole or any part of it on certain grounds. The order did not contain any direction to the master to tax the costs of the reference. The master taxed off less than a sixth of the whole bill, and taxed the attorney the costs of the reference:—Held, that the client was liable to pay the costs of the taxation, whatever might be the event of the questions referred. *Shaw, In re*, 2 L. M. & P. 214; 20 L. J., Q. B. 280.

When an order has been made for the taxation of the solicitor's bill of costs, semble, that a subsequent petition for the costs of the taxation cannot be heard until the master has made his certificate, nor unless the original petition is also set down in the paper. *Elsee, Ex parte*, 2 Deac. & C. 332.

Waiver of Delivery of Signed Bill—Effect of.]—Where, on reference of an attorney's bill to taxation, the parties agree to waive the delivery of a signed bill, primâ facie they waive the operation of the statute as to payment of the costs of taxation. *Gerrard* v. *Arnold*, 6 D. P. C. 336.

Arrangement between Parties.]—Where an attorney's bill is referred for taxation, and, after a discussion before the master, the parties come to an arrangement as to the amount, and the master thereupon makes his allocatur for more than five-sixths of the original amount of the bill, the attorney is not entitled to the costs of taxation. *Laurie* v. *Bartlett*, 1 D. & L. 730; 13 L. J., Q. B. 145; 8 Jur. 474.

Order to Pay.]—Upon an application that the solicitor may be directed to pay the costs of taxation, more than a sixth part having been taken off his bill, the court will not enter into the particulars of the bill. *Millington, Ex parte*, 1 Deac. 114.

A writ of attachment may be issued against a solicitor for non-compliance with an order to pay the costs of a taxation. *A. B. (a Solicitor), In re*, 64 L. J., Ch. 467; [1895] 2 Ch. 66; 13 R. 434; 72 L. T. 679; 43 W. R. 490.

A judge's order directed an attorney's bill to be taxed upon an undertaking being given, signed by the then churchwardens. The undertaking was signed by some only of the previous churchwardens; but the attorney having made no objection, the costs were taxed, and more than a sixth deducted. An order for the attorney to pay the costs of the taxation having been obtained:—

Held, that the attorney could not apply to set it aside, on the ground that the undertaking was not signed in compliance with the judge's order. *Doe* d. *Goodland* v. *Frankland*, 2 D. (N.S.) 975; 12 L. J., Q. B. 249; 7 Jur. 671.

After Action brought.]—Where an attorney's bill is referred for taxation after action brought upon it, he is liable to pay the costs of taxation, if more than one-sixth is struck off. *Wollett, In re*, 12 M. & W. 504; 1 D. & L. 593; 13 L. J., Ex. 121; 8 Jur. 130.

Notwithstanding an action is commenced by the solicitor before an application for taxation is made, still, if more than a sixth is taken off the bill, the solicitor pays the costs of taxation. *Watts, Ex parte*, 1 Deac. 588; 2 Mont. & Ayr. 621; 5 L. J., Bk. 31.

Where taxation is directed after action brought, this court does not give the client the costs of taxation, though more than one-sixth be taxed off. *Toghill* v. *Grant, Boord, In re*, 6 Beav. 348; 12 L. J., Ch. 481; 7 Jur. 589.

Where taxation is ordered after action brought, the general rule is, that if anything is found due, the client must pay the costs of the action. *Hair, In re*, 11 Beav. 96.

—— **Costs in the Cause.**]—Where an attorney's bill, on which an action is commenced, is referred to taxation, and the defendant succeeds in the action in consequence, a sum, though less than one-sixth, being taxed off, so as to reduce the amount of the charges below advances made, the costs of that taxation shall not be allowed to the defendant in taxing the costs of the cause. *Wilson* v. *Knapp*, 4 Jur. 220.

An attorney having brought an action on his bill, the defendant obtained an order to tax it, and after taxation paid money into court. The plaintiff took the money out of court, and taxed his costs of the cause:—Held, that the master was right in treating the costs of taxing the bill as costs in the cause. *Thomas* v. *Swansea Corporation*, 11 M. & W. 83; 2 D. (N.S.) 1003; 12 L. J., Ex. 281.

Taxing-master's Certificate — Offer to reduce Amount — Special Circumstances.]— Solicitors sent in a bill of costs for 44*l.* 2*s.* 8*d.*, and there was added at the foot, "By allowance, 7*l.* 2*s.* 8*d.*" The taxing-master disallowed 10*l.* 19*s.* 4*d.* from the bill, but stated in his certificate that he treated the bill as one for 37*l.*, as he considered the 7*l.* 2*s.* 8*d.* allowance to be unconditional; and he certified under s. 37 of the Solicitors Act, 1843, that in his opinion the solicitors were entitled to the costs of taxation:—Held, that the bill was properly taxable on 44*l.* 2*s.* 8*d.*, and further that the facts were sufficient to justify the discretion exercised by the court below in allowing the solicitors the costs of the taxation. *Carthew, In re*, and *Paull, In re* (27 Ch. D. 485), followed. *Short, Ex parte, Mackenzie, In re*, 2 R. 478; 69 L. T. 751; 41 W. R. 530—C. A.

C., a solicitor, sent in to executors a bill of costs for 83*l.*, writing at the foot, "say 78*l.*," and the 78*l.* was paid. The residuary legatee obtained an order to tax the bill, which was taxed at 66*l.*, being more than five-sixths of 78*l.*, but less than five-sixths of 83*l.* The residuary legatee objected to certain items as excessive, and the taxing-master considered that they were excessive; but held that, as the executors had authorised them, and admitted their liability to pay them, the residuary legatee could not have them reduced:—Held, that the taxing-master was right in allowing these items; that the bill must be treated as a bill for 78*l.*, from which less than one-sixth had been taxed off, and that the solicitor was entitled to the costs of the reference; but held, on appeal, that the bill delivered, within the meaning of 6 & 7 Vict. c. 73, s. 37, was a bill for 83*l.*, and that, as more than one-sixth had been taxed off, the solicitor must, according to that section, pay the costs of the reference, the case not coming within the proviso giving the court a discretion where special circumstances are certified. *Carthew, In re*, 54 L. J., Ch. 134; 27 Ch. D. 485; 51 L. T. 435; 32 W. R. 940—C. A.

P., a solicitor, delivered a bill for 362*l.*, but stared that he would only claim 320*l.*, and the 320*l.* only was entered in the cash account which he delivered to his clients. The clients obtained an order for taxation. The taxing-master taxed the bill at 280*l.*, being more than five-sixths of 320*l.*, but less than five-sixths of 362*l.*, and certified that he had allowed the solicitor the costs of the reference, as he considered that, since he had never claimed more than 320*l.*, the difference of 42*l.* between this sum and the amount of the whole bill ought to be deducted from the sums taxed off, thus reducing them to 40*l.*, which was less than a sixth of the sum he had claimed:—Held, that the solicitor must pay the costs of the reference; held, on appeal, that special circumstances were certified so as to give the court a discretion as to the costs of the reference, but that the special circumstances were not such as to induce the court to depart from the general rule that the costs of the reference should follow the event of the taxation, and that in this case also, more than one-sixth having been taxed off the 362*l.*, the solicitor must pay the costs of the reference. *Paull, In re*, 54 L. J., Ch. 134; 27 Ch. D. 485; 51 L. T. 435; 32 W. R. 940—C. A.

—— **Payment of Less Sum in Discharge.**]—This was a summons on behalf of a client for review of taxation, and that the costs of taxation might be allowed to the client and disallowed to the solicitors. The solicitors had paid themselves 20*l.* out of money of their client in their hands in full discharge of their bill of costs. After this the client changed his solicitors and required a bill of costs, and obtained a common order to tax the costs of his former solicitors. The bill was delivered to him, and soon after the solicitors moved the court to cancel the order, but the motion was refused. The bill delivered amounted to 26*l.* 8*s.* 3*d.*, and was reduced, on taxation, to 20*l.* 16*s.* 7*d.*, more than one-sixth being taxed off. The taxing-master certified that the solicitors were entitled to all the costs of the taxation, on the ground that the sum allowed on taxation was greater than the sum accepted by the solicitors in full discharge:—Held, that, one-sixth having been taxed off the bill, the solicitors are not entitled to the costs of the taxation. *Elwes and Turner, In re*, 58 L. T. 580.

Bill for Lump Sum—Items Supplied.]—Lessor's solicitors wrote a letter to lessee's solicitors stating the expenses of the lease at a lump sum of 7*l.* 11*s.* On application for items, they furnished a document which they called "our bill," containing items amounting to 10*l.* 10*s.* 8*d.*, but wrote at the foot of it "say 7*l.* 11*s.*" The costs

were taxed at 7*l.* 11*s.*:—Held, that the letter stating the lump sum was the bill to be taxed, the so-called "bill" of items being only explanatory, and that consequently the solicitors were entitled to the costs of the reference. *Tilleard, In re* (32 Beav. 476; 32 L. J., Ch. 765), and *Russell, Son and Scott, In re* (55 L. T. 71), followed. *Hellard and Bewes, In re*, 65 L. J., Ch. 550; [1896] 2 Ch. 229; 74 L. T. 457; 44 W. R. 475.

Mode of Calculating the One-sixth.]—The costs of taxation depend on whether one-sixth is taken off the bill of costs; and, to determine this, a distinction is to be made between strictly professional charges and disbursements, and independent cash payments. Those payments only which are made in pursuance of the professional duty undertaken by the solicitor, and which he is bound to perform, or which are sanctioned as professional payments, by the general and established custom and practice of the profession, ought to be entered and allowed as professional disbursements in the bill of costs; other disbursements ought to be included in a separate cash account. *Remnant, In re*, 11 Beav. 613; 18 L. J., Ch. 374.

Where the master disallows some and adds other items, in order to apply the rule as to the one-sixth, the bill delivered is to be increased by the sum added, and then reduced by the sum disallowed. *Reg.* v. *Eastwood*, 6 El. & Bl. 285; 2 Jur. (N.S.) 448; 4 W. R. 483.

Moneys specifically paid by a client to his solicitor for counsel's fees and stamps, as they were required, are properly included in his bill, in calculating the sixth on a taxation. *Metcalfe, In re*, 30 Beav. 406.

A solicitor must pay the costs of the taxation of his bill of costs, reduced by the taxation more than one-sixth of the amount, which reduction arose from the master disallowing fees, paid to the commissioners for travelling expenses. *Inman, Ex parte*, Buck, 129.

—— **Want of Authority.**]—Sums deducted in respect of business done for a third person, at the alleged retainer of the client, but the authority not proved, are always computed as deductions in the question of costs of taxation. *Rigby* v. *Edwards*, 5 Madd. 20. This is said to be overruled.

Semble, on taxation charges disallowed for want of authority, and charges reduced by limiting to one of several defendants, his aliquot part of a joint charge ought not to be computed in determining on whom the costs of taxation should fall. *Att.-Gen.* v. *Nethercoat*, 3 Beav. 297.

—— **Another Person Chargeable.**]—Since the Solicitors Act, items struck out of a solicitor's bill on taxation as chargeable against another person, must be taken into account in determining the costs of the taxation. *Clark, In re*, 13 Beav. 173. Affirmed, 1 De G. M. & G. 43; 21 L. J., Ch. 20; 15 Jur. 1047.

—— **Items inserted by Mistake.**]—After bill has been referred for taxation, erroneous overcharges inserted by mistake cannot be withdrawn so as to be excluded from the calculation of the one-sixth as between the solicitor and the estate. *Christy, Ex parte, Barrow, In re*, 3 Mont. & Ayr. 104; 2 Deac. 131, 132; 6 L. J., Bk. 68.

The plaintiff had obtained an order for taxation of his solicitor's bills, amounting to 399*l.* The solicitor, with the master's permission, struck out certain items as having been inserted by mistake. The bills were then taxed, and less than a sixth was taken off; but if the items struck out were included, then more than a sixth would have been taken off:—Held, that as less than a sixth had been taken off, the plaintiff must pay the costs of taxation. *Marshall* v. *Oxford*, 5 Sim. 456.

—— **Retainer by Several.**]—A solicitor was retained by A. B. and four other defendants. A. B. having withdrawn his retainer, the solicitor delivered his bill against A. B., amounting to 19*l.* 19*s.*, which was referred for taxation; the master, considering that A. B. was liable to one-fifth part only of several charges, struck off four-fifths thereof, and certified that he had taxed the bill at 4*l.* 10*s.* 6*d.* The client then obtained an order of course for payment by the solicitor of the costs of the taxation; a motion being made, on behalf of the solicitor, to discharge the latter order for irregularity, on the ground that more than one-sixth had not been struck off within the rule, but no application being made to be relieved from the certificate which warranted the second order, the motion was on that ground refused with costs. *Muskett* v. *Hill*, 3 Beav. 301.

—— **Several Bills.**]—An order was made for the taxation of four several bills of a solicitor for various business done for the same assignee under which more than a sixth part was taken off the gross amount of the four bills, but not off the amount of every one of the bills:—Held, that as all the bills were incurred by the same person in the same right, there was no need for a separate order of taxation for each bill, and that, as more than a sixth was taken off from the whole amount, the solicitor must pay the costs of taxation. *Barrett, Ex parte*, 3 Deac. & C. 731; 1 Mont. & Ayr. 447.

Less than one-sixth was taken off a bill of costs on taxation, but more than one-sixth was taken off in the suit (which was one for a general account between the solicitor and client) on other grounds, into which the master could not enter. The costs of taxation were allowed to the solicitor. *May* v. *Biggenden*, 24 Beav. 207.

—— **Legacy Duty paid by Solicitor.**]—A payment for legacy duty made by a solicitor for his client, ought, for taxation, to be included in his cash account and not in his bill of costs, and therefore such a payment is not to enter into the computation, in considering whether a sixth is taxed off. *Haigh, In re*, 12 Beav. 307; 19 L. J., Ch. 79; 14 Jur. 340.

By whom Payable.]—An action had been brought by an attorney to recover the amount of bills of costs, including costs incurred on an appeal to the house of lords. The usual order having been obtained on the part of the defendant for taxation, that portion of the bills which related to business done in the house of lords was referred to the proper taxing officer of the house:—Held, that, as between the parties, the plaintiff was in the first instance bound to pay the fees necessary for obtaining the certificate of that officer. *Beche* v. *Cattell*, 4 Scott (N.R.) 246; 3 Man. & G. 480; 11 L. J., C. P. 49.

—— **Party Chargeable not Attending.**]—A solicitor proceeding under the common order for taxation (which is in accordance with s. 37 of the Solicitors Act, 1843) must pay the costs of reference if the party chargeable does not attend the taxation. A person does not attend by writing letters to the taxing-master. *Upperton, In re*, 30 W. R. 840.

—— **Where Solicitor Dead.**]—Representatives of a deceased solicitor will not be ordered to pay costs of taxation of his bill, more than a sixth being taken off; nor, where they have brought an action for the amount, to the costs of which the assignees are liable, can they set off such costs against each other. *Hammond, Ex parte. Jackson, In re*, Mont. & C. 136; 4 Deac. 48; 8 L. J., Bk. 26.

The executors of a bankrupt solicitor are not, under statute, liable to pay the costs of taxation, if more than one-sixth of the bill of costs of the solicitor is deducted on taxation. *Willasey* v. *Mashiter*, 3 Myl. & K. 293.

If a bill of costs is taxed after solicitor's death, his representative will not be ordered to pay costs of taxation, although more than a sixth is deducted. *Cole, In re*, 2 Sim. & S. 462. *S. C.*, nom. *Miller* v. ——, 4 L. J. (o.s.) Ch. 71.

Court has no jurisdiction to order executor of deceased solicitor to pay costs of taxing solicitor's bill, nor to order executor to refund balance found due from deceased solicitor, if executor does not admit assets, and even if he admit assets. Sed quære. *Spackman, Ex parte, Phillips, In re*, 3 Mont. & Ayr. 135.

—— **Where Solicitor Bankrupt.**]—The costs of taxing the bills of costs of a solicitor who has become bankrupt do not fall upon his assignees, on the ground that more than a sixth part is deducted on taxation, although the assignees may have attended the taxation by their solicitor. *Alsop* v. *Oxford* (*Lord*), 1 Myl. & C. 26.

The assignees of a bankrupt solicitor are not under the statute liable to pay the costs of taxation, if more than one-sixth of the bill of costs of the solicitor is deducted on taxation. *Willasey* v. *Mashiter*, 3 Myl. & K. 293.

Upon taxation, under the 6 & 7 Vict. c. 73, s. 37, assignees of a bankrupt solicitor are personally liable for the costs of taxation of a bill of costs delivered by them, where more than one-sixth is taken off. *Peers, In re*, 21 Beav. 520.

Assignees in insolvency of solicitors ordered to pay the costs of taxation, more than one-sixth having been taxed off a bill of costs delivered by them. *Peile, In re*, 25 Beav. 561.

Pending the taxation of an attorney's bill, he petitioned for and obtained his discharge under the Insolvent Debtors Act. More than a sixth was taxed off. The attorney was personally liable for the costs of the taxation, notwithstanding his discharge. *Whalley* v. *Williamson*, 6 Man. & G. 269; 6 Scott (N.R.) 948.

—— **Executrix of Client.**]—After the death of a plaintiff in an action, his executrix obtained an order for referring the bill of the plaintiff's attorney to taxation, less than a sixth having been taxed off:—Held, that the executrix was liable to the costs of the taxation. *Jefferson* v. *Warrington*, 7 M. & W. 137; 8 D. P. C. 880; 10 L. J., Ex. 79.

—— **Married Woman.**]—A married woman having separate property employed a solicitor, and undertook to pay him out of her separate estate. By the decree in a suit instituted by the solicitor, his bills were ordered to be paid out of the separate property, and it was referred to the master to tax them. Semble, that the solicitor is entitled to the costs of taxation, though more than one-sixth was taken off. *Murray* v. *Barlee*, 7 Sim. 194.

15. Reviewing Taxation.

Objections taken before Taxing-master.]—To enable the court to entertain a summons to review a taxing-master's certificate, where the ground of objection is to the whole of the finding generally, it is not necessary that the objections raised by the summons to his finding should have been carried in before the signing of the certificate: Ord. LXV. r. 27, sub-rr. 39 and 41, being applicable only where particular items are objected to. *Sparrow* v. *Hill* (7 Q. B. D. 362; 8 Q. B. D. 479) followed. *Castle, In re*, 56 L. J., Ch. 753; 36 Ch. D. 194; 57 L. T. 76; 35 W. R. 621.

Where under an order for taxation of a solicitor's bill of costs and cash account, the taxing-master found that, in consequence of all accounts between the parties having been settled, there was nothing to tax, and certified accordingly, but no objections to the finding were carried in before the certificate was signed:—Held, that the court had jurisdiction to entertain a summons to review the certificate. *Ib.*

Ord. LXV. r. 27, sub-r. 42, of the Rules of Court, 1883, precludes appellants to the court of appeal from taking at that stage of the proceedings any objection to the taxation or adducing any evidence other than that which had been carried in and brought before the taxing officer. *Hester* v. *Hester*, 56 L. J., Ch. 247; 34 Ch. D. 607; 55 L. T. 862; 35 W. R. 233; 51 J. P. 438—C. A.

Objections to Taxation—Procedure.]—Where, on the taxation of a bill of costs, a party objects to the course which the taxing-master proposes to adopt in the taxation, it is not in accordance with the practice that he should at once bring the matter before the court on motion. He should allow the taxing-master to make his certificate, and then carry in his objections to it, and allow the master to answer them, and upon that apply to the court to vary the certificate. *Le Brasseur and Oakley, In re, Terrell, Ex parte*, 65 L. J., Ch. 763; [1896] 2 Ch. 487; 74 L. T. 717; 45 W. R. 87—C. A.

Party to take out Summons.]—Where solicitors to trustees claimed to be entitled to certain charges that were disallowed by the taxing-master, the trustees took out a summons to review the taxation:—Held, that the matter had been wrongly brought before the court, as the summons ought to have been taken out by the solicitors, and not the trustees, whose duty it was to protect the estate against increased charges, and the costs of the application must be paid by the trustees personally. *Wood* v. *Calvert*, 55 L. T. 53; 34 W. R. 732.

Notice to consider Objections—Length of.]—Upon a party objecting to the allowance of certain costs, his solicitors received at 4.30 p.m. from the taxing-master a notice that at 1 p.m. the following day he would proceed to consider

the objections. On a summons to review taxation on the ground that by analogy to r. 16 of Ord. LXV. of the Rules of Court, 1883, the taxing-master ought to have given a clear day's notice of his intention to proceed, notice of the 4th of December, 1885, was sufficient. *Hill, In re*, 33 Ch. D. 266 ; 55 L. T. 104—C. A.

Amount in Dispute.]—A review of taxation will not be ordered when the items alleged to be overcharged do not amount to 40*s*. *Newton* v. *Boodle*, 4 C. B. 359.

Where an attorney's bill has after payment been referred to the master for taxation by a judge's order, the court will not review the matter in a case where the amount of the bill is not stated, inasmuch as the matter in dispute may not be worth the expense of the proceedings. *Dearden, In re*, 9 Ex. 210 ; 2 C. L. R. 308 ; 23 L. J., Ex. 14 ; 17 Jur. 993 ; 2 W. R. 18.

On what Grounds.]—Where, in a bill of costs, several charges of a discretionary nature were entered, some too low and some too high, the latter of which the master reduced to their proper amount, but refused to raise the former, the court refused to review the taxation. *Eyre* v. *Shelley*, 8 M. & W. 154 ; 10 L. J., Ex. 295 ; 5 Jur. 439.

If an action is brought to recover the amount of an attorney's bill, and it is referred to taxation by the usual order obtained at the instance of the client, the master has power to determine whether certain items were necessary, and the court will not review his taxation on the ground that such disallowance is an excess of jurisdiction. *Williams* v. *Nicholas*, 1 D. (N.S.) 841.

A bill of costs had been referred for taxation, and the parties agreed in the office upon the sum at which they were to be reported ; subsequently the client, having discovered certain entries in his own handwriting of advances made to the solicitor, and for which he had received no credit, applied that the costs should be sent back to the master for taxation. The application was refused with costs. *Austin* v. *Chambers*, 3 Dr. & War. 178.

Principles upon which the court acts in permitting a review of the master's certificate on taxation. *Congreve, In re*, 4 Beav. 87.

The master, on evidence before him, allowed a few items on the taxation of a solicitor's bill for business, as to which there was a conflict, whether the solicitor had authority to perform it : — Held, that this was not a sufficient reason for permitting a review of the taxation. *Ib.*

A petition of a solicitor to review the master's decision, as to specified items of charges for conferences, some of which had been reduced and others wholly disallowed, was dismissed with costs, the court declining to enter into the merits of such matters. *Hubbard, In re*, 23 Beav. 481.

The court refused to entertain the question whether the master had properly disallowed costs of separate answers. *Beattie* v. *Ebury*, 43 L. J., Ch. 80 ; 29 L. T. 419 ; 22 W. R. 68.

The court will only determine questions on items in a bill of costs which involve some principle, and those not relating to quantum only. *Catlin, In re*, 18 Beav. 508.

The court will not review a taxation when no principle of taxation has been violated. *Moss, In re*, 3 W. R. 19. S. P., *Mortimer, In re*, Ir. R. 4 Eq. 96 ; 18 W. R. 367.

When Barred.] — The acceptance of money under an allocatur prevents a solicitor from applying for a review of taxation. *Marshall, Ex parte*, 5 W. R. 652.

On what Terms.]—An application that the officer of the court may be directed to review his certificate as to the taxation of costs, may be made by motion. It is not an objection to such application that the amount of the taxed costs has not been paid into court, though it may be proper to make such payment one of the terms of the order for re-taxation. *Richardson, Ex parte, Consett, In re*, 3 Deac. & C. 735 ; 1 Mont. & Ayr. 377.

III. MODES OF RECOVERING.

a. CHARGING ORDERS.

1. Property Recovered or Preserved.

Money Paid into Court.]—An action having been brought to recover a sum of 727*l*., C., one of the defendants, counterclaimed against the plaintiff for the sum of 700*l*. C. presented also a petition in bankruptcy against the plaintiff, who was ordered to bring into court a sum of 300*l*. The action and the proceedings in bankruptcy ultimately were referred to an arbitrator, who, by his award, found that the plaintiff was entitled to judgment in the action for 157*l*., that no debt was due from the plaintiff to C., and that the sum of 300*l*. must be paid to the plaintiff out of the court of bankruptcy. The plaintiff's solicitors having applied to the queen's bench division for a charging order on the sum of 300*l*. for their costs in the action :—Held, that they were not entitled to an order. *Pierson* v. *Knutsford Estates Co.*, 53 L. J., Q. B. 181 ; 13 Q. B. D. 666 ; 32 W. R. 451—C. A.

Money paid into court as security for the costs of a party to an action is not, in case by the success of the party it becomes payable to him, property "preserved" in the action within the meaning of the act. *Wadsworth, In re, Rhodes* v. *Sugden*, 54 L. J., Ch. 638 ; 29 Ch. D. 517 ; 52 L. T. 613 ; 33 W. R. 558.

A charging order for solicitors' costs may be made upon money paid into court under Ord. XIV., to abide the event, as being property "recovered or preserved," within s. 28 of the Solicitors Act, 1860. *Moxon* v. *Sheppard*, 59 L. J., Q. B. 286 ; 24 Q. B. D. 627 ; 62 L. T. 726 ; 38 W. R. 704.

Money paid into court by a defendant, although accompanied by a defence denying legal liability, may be taken out of court by the plaintiff, and is therefore property "recovered or preserved" within s. 28 of the Solicitors Act, 1860. *Berdan* v. *Greenwood* (3 Ex. D. 251) followed. *Emden* v. *Carte*, 51 L. J., Ch. 371 ; 19 Ch. D. 311 ; 45 L. T. 328 ; 30 W. R. 17—C. A.

A., as administrator of his deceased mother, sued B. and C. (his brother and sister) in the common pleas at Lancaster in detinue for goods belonging to the estate of the intestate, and recovered a verdict and judgment against them, but was unable to levy. Afterwards B. and C. sued out a plaint in a county court for administration of the estate, and brought into court the proceeds of the goods of the intestate, which they had hitherto concealed :—Held, that the

solicitor who acted for A. in the action of detinue was entitled to a charge or lien upon the fund in the hands of the registrar of the county court, under s. 28 of the Solicitors Act, 1860, as "property recovered or preserved through his instrumentality," in respect of his costs incurred by him, to be taxed as between attorney and client. *Catlow* v. *Catlow*, 2 C. P. D. 362; 25 W. R. 866.

Appointment of Receiver.]—When a suit is instituted for the preservation of property, and a receiver is appointed, there is a preservation of property within s. 28 of the Solicitors Act, 1860, and the solicitors are entitled to a charge upon their client's interest in the property. *Twynam* v. *Porter*, 40 L. J., Ch. 30; L. R. 11 Eq. 181; 23 L. T. 551; 19 W. R. 151.

Amount Awarded by Arbitrator.]—A reference to arbitration having been made in an action, the arbitrator awarded that a certain sum should be paid by the plaintiff to the defendant, and the award was confirmed by the court. An order was made, on the application of the defendant's solicitor, under s. 3 of 39 & 40 Vict. c. 44 (similar to s. 28 of the Solicitors Act, 1860), declaring him entitled to a lien for the costs of the defendant in the action upon the amount awarded, as property recovered or preserved for the defendant through the instrumentality of the solicitor, and directing the plaintiff to pay thereout to the solicitor the amount of such costs when taxed. *M'Aleavey* v. *M'Aleavey*, 9 L. R., Ir. 165.

Wife's permanent Maintenance.] — A sum secured to the wife on a dissolution of marriage under s. 32 of the Divorce Act, 1867, is not alimony, and is property in respect of which the court has jurisdiction to grant the wife's solicitor a charging order for costs under s. 28 of the Solicitors Act, 1860. *Harrison* v. *Harrison*, 58 L. J., P. 28; 13 P. D. 180; 60 L. T. 39; 36 W. R. 748—C. A.

Compromise of Action—Notice.]—A collision action having been settled on the terms of the defendants paying to the plaintiff fifty per cent. of his damages, the plaintiff, before the damages were assessed, assigned the amount to which he would become entitled in respect thereof to the defendants' solicitors and to certain clients of the defendants' solicitors, to whom he was indebted. The damages were subsequently assessed by an arbitrator, and the amount awarded was paid by the defendants to their solicitors, who paid themselves and their clients in accordance with the terms of the assignment. No express notice of the plaintiff's solicitors' lien was given, though the defendants' solicitors were aware that the money so assigned and paid away was the fruits of the action in which the plaintiffs' solicitors had acted:—Held, that the plaintiffs' solicitors were entitled to a charging order on the money so assigned and paid away. *The Paris*, 65 L. J., P. 42; [1896] P. 77; 73 L. T. 736; 8 Asp. M. C. 126.

Partnership Action—Compromise.]—An action was brought for the dissolution of a partnership and the winding-up of the partnership business. The defendant delivered a defence, and a counterclaim claiming certain remedies against his copartners. At the trial the parties agreed to compromise the action, including the counterclaim, and an order was made directing the taxation of the costs of all parties, and staying all proceedings, except for the purpose of enforcing the agreement and that order. The agreement, which was set out in the schedule to the order, provided for the dissolution of the partnership, the sale of the partnership property, and that all costs of the parties should be paid out of the estate. Subsequently the parties made an agreement that a sale of a certain part of the partnership property should be rescinded, that all litigation should be put an end to, and the business carried on as before the action. The defendant's solicitor applied for an order charging his costs on the shares, both of the plaintiffs and defendant, in the partnership property, or, in the alternative, on the defendant's share. The defendant was willing that the order should be made as regards his share of the property:—Held, that the solicitor could not have a charging order on the plaintiffs' shares, as they had been in no way recovered or preserved through his instrumentality. Also, that the persons to apply to enforce the order carrying out the agreement were the parties to it, and the solicitor could not apply under it to obtain payment of his costs. *Rowlands* v. *Williams*, 53 L. T. 135. Reversed in C. A.

—— **Transfer to Bankruptcy Court.**]—If a solicitor has bonâ fide commenced a partnership action, and obtained the appointment of a receiver, who has got in assets, he is entitled to a charge on the assets recovered for his costs, unless, being aware that the partnership was insolvent, he commenced his action not bonâ fide, but merely to obtain costs where proceedings might have been taken in bankruptcy. *Lovett, Ex parte, Nicholas, In re*, 61 L. T. 87; 37 W. R. 715; 6 Morrell, 173.

Administration Suit.]—A solicitor instituted an administration suit on behalf of a cestui que trust against a sole trustee, obtained a common decree with a direction for the appointment of a new trustee, and procured an account to be brought into chambers by the defendant. The plaintiff then abandoned the suit. On a petition by the solicitor that his costs might be made a charge on the plaintiff's interest in the trust estate, under s. 28 of the Solicitors Act, 1860:—Held, that no property had been preserved or recovered on which the costs could be made a charge. *Pinkerton* v. *Easton, Pinkerton, In re*, 42 L. J., Ch. 878; L. R. 16 Eq. 490; 29 L. T. 364; 21 W. R. 943.

A solicitor for a party in an administration suit who cannot otherwise obtain payment of his bill may apply by petition to have his costs taxed, and for a charge for them on dividends payable to his client under an order made in the suit, although there may have been no real question at issue between the parties to the suit, or although, so far as there has been any such question, the decision in the suit may have been given wholly or in part in favour of the opposite party. *Smith* v. *Winter, Hartley, Ex parte*, 18 W. R. 447.

On Real Estate.]—A suit was instituted in equity by a next friend on behalf of an infant to recover real estate and a fund in court. The costs were directed to be paid by the defendant, but in consequence of his insolvency they could not be recovered from him. A court of equity directed that the fund in court should be applied

in payment of the costs pro tanto, the proceedings taken by the next friend being for the benefit of the infant, but refused to make an order declaring that the residue of the costs were a charge on the real estate recovered, as that act applied only to suits instituted by persons sui juris. *Bonser* v. *Bradshaw*, 30 L. J., Ch. 159; 7 Jur. (N.S.) 231; 3 L. T. 545; 9 W. R. 229.

Where a solicitor was employed by the next friend in establishing an infant's title to land, the infant having attained his majority, a court of equity declared so much of the costs as remained unpaid a charge on the land recovered. *Bonser* v. *Bradshaw*, 4 Giff. 260; 9 Jur. (N.S.) 1048; 9 L. T. 195.

Action as to Easement.]—A suit which only relates to an easement is not a suit in which it can be said that property is recovered or preserved, even though a mandatory injunction for pulling down buildings is refused. *Foxon* v. *Gascoigne*, 43 L. J., Ch. 729; L. R. 9 Ch. 654; 31 L. T. 289; 22 W. R. 939.

Building Society—Fraudulent Transfer.]—An action was brought by a husband against his wife and another person for a sum of money invested in a building society, which the husband alleged to have been fraudulently transferred by his wife to the other person. The building society were also made defendants to the action and appeared. Judgment was given for the defendants. Upon petition presented under the Solicitors Act, 1860, by the solicitor to the defendants other than the building society:—Held, that he was entitled to a charge upon the whole sum invested, as being the amount "recovered or preserved" to them. *Porter* v. *West*, 50 L. J., Ch. 231; 43 L. T. 569; 29 W. R. 236.

Lien Diminished.]—Where through the exertions of solicitors the lien of a railway company on waggons belonging to a coal company was diminished and the value of the waggons to the coal company proportionately enhanced, the solicitors were held entitled to a charging order on the waggons. The services of solicitors in such a case are in the nature of salvage, and do not depend upon contract. *Pellsall Coal and Iron Co.* v. *L. & N. W. Ry.*, 8 Ry. & Can. Traff. Cas. 146.

Bankruptcy Proceedings.]—The bankrupt left this country for Australia, where he was arrested on a charge of forgery. A receiving order having been made against him, the solicitors to the trustee obtained from the police in Australia a sum of money which had been found in his possession. The solicitors claimed to have a charging order on this amount under the Solicitors Act, 1860, s. 28, not only for their costs in the bankruptcy proceedings, but also for their costs in the prosecution:—Held, that the money had not been recovered or preserved by the solicitors in or by the bankruptcy proceedings. *Humphreys, In re, Roberts, Ex parte*, 77 L. T. 501; 4 Manson, 239.

A suit was commenced in January, 1887, to establish a will and codicil. The plaintiff was the surviving executor appointed by the will, and the defendant was a daughter of the deceased, who contested the validity of the codicil only. A son of the deceased, who was the principal legatee under the codicil, obtained leave, on the 8th March, 1887, to intervene in the suit, and propounded the codicil. On the 3rd May, 1887, the trustees appointed under the bankruptcy of the said legatee also obtained leave to intervene, and they, too, propounded the codicil. On the 9th November, 1887, the court, by consent, pronounced for the will and codicil, and reserved all questions of costs of the trustees and of other interveners. On the 6th December, 1887, upon summons for directions as to these costs, it was ordered that the costs of the bankrupt be paid "out of the residue of the estate, if any." It was stated that there would be no residue. On the 30th April, 1889, an order was made giving the bankrupt's solicitor a charge in respect of his costs in these proceedings upon the interest of his client under the codicil. This order was served upon the trustee in bankruptcy, and upon the surviving executor. The trustees thereupon issued a summons to set aside the order:—Held, that the trustees in bankruptcy having intervened and propounded the codicil, and having obtained judgment thereon, the solicitor for the bankrupt was only entitled to a charge upon any residue which might be found due to the bankrupt after his creditors had been satisfied. *Keeson* v. *Luxmore*, 61 L. T. 199.

Mortgages — Validity Established.]—In an action to establish the validity of two mortgages, and to raise the amount due thereon, the plaintiff obtained the usual judgment declaring the mortgages well charged, referring to chambers to take accounts, directing the appointment of a receiver and declaring the plaintiff entitled to the costs of the action. The solicitor for the plaintiff applied under the 39 & 40 Vict. c. 44, s. 3 (similar to s. 28 of the Solicitors Act, 1860), to have his costs as between solicitor and client, when taxed, declared a charge upon the plaintiff's interest in the mortgaged lands, and on all amounts which might be found to be due from the defendant to the plaintiff:—Held, that the solicitor was entitled to the order sought. *Keenan* v. *Armstrong*, 28 L. R., Ir. 371.

A defendant in a foreclosure suit established his right to a second mortgage on certain property:—Held, that it was property recovered or preserved by the instrumentality of a solicitor to which the solicitor was entitled to a declaration of charge under s. 28 of the Solicitors Act, 1860. *Scholefield* v. *Lockwood*, 38 L. J., Ch. 232; L. R. 7 Eq. 83; 17 W. R. 184.

A solicitor is entitled to a charge for his costs on property, the subject of a successful suit conducted by him against an incumbrancer, although the incumbrance is entirely valueless, provided it formed a cloud upon the title. *Jones* v. *Frost*, *Fiddey, In re*, 42 L. J., Ch. 47; L. R. 7 Ch. 773; 27 L. T. 465; 20 W. R. 1025.

Declaration of Title — Partition.]—The costs of proceedings under the Declaration of Titles Act (25 & 26 Vict. c. 67), on behalf of an infant, together with the costs of a partition suit and of suit to obtain a declaration of lien, are costs for which the solicitor has a lien on the fund recovered. *Pritchard* v. *Roberts*, 43 L. J., Ch. 129; L. R. 17 Eq. 222; 29 L. T. 883; 22 W. R. 259.

Costs Ordered to be Refunded.]—Costs paid under order of the court below and ordered by the court of appeal to be refunded are property recovered within the meaning of s. 28 of the Solicitors Act, 1860. *Guy* v. *Churchill*, 56 L. J., Ch. 670; 35 Ch. D. 489; 57 L. T. 510; 35 W. R. 706—C. A.

An action was dismissed with costs, which were taxed at 298*l.* and paid. On appeal this judgment was reversed, leave was given to amend the pleadings, and the action was ordered to proceed on the amended pleadings, and the defendants were ordered to repay to the plaintiffs the costs they had received, and to pay to the plaintiffs their costs of the appeal, which were taxed at 165*l.* After this the plaintiffs became bankrupt:—Held, on the application of the solicitors who had acted for the plaintiffs in the appeal, that they were entitled to receive from the defendants the 165*l.*, and also to receive from the defendants out of the 298*l.* the difference between the 165*l.* and the plaintiffs' costs of the appeal taxed as between solicitor and client, and that the balance only of the 298*l.*, after paying the above difference and the costs of the solicitors and the defendants of the application, was to be paid to the trustee in the bankruptcy. *Ib.*

2. Practice.

On Change of Solicitor.]—In a suit for the administration of a testator's estate, an order was made for the taxation of the costs and payment to the plaintiff's solicitor personally of the plaintiff's costs out of a fund set apart for that purpose. The plaintiff sold his life interest in the estate with the knowledge of his solicitor, who did not then raise any claim upon it for his costs. The plaintiff subsequently, and before any of the costs were taxed, changed his solicitor. The solicitor then took out a summons for a charging order, under s. 28 of the Solicitors Act, 1860, upon the plaintiff's interest in the funds in court. It was not the practice for the masters to give a warrant for taxation to any solicitor not acting for a party to the cause:—Held, that the solicitor was entitled to a charging order, with liberty to apply to the judge as to enforcing it by sale or otherwise. *Pilcher* v. *Arden, Brook, In re*, 47 L. J., Ch. 479; 7 Ch. D. 318; 38 L. T. 111; 26 W. R. 273—C. A.

Solicitor ceasing to be such at Time of Order.]—An order is valid, though the plaintiff's solicitor had ceased to be such when it was made. Though he has discharged himself from the position of plaintiff's solicitor, yet, if he has not done so wrongfully or improperly, the order is right. *Clover* v. *Adams*, 6 Q. B. D. 622.

Solicitor Discharged before Trial.]—A solicitor, through whose instrumentality property has been recovered or preserved in an action, is entitled, under s. 28 of the Solicitors Act, 1860, to a declaration of charge upon such property, although his client may have discharged him before the trial of the action. In such a case his charge will be subject to the lien for costs of the client's solicitor for the time being. *Wadsworth, In re, Rhodes* v. *Swyden*, 54 L. J., Ch. 638; 29 Ch. D. 517; 52 L. T. 613; 33 W. R. 558.

London Agents of Country Solicitor.]—London agents of a country solicitor have no right to a charge for costs, as they are not the solicitors employed by the client. *Macfarlane* v. *Lister*, 57 L. J., Ch. 92; 37 Ch. D. 88; 58 L. T. 201—C. A.

A town agent is entitled to a charge on all property recovered in three suits for an unascertained balance due to him by the country solicitor. *Tardrew* v. *Howell*, 3 Giff. 381; 31 L. J., Ch. 57; 7 Jur. (N.S.) 1120; 5 L. T. 276; 10 W. R. 32.

Solicitors Practising in Admiralty Court.]—Sect. 28 of the Solicitors Act, 1860, applies to solicitors practising in the court of admiralty. *The Philippine*, L. R. 1 P. 309; 16 L. T. 34; 15 W. R. 462.

Where, in a suit by a master against an owner for wages and disbursements, a sum of money was found to be due to him as master by the owner; but a counter-claim being set up, the registrar took all the accounts between the parties, and reported that there was a balance due by the master for unpaid purchase-money for shares in the vessel; but the transfer of the shares had not been registered:—Held, that the solicitors who acted in the suit had preserved property of the master under the act, and were entitled to their costs out of the master's shares, subject to the claim of the owner for the balance found to be due. *Ib.*

Employment by Infant—Ratification.]—A bill was filed by the maternal grandmother of an infant tenant in tail, as his next friend, praying the appointment of a guardian to him and his brothers and sisters, directions for his maintenance and education, having regard to the circumstances of the family, accounts, and a receiver. The solicitor employed by the next friend died pending the suit, and within six years from the presentation of the petition. A petition was presented by the personal representative of the solicitor for a declaration as to, and a charge for, his costs:—Held, that the solicitor was employed for the infant; that the property was preserved for the infant through the instrumentality of the solicitor; that the infant had, as a matter of fact, adopted the suit after attaining his majority; that the Statute of Limitations was not a bar to the petition; that it was well presented by the legal personal representative; and that the petitioner was entitled to the relief for which she prayed. *Baile* v. *Baile*, 41 L. J., Ch. 300; L. R. 13 Eq. 497; 26 L. T. 283; 20 W. R. 534.

Assignee Entitled to Apply for.]—The assignee from a solicitor of the costs of litigation, wherein property has been recovered or preserved through the instrumentality of the solicitor, is entitled to apply to the court under the Solicitors Act, 1860, s. 28, for an order charging the property with the costs assigned to him. *Baile* v. *Baile* (L. R. 13 Eq. 497) discussed and followed. *Briscoe* v. *Briscoe*, 61 L. J., Ch. 665; [1892] 3 Ch. 543; 67 L. T. 116; 40 W. R. 621.

Parties to Action cannot obtain Order.]—Sect. 28 of the Solicitors Act, 1860, is intended for the benefit and protection of solicitors only, and the court will not sanction the use of it for the purpose of enabling parties to an action to charge the property recovered or preserved in the action with the payment of costs for which they themselves are liable, and which they are able to pay. *Harrison* v. *Cornwall Minerals Ry.*, 53 L. J., Ch. 596; 50 L. T. 452; 32 W. R. 748; 48 J. P. 724.

Petition—Service.]—An application by a solicitor, under s. 28 of the Solicitors Act of 1860, for an order charging his costs upon the interest of a party to an action in a fund in court, is

notwithstanding s. 39 of the Judicature Act, 1873, properly made by a petition in the action. But the other parties to the action ought not to be served with the petition. *Brown* v. *Tratman*, 48 L. J., Ch. 862 ; 12 Ch. D. 88 ; 28 W. R. 164.

—— **How Intituled.**]—An order giving a solicitor a charge under s. 28 of the Solicitors Act, 1860, for his costs as between solicitor and client, on property recovered by him for his client in an action, is sufficient if intituled in the action ; it may be obtained either on summons or petition, and need not be intituled either in the matter of the act or of the solicitor. *Hamer* v. *Giles*, 48 L. J., Ch. 508 ; 11 Ch. D. 942 ; 27 W. R. 834.

A declaration giving a solicitor a charge for his costs upon property recovered or preserved in a suit may be made upon a petition presented in the suit. *Jones* v. *Frost*, *Fiddey*, *In re*, 42 L. J., Ch. 47 ; L. R. 7 Ch. 773 ; 27 L. T. 465 ; 20 W. R. 1025.

And a petition for the purpose of obtaining a declaration under the statute must be intituled in the suit, notwithstanding that the bill has been dismissed, and that the parties to the suit, whom it will become necessary to serve, are numerous. *Keane*, *In re*, 19 W. R. 429. *See next case.*

Application, to what Court.]—When a solicitor applies to the court of chancery to have it declared that he is entitled to a charge upon property which has been recovered or preserved by him for his client in a suit in which he has been employed, he must make the application to the judge to whose court the suit is attached, and it must be intituled in that suit as well as in the matter of the solicitor. *Heinrich* v. *Sutton*, *Fiddey*, *In re*, L. R. 6 Ch. 865 ; 25 L. T. 643 ; 19 W. R. 1075. Reversing 40 L. J., Ch. 518.

An order declaring a solicitor entitled to a charge for his costs under s. 28 of the Solicitors Act, 1860, on a judgment recovered in an action which he was employed to prosecute, must not be made by any other judge than the judge who tried the action. *Higgs* v. *Schrader*, 47 L. J., Q. B. 426 ; 3 Q. B. D. 252 ; 26 W. R. 831.

Upon a petition by a solicitor for a charging order under s. 28 of the Solicitors Act, 1860, upon property preserved in an action instituted in the chancery division in the Liverpool district registry, and attached to the court of the Vice-Chancellor Hall, but which had been tried by a judge and jury at Liverpool :—Held, that the judge before whom the action had been tried, and who had dealt with the substantial question in the case, was the judge to whom the application ought to be made. *Owen* v. *Henshaw*, 47 L. J., Ch. 267 ; 7 Ch. D. 385 ; 26 W. R. 188.

A., as administrator of his deceased mother, sued B. and C. (his brother and sister) in the common pleas at Lancaster, in detinue for goods belonging to the estate of the intestate, and recovered a verdict and judgment against them, but was unable to levy. Afterwards B. and C. sued out a plaint in a county court for administration of the estate, and brought into court the proceeds of the goods of the intestate, which they had hitherto concealed :—Held, that the common pleas division of the high court was the proper court in which to make the application. *Catlow* v. *Catlow*, 2 C. P. D. 362 ; 25 W. R. 866.

Jurisdiction — Cause Transferred.] — Under Rules of Supreme Court, 1875, Ord. LL., r. 1a, a judge, to whom an action has been transferred for trial, has authority to hear a petition by a solicitor under the Solicitors Act, 1860, for costs incurred in recovering property in the action. *Porter* v. *West*, 50 L. J., Ch. 231 ; 43 L. T. 569 ; 29 W. R. 236.

—— **Judge at Chambers.**] — The defendant having paid money into court in the action, the plaintiff's solicitor declined to proceed with the action except on terms to which the plaintiff would not assent. Thereupon, the plaintiff retained fresh solicitors, and obtained an order for a change of solicitors. After the order was made, the late solicitor obtained a judge's order at chambers, charging the money in court with his costs in the action :—Held, that when an action is pending, a judge at chambers has jurisdiction to make such an order. *Clover* v. *Adams*, 6 Q. B. D. 622.

—— **Judge in Bankruptcy—Registrar.**]—The judge in bankruptcy, in the exercise of his bankruptcy jurisdiction, has no power to make a charging order under s. 28 of the Solicitors Act, 1860. He has, however, power to do so by virtue of his jurisdiction as a judge of the high court. The power of making a charging order being one which it is convenient should be exercised in chambers, the judge may direct its exercise by the registrar. *Wood*, *In re*, *Fanshawe*, *Ex parte*, 66 L. J., Q. B. 69 ; [1897] 1 Q. B. 314 ; 75 L. T. 387 ; 3 Manson, 299.

Substituted Service of Summons.]—A sum of money having been paid into court for the benefit of the defendant, M., his solicitor, obtained a charging order for costs upon it under s. 28 of the Solicitors Act, 1860. The costs had been taxed ex parte. M. then took out a summons to show cause why the sum of money paid into court should not be paid out to him in part satisfaction of his taxed costs. This summons could not be served upon the defendant, who appeared to be wilfully evading service of it. L. had acted for the defendant after M. had ceased to do so, and H. had introduced the defendant to M. :—Held, that substituted service of the summons should be allowed ; that a notice calling upon the defendant to appear in one month should be put up at the master's office, and served upon L. and H., and advertised in the "Times" newspaper, and thereupon, if the defendant did not appear, an order might be made on the summons. *Hunt* v. *Austin*, *Mason*, *Ex parte*, 51 L. J., Q. B. 455 ; 9 Q. B. D. 598 ; 47 L. T. 300—C. A.

Inability to obtain Payment otherwise.]—The court will not grant an order under s. 28 of the Solicitors Act, 1860, unless the solicitor make out a primâ facie case of inability to obtain payment in any other way. *Harrison* v. *Harrison*, 58 L. J., P. 28 ; 13 P. D. 180 ; 60 L. T. 39 ; 36 W. R. 748—C. A.

C. having recovered judgment for debt and costs against M., the executors of C.'s solicitor, G., to whom costs of the action were admittedly due, issued execution for the costs, the amount of which M. paid to the sheriff in whose hands it was seized under a fi. fa. at suit of S., who had obtained judgment for a larger amount against C. G.'s executors applied to the court for a declaration that the money in the sheriff's hands was subject to their lien, but it was not shown that there were not other means of recovering

the costs:—Held, in accordance with the principle of *Harrison* v. *Harrison* (13 P. D. 180), that the application was one to the discretion of the court, and in the absence of special grounds calling for equitable interference ought not to be granted. *Croghan* v. *Maffett*, 28 L. R. Ir. 97.

Must be in an Action.]—A company had given notice to take property compulsorily, the price to be paid was ascertained by arbitration:—Held, that the solicitors who acted for the vendor in the matter were not entitled to a charging order, as the proceedings were not in a court of justice. *Macfarlane* v. *Lister*, 57 L. J., Ch. 92; 37 Ch. D. 88; 58 L. T. 201—C. A.

Previous Assignment to Secure Costs.]—Where a plaintiff has by deed assigned the proceeds of the action to a trustee on trust to secure in the first place the costs of his solicitor in the action, and then the debts of other creditors, the solicitor is not entitled under s. 28 of the Solicitors Act, 1860, to a charging order for his costs upon such proceeds. *Groom* v. *Cheesewright*, 64 L. J., Ch. 406; [1895] 1 Ch. 730; 13 R. 386; 72 L. T. 555; 43 W. R. 475.

To what Costs Applying.]—Costs were incurred for proceedings in a foreclosure suit, and for proceedings in actions of ejectment; and on indictments in reference to the mortgaged property: a court of equity refused to make a charging order for more costs than those incurred in the proceedings for foreclosure. *Wilson* v. *Round*, 4 Giff. 416; 3 N. R. 288; 10 Jur. (N.S.) 34; 9 L. T. 675; 12 W. R. 402.

An attorney was declared entitled to a charge upon the land recovered by him in ejectment, his client having died since the action, the lands being in the course of administration by his executors, the judge before whom the ejectment was tried not having been applied to, and a court of equity, before whom the case had been brought in another form, having declined to make an order for the common-law costs. *Seaman, Ex parte and In re*, 3 H. & C. 148; 33 L. J., Ex. 204; 10 Jur. (N.S.) 592; 10 L. T. 345; 12 W. R. 748.

A charging order must be confined to costs of proceedings in the court where it is made. It does not extend to miscellaneous costs or costs of proceedings in another court, or of a proceeding (e.g., to remit an action to an inferior court) which has been abandoned. *Sheolin* v. *M'Grane*, 17 L. R., Ir. 271.

An attorney can only have a charge upon property recovered or preserved by him for his client in respect of the costs in the particular suit, matter or proceeding in which they were incurred, and not for general costs. *Thompson, Ex parte*, 3 L. T. 317.

Action no longer Pending—Property Sold.]—It is no objection to an application for a charging order that it is made in a suit which is no longer pending, and which was never brought to a hearing, nor that the property had been sold before the application of the solicitor. *Jones* v. *Frost, Fiddey, In re*, 42 L. J., Ch. 47; L. R. 7 Ch. 773; 27 L. T. 465; 20 W. R. 1025.

In Friendly Suit.]—It is not merely when there is an adverse claim to property recovered or preserved in a suit through the instrumentality of the solicitor for his client, that the solicitor is entitled to a charge on the property for his costs, under s. 28 of the Solicitors Act, 1860; but he may also obtain such a declaration, where the suit is a friendly one, and instituted on behalf of an infant. *Baile* v. *Baile*, 41 L. J., Ch. 300; L. R. 13 Eq. 497; 26 L. T. 283; 20 W. R. 534.

No Real Question at Issue in Suit.]—A solicitor for a party in an administration suit, who cannot otherwise obtain payment of his bill, may apply by petition to have his costs taxed, and for a charge for them on dividends payable to his client under an order made in the suit, although there may have been no real question at issue between the parties to the suit, or although, so far as there has been any such question, the decision in the suit may have been given wholly or in part in favour of the opposite party. *Smith* v. *Winter, Hartley, Ex parte*, 18 W. R. 447.

Suit by Persons sui juris.]—A suit was instituted in equity by a next friend on behalf of an infant to recover real estate and a fund in court. The costs were directed to be paid by the defendant, but in consequence of his insolvency they could not be recovered from him. The court, on petition for that purpose, directed that the fund in court should be applied in payment of the costs pro tanto, the proceedings taken by the next friend being for the benefit of the infant, but refused to make an order declaring that the residue of the costs were, under s. 28 of the Solicitors Act, 1860, a charge on the real estate recovered, as that act applied only to suits instituted by persons sui juris. *Bonser* v. *Bradshaw*, 30 L. J., Ch. 159; 7 Jur. (N.S.) 231; 3 L. T. 545; 9 W. R. 229.

Client not being Beneficial Owner is Immaterial.]—A plaintiff in a suit instituted to set aside a conveyance of real estate sold his interest in the property, and the suit was compromised, and a conveyance of the property made to the purchaser, who obtained an order dismissing the bill:—Held, that the plaintiff's solicitor was entitled to a charge for his costs upon the property as against the purchaser. *Jones* v. *Frost, Fiddey, In re*, 42 L. J., Ch. 47; L. R. 7 Ch. 773; 27 L. T. 465; 20 W. R. 1025.

The principle of s. 28 of the Solicitors Act, 1860, is analogous to the principles of salvage, and gives a charge on the property preserved, irrespectively of any question as to who is the owner of it; and the fact that the client by whom the solicitor was retained is not the beneficial owner of the whole property is immaterial. *Bulley* v. *Bulley*, 47 L. J., Ch. 841; 8 Ch. D. 479; 38 L. T. 401; 26 W. R. 638—C. A.

Therefore, when a solicitor has been retained by a person interested in an estate, as to two-fifths in his own right, and as to three-fifths as a trustee for others, and the whole estate has been preserved, the court will make an order as against the cestui que trust charging the whole property preserved; and this charge will not be incumbered or affected with any equities that may exist between such trustee and his cestui que trust, even though the trustee were a defaulting trustee or bankrupt. *Ib.*

A solicitor is entitled to a charge upon property recovered or preserved, for his costs of the litigation by which it is recovered or preserved, irrespective of his client's interest in the property, and although it turns out that the latter has not

and never had any interest therein. *Bailey* v. *Birchall*, 2 H. & M. 371; 11 Jur. (N.S.) 57; 5 N. R. 237.

A solicitor is entitled, under 39 & 40 Vict. c. 44, s. 3 (equivalent to 23 & 24 Vict. c. 127, s. 28), to a charge for costs incurred in recovering or preserving property, not only against his own client, but against all persons entitled to the property. *Sheolin* v. *McGrane*, 17 L. R., Ir. 271.

The charge for costs to which a solicitor is entitled under s. 28 of the Solicitors Act, 1860, extends to the property of his own client only, and not to that of other persons. *Berrie* v. *Howitt*, 39 L. J., Ch. 119; L. R. 9 Eq. 1; 21 L. T. 414.

Under s. 28 of the Solicitors Act, 1860, the court can declare a solicitor entitled to a charge for costs on the whole of the property recovered or preserved through his instrumentality, and not merely on his client's interest in that property. *Berrie* v. *Howitt* (L. R. 9 Eq. 1) not followed. *Charlton* v. *Charlton*, 52 L. J., Ch. 971; 49 L. T. 267; 32 W. R. 90.

A firm of solicitors were employed throughout the proceedings in an action for partition and sale of certain hereditaments of which the defendants were in possession, and for an account of the rents and profits of one-third part thereof for six years prior to the issue of the writ. By the decree the plaintiffs were declared entitled to one-third part of the hereditaments, and to an account and payment by the defendants of one-third of the said rents and profits, and the premises were ordered to be sold, and the plaintiffs' costs up to and including the hearing were ordered to be costs in the action. The account was not completed and the property was not sold when the plaintiffs threatened to change their solicitors and to compromise the action. The share of the plaintiffs in the property and rents was insufficient to pay the plaintiffs' costs. On a petition by the plaintiffs' solicitors asking for a declaration that they were entitled to a charge on the whole property in respect of the plaintiffs' costs, as such costs had been made costs in the action:—Held, that no order having been made for payment of the costs of the action out of the proceeds of sale, the court could not anticipate such order, and that the solicitors could only be treated as having a lien on the plaintiffs' share recovered by them in the action. An injunction was granted to prevent the plaintiffs from receiving any money in the action, or by way of compromise, without notice to the solicitors. *Lloyd* v. *Jones*, 40 L. T. 514; 27 W. R. 655.

The charge declared in pursuance of s. 28 of the Solicitors Act, 1860, on the property recovered or preserved in favour of the solicitor employed is in the nature of salvage, and may be made on the interest of persons who did not employ the solicitor and were not parties to the suit, if they adopt the benefit obtained in the suit. *Greer* v. *Young*, 52 L. J., Ch. 915; 24 Ch. D. 545; 49 L. T. 224; 31 W. R. 930.

Client indebted to Estate.]—A solicitor was allowed a lien on the proceeds of the estate of a deceased person, realised by him under an order of the court, notwithstanding that a balance was due to the estate by his client as executrix, which she was unable to bring into court. *White, In re*, 17 L. R., Ir. 223.

Order as to Payment of Costs.]—An order had been made for the payment of the costs, charges, and expenses of all parties to a petition to appoint new trustees in the room of others who had disclaimed, such costs to be paid out of the trust estate to the London agent of the petitioner's solicitor. On an application that the amount of these costs (which had been taxed but not paid in consequence of the trust estate not having been realised) should be declared to be a charge on the trust property:—Held, that the petitioner having already obtained an order for these costs, the court could not, under s. 28 of the Solicitors Act, 1860, declare the amount to be a charge on the estate. *Viney, In re*, 18 L. T. 851.

Nothing due to Client.]—The lien of a solicitor, upon property preserved in a suit, is not affected by the fact that when the accounts are taken, it appears that nothing is due to his client. *Bailey* v. *Birchall*, 5 N. R. 237; 2 Hem. & M. 371; 11 Jur. (N.S.) 57.

Fund in Court to Answer Claim—Extent of Charge.]—In an action for work done and materials supplied to a ship, the defendants (to release their ship) paid 742*l.* into court with a denial of liability, and appropriated 500*l.* of it to any claim the plaintiff could establish. They also counter-claimed for damages. In the result, upon the report of a referee, the plaintiff recovered 465*l.* on his claim, and the defendants 210*l.* on their counter-claim. Pending the delivery of the referee's report the plaintiff's solicitor obtained a charging order upon the 742*l.* in court:—Held, that this order was too large in its terms, and that his right to attach the fund in court was limited to the net result of the action; further, that when claim and counter-claim arose out of the same contract, they were to be taken to be one and not two actions. Thus, in the present instance, the defendants might set off the amount recovered by them on their counter-claim against the amount found due to the plaintiff on his claim. Accordingly, the charging order, to which the plaintiff's solicitor was entitled, was limited to the sum of 255*l.*, the net result of the action in the plaintiff's favour. *Westacott* v. *Bevan*, 60 L. J., Q. B. 536; [1891] 1 Q. B. 774; 65 L. T. 263; 39 W. R. 363.

Action by Bankrupt—Intervention of Trustee.]—An undischarged bankrupt commenced an action for the purpose of recovering moneys alleged to be due to him for remuneration for his personal services as an architect, rendered since the bankruptcy, and for damages for wrongful dismissal since that date, and also for further relief of a personal character which it was possible, but not probable, that he might obtain. The defendant denied the whole claim, but paid money into court. The plaintiff took out a summons to withdraw the money so paid in. The trustee in his bankruptcy took out another summons to withdraw the money, and also, before this case came on for hearing, a further summons, upon which being heard, the trustee was added as a co-plaintiff, and given the conduct of the action on the ground that the bulk, if not the whole, of the money which might be recovered in the action, would, if recovered, pass to the trustee for the benefit of the creditors. The solicitor, acting for the bankrupt, took out a summons under the Solicitors Act, 1860, s. 28, by which he asked for an order charging upon the fund in court his costs of or

in reference to the action :—Held, that the fund paid into court had been "recovered or preserved" through the instrumentality of the solicitor, within the meaning of s. 28 of the Solicitors Act, 1860, and that such solicitor was entitled to a charging order on the money in respect of his costs down to the time when the trustee intervened, but not as to his costs incurred in opposing the trustee's claim to intervene. *Emden* v. *Carte*, 51 L. J., Ch. 371 ; 19 Ch. D. 311 ; 45 L. T. 328 ; 30 W. R. 17.

Client's Estate being Administered.]—A charging order may be made although the client's estate is being administered in chancery. *Wilson* v. *Hood*, 33 L. J., Ex. 204 ; 10 L. T. 345. S. P., *Sleeman, Ex parte*, 10 Jur. (N.S.) 593 ; 12 W. R. 748.

Infants interested.]—It makes no difference that the persons whose interests are charged are infants, but the court will not make the order until the infants have an opportunity of being heard on it. *Greer* v. *Young*, 52 L. J., Ch. 915 ; 24 Ch. D. 545 ; 49 L. T. 224 ; 31 W. R. 930.

The court will not hear an application by a solicitor for an order to charge the real estate of an infant with the costs of a suit instituted for its recovery, unless the application is substantially opposed on behalf of the infant. *Bonser* v. *Bradshaw*, 10 W. R. 481.

Creditors interested.]—In a partnership action the court will not make a charging order in the absence of the creditors. But where one of the creditors was present, and the case was argued on his behalf, the court appointed him to represent all the creditors. *Jackson* v. *Smith, Digby, Ex parte*, 53 L. J., Ch. 972 ; 51 L. T. 72.

Length of Time—Alteration of Rights of Parties—Discretion.]—A charging order on property recovered or preserved under s. 3 of 39 & 40 Vict. c. 44 (similar to 23 & 24 Vict. c. 127, s. 28), is a matter for the discretion of the court, and will be refused if applied for after a considerable lapse of time from the date of the work done, especially in cases where events have happened affecting the rights and interests of the parties entitled to the said property. *Roche* v. *Roche*, 29 L. R., Ir. 339—C. A.

—— **In Matters of Lunacy.**]—A lunatic died in June, 1853. In February, 1854, an order in lunacy was made, by which it was declared that the costs incurred in prosecuting the commission had been incurred for the benefit of the lunatic, and the bill was directed to be taxed. The taxation was completed in February, 1855, and after this the solicitor who had been employed in prosecuting the commission delivered for the first time a signed bill of costs. In October, 1860, the solicitor presented a petition to have his costs raised out of property of which the lunatic, who left issue, had been tenant in tail :—Held, that under the proviso contained in 23 & 24 Vict. c. 127, s. 29, the application was too late. *Cumming, In re*, 2 De G. F. & J. 376 ; 30 L. J., Ch. 29 ; 6 Jur. (N.S.) 1129 ; 3 L. T. 391 ; 9 W. R. 213.

Costs — Further Consideration.] — Solicitors who had obtained a charging order for costs due to them were not allowed the costs of appearing by counsel at the hearing on further consideration. *Mildmay* v. *Quiche*, 46 L. J., Ch. 667 ; 6 Ch. D. 553 ; 25 W. R. 788.

—— **Of Obtaining Order.**]—H. and H., solicitors, acting for an administrator, were authorised by him to retain, in respect of their costs, certain moneys forming part of the estate of the deceased. An order to tax the bill of costs of H. and H. was obtained by J., one of the next of kin of the deceased, acting by R., her solicitor. The taxation shewed that H. and H. had been overpaid to the extent of 354*l*. H. and H. then acted for J., and on her behalf disputed the validity of R.'s retainer by J. It was, however, decided by Kay, J., that the retainer was valid. An order was then obtained by R. giving him a charge on the 354*l*. in respect of his costs properly incurred in the recovery of that sum ; and such costs were thereby directed to be taxed. The Court of Appeal affirmed the order, upholding R.'s retainer. In taxing the costs of R. under the charging order, the taxing-master allowed him the costs of the opposition to the proceedings to set aside the retainer, and also the costs connected with the appeal. H. and H. having objected to such allowance, they received, at 4.30 p.m. on the 4th December, 1885, from the taxing-master, a notice that, at 1 p.m. on the following day, he would proceed to consider their objections. H. and H. requested the taxing-master to adjourn to a later day, but he refused to do so, and proceeded in their absence. On a summons being taken out by the administrator, that the taxation should be reviewed on the grounds : (1) That the costs in reference to the dispute as to the retainer ought not to have been included in the taxation, inasmuch as they were merely the costs of a private dispute between J. and R. ; (2) that the costs of the appeal ought not to have been included, inasmuch as they were incurred after the date of the charging order :—Held, (1) that the costs of the opposition to the proceedings to set aside the retainer were costs of "recovering" 354*l*., and that such costs were properly included in the taxation ; (2) that the appeal having been brought in consequence of the proceedings in the court below, the costs thereof were properly included. *Hill, In re*, 33 Ch. D. 266 ; 55 L. T. 104—C. A.

Raising Costs—Direction in Order.]—In the absence of evidence that the plaintiff was himself unable to pay the costs, the order ought not to direct the costs to be raised out of the fund, but should merely give liberty to the solicitors to apply as to raising them. *Jackson* v. *Smith, Digby, Ex parte*, supra.

—— **Time for —Action not Finished.**] — A decree for administration of a testator's estate was made at the suit of an infant who was entitled to a contingent reversionary share in the estate. R. was solicitor for the plaintiff and for J. and A., two of the persons entitled to the other shares. After decree he ceased to be solicitor for these parties, and obtained an order directing taxation of his costs as their solicitor in the action, including the costs of the application, and charging their shares in the estate with the payment of such costs, with liberty to apply to have them raised. Before the cause had been heard, on further consideration, he applied to have the costs raised by a sale of the shares charged :—Held, that the application was premature, and that no order ought to be made for raising the costs until the cause was heard on further consideration. *Green, In re, Green* v. *Green*, 54 L. J., Ch. 54 ; 26 Ch. D. 16 ; 50 L. T. 513 ; 32 W. R. 373—C. A.

Application to Enforce Charge by Sale—Substituted Service on Persons interested.]—An action was commenced for the execution of the trusts of a settlement. The plaintiffs were one of the trustees of the settlement, the tenant for life, and three of the four beneficiaries interested in remainder. The other trustee was the sole defendant. The fourth beneficiary was not a party to the action. In February, 1883, judgment was given for the execution of the trusts of the settlement. In March, 1883, the solicitor for the plaintiffs obtained a charging order under 23 & 24 Vict. c. 127, s. 28, on the real estate comprised in the settlement for his taxed costs, and liberty was given to him to apply for a sale of the property to raise such costs. The fourth beneficiary was not a party to this order. The solicitor took out a summons for a sale of the property under the liberty to apply. The summons was not served on the fourth beneficiary, as her address was not known:—Held, that no order for a sale could be made without notice to the fourth beneficiary; but that substituted service on her might be allowed by means of advertisements; that a notice calling upon her to appear within a certain time should be advertised, and thereupon, if she did not appear, an order might be made on the summons. *Rowley* v. *Southwell*, 61 L. T. 805.

3. Priority of.

Compromise between Parties.]—In a suit by a cestui que trust against a trustee of landed estate, praying for an account and a reconveyance, a receiver was ordered to be, and afterwards was, appointed, adversely to the defendant. Notice of motion for decree was served, but before the time for closing evidence had arrived, the plaintiff, without consulting her solicitor, and without his knowledge, entered into an agreement with the defendant for a compromise of the suit on the terms, first, that a sum of cash should be paid to the plaintiff, then that the mortgages on the property should be paid off, and then that the costs of all parties estimated at a fixed sum should be paid. Upon hearing of the compromise, the plaintiff's solicitor applied to the plaintiff and to the defendant's solicitor for the terms of it, but was refused all information:—Held, that the solicitor was entitled to a first charge for the amount of his taxed costs, as between solicitor and client, upon the property of the plaintiff, as having been recovered and preserved through his instrumentality. *Twynam* v. *Porter*, 40 L. J., Ch. 30; L. R. 11 Eq. 181; 23 L. T. 551; 19 W. R. 151.

Winding-up.]—In winding up a company the costs of the petition are the first charge on the estate, and next to them are the costs of the winding-up, including the bill of costs of the solicitor employed, which bill must be paid before any payment is made by way of remuneration to the official liquidator. *Freehold Land and Brickmaking Co., In re, Massey, Ex parte*, 39 L. J., Ch. 492; L. R. 9 Eq. 367; 22 L. T. 195; 18 W. R. 444.

Garnishee Proceedings.]—A judgment creditor of the defendant in a partnership action obtained a garnishee order nisi to attach all moneys in the hands of the receiver in the action appearing to be due to the defendant on taking the accounts. On the following day, and before service of the order nisi, the defendant's solicitors obtained, on a summons served on the receiver, a charging order intituled in the action, declaring that they were entitled to a charge for their costs upon all moneys coming to the defendant under the action. On the next day the garnishee order nisi was served on the receiver, and was subsequently made absolute:—Held, that the solicitors were entitled to their costs in priority to the claim of the creditor under the garnishee order both under the act and independently of it. *Hamer* v. *Giles*, 48 L. J., Ch. 508; 11 Ch. D. 942; 27 W. R. 834.

The plaintiffs were the solicitors for W. in an action in which he recovered a sum of money. The defendant was a judgment creditor of W., and obtained, ex parte, on the day that judgment was signed in the above action, a garnishee order attaching all debts due to W. On the taxation of costs on the same day the plaintiffs for the first time learned of the defendant's claim, and then gave notice to the defendant in the action in which W. was plaintiff of their claim of lien, and within five days applied for an order declaring that they were entitled to a charge on the money recovered by W.:—Held, that the plaintiffs had a lien for their costs on the sum recovered by W., that they were entitled to the order sought for, and that the garnishee order obtained by the defendant did not take priority over that lien. *Shippey* v. *Grey*, 49 L. J., C. P. 524; 42 L. T. 673; 28 W. R. 877—C. A.

A proctor's lien on a fund in court is not affected by a garnishee order, and he is entitled to be paid his costs in priority to the claim of the garnishee. *The Jeff Davis*, L. R. 2 Adm. 1; 17 L. T. 151.

The defendant having recovered a sum of money in an action brought by him against M., B., the defendant's attorney in that action, had taken out a summons for an order charging his costs in such action upon the sum recovered. The plaintiff afterwards, having recovered judgment in his action against the defendant, obtained an ex parte garnishee order attaching the sum recovered by the defendant against M. in execution. Under these circumstances the parties came before a judge at chambers, B. claiming to have a charging order on the judgment debt as property recovered within s. 28 of the Solicitors Act, 1860, and the plaintiff claiming an order on M. to pay the sum attached to him. The judge made an order in favour of B.:—Held, that he was right in so doing; that the sum recovered was property within the section, and that the attorney was entitled to priority. *Birchall* v. *Pugin*, 44 L. J., C. P. 278; L. R. 10 C. P. 397; 32 L. T. 495; 23 W. R. 923.

The proceeds of a fi. fa., issued on behalf of the successful plaintiff in an action, were attached in the hands of the sheriff by a garnishee summons from a county court to answer a judgment obtained against the plaintiff in that court. The plaintiff's solicitor in the action, who had received notice of the service of the garnishee summons, subsequently obtained an order under s. 28 of the Solicitors Act, 1860, charging the fund recovered with costs of the action remaining due to him:—Held, that such order was rightly made, and the solicitor's claim was entitled to priority over the claim of the judgment creditor of the plaintiff under the garnishee summons. *Dallow* v. *Garrold*, 54 L. J., Q. B. 76; 14 Q. B. D. 543; 52 L. T. 240; 33 W. R. 219—C. A.

Mortgage of Client's Interest.]—The plaintiffs in a suit mortgaged their interests in the estate, the subject of the suit, to two of the defendants. This mortgage was sent to the solicitor of the plaintiffs for his perusal and approval on their behalf, and he sanctioned their executing it. Nothing was said by either party about any claim by the plaintiffs' solicitor for the costs of suit. The solicitor afterwards obtained a charging order for them under s. 28 of the Solicitors Act, 1860, on the interests of the plaintiffs:—Held, that as the mortgagees had notice of the suit, they must be presumed to have known the rights of the solicitor of the plaintiffs, and that his charge ought not to be postponed to the mortgage, he not having been guilty of any misrepresentation or concealment. *Faithfull* v. *Ewen*, 47 L. J., Ch. 457; 7 Ch. D. 495; 37 L. T. 805; 26 W. R. 270—C. A.

The solicitors of a successful plaintiff in an action for specific performance of a contract for the sale of leasehold premises are entitled to a charging order on the property recovered, which has priority over a mortgage granted by the plaintiff before the commencement of the action, where the mortgagee, though not a party to the proceedings, adopts the benefit obtained thereby. *Scholey* v. *Peck*, 62 L. J., Ch. 658; [1893] 1 Ch. 709; 3 R. 245; 68 L. T. 118; 41 W. R. 508.

Solicitors who have acted for the plaintiff in a still pending suit, under which the plaintiff had recovered certain lands, were held entitled to a charging order for their costs, when taxed, under s. 3 of 39 & 40 Vict. c. 44 (similar to s. 28 of the Solicitors Act, 1860), on the interest of the plaintiff in the lands, and their right of lien in respect of costs incurred in the suit ought not to be postponed to an equitable mortgage, inasmuch as there had been no fraud, misrepresentation, or concealment on their part. *Dennis* v. *Addy*, [1894] 1 Ir. R. 511.

—— **Direction of Client as to Money.**]—While a suit for redemption of a mortgaged estate was pending the plaintiff mortgaged his interest in the estate to D. The plaintiff's solicitor in the suit acted for both parties in this mortgage. A company had given notice to take the property compulsorily, but the price had not been ascertained. On the day of the execution of the mortgage to D., the plaintiff wrote to his solicitors and their London agents a letter directing them to pay D.'s mortgage debt out of the first money that should come to their hands from the company, and the solicitors handed this letter to D. with the mortgage debt. After this the price of the land was ascertained by arbitration, in which arbitration the London agents acted as the plaintiff's solicitors, and the price was carried over to the credit of the redemption suit, and left a balance after paying off the original mortgage debt. After this the solicitors and their London agents applied for an order charging the fund with their costs in the action and in the arbitration. The court made an order giving them a charge, and decided that they were entitled to priority over D.'s mortgage:—Held, on appeal, that the mere fact that the solicitors acted for D., as well as for the plaintiff, in the matter of the mortgage, did not disentitle them to priority. *Snell, In re* (6 Ch. D. 105), distinguished. But held, that the plaintiff's letter was a direction to the solicitors that moneys to come to their hands from the property were to be applied in the first place to paying D., and that they having forwarded this letter to D. were bound by the direction, and could not set up a claim of their own in opposition to it, and were in no better position as to moneys in court than as to moneys which actually came to their hands, and that their charge must be postponed to D.'s mortgage. *Macfarlane* v. *Lister*, 57 L. J., Ch. 92; 37 Ch. D. 88; 58 L. T. 201—C. A.

Assignment of Judgment Debt or Fund.]—On the assignment of a judgment debt, notice that the subject-matter of the assignment is the subject-matter of a suit amounts to notice to the assignee of the existence of the solicitor's right to a lien, and prevents the assignee from being a "purchaser for value without notice" so as to defeat the solicitor's claim to a charging order under the Solicitors Act, 1860. *Faithfull* v. *Ewen* (7 Ch. D. 495) followed. *Cole* v. *Eley*, 63 L. J., Q. B. 682; [1894] 2 Q. B. 350; 9 R. 552; 70 L. T. 892; 42 W. R. 561—C. A.

The lien of a solicitor for his costs on a fund recovered by his exertions cannot be affected by an assignment of the fund by the client, nor by a stop-order obtained by the assignee. *Haymes* v. *Cooper*, 33 Beav. 431; 33 L. J., Ch. 488; 10 Jur. (N.S.) 303; 10 L. T. 87; 12 W. R. 539.

Restraint on Anticipation.]—A solicitor was retained by a wife in the successful defence of a suit instituted by her husband to set aside a settlement, whereby he covenanted to pay her an annuity for her separate use without power of anticipation, and assigned property to trustees to secure the annuity. Upon a petition by the solicitor to charge, under s. 28 of the Solicitors Act, 1860, the annuity with his costs incurred on her behalf:—Held, that the married woman was competent to employ a solicitor for the purpose of defending such a suit, and that the right of the solicitor under the act to a charge upon the property preserved by his exertions was paramount to the restraint upon anticipation. *Keane, In re, Lumley* v. *Desborough*, 40 L. J., Ch. 617; L. R. 12 Eq. 115; 24 L. T. 780; 19 W. R. 1025.

Held, also, that the charge was limited to the annuity and did not extend to the trust fund upon which it was secured. *Ib.*

Lien for Necessaries or Wages.]—When a solicitor in the Court of Admiralty has acquired, by order of the court under s. 28 of the Solicitors Act, 1860, or otherwise, a lien for his costs upon a ship, as for property recovered or preserved by his exertions, or upon its proceeds in court, his lien takes precedence of liens for necessaries supplied after the institution against the ship of the cause in respect of which he is entitled to costs, but not of liens for necessaries supplied before the institution. *The Heinrich*, 41 L. J., P. 68; L. R. 3 Adm. 505; 26 L. T. 372; 20 W. R. 759.

His lien takes precedence of the lien of the master of the ship for wages, where the master is also part owner, and has instructed him to defend the cause. *Ib.*

Claim by Foreign Consul for Payment of Expense of sending Crew Home.]—Salvage actions were brought against an Italian vessel, and she was sold by order of the court. After the salvors had been remunerated, the balance of the fund in court was insufficient to satisfy the costs of the solicitors who had appeared in the above actions for the parties interested in the ship, and who sought to enforce their claim for such costs by

virtue of 23 & 24 Vict. c. 127. s. 28, as well as the claim of the Italian consul in respect of the expenses of sending the crew back to Italy. It was proved that by the law of Italy such expenses and the keep of the master and crew ranked next to the salvage payments :—Held, that the claim of the Italian consul had priority to that of the solicitors. *The Livietta*, 52 L. J., P. 81 ; 8 P. D. 209 ; 49 L. T. 411 ; 5 Asp. M. C. 151.

Rights of Creditors.]—Where in a partnership action a receiver, who was appointed at the instance of the plaintiff, realised the assets and paid into court a fund representing the proceeds of such realisation :—Held, that the solicitors of the plaintiff were entitled to a lien on the fund for their costs in priority to the creditors of the partnership. *Hamer* v. *Giles* (11 Ch. D. 942) explained. *Jackson* v. *Smith*, *Digby*, *Ex parte*, 53 L. J., Ch. 972 ; 51 L. T. 72.

Where a solicitor had obtained a right to charge his costs under s. 28 of the Solicitors Act, 1860, upon certain real property :—Held, that his right was paramount to that of the creditors of the client (who was dead), under a decree for sale made in a suit to administer his real and personal estate. *Wilson* v. *Round*, 3 N. R. 288 ; 4 Giff. 416 ; 10 Jur. (N.S.) 34 ; 9 L. T. 675 ; 12 W. R. 402.

Change of Solicitor before Trial.]—The solicitor who had acted for the plaintiff in the institution and conduct of an action to establish his right to a sum of money was discharged by the client shortly before the trial. The action was continued by new solicitors on behalf of the plaintiff, and judgment was delivered in favour of the plaintiff ordering the defendant to pay him the money. After the trial the former solicitor obtained, under s. 28 of the Solicitors Act, 1860, a declaration of charge upon the sum recovered "subject to the lien of the present solicitors of the plaintiff upon the said sum" :—Held, that the solicitor who was solicitor at the time the fund was recovered was entitled to a first charge thereon for all his taxed costs of the action, and subject thereto that the discharged solicitor was entitled to such lien as he obtained under his charging order. *Cormack* v. *Beisley* (3 De G. & J. 157) followed. *Wadsworth*, *In re*, *Rhodes* v. *Sugden*, 56 L. J., Ch. 127 ; 34 Ch. D. 155 ; 55 L. T. 596 ; 35 W. R. 75. *See cases*, post, cols. 1742, 1743.

Where successive solicitors are employed in an action, and the fund in court is insufficient for payment of all the costs, the solicitor who conducts the cause to its conclusion is entitled to be paid first, and the solicitor who was next previously employed is entitled to be paid next, and so on throughout, the latest in order of employment being entitled to priority ; and it is immaterial that the previously employed solicitors may have obtained charging orders for their costs. *Wadsworth*, *In re* (34 Ch. D. 155), followed. *Knight*, *In re*, *Knight* v. *Gardner*, 61 L. J., Ch. 399 ; [1892] 2 Ch. 368 ; 66 L. T. 646 ; 40 W. R. 460.

Landlord's Claim for Rent.]—A solicitor who has obtained an order, under s. 28 of the Solicitors Act, 1860, charging property preserved with payment of his taxed costs, takes priority over a landlord who, before the charging order, might have, but had not, distrained for rent upon the same property. *Suffield and Watts*, *In re*, *Brown*, *Ex parte*, 20 Q. B. D. 693 ; 58 L. T. 911 ; 36 W. R. 584 ; 5 Morrell, 83—C. A.

Arrestment ad fundandam jurisdictionem.]—The appellant, a domiciled Englishman, being defendant in an action in the Queen's Bench Division, obtained on 25th April, 1887, judgment for costs against W., the plaintiff, who was a domiciled Scotchman. On 26th May, the respondent executed in Scotland an arrestment ad fundandam jurisdictionem against W. of the amount due under the judgment, and his summons was served on the appellant on the following day. On 13th June, the appellant's solicitors in the action in the Queen's Bench Division obtained a charging order upon the costs recovered in the action :—Held, that even assuming that the charging order was retrospective in its operation, the arrestment was effectual for the purpose of founding jurisdiction, as such arrestment could in no way affect the operation of the charging order. *North* v. *Stewart*, 15 App. Cas. 452 ; 63 L. T. 718—H. L. (Sc.)

b. Lien.

1. What Costs or Debts.

Due to Solicitor in that Character.]—Lien is confined to what is due to the solicitor in that character, and does not extend to general debts. Accordingly the lien of the solicitor of a railway company for his costs does not include costs incurred in relation to the promotion of the company before incorporation, such costs by the usual clause in the act having been made a statutory debt to be paid by the company. *Galland*, *In re*, 55 L. J., Ch. 478 ; 31 Ch. D. 296 ; 53 L. T. 921 ; 34 W. R. 158—C. A.

The lien of a solicitor does not extend to debts that are not due to him in his professional character. *Worrall* v. *Johnson*, 2 Jac. & W. 214 ; 22 R. R. 106.

A testator assigned policies of assurance on his own life to his solicitor as trustee to secure to mortgagees the repayment of a loan. On a claim against the testator's estate of a lien on the policy moneys (*a*) in respect of solicitor's costs, (*b*) in respect of premiums paid by the solicitor on the policies, and (*c*) in respect of work done as a land agent :—Held, that the solicitor was entitled to be repaid the premiums and to a lien in respect of his solicitor's costs, but that land agency charges were not the subject of a lien. *Walker*, *In re*, *Meredith* v. *Walker*, 3 R. 455 ; 68 L. T. 517.

Costs relating to a habeas corpus (not being taxable costs, charges, and expenses incurred as solicitors for the client) cannot be included in the lien. *Hanbury*, *Whitting*, *and Nicholson*, *In re*, 75 L. T. 449.

A solicitor's lien extends to all taxable costs, charges, and expenses incurred by him as solicitor for his client, in which category are included all such advances as are not necessarily allowed by the taxing-master on being vouched, but may be disallowed or moderated if improper or excessive. It does not extend to ordinary advances. *Payne-Collier*, *Ex parte*, *Taylor*, *In re*, 60 L. J., Ch. 525 ; [1891] 1 Ch. 590 ; 64 L. T. 605 ; 39 W. R. 417—C. A.

The solicitor of the executrix and devisee paying a sum of money in exoneration of an adverse claim on part of the testator's estate, does not, as against creditors of the testator, necessarily, and by force of the transaction alone, acquire a lien upon the estate or on the title deeds for the sum which he so paid. *Christian*

v. *Field*, 2 Hare, 177; 11 L. J., Ch. 97; 5 Jur. 1130.

Acting without Authority.]—A solicitor who used the names of the parties as plaintiffs in a suit without their consent was held to have no lien for his general bill of costs on the fund in court. *Hall* v. *Lacer*, 4 Y. & Coll. 216; 1 Hare, 571; 5 Jur. 241.

Where the directors of a company carry on a business not authorised by the deed of settlement, and costs are thereby increased, the solicitors of the company have no lien for their costs on the papers of the company. *Phœnix Life Assurance Co., In re, Howard and Dollman, Ex parte*, 2 N. R. 548; 1 Hem. & M. 433; 8 L. T. 728; 11 W. R. 984.

Trover — Application for Deeds.] — Trover against an attorney for deeds; cause referred; award, a nonsuit, and each party to pay his own costs:—Held, that the attorney had no lien on the deeds for the costs. *Sharpe, In re*, 1 D. P. C. 432.

Held, also, that the attorney had no lien on the deeds for expenses incurred by him in consequence of applications made to him for the deeds. *Ib.*

Debt Barred by Statute.]—A lien is not barred by the fact that the debt in respect of which the lien is claimed is barred, and may be enforced for the purpose of obstructing an administration action, if the debtor declines to waive his rights under the statute. *Carter, In re, Carter* v. *Carter*, 55 L. J., Ch. 230; 53 L. T. 630; 34 W. R. 57.

The lien of an attorney remains although the claim is barred by the Statute of Limitations. *Broomhead, In re*, 5 D. & L. 52; 16 L. J., Q. B. 355.

Express Contract.]—A client wrote a letter to her solicitors authorising them to sell the property of hers of which they were legal mortgagees by transfer, and to pay off the money due thereon and on the transfer to them, and "all expenses due to you":—Held, that this memorandum gave the solicitors no charge in respect of their general bill of costs not relating to the mortgage. *Champney* v. *Burland*, 19 W. R. 913.

The character of an incumbrance, the result of contract, does not belong to the solicitor's lien. *Blunden* v. *Desart*, 2 Dr. & War. 405; 2 Con. & L. 111; 5 Ir. Eq. R. 221.

On a lease being granted, the lessee deposited it with the lessor's solicitor (who acted for the lessor and lessee), together with a bill of exchange as a security for the costs of preparing the lease, which the lessee was to pay. The lessee afterwards mortgaged the term, and the defendants (who were his solicitors on that occasion), in order to obtain the lease, paid the bill of costs of the lessor's solicitors, and received from them, without any authority from the lessee, the lease and the bill of exchange:—Held, first, that without express contract the defendants acquired no lien on the bill of exchange beyond the amount which they had paid to the lessor's solicitors; secondly, that evidence of an express contract would not support such a lien without proof that the defendants had explained to their client, the lessee, his rights, independently of express contract. *Gibson* v. *May*, 4 De G. M. & G. 512.

On Deeds—General Lien.]—Attorney's lien generally on papers in his possession not limited to the occasion on which they were delivered, without special agreement. *Sterling, Ex parte*, 16 Ves. 258; 10 R. R. 177.

A solicitor is entitled to a general lien for costs on papers deposited with him by his client for a particular purpose only, unless that general lien is excluded by a special agreement. *Colmer* v. *Ede*, 40 L. J., Ch. 185; 23 L. T. 884; 19 W. R. 318.

An attorney has a lien for his general balance on papers of his client which come to his hands in the course of his professional employment. *Stevenson* v. *Blakelock*, 1 M. & S. 535; 14 R. R. 525. S. P., *Bozon* v. *Bolland*, 4 Myl. & C. 354; 9 L. J., Ch. 123; 3 Jur. 884; 4 Jur. 763; *Blunden* v. *Desart*, 2 Dr. & War. 405; 2 Con. & L. 111; 5 Ir. Eq. R. 221.

He has a lien on the papers in a particular suit, not only for his costs in that suit, but for his general costs. *Broomhead, In re*, 5 D. & L. 52; 16 L. J., Q. B. 355. S. P., *Faithfull, In re*, L. R. 6 Eq. 325; 18 L. T. 502.

A solicitor has a lien on papers delivered to him in that character for all professional business, but no lien as a solicitor on papers delivered to him as steward. *Champernown* v. *Scott*, 6 Madd. 93; 22 R. R. 248.

Deeds deposited with a solicitor for a particular purpose, and after that has failed permitted to remain with him, are subject to the general lien. *Pemberton, Ex parte*, 18 Ves. 282.

—— **On Fund—Difference between.**]—A difference exists between the lien of a solicitor on a fund recovered for his client in an action and on deeds coming into his possession, inasmuch as in the former case he has no lien for all costs due to him from his client, but only for the costs of recovering that particular fund; and even where the solicitor actually gets the fund into his possession he obtains no greater lien than if it had remained in court. *Mackenzie* v. *Mackintosh*, 64 L. T. 706; 7 Asp. M. C. 53—C. A.

Solicitor has no lien on fund decreed to be paid to his client beyond the costs in that suit. *Lann* v. *Church*, 4 Madd. 391.

Whether a solicitor's lien for his costs on a fund in court is general, or is confined to costs of the particular suit, quære. Solicitor having in his possession the instrument on which his client's right to the fund rests, he has a general lien on the fund. *Worrall* v. *Johnson*, 2 Jac. & Walk. 214; 22 R. R. 106.

When a pauper obtains a decree for debt and costs, his solicitor has a lien on the sum recovered for divers costs, though the sum is deficient for payment of plaintiff's demands. *Quin* v. *Bodkin*, 2 Hog. 240.

A solicitor's lien upon the fund is not a general lien; it extends only to costs in the cause, and costs immediately connected with costs in the cause; as, for instance, the costs of successfully protecting a solicitor's right to the costs in a cause. *Lucas* v. *Peacock*, 9 Beav. 177.

The lien of a solicitor upon a fund recovered in a suit which he has conducted is confined to the costs of that particular suit, and therefore, semble, a solicitor who, in relation to the same estate in which the same parties are interested, has brought an ejectment and a suit in equity, has no lien upon the fund recovered in the suit

for his costs of the ejectment. *Hall* v. *Laver*, 1 Hare, 571 ; 4 Y. & Coll. 218 ; 5 Jur. 241.

A solicitor has a lien for his costs on a fund in court produced by his exertions ; and, therefore, where on a bill for discovery in aid of a defence at law an injunction was granted on terms, one of which was the payment of money into court, and an answer was afterwards filed, and the action at law being subsequently tried, a verdict was found for the defendant, it was :—Held, that the solicitor for the defendant in equity had a lien on the fund for the costs of the discovery. But where the solicitor putting in the answer was removed, and his demand paid, and another solicitor employed, it was considered that the fund was exonerated to that extent, and the latter solicitor had not any lien for the cost of the former solicitor, though paid by him. *Irving* v. *Viana*, 2 Y. & J. 70 ; 31 R. R. 552.

On Fund—Production of Document.]—Where a security is realised in a suit by means of the production of a document, upon which a solicitor, then acting as such, has a lien, his lien upon the fund realised is confined to the costs of that suit. It is the same too when the document is voluntarily produced by a solicitor not at the time acting as a solicitor to the party ; but in such a case he might if he chose have made his own terms with his former client before producing the deed. *Bozon* v. *Bolland*, 4 Myl. & C. 354 ; 9 L. J., Ch. 123 ; 3 Jur. 884 ; 4 Jur. 763.

—— **Form of Order.**]—The lien of a solicitor on the fund is not impeded by the fact that the order of the court directs the fund to be paid to the client without reserving the right of the solicitor. *Lloyd* v. *Mason*, 4 Hare, 132 ; 14 L. J., Ch. 257 ; 9 Jur. 772.

—— **Defaulting Receiver.**] —Although the solicitor of a defaulting receiver cannot have the cost of his proceedings until the sum found to be due from the receiver, with interest, shall have been paid in, yet, when at his own proper costs, and under the orders of the court, the solicitor of the receiver brought certain actions at law against defaulting tenants and their sureties, &c. :—Held, that the solicitor was entitled to be paid the costs of such proceedings out of the funds in court. *M'Bride* v. *Clarke*, 1 Ir. Eq. R. 203.

On Client's Moneys.]—A solicitor has no lien on his client's money in his hands, beyond the amount in which the latter is indebted to him. *Miller* v. *Alter*, 3 Ex. 799 ; 13 Jur. 431.

The attorney's right to lien extends to costs taxed as between attorney and client. *Watson* v. *Maskall*, 1 Scott, 658 ; 1 Bing. (N.C.) 366 ; 3 D. P. C. 638 ; 1 Hodges, 73 ; 4 L. J., C. P. 266.

Tenant for Life and Remainderman—Lunatic—Committee.]—A lunatic was tenant for life of certain lands, with remainder to two remaindermen as tenants in common in tail. A firm of solicitors acted for the committee in the lunacy, and in that capacity obtained custody of the title deeds. One of the remaindermen was subsequently appointed committee, and he employed the same solicitors. To pay off a mortgage on the life estate the two remaindermen, being desirous of creating a charge on the fee, presented a petition in the lunacy matter asking that the committee should be authorised to join in barring the entail. The same solicitors acted in this matter, in the raising of the loan, and in the disentailment of the estate :—Held, after the death of the lunatic, that the solicitors were entitled to a lien on the deeds for these costs against the remaindermen, but not in respect of costs incurred as solicitors for the committee. *Stannard's Estate, In re*, [1897] 1 Ir. R. 415.

2. What Persons Entitled to.

Clerk to Local Board.]—A solicitor appointed clerk to a local board at a fixed salary for conducting the legal as well as the ordinary business of the board has a lien on documents for costs due for professional services. *Newington Local Board* v. *Eldridge*, 12 Ch. D. 349—C. A.

Town Clerk.]—A town clerk, who is solicitor to a corporation, has the same lien on corporation papers for professional business that he would have if he were not also town clerk. *Rex* v. *Sankey*, 6 N. & M. 839 ; 5 A. & E. 423 ; 5 L. J., K. B. 255. S. P., *Rex* v. *Williams*, 2 H. & W. 275.

Town Agent for Country Solicitor.]—*See* post, col. 1750.

Plaintiff's or Defendant's Solicitor.]—The solicitor's lien on a fund recovered applies in equity to the defendant's solicitor as well as the plaintiff's. *Townsend* v. *Reade*, 4 L. J., Ch. 233.

Where Solicitor is also a Mortgagee.]—Lands were ordered to be sold on the petition of C., an incumbrancer. C., who had previously been solicitor for the owner, lodged in court, under an order and subject to his lien for costs due to him by the owner, several deeds and documents relating to the lands, including proposals and counterparts of leases under which the tenants held. These deeds and documents (as the court held) had come into the hands of C. as solicitor for the owner. C. was also transferee of a mortgage of the lands, which had been executed to one H., and C. had acted as solicitor for H. and the owner on the occasion of the mortgage. The owner made a private offer for purchase of the lands, which was accepted, and took a conveyance. The owner having objected to the claim of lien, on the grounds that the documents were not such as a purchaser would require, and further, that C. had held them not as solicitor but as mortgagee :—Held, that these grounds of objection were unsustainable, and that C. was entitled to his lien on the deeds and documents lodged under the order. Semble, C. would not have lost the lien by taking a mortgage from the owner for money due other than the costs secured by the lien. *Harvey's Estate, In re*, 17 L. R., Ir. 65.

Undischarged Bankrupt—Title of Trustee.]—An undischarged bankrupt took out letters patent for an invention, and granted a licence to a company to work the patented invention at a royalty of 10*l.* per week. Subsequent royalties became due, and the trustee applied to the Bankruptcy Court for a declaration that they vested in him as after-acquired property of the bankrupt :—Held, that the solicitor of the bankrupt had as against the trustee a first charge for his costs of creating the fund—i.e., his costs properly incurred in taking out and maintaining

the letters patent and carrying through the arrangements with the company. *Graydon, In re, Official Receiver, Ex parte*, 65 L. J., Q. B. 328; [1896] 1 Q. B. 417; 44 W. R. 495.

3. Extent of Client's Interest.

Binds Solicitor's Right of Lien.]—A solicitor cannot, by his lien, have a better right to the client's title deeds than the client himself had at the time of the costs being incurred. *Smith* v. *Chichester*, 2 Dr. & War. 393; 1 Con. & L. 486; 4 Ir. Eq. R. 580.

By settlement a sum of 2,500*l.* was charged on an estate for lives renewable for ever for the issue of the marriage, subject to appointment, part of which was appointed to one of the children on her marriage, and then settled; the residue was never appointed. After the death of the first settlor, A., the solicitor of B., the other child of the marriage, acting under a power of attorney, obtained a renewal, and instituted a suit in his name to raise his portion of the unappointed charge, but did not prosecute it. On the death of B., A. obtained limited administration to him, and, with the parties entitled to the daughter's share of the charge, filed a bill to raise the charge, when a receiver was appointed and funds got in. The lands being sold in a creditors' suit, and the settlements lodged in the office by order, without prejudice to A.'s lien:—Held, that A. had no lien for costs on the deeds, as B., through whom he got them, had no exclusive right to them, and that there could not be any lien transferred to the funds. *Molesworth* v. *Robbins*, 8 Ir. Eq. R. 1; 2 Jo. & Lat. 358. Affirmed 8 Ir. Eq. R. 223.

A solicitor, without notice of an incumbrance, either legal or equitable, prior to his possession of the title deeds of the property affected by it, has no right of lien on the deeds as against the incumbrancer, for a solicitor can have no lien of a higher nature on deeds in his possession belonging to his client than the interest which the client himself has. *Pelly* v. *Wathen*, 1 De G. M. & G. 16; 21 L. J., Ch. 105; 16 Jur. 47.

The lien which an attorney has on the papers in his hands is only commensurate with the right which the party delivering the papers to him has therein. *Hollis* v. *Claridge*, 4 Taunt. 807.

The lien of an attorney is only co-extensive with the rights of his client, and therefore, as between the plaintiff and defendant, the lien of the plaintiff's attorney cannot affect the right of the defendant. *Symons* v. *Blake*, 2 C. M. & R. 416; 4 D. P. C. 263; 1 Gale, 182.

In an administration action against an executrix, unless the estate of the executrix is indebted to that of the testator, her estate is entitled to a lien on the deeds for her costs, and her solicitor has a lien to that extent. *Turner* v. *Letts*, 7 De G. M. & G. 243; 3 Eq. R. 846; 24 L. J., Ch. 638; 1 Jur. (N.S.) 1057; 3 W. R. 494.

A solicitor may detain title deeds as against client till payment of his bill, but not against persons who have antecedent rights. *Marsh* v. *Bathoe*, Ridgw. P. C. 256.

Solicitor has no lien against remainderman on deeds put into his hands by tenant for life. *Nesbitt, Ex parte*, 2 Sch. & Lef. 279.

Where a trustee, at the request of the tenant for life, lends the trust deed to the solicitor of such tenant for life, he not being the trustee's solicitor, such loan gives no lien to the solicitor for his costs due from his client. *Mayhew, In re*, 7 W. R. 351.

Committee of a lunatic has a lien on the lunatic's estate: the solicitor employed by the committee declared to stand in his place. *Barnesley* v. *Powell*, Ambl. 102.

Solicitor has a lien on funds of a lunatic. *Price, Ex parte*, 2 Ves. 407.

A solicitor's lien is not a general lien on a fund in court, though brought in by his exertions, but only on what may, on the issue of the suit, be belonging to his client. *Downes, In re, Verity* v. *Wild*, 4 Drew. 427; 28 L. J., Ch. 561.

Therefore, where, by the exertions of a plaintiff's solicitor, a fund was ordered to be brought into court on which the defendant had a primary claim, and afterwards the plaintiff changed his solicitor, and the parties were proceeding without bringing the fund into court to divide it under compromise, without paying the plaintiff's original solicitor:—Held, that he had no lien on the fund; but it was ordered that no order should be made by compromise or otherwise for payment of any money to the plaintiff without notice to the plaintiff's original solicitor. *Ib.*

Solicitors have no right to look for their costs to a fund in court not belonging to their clients. *Chick* v. *Nicholls*, 26 W. R. 231.

Where, therefore, in an administration suit the estate in court was exhausted by creditors, so that nothing was left for the testator's representative, and she became insolvent, a motion that her costs of suit might be retained out of the fund in court, so that her solicitors might be paid, was refused. *Ib.*

—— **Husband's Petition—Money in Court.**]—A husband having obtained a decree nisi against his wife, the wife moved for a new trial, and her motion was dismissed with costs. The husband claimed to apply a sum which he paid into court to provide for the costs of the wife's defence to the action, and which still remained in court, in payment of his costs on the motion for the new trial:—Held that the court ought not to deprive the wife's solicitor of his costs out of the fund provided for that purpose, in the absence of misconduct on his part, and the application was refused. *Hall* v. *Hall*, 60 L. J., P. 73; [1891] P. 302; 65 L. T. 206—C. A.

—— **In Cases of Partnership.**]—An attorney with whom title deeds, the property of a member of a firm, have been deposited by that member, in the course of professional business done on his private account, has no lien on them for a debt due from the partnership. *Turner* v. *Deane*, 6 D. & L. 669; 3 Ex. 836; 18 L. J., Ex. 343.

—— **Client indebted to Trust Estate.**]—Where a person, at the time of an order being made for the payment of his costs by trustees on a petition in the matter of a trust, is indebted to the trust estate, although the amount is not then ascertained, he cannot get any of such costs until he has paid the amount due from him to the trust, and the trustees, therefore, can set off the costs payable by them against the amount due from him. His solicitor cannot be in a better position than he is himself, and has no lien on such costs. *Harrald, In re, Wilde* v. *Walford*, 53 L. J., Ch. 505; 51 L. T. 441—C. A. Reversing 31 W. R. 318.

Secus, as to the costs of the trustees incurred in recovering such amount. *Ib.*

Employment by Liquidator.]—The general principle that an official liquidator can retain no part of the company's estate without an order of the court applies equally to the lien of his solicitor for costs on the company's moneys recovered by his exertions. Such moneys must in the first instance be paid into court. *Union Cement and Brick Co., In re*, 26 L. T. 240; 20 W. R. 361.

An official liquidator cannot, by contract or otherwise, give to his solicitor any lien for costs in the winding-up upon any of the documents relating to the winding-up which are included in r. 58 of the general order under the Companies Act, 1862. *Pulbrook, Ex parte, Union Brick and Cement Co., In re*, L. R. 4 Ch. 627; 21 L. T. 46; 17 W. R. 946.

Employment by Company.]—Directors have no power to create any lien on the share register and minute book of a company which could interfere with their being used for the purposes of the company. *Capital Fire Insurance Association, In re*, 53 L. J., Ch. 71; 24 Ch. D. 408; 49 L. T. 697; 32 W. R. 260—C. A.

—— **Acting for Trustees of Debenture Holders.**]—Solicitors of a company, who, upon the occasion of the directors conveying all the property of the company to two of their body upon trusts to secure the repayment of moneys borrowed upon debentures, prepare a mortgage deed and act for the company and the trustees, have no right of lien for the payment of their costs. *Mason and Taylor, In re*, 48 L. J., Ch. 193; 10 Ch. D. 729; 27 W. R. 311.

Vendor and Purchaser.]—The vendee's solicitor sent the conveyance to the vendor to be executed; he returned it executed to the defendant, his own solicitor. On the contract being rescinded, the vendee is entitled to the deed without being subject to the lien of the vendor's solicitor. *Esdaile* v. *Oxenham*, 3 B. & C. 225; 5 D. & R. 49; 27 R. R. 331.

A. is employed for some time by Messrs. B. as their attorney, and in the course of such employment, a considerable debt becomes due to him. Messrs. B. contract to sell an estate to C., who pays to them a part of the purchase-money, and A. is employed in preparing the contract, and making out the title. The solicitor of C. prepares the draft of the conveyance, which is sent to A. and approved by him on behalf of Messrs. B., and the engrossment is afterwards executed by Messrs. B., and delivered by them to A., for the purpose of being handed over to C., on payment of the remainder of the purchase-money; before this is done, Messrs. B. become bankrupts, and the contract is rescinded:—Held, that A. has no lien on the deeds for the debt due to him from Messrs. B., but that C. is entitled to have the deeds delivered to him. The rules with respect to lien are the same in equity as at law. *Oxenham* v. *Esdaile*, 2 Y. & J. 493.

Acting in Trust Matters.]—The employment of a solicitor in business relating to the trust estate by the authority of the trustee, or of some of several cestuis que trustent, gives the solicitor no lien or charge upon the trust estate, or upon the shares of the other cestuis que trustent, for costs incurred in relation to the trust. *Hall* v. *Laver*, 1 Hare, 571; 4 Y. & Coll. 218; 5 Jur. 241.

A testator devised his estates to trustees to receive the rents and profits, and pay and apply two-thirds of them to the plaintiff, and one-third to his widow during her life, and after her decease he devised the estates to the plaintiff in fee. The trustees deposited the deeds with an attorney for purposes connected with the trust, who claimed to detain the deeds as a lien for his charges incurred in respect thereof:—Held, that he was not entitled to detain them from the plaintiff on the death of the widow, as the debt incurred was the personal debt of the trustees. *Lightfoot* v. *Keane*, 1 M. & W. 745; 2 Gale, 138; 5 L. J., Ex. 257.

A trustee under a will committed a breach of trust by lending trust moneys to his co-trustee upon a mortgage for a term of years. An administration suit was instituted, and he was ordered to pay the money into court. He sold part of the mortgaged property under a power of sale in the mortgage, and on the application of two of the cestuis que trustent the proceeds were paid into court, subject to an order that they were not to be paid out without the consent of the purchaser. The trustees' solicitors refused to give up the mortgage deeds unless upon payment of their bill of costs:—Held, that the circumstances of the realisation of the trust fund by the trustees' solicitors, and of the cestuis que trustent availing themselves of that realisation, did not entitle the trustees' solicitors to a lien on the deeds or on the fund in court, as against the cestuis que trustent, but that they could have no higher claim against the deeds or the fund than that of their client, the trustee. *Francis* v. *Francis*, 3 De G. M. & G. 108. And see *S. C.*, 2 De G. M. & G. 73.

Mortgagor and Mortgagee.]—The attorney of the mortgagor, to whom, pending a suit to foreclose the mortgage, the title deeds of the mortgaged premises have been delivered by the mortgagor, for the purpose of procuring a loan of money, has no lien upon them for his costs in that transaction as against the mortgagee. *Hutchinson* v. *Joyce*, 2 Jones, 122.

The owner of lands, subject to a mortgage of the year 1777, and to judgments confessed in and subsequently to the year 1820, deposited, in March 1819, the title deeds with his solicitor. In a suit instituted by the judgment creditors, it was decreed that those lands should be sold to pay off the mortgage, and that the title deeds should be lodged in the office without prejudice to any lien which the solicitor might have thereon for costs, which was done accordingly. The lands were sold and the deeds handed to the purchaser:—Held, that the solicitor had no lien on the deeds, having no right to retain them as against the mortgagee. *Taylor* v. *Gorman*, 6 Ir. Eq. R. 300. Affirmed 7 Ir. Eq. R. 259.

Held, also, that his lien on the deeds was not transferred to the surplus funds of the sale, remaining after payment of the mortgage. *Ib.*

A mortgagor, who had borrowed the title deeds from an equitable mortgagee to enable him to sell the property, handed them to his solicitor in order to complete. The mortgagee acquiesced in the sale:—Held, that the solicitor had a lien on the deeds for his costs of the transaction only, but not for his other claims for costs against the mortgagor. *Young* v. *English*, 7 Beav. 10; 13 L. J., Ch. 76.

A solicitor, who was employed by an administrator as well in the affairs of the administration as on his private account, having in the course of that employment obtained possession of several

documents relating to the intestate's leasehold estate, and having, by the direction of his client, deposited certain deeds relating to a portion of such property with the executor of a deceased party, who was entitled to a distributive share of the intestate's estate (for the purpose of securing the payment of certain legacies given by her will), claimed for his bill of costs, due from the administrator, a lien on other documents in his possession, relating to the same property as that to which the deeds related which were so deposited :—Held, that the security having been effected through the agency of the solicitor, without any reservation on his part in favour of his lien, he had no right to derogate from that security by withholding any document necessary to give effect to it, and that therefore he had no lien on the documents in his possession as against the party entitled to the benefit of the security. *Hicks* v. *Keate*, 3 Jur. 1024.

A., being seised in quasi fee of an estate pur autre vie, granted a mortgage thereof in 1814. In 1824 A. obtained a renewal from the head landlord, and deposited the indenture of renewal with his solicitor, who, in a foreclosure suit by a mortgagee, insisted upon retaining the indenture by virtue of a lien thereupon for costs incurred since 1814 :—Held, that he was not entitled to that lien as against the right of the mortgagee. *Smith* v. *Chichester*, 2 Dr. & War. 393 ; 1 Con. & L. 486 ; 4 Ir. Eq. R. 580.

A mortgagee's attorney having possession of the title deeds has a lien upon such deeds for costs due to him from the mortgagee. *Ogle* v. *Storey*, 1 N. & M. 474 ; 4 B. & Ad. 735 ; 2 L. J., K. B. 110.

A., the attorney of B., an intended mortgagee, has no lien as against C., the intended mortgagor, for the costs of preparing the mortgage upon deeds delivered by C. to B., and by the latter handed over to A. for the purpose of investigating C.'s title. *Pratt* v. *Vizard*, 2 N. & M. 455 ; 5 B. & Ad. 808 ; 3 L. J., K. B. 7.

A mortgagee of lands handed over the deeds to his attorney. The mortgagor paid the principal and interest, and the lands were re-conveyed to him :—Held, that the attorney could not retain the deeds against him, as a security for the expenses of the transaction due from the mortgagee to the attorney. *Wakefield* v. *Newbon*, 6 Q. B. 276 ; 13 L. J., Q. B. 258 ; 8 Jur. 735.

A solicitor who, whilst a mortgage was subsisting, had done work for the mortgagee relating to the mortgaged property claimed to have a lien on the title deeds for the costs so incurred as against the mortgagor, who had paid the mortgagee all moneys owing under the mortgage, and had obtained from him a release. It was not suggested that this was done in order to defeat the solicitor's lien :—Held, that the lien could not be sustained, for the right of the mortgagor to have back from the mortgagee his deeds, on payment of principal, interest, and costs, prevailed against the solicitor's lien claimed in right of the mortgagee. *Llewellin, In re*, 60 L. J., Ch. 732 ; [1891] 3 Ch. 145 ; 65 L. T. 249 ; 39 W. R. 713.

A solicitor acting for a mortgagee must deliver up the title deeds of the mortgagor which he holds for the mortgagee on payment of the mortgage debt and mortgagee's costs, and cannot claim a general lien on such deeds for costs due to him from the mortgagor, in respect of business previously done by him as solicitor for the mortgagor. *Moseley, In re*, 15 W. R. 975.

—— **Mortgage by Client to his Solicitor.**]—A client mortgaged property, which was at the time subject to a first mortgage, to his solicitors, who prepared the mortgage deed. Afterwards the mortgagor made a third mortgage to another person :—Held, in an action by the solicitors against the first and third mortgagees and the mortgagor, that they were entitled only to their ordinary costs as mortgagees, and that they had no lien on the mortgage deed for the costs of its preparation or other costs due to them from the mortgagor. *Sheffield* v. *Eden*, 10 Ch. D. 291 ; 40 L. T. 283 ; 27 W. R. 477—C. A.

A solicitor obtained from his client, who had no other professional assistance, a mortgage deed, under circumstances which, as the client alleged, amounted to pressure and surprise. The deed was prepared by the solicitor at the expense of his client :—Held, that, under the circumstances, he could not be permitted to stand upon his rights as mortgagee for the purpose of resisting production of the instrument in question. *Davis* v. *Parry*, 27 L. J., Ch. 294 ; 4 Jur. (N.S.) 431 ; 6 W. R. 174.

—— **Solicitor of Mortgagees Acting for Mortgagor.**]—A mortgage deed and the title deeds to the mortgaged property were deposited by the mortgagees with their solicitors for safe custody. Afterwards the mortgagor instructed the same solicitors to sell the property, and they employed an auctioneer for the purpose, and made use of the deeds in preparing particulars and conditions of sale. The property was put up for sale, but was not sold. The mortgagor then filed a liquidation petition, and the trustee contracted to sell the mortgaged property :—Held, that the solicitors had no lien on the deeds as against the trustee in respect of their costs of the abortive sale. *Fuller, Ex parte, Long, In re*, 50 L. J., Ch. 448; 16 Ch. D. 617; 44 L. T. 63; 29 W. R. 448.

A solicitor acting for the mortgagee as well as mortgagor in the preparation of a mortgage thereby loses his lien on the title deeds in his possession for costs due to him from the mortgagor, unless such lien is expressly reserved, even though the mortgagee may have known that the solicitor had such lien as against the mortgagor. *Snell, In re*, 46 L. J., Ch. 627 ; 6 Ch. D. 105 ; 37 L. T. 350 ; 25 W. R. 823.

A solicitor acting for mortgagee as well as mortgagor in the preparation of a mortgage thereby loses his lien on the title deeds in his possession for costs due to him from the mortgagor, even though the costs were incurred prior to the mortgage and the title deeds never left the solicitor's office. *Quinn, Ex parte, Nicholson, In re*, 53 L. J., Ch. 302 ; 49 L. T. 811 ; 32 W. R. 296.

A solicitor was instructed to prepare a mortgage, and the title deeds of the property were deposited with him for this purpose by the mortgagor. He was also acting as solicitor for the mortgagee, and when the mortgage was executed he continued to hold the deeds on behalf of the mortgagee. The mortgagor filed a liquidation petition, and the solicitor was employed on behalf of the trustee. The trustee sold the equity of redemption, and the solicitor received the purchase-money :—Held, that the solicitor had a lien on the deeds against the mortgagor, and was entitled to retain out of the purchase-money the amount of costs due to him from the mortgagor. *Messenger, In re, Calvert, Ex parte*, 45 L. J., Bk. 134 ; 3 Ch. D. 317.

4. On What Documents, Funds, &c.

What Documents.]—Solicitor has lien on papers delivered to him as such, but not on those delivered to him as steward. *Champernown* v. *Scott*, 6 Madd. 93.

A solicitor has a lien for his costs on all papers that come into his hands for the purpose of business, though not papers in the cause in which he makes the demand. *Nesbitt, Ex parte*, 2 Sch. & Lef. 279.

On a lease being granted, the lessee deposited it with the lessor's solicitor (who acted for the lessor and lessee), together with a bill of exchange as a security for the costs of preparing the lease, which the lessee was to pay. The lessee afterwards mortgaged the term, and the defendants (who were his solicitors on that occasion), in order to obtain the lease, paid the bill of costs of the lessor's solicitors, and received from them, without any authority from the lessee, the lease and the bill of exchange:—Held, first, that without express contract the defendants acquired no lien on the bill of exchange beyond the amount which they had paid to the lessor's solicitors; secondly, that evidence of an express contract would not support such a lien without proof that the defendants had explained to their client, the lessee, his rights, independently of express contract. *Gibson* v. *May*, 4 De G. M. & G. 512.

Where a trustee at the request of the tenant for life, lends the trust deed to the solicitor of such tenant for life, he not being the trustee's solicitor, such loan gives no lien to the solicitor for his costs due from his client. *Mayhew, In re*, 7 W. R. 351.

—— **Marriage Settlement.**]—Solicitors employed to prepare a marriage settlement and accompanying documents have no lien thereon for their costs. *Snell, In re* (6 Ch. D. 105), and *Mason and Taylor, In re* (10 Ch. D. 729), followed; *Gregson, In re* (26 Beav. 87), disapproved. *Lawrance, In re, Bowker* v. *Austin*, 63 L. J., Ch. 205; [1894] 1 Ch. 556; 8 R. 102; 70 L. T. 91; 42 W. R. 265.

—— **Mortgages.**]—A mortgagor instructed his solicitors, to whom he was indebted in a bill of costs, to prepare a conveyance of the mortgaged property. They did so, and sent the engrossment to the mortgagee's solicitors, with an intimation that they had a lien on it, and a request that the mortgagee's solicitors would hold it on account of the mortgagor's solicitors. The engrossment was executed by the mortgagees. The mortgage money was not paid, but the mortgagor sold the property to purchasers who agreed to pay it:—Held, that the mortgagor's solicitors had a lien on the engrossment, and that such lien was not prejudiced by their having parted with the engrossment under the above circumstances, nor by the execution of it as a deed, nor by a promissory note delivered to the solicitors not covering their whole demand, and that the purchaser had been properly restrained by injunction from proceeding to recover the deed. *Watson* v. *Lyon*, 7 De G. M. & G. 288; 24 L. J., Ch. 754; 3 W. R. 543.

A solicitor who acts for both parties to a mortgage cannot, after the execution of the mortgage, claim a lien on the title deeds of the property for any costs due from the mortgagor. *Snell, In re*, 46 L. J., Ch. 627; 6 Ch. D. 105; 37 L. T. 350; 25 W. R. 823.

—— **Will.**]—A solicitor has no lien upon the will of his client, and cannot refuse to produce a deed executed by the client in his favour, containing a reservation of a life interest, and a power of revocation. *Balch* v. *Symes*, Turn. & R. 87. And see *Tyler* v. *Drayton*, 2 Sim. & S. 309.

Whether an attorney lien upon papers extends to the original will of his client, quære. Ordered to produce it before the examiner, and for the hearing of the cause, without prejudice. *Georges* v. *Georges*, 18 Ves. 294.

—— **Orders or Decrees.**]—A clerk in court and solicitor refusing to continue the conduct of a cause until his fees are paid, ordered to produce an office copy of the bill to be marked by the six clerk, so that an answer might be called for. *Mayne* v. *Hawkey*, 3 Swan. 93.

The solicitor in a cause will be ordered to produce an original order of the court, for the purpose of correcting an accidental error, notwithstanding that he claims a lien on the papers in the cause. *Bird* v. *Heath*, 6 Hare, 236; 12 Jur. 861.

An order was made for the payment out of court of a sum of money to a married woman for her separate use. The solicitor who had the charge and carriage of the order refused to produce it to the registrar, to enable him to countersign the cheque of the accountant-general, except upon condition of his being paid thereout a sum of money which, he alleged, he had advanced to the lady, or become security for, upon the faith of his being repaid out of the money. Upon motion, he was directed to produce the order, and to pay the costs of the motion. *Benyon* v. *Amphlett, Sidney, In re*, 8 Jur. (N.S.) 759.

A plaintiff in a suit became bankrupt, and the suit was revived by his assignee, who employed a different solicitor. A decree was afterwards made:—Held, that the solicitor of the original plaintiff must produce the documents in his possession which were necessary for drawing up the decree, notwithstanding his lien on them for costs, even though the documents were not strictly in evidence in the cause. *Simmonds* v. *G. E. Ry.*, 38 L. J., Ch. 87; L. R. 3 Ch. 797; 19 L. T. 235; 16 W. R. 1100.

A clerk in court has a lien upon the fund in court, and also upon the decree and other documents in the cause in respect of his fees and disbursements. *Potter* v. *Hyatt*, 5 Y. & Coll. 112; 6 L. J., Ex. Eq. 36.

A solicitor for a plaintiff in a cause obtained an order, which he passed; he was then discharged by the plaintiff, and a new solicitor appointed in his stead. The discharged solicitor refused to produce the order to be entered, on the ground that he had a lien for his costs in the same suit, and other costs. Upon motion by plaintiff for production, that the order might be entered:—Held, that lien cannot be allowed to intercept the completion of an order of the court which has been passed, and the discharged solicitor was directed to produce the order for entry, upon payment of 20*s.* costs. *Clifford* v. *Turrill*, 2 De G. & Sm. 1; 12 Jur. 428.

—— **Letters of Administration.**]—M. and her sister S. had employed F. as their solicitor and as their land agent over a joint property; and M. was indebted to him in the amount of certain costs in 1881, when S. instituted a suit against him in the chancery division for an account of her land agent. In September, 1881, F. filed an account in that suit, shewing that there was a

considerable balance due to him in respect of the rents. He died insolvent in August, 1882, and no step was taken to revive the suit against his personal representatives. The costs due to F. had been incurred by his obtaining for M., in 1869, a grant of administration de bonis non of her late father, limited to receive the dividends on a sum of stock standing in the name of the latter as executor of a will under which the dividends were payable to a tenant for life, upon whose death M., having become beneficially interested in the principal, obtained in November, 1882, an order from the judge of the Probate Division authorising her to apply for a general grant, so as to obtain a transfer of the stock into her own name. M. thereupon required T., the solicitor for F.'s personal representative, to bring in the limited grant for cancellation, which he declined to do, claiming a lien upon it for the costs due by M. :—Held, that T. was entitled to the lien claimed. *Martin, In goods of*, 13 L. R., Ir. 312—C. A.

—— **Company—Winding-up.**]—The solicitor of a company cannot acquire a lien for costs upon such books of the company as under the articles of the company or the provisions of the Companies Acts ought to be kept at the registered office of the company. *Anglo-Maltese Hydraulic Dock Co., In re*, 54 L. J., Ch. 730 ; 52 L. T. 841 ; 33 W. R. 652.

Directors have no power to create any lien on the share register and minute book of a company which could interfere with their being used for the purposes of the company. *Capital Fire Insurance Association, In re*, 53 L. J., Ch. 71 ; 24 Ch. D. 408 ; 49 L. T. 697 ; 32 W. R. 260—C. A.

A solicitor cannot assert against documents which came to his hands pending the winding-up any such lien as will interfere with the prosecution of the winding-up. *Ib.*

A winding-up order cannot defeat any valid lien existing at the time when the winding-up petition was presented. *Belaney* v. *Effrench* (L. R. 8 Ch. 918) and *Boughton* v. *Boughton*, (23 Ch. D. 169) distinguished. *Ib.*

Chattels.]—A solicitor's lien for costs is not confined to deeds and papers, but extends to other articles delivered to him for the purpose of being exhibited to witnesses on the trial of an action. *Friswell* v. *King*, 15 Sim. 191.

Chattels personal, not under the control of the Court of Chancery nor in possession of the plaintiff's solicitor, are not subject to a lien for his costs in the suit in which they are recovered. *Savage* v. *James*, Ir. R. 9 Eq. 357.

On Inheritance.]—In a suit in the nature of a partition suit, it having been decided that each party must bear his own costs, a solicitor employed by a party entitled as tenant in tail who had not barred the entail has not a lien for costs on the inheritance of his client's share. *Berrie* v. *Howitt*, 39 L. J., Ch. 119 ; L. R. 9 Eq. 1 ; 21 L. T. 414.

On Real Estate.]—An attorney has no lien on an estate recovered for a client in respect of the costs and expenses incurred in recovering it. He has a lien only on the papers in his hands. *Shaw* v. *Neale*, 6 H. L. Cas. 581 ; 27 L. J., Ch. 444 ; 4 Jur. (N.S.) 695 ; 6 W. R. 635. *See now* CHARGING ORDERS, supra, cols. 1656, 1657.

Solicitor prosecuting to a decree has a lien on the estate recovered, in the hands of the person recovering, for his bill ; but not in the hands of the heir. But if the suit be revived, the lien revives. *Barnesley* v. *Powell*, Ambl. 102.

Balance Due—Equities between the Parties.]—The solicitor's lien for costs is subordinate, and to be postponed to the equities between the parties. *Gwynn* v. *Kraus*, 7 Ir. Eq. R. 274.

In equity the costs are arranged according to the equities of the parties, and the solicitor's lien is only upon the balance, under that arrangement. *Taylor* v. *Popham*, 15 Ves. 72.

The lien of solicitors cannot interfere with the equities between the parties. *Bawtree* v. *Watson*, 2 Keen, 713 ; 7 L. J., Ch. 183.

A sum was found due from the plaintiff to the defendant, and on the other hand the defendant was ordered to pay the costs of suit :—Held, that the lien of the defendant's solicitor for his costs extended only to the ultimate balance due from the plaintiff, after deducting the costs payable to him by the defendant. *Ib.*

A solicitor's lien upon costs, or upon a fund recovered through him by a party in an action, is subject to the rights of the parties inter se, including the right of set-off or deduction of costs as between successful and unsuccessful defendants. *M'Cormack* v. *Ross*, [1894] 2 Ir. R. 545.

Lien only extends to the balance of damages and costs recovered in the particular action. The general costs of the cause were taxed for the plaintiff, and after deducting the costs of the defence the plaintiff was entitled to 50*l.* He had paid his solicitor 19*l.*, and therefore the lien of the latter only attached to 31*l.* *Cain* v. *Adams*, 5 L. J., K. B. 252.

The liquidators of a company brought an action against S., in which he obtained judgment with costs. S. was indebted to the company in a larger amount on a bill of exchange. The costs of S.'s solicitor in the action being unpaid, they proceeded in his name to levy execution. The execution was stayed under an interim order in the winding-up, a sum being retained by the liquidators sufficient to meet the costs for which the judgment had been signed :—Held, that, apart from the Companies Act, 1862, s. 163, there was at common law no right to set off the debt on the bill of exchange against the judgment ; that the solicitors had a lien on what could be recovered by the execution, and that they had the same right against the sum set apart which represented the proceeds of the execution. *Bank of Hindustan, China, and Japan, In re, Mackrill Smith, Ex parte*, 37 L. J., Ch. 185 ; L. R. 3 Ch. 125 ; 17 L. T. 339 ; 16 W. R. 170.

Held, also, that if the Companies Act, 1862, s. 163, applied to such a case and made the execution void, the court would put the defendant and his solicitors in the same position as if the execution was not so restrained ; and, therefore, that the solicitors must be paid their costs out of the sum set apart. *Ib.*

Sum Due under Award.]—An attorney has a lien upon a sum awarded in favour of his client, as well as if he recovered by judgment ; and if, after notice to the defendant, the latter pays it over to the plaintiff, the plaintiff's attorney may compel a repayment of it to himself. *Ormerod*

v. *Tate*, 1 East, 464. S. P., *Cowell* v. *Betteley*, 4 M. & Scott, 265; 10 Bing. 432; 2 D. P. C. 780; 3 L. J., C. P. 148.

A builder, and an uncertificated bankrupt, sued for a balance due to him for repairs, and was nonsuited; the cause was referred, and the arbitrator found a sum due to the plaintiff:—Held, that the attorney had a claim, as against the assignees, to the amount of his lien on the award, for the costs of the action and of the award. *Jones* v. *Turnbull*, 5 D. P. C. 591; 2 M. & W. 601; M. & H. 106; 6 L. J., Ex. 166; 1 Jur. 638.

On reference of an action (the costs to abide the event), the arbitrator ordered the defendant to pay the plaintiff a certain sum. The plaintiff afterwards became insolvent. His attorney, whose bill of costs exceeded the amount awarded, and the costs taxed under the award, claimed a lien in respect of his bill on such an amount and taxed costs, and called upon the defendant to pay them to him for his own use, and in satisfaction of his lien:—Held, that the plaintiff's attorney was not entitled to a rule, calling upon the defendant to pay him the money. *Lloyd* v. *Mansell*, 1 B. C. C. 130; 22 L. J., Q. B. 110.

On Verdict.]—Where a defendant is entitled against a plaintiff to be released from a verdict obtained against him, the court will not abstain from interfering, on the ground of the lien of the plaintiff's attorney upon the verdict for his costs. *Symons* v. *Blake*, 2 C. M. & R. 416; 4 D. P. C. 263; 1 Gale, 182.

Cause cannot be shewn on behalf of a solicitor who claims a lien on the verdict for his costs. *Sloman* v. *Allen*, 1 Man. & G. 96, n. S. P., *Wiedemann* v. *Walpole*, 56 J. P. 4—C. A.

Money Received without Authority.] — A solicitor who receives rents in a cause, without the authority of the court, will be ordered to pay them over to the receiver, and cannot retain them on the ground of lien, or set them off against costs alleged to be due to him from the plaintiff. *Wickens* v. *Townshend*, 1 Russ. & M. 361.

—— **Conflict of Interest and Duty.**]—In a creditor's administration action, brought against the administrator of an intestate (the defendant being a solicitor, and a member of the firm of solicitors who were acting for the plaintiff), after judgment for administration had been pronounced, an order was made on the application of the plaintiff by his solicitors for the appointment of a specified person, "upon his giving security," to receive the rents of the intestate's real estate, and to collect and get in his outstanding personal estate. On the application for this order the defendant made an affidavit stating his approval of the person proposed. Before the receiver had perfected his security some money arising from the sale of furniture belonging to the intestate was received by the defendant's firm, and appropriated by him, and he claimed to retain out of it a debt due to him by the intestate:—Held, that, by reason of the relation in which the defendant stood to the plaintiff as a member of the firm of solicitors who were acting for him, the defendant stood in no better position than he would have stood after the receiver had perfected his security, and that the defendant could not under the circumstances exercise his right of retainer. *Wickens* v. *Townshend* (1 Russ. & M. 361) applied. *Birt, In re, Birt* v. *Burt*, 52 L. J., Ch. 397; 22 Ch. D. 604; 48 L. T. 67; 31 W. R. 334.

Costs ordered to be paid to Client.] — A solicitor has a lien upon costs ordered to be paid to his client upon a petition in bankruptcy, although there be no fund in court; nor can the client release the benefit of the order to the prejudice of the solicitor. *Bryant, Ex parte*, 2 Rose, 237; 1 Madd. 49.

Where costs are ordered to be paid to the client, solicitors need not wait the result of process to compel the payment of such costs, but may insist upon the immediate benefit of the lien. *Pounset* v. *Humphreys*, C. P. Cooper, 142.

A solicitor's lien for his costs upon costs ordered to be paid to his client by the opposite party in the suit remains notwithstanding he has ceased to be the client's solicitor in the suit, and notwithstanding that he has taken the client's body in execution under a judgment against him for the amount of the solicitor's costs. *O'Brien* v. *Lewis*, 2 N. R. 536; 3 De G. J. & S. 606; 32 L. J., Ch. 665; 9 Jur. (N.S.) 764; 8 L. T. 683; 11 W. R. 973.

Interlocutory Costs.]—An attorney has a lien on interlocutory costs under an order of a judge. *Aspinall* v. *Stamp*, 4 D. & R. 716; 3 B. & C. 108.

Funds in Court.]—Solicitors have no right to look for their costs to a fund in court not belonging to their clients. Where, therefore, in an administration suit the estate in court was exhausted by creditors so that nothing was left for the testator's representative, and she became insolvent, a motion that her costs of suit might be retained out of the fund in court, so that her solicitors might be paid, was refused. *Chick* v. *Nicholls*, 26 W. R. 231.

Fund Recovered.]—The costs of proceedings under the Declaration of Titles Act (25 & 26 Vict. c. 67), on behalf of an infant, together with the costs of a partition suit and of a suit to obtain a declaration of lien, are costs for which the solicitor has a lien on the fund recovered. *Pritchard* v. *Roberts*, 43 L. J., Ch. 129; L. R. 17 Eq. 222; 29 L. T. 883; 22 W. R. 259.

Money held by Solicitor as Trustee.]—The creditors of a debtor having agreed to accept a composition secured by sureties, the debtor and one of the sureties placed funds in the hands of the debtor's solicitor, for the purpose of paying the composition. The solicitor sent round a circular to the creditors informing them they could be paid at his office on a certain day. Before that day the debtor absconded, leaving the solicitor's bill of costs unpaid:—Held, that the solicitor held the funds as trustee for the creditors, and that he was not entitled to any lien on them for his costs. *Clark, In re, Newland, Ex parte*, 4 Ch. D. 515; 35 L. T. 916; 25 W. R. 275.

Money Payable in Futuro.]—A firm of solicitors were employed throughout the proceedings in an action for partition and sale of certain hereditaments of which the defendants were in possession, and for an account of the rents and profits of one-third part thereof for six years prior to the issue of the writ. By the decree the plaintiffs were declared entitled to one-third part of the hereditaments, and to an account and payment by the defendants of one-third of the said rents and profits, and the premises were ordered to be sold, and the plaintiffs' costs up to and including the hearing were ordered to be costs in the action

The account was not completed and the property was not sold when the plaintiffs threatened to change their solicitors and to compromise the action. The share of the plaintiffs in the property and rents was insufficient to pay the plaintiffs' costs. On a petition by the plaintiffs' solicitors asking for a declaration that they were entitled to a charge on the whole property in respect of the plaintiffs' costs, as such costs had been made costs in the action:—Held, that no order having been made for payment of the costs of the action out of the proceeds of sale, the court could not anticipate such order, and that the solicitors could only be treated as having a lien on the plaintiffs' share recovered by them in the action. An injunction was granted to prevent the plaintiffs from receiving any money in the action, or by way of compromise, without notice to the solicitors. *Lloyd* v. *Jones*, 40 L. T. 514; 27 W. R. 655.

Policy of Assurance—Notice.]—A solicitor's lien on a policy of insurance is not lost by want of notice to the assurance company against assignees who give notice. *West of England Bank* v. *Batchelor*, 51 L. J., Ch. 199; 46 L. T. 132; 30 W. R. 364.

Alimony Pendente Lite.]—A solicitor's lien does not extend to alimony pendente lite paid over to him as such, i.e., for the purpose of the wife's maintenance, unless he holds her direct written authority to him to receive it as her agent under r. 94 of the Divorce Rules. *Bremner* v. *Bremner* (L. R. 1 P. & M. 254) distinguished. *Leete* v. *Leete* (48 L. J., P. 61) followed. *Cross* v. *Cross*, 43 L. T. 533—C. A.

An attorney who has acted in a suit on the part of a wife, and has a claim for costs therein incurred beyond those which have been taxed against the husband, has a lien upon the alimony paid into his hands on her behalf for such extra costs. *Bremner* v. *Bremner and Brett*, 36 L. J., Mat. 11; L. R 1 P. & M. 254; 15 L. T. 297; 15 W. R. 75.

An order was made for the change of solicitors in a wife's suit for dissolution of marriage. At the date of the order the former solicitor had in his hands a sum of money, being the balance of an amount received by him on account of alimony due to the petitioner:—Held, that the solicitor had no lien for his costs upon the balance of alimony in his hands. *Leete* v. *Leete*, 48 L. J., Mat. 61; 40 L. T. 788; 27 W. R. 921.

Judgments.]—The fact that an attorney has obtained a judgment for a client, and that costs are due to the attorney, does not raise the relation of trustee and cestui que trust between the client and the attorney with respect to the proceeds of such judgment; and the lien of the attorney is merely a claim to the protection of the court as to his costs when the equitable interference of the court is invoked for the purpose of setting off one judgment against another. *Mercer* v. *Graves*, 41 L. J., Q. B. 212; L. R. 7 Q. B. 499; 26 L. T. 551; 20 W. R. 605.

An attorney has a lien for his costs on a judgment recovered by his client, and the court will lay hold of the fund where it exists, and when it does not thereby set aside any arrangement of the parties. *Slater* v. *Sunderland Corporation*, 33 L. J., Q. B. 37; 9 L. T. 422.

The lien which an attorney has on a judgment obtained by his client is merely a claim to the equitable interference of the court to have that judgment held as a security for his debt. *Hough* v. *Edwards*, 1 H. & N. 171; 26 L. J., Ex. 54; 2 Jur. (N.S.) 814.

Voluntary Payment.]—Where a juror is withdrawn and the defendants voluntarily give the plaintiff a sum of money, semble that the court will not give effect to the plaintiff's attorney's claim for lien. *Stretton* v. *L. & N. W. Ry.*, 16 C. B. 40.

Fund Recovered without Solicitor's Assistance.]—The general lien of a solicitor for costs due by his client does not extend to a fund which the client can reach without the assistance of the solicitor, or the use of the papers in his possession. *Hodgens* v. *Kelly*, 1 Hog. 388.

Compromise—Money Received.]—A solicitor has no lien on a fund received by his client, for compromising a suit, where it is clear that the result of the suit, if successfully prosecuted, would not have been to realise a fund on which such lien might attach. *Townsend* v. *Reade*, 4 L. J., Ch. 233.

The solicitor of the plaintiff in a foreclosure suit, in which a decree for sale before the master was made by consent, prosecuted the suit to the settlement of the particulars and conditions, and appointment of the day of sale, when the plaintiff and the defendant (by his solicitor), having notice of the claim of the plaintiff's solicitor for the costs of the suit, compromised the suit on the terms of paying the plaintiff a certain sum in discharge of the debt and costs, part of which sum was immediately paid to the plaintiff. Upon the petition of the plaintiff's solicitor, the court ordered the costs of the plaintiff's solicitor in the suit to be taxed, and paid by the plaintiff and defendant, or one of them. *White* v. *Pearce*, 7 Hare, 276; 18 L. J., Ch. 462; 13 Jur. 999.

The lien attaches upon money received by way of compromise, though the verdict and judgment are against his client. *Davies* v. *Lowndes*, 3 C. B. 823.

The lien of the solicitor of a plaintiff for the costs of an action attaches to money received by the plaintiff by way of compromise where such money is in substance the fruit of the action. *Ross* v. *Buxton*, 58 L. J., Ch. 442; 42 Ch. D. 190; 60 L. T. 630; 38 W. R. 71; 54 J. P. 85.

—— **Payment after Notice.**]—Where a valid compromise of an action has been entered into under which a sum of money, the fruit of the action, is coming to the plaintiff, the defendant or his solicitor is not at liberty after express notice by the plaintiff's solicitor of his claim to a lien for his costs to pay that sum over to the plaintiff in disregard of such matter. *Ib.*

On Person of Defendant.]—A plaintiff having charged the defendant in execution, died; the defendant's wife took out administration to the plaintiff; the court ordered the defendant to be discharged out of custody, saying, that the plaintiff's attorney had no lien on the judgment for his costs. *Pyne* v. *Erle*, 8 Term Rep. 407.

A defendant was in custody under a judgment recovered by the plaintiff. The plaintiff had died previously in insolvent circumstances,

leaving two infant children. As soon as the defendant heard of the death he applied to be discharged. The plaintiff's attorneys resisted the application, alleging that they had advanced sums of money to the plaintiff, and that the plaintiff had agreed that they might retain these sums, together with their costs, out of the amount to be recovered by the judgment; and they expressed an intention of taking out administration to the plaintiff's estate. The court refused to discharge the defendant. *Cox* v. *Pritchard*, 20 L. J., Q. B. 353.

A defendant was taken upon a ca. sa. at the suit of the plaintiff, in June, 1841; in August the plaintiff left England, and was shortly afterwards seen at St. Petersburg, but had never been heard of since. Upon an affidavit of these facts, and shewing reasonable ground to induce them to believe that the plaintiff was dead, and that proper search had been made, and no trace of a will or grant of administration found, the court (in 1849) ordered the defendant to be discharged from custody, without any regard to any supposed lien of the attorney for costs. *Camp* v. *Pote*, 8 C. B. 375; 7 D. & L. 289.

It is competent to a plaintiff to discharge the defendant from custody under a ca. sa., notwithstanding the claim of his attorney for the costs of the action is unsatisfied, and, by reason of the plaintiff being an infant, is likely to remain so. *Langley* v. *Headland*, 19 C. B. (N.S.) 42; 34 L. J., C. P. 183; 11 Jur. (N.S.) 431; 12 L.T. 385; 13 W. R. 752.

Where a plaintiff, after judgment recovered, settled the action with the defendant, and employed a new attorney to enter up satisfaction on the record:—Held, that the defendant was entitled to be discharged out of custody, although the lien of the plaintiff's attorney on the costs had not been satisfied. *Marr* v. *Smith*, 4 B. & Ald. 466.

Money Levied.]—An attorney has a lien for his bill of costs on money levied by the sheriff under an execution on a judgment recovered by his client, and is entitled to have it paid over to him, notwithstanding the sheriff has had notice from the party against whom the execution issued to retain the money in his hands. *Griffin* v. *Eyles*, 1 H. Bl. 122.

5. Effect of Bankruptcy and Winding-up.

Bankruptcy.]—If a solicitor refuses to deliver the proceedings to the assignee, the order is of course with costs. *Crowe, In re, Wharton, In re*, Mont. & Bli. 90.

Solicitor is bound to produce papers of his client for him, or in bankruptcy for his assignees, though not employed by them in the cause, for the purposes of which he received them: but not bound to deliver them up, or produce them in any other business, without payment. *Ross* v. *Laughton*, 1 Ves. & B. 349; 12 R. R. 232.

The court has jurisdiction in bankruptcy to order the papers deposited by the bankrupt with his attorney, in actions commenced before the bankruptcy, to be delivered up to the assignees, provided they are necessary to the administration of the estate. But where assignees wanted such papers for the purpose of instituting criminal proceedings against the bankrupt, the court refused to make the order, and dismissed the petition with costs. *Innes, Ex parte*, Buck, 337.

The right of assignees to inspect or take a copy of a title deed of the bankrupt's property in the hands of his solicitor is no higher than the right of the bankrupt himself: and therefore, where the assignees petitioned that the solicitor might produce or give an attested copy of such document, on being paid only the portion of his costs relating thereto, and the costs of the production or copy, the petition was dismissed with costs. *Underwood, Ex parte, Hemsworth, In re*, 1 De G. 190; 9 Jur. 632.

Traders, before their bankruptcy, deposited their books with a solicitor, with a view to his effecting for them a compromise with their creditors. Terms were arranged, but the bankrupts were unable to comply with them, and the solicitor refused to act further in the matter. Adjudication followed:—Held, that the solicitor was entitled to the lien on the books. *Jabet, Ex parte, Leak, In re*, 6 Jur. (N.S.) 387; 2 L. T. 72—L.JJ.

An attorney holding deeds of a bankrupt in his custody at the date of the adjudication has a general lien thereon for professional services. *May, In re*, 1 Fonb. N. R. 243.

A solicitor, claiming to have a lien on a deed of the bankrupt for professional business done for him, was summoned to attend before the commissioner acting in the prosecution of the fiat, to be examined touching the estate of the bankrupt, and to produce the deed. The solicitor obeyed the summons, and produced the deed when the commissioner, being of opinion that he had no lien, ordered him to deliver up the deed to the solicitor of the fiat, and, on his declining to do so, unless his lien was first discharged, directed an officer of the court to seize the deed:—Held, that the commissioner, in making such order, exceeded his jurisdiction. *Llewellin, Ex parte, Wright, In re*, 8 Jur. 816.

Where the claim of a solicitor to a lien on a deed of the bankrupt is disputed, the remedy of the assignees for recovering the deed is by an action of trover. *Ib.*

A bankrupt, upon consulting his solicitor before his bankruptcy, but after an act of bankruptcy committed, of which the solicitor had no notice, as to the state of his affairs, told him that his cash-book contained all his receipts and payments, and that anything else he wanted would be found in the office. He afterwards sent by post the key of a drawer in the office to his solicitor, who subsequently removed the papers and documents in the drawer, and also a tin box containing papers, &c., from the bankrupt's office to his own. The bankruptcy occurred a few days after the removal, whereupon the solicitor claimed a lien upon the papers and documents for his bill of costs:—Held, that he was entitled to such lien for his taxed costs down to the date of the filing of the petition. *Markby, In re*, 11 L. T. 250.

A solicitor is not, on the ground of his lien on documents of a bankrupt in respect of professional services before the bankruptcy, entitled to refuse to produce such documents for examination by the trustee. *Toleman and England, In re, Bramble, Ex parte*, 13 Ch. D. 885; 42 L. T. 413; 28 W. R. 676.

A trustee was removed from his office, and a new trustee appointed. The old trustee's solicitor, on being applied to, gave up all the account books of the estate, but refused to

deliver up certain documents and papers on which he had expended labour as solicitor, and upon which he claimed a lien for costs. Thereupon the new trustee applied to the court for an order upon the old trustee and his solicitor to deliver up all documents relating to his office as trustee:—Held, that the solicitor was entitled to a lien on the documents which he had retained, and that the old trustee was not bound to discharge that lien by paying the costs out of his own pocket. *Valden, Ex parte, Austin, In re*, 46 L. J., Bk. 59; 4 Ch. D. 129; 35 L. T. 720; 25 W. R. 134.

S. and M., solicitors, obtained possession in the course of business of certain deeds and documents, the property of W., whose solicitors they were, and retained possession of same, subject to a lien for costs due by W. to them. W. was subsequently adjudicated a bankrupt, and his assignees applied for an order that S. and M. should deliver up to them the deeds and documents so in their possession. The court refused the application. *Watters, In re*, 7 L. R., Ir. 531. S. P., *Lambert* v. *Buckmaster*, 2 B. & C. 616; 4 D. & R. 125; 2 L. J. (O.S.) K. B. 93.

A. was a partner in a mercantile firm, and was also a partner in a firm of solicitors. The mercantile firm alone was made bankrupt:—Held, that the assignees were not entitled to the delivery to them, by the firm of solicitors, of the papers of the mercantile firm, until their lien on them had been satisfied. *Moss, In re*, 35 Beav. 526; 35 L. J., Ch. 554; L. R. 2 Eq. 345; 12 Jur. (N.S.) 557; 14 L. T. 536; 14 W. R. 814.

An attorney has a lien on all the papers of a bankrupt client received by him before the bankruptcy; and he may prove the debt, though he holds the papers. *Bush, Ex parte*, 7 Vin. Abr. 74, pl. 8.

The fund in court being decreed to the assignees of a party who, in the course of the cause, had become bankrupt, the solicitors employed by him during part of the proceedings have a lien for their costs. *Pounsett* v. *Humphreys*, C. P. Cooper, 142.

A solicitor was instructed to prepare a mortgage, and the title deeds of the property were deposited with him for this purpose by the mortgagor. He was also acting as solicitor for the mortgagee, and when the mortgage was executed he continued to hold the deeds on behalf of the mortgagee. The mortgagor filed a liquidation petition, and the solicitor was employed on behalf of the trustee. The trustee sold the equity of redemption, and the solicitor received the purchase-money:—Held, that the solicitor had a lien on the deeds against the mortgagor, and was entitled to retain out of the purchase-money the amount of costs due to him from the mortgagor. *Messenger, In re, Calvert, Ex parte*, 45 L. J., Bk. 134; 3 Ch. D. 317; 34 L. T. 920.

Winding-up.]—A company having issued a debenture loan, a deed was prepared by their solicitor mortgaging their property to two of the directors as trustees for the debenture holders, the same solicitor acting also for the trustees. The mortgage contained a power of sale and the usual covenant against incumbrances. The company afterwards passed a resolution for a voluntary winding-up, whereupon the trustees, acting under their power of sale, contracted to sell the mortgaged property to a purchaser and applied to the solicitor for the company's title deeds, which were in his possession. He, however, refused to give them up, claiming a lien upon them for costs incurred by the company prior to the mortgage. Upon a petition by the trustees and a debenture holder praying that the solicitor might be ordered to deliver up the title deeds to them:—Held, that the solicitor was not entitled to a lien on the deeds, and that they must be delivered up to them. *Snell, In re*, 46 L. J., Ch. 627; 6 Ch. D. 105; 37 L. T. 350; 25 W. R. 823.

Directors have no power to create any lien on the share register and minute book of a company which would interfere with their being used for the purposes of the company. *Capital Fire Insurance Association, In re*, 53 L. J., Ch. 71; 24 Ch. D. 408; 49 L. T. 697; 32 W. R. 260.

A solicitor cannot assert against documents which came to his hands pending the winding-up any such lien as will interfere with the prosecution of the winding-up. *Ib.*

A winding-up order cannot defeat any valid lien existing at the time when the winding-up petition was presented. *Belany* v. *Efrench* (L. R. 8 Ch. 918) and *Boughton* v. *Boughton* (23 Ch. D. 169) distinguished. *Ib.*

6. Death of Client or Solicitor.

Of Client.]—The solicitor, after the death of his client, retains his lien on the fund which he has recovered, and is not left merely to his rights as a general creditor on the estate of his client. *Lloyd* v. *Mason*, 4 Hare, 132; 14 L. J., Ch. 257; 9 Jur. 772.

There is a privity of estate between an administrator or executor who has partly administered and a subsequent administrator de bonis non, and the latter receives the estate with all the liabilities to which it was subject in the hands of the previous administrator or executor. The solicitor of a testator who has afterwards acted for his legal personal representatives during a partial administration of the estate, and has unpaid bills of costs against both the testator and his representatives, is entitled as against a subsequent administrator de bonis non to a lien upon documents in his hands belonging to the estate for all the costs so owing to him. *Watson, In re*, 53 L. J., Ch. 305; 50 L. T. 205; 32 W. R. 477.

A solicitor's lien on deeds and papers is binding on the representatives of the client. *Blunden* v. *Desart*, 2 Dr. & War. 405; 2 Con. & L. 111; 5 Ir. Eq. R. 221.

Of Solicitor.]—The attorney for the plaintiff died during the progress of the suit, and a new attorney was thereupon appointed. More than six years afterwards, funds were brought into court by the receiver in the cause:—Held, that the personal representative of the deceased attorney had a lien on the funds for the costs of the suit due to the attorney at the time of his decease. *Kellet* v. *Kelly*, 5 Ir. Eq. R. 34.

By the direction of A., a bill was filed for the administration of a testator's assets, in which A. and his infant brother and sister, by A. as their next friend, were plaintiffs; D., their elder brother, who had an interest adverse to theirs, and was one of the defendants, acted as solicitor in the country for the plaintiffs, and the suit was conducted by his town agents. After the sister

had attained her full age, D. died, having appointed her his executrix. A. gave notice to the persons who had been the town agents of D. not to take any proceedings in his name, and the sister appointed them to act as solicitors for her :—Held, that A. was not entitled to have the papers connected with the cause delivered over to him, though he offered to satisfy any lien which might be claimed against them. *Livesey* v. *Livesey*, 1 Russ. & M. 10.

—— **Order for Delivery of Deeds on Executors.**]—The court has not jurisdiction to order the personal representatives of a deceased solicitor to deliver up title-deeds on which they claim a lien. *Allen* v. *Jervoise*, 11 Ir. Eq. R. 583.

The court will not order the personal representative of a deceased solicitor to deliver the papers in the cause to another solicitor without payment or security for payment of the solicitor's bill. It seems that the summary jurisdiction of the court extends to the representatives of a solicitor. *Redfearn* v. *Sowerby*, 1 Swan. 84 ; 1 Wils. 96 ; 18 R. R. 31.

A client cannot compel the executor of his attorney to produce his papers, &c., in court, though only for the purpose of using them there, unless the testator's bill of costs be paid or secured. *Magrath* v. *Muskerry*, 1 Ridgw. P. C. 477 ; Vern. & Scriv. 171.

Except against the personal representative of the solicitor, the court has no summary jurisdiction to take the client's deeds, lodged with the solicitor, out of his hands, upon an offer to pay all his costs due, as such an order can be only made upon a person with whom the court can settle. If any other person has the deeds, the client must file a bill against him. *Ashley* v. *Busteed*, 2 Moll. 489.

7. On Change or Discharge of Solicitor.

a. *On Discharge of Solicitor by Client.*

What is.]—If a client, by his conduct, makes it impossible for his solicitor to continue any longer connected with him, and the solicitor in consequence refuses to continue the connection, he will be considered as if discharged by his client, and will not be ordered to give up the client's deeds and papers until his costs are paid, but he must produce them to be used at the hearing, and for inspection. *Steele* v. *Scott*, 2 Hog. 141.

M., one of the partners in a trading firm, also carried on business as a solicitor in co-partnership with L. The solicitor's firm was employed by the trading firm. The trading partners became bankrupt, but the business of the solicitor's firm was continued by L. alone. The assignees of the bankrupts employed fresh solicitors. Before the bankruptcy, one of the partners in the trading firm retired :—Held, first, that the bankruptcy of the trading firm was a discharge of the solicitors by their clients, and that the solicitors were entitled to their lien. *Moss, In re*, 35 Beav. 526 ; 35 L. J., Ch. 554 ; L. R. 2 Eq. 345 ; 12 Jur. (N.S.) 557 ; 14 L. T. 536 ; 14 W. R. 814.

—— **Dissolution of Firm.**]—*See* post, col. 1704.

Rights of Solicitor.]—A party changing his solicitor, the former solicitor has a lien for his costs upon papers in his hands, but cannot otherwise stop the progress of the cause till he is paid. *Merrewether* v. *Mellish*, 13 Ves. 161.

Party may discharge his solicitor ; but he has a lien for his costs upon papers in his possession, but cannot, except by retaining them, prevent the progress of the cause until he is paid. *Twort* v. *Dayrell*, 13 Ves. 195.

Solicitor in a suit, who had been discharged by the client, but had not delivered his bill of costs within the proper time, ordered, under the circumstances of the case, to deliver the papers and documents in his possession, relating to the suit (without prejudice to his lien), to the new solicitor. *Cooper* v. *Hewson*, 2 Y. & Coll. C. C. 515 ; 12 L. J., Ch. 446 ; 7 Jur. 760.

A solicitor, discharged by his client or his representatives, is not bound to produce the papers in his possession for the purposes of the cause, his bill of costs not being paid. *Lord* v. *Wormleighton*, Jac. 580 ; 23 R. R. 146.

When the majority of several parties who have employed the same solicitor substitute another solicitor, they are entitled to the custody of the papers. *Janson* v. *Davison*, 1 Jur. 352.

The solicitors for the trustees of an estate which is under the administration of the court have not, after their discharge, such a lien for costs and for money advanced in the suit as will enable them to refuse the production of documents which are required by the receiver for the management of the estate. *Belaney* v. *French*, 43 L. J., Ch. 312 ; L. R. 8 Ch. 918 ; 29 L. T. 706 ; 22 W. R. 177.

The solicitor for the parties to an administration action will not, on a change of solicitor, be allowed to assert his lien for costs on papers in his possession in such a way as to embarrass the proceedings in the action. On the contrary, he must produce the papers when they are required for the carrying on of the proceedings. *Boughton, In re, Boughton* v. *Boughton*, 23 Ch. D. 169 ; 48 L. T. 413 ; 31 W. R. 517.

After decree in a partition action (the plaintiff and defendant being entitled in moieties to the property) an inquiry as to incumbrances having been directed, the plaintiff changed her solicitors. The discharged solicitors claimed a lien for costs :—Held, that they were bound to deliver up to the new solicitors, subject to their lien, such documents as had come to their hands since the commencement of or for the purposes of the action. *Boden* v. *Hensby*, 61 L. J., Ch. 174 ; [1892] 1 Ch. 101 ; 65 L. T. 744 ; 40 W. R. 205.

A solicitor for the parties to an administration action will not, on a change of solicitor, be allowed to assert his lien for costs on papers in his possession in such a way as to embarrass the proceedings in the action, but must produce such papers subject to his lien as and when they are required for the carrying on of the proceedings. *Boughton* v. *Boughton* (23 Ch. D. 169) followed. *Gerty* v. *Mann*, 29 L. R., Ir. 7.

An action was brought for the administration of the estate of H. by his infant grandchildren. The action was brought with the approval of the infant's father, and the next friend was nominated and approved by him. The father having died pending the action, the mother of the infants, who was also their testamentary guardian, applied to be appointed next friend in the place of the existing next friend, and an order was made appointing her. She changed the plaintiff's solicitors, and the new solicitors applied to the old solicitors for delivery of the papers in the action. The original solicitors

refused to deliver them till their costs were paid :—Held, upon a summons, that the old solicitors must deliver them over to the new solicitors without prejudice to their lien for costs. The action being a very heavy one, and the taxation of costs not likely to come on for some years, the costs of the original solicitors were under the special circumstances ordered to be taxed at once. *Hutchinson, In re, Hutchinson* v. *Norwood*, 54 L. T. 842 ; 34 W. R. 637.

Although a solicitor who discharges himself cannot set up a lien for costs as a reason for not delivering up papers necessary to enable his client to proceed with pending matters in litigation to which they relate, yet a solicitor who has been discharged by the client may set up such lien, and will not be ordered to produce or to deliver up to the client the papers on which he claims the lien, although his not doing so will embarrass the client in prosecuting or defending his claim. *Faithfull, In re*, L. R. 6 Eq. 325 ; 18 L. T. 502.

—— **Bankruptcy.**]—After a suit was instituted the plaintiff became bankrupt. His assignees continued the suit, employing a different solicitor. A decree was taken by consent. On drawing up the decree the registrar required production of certain documents which were referred to in the decree, and which, being in the hands of the solicitor to the original plaintiff, had not been produced at the hearing. The solicitor refused to produce them, claiming a lien for costs :—Held, that he was bound to produce them. *Simmonds* v. *G. E. Ry.*, 38 L. J., Ch. 87 ; L. R. 3 Ch. 797 ; 19 L. T. 235 ; 16 W. R. 1100.

The trustee of a bankrupt's estate appointed a solicitor, whose appointment was duly confirmed, and who transacted considerable professional business for the trustee as such. After several years the trustee was removed by the creditors, and a new trustee appointed, who called upon the solicitor to hand over all documents relating to the estate to himself or to his solicitor. The solicitor of the old trustee opposed this application on the ground that he had a lien on them for his costs :—Held, that he had a lien upon all documents the fruits of his own labour or expense. *Yalden, Ex parte, Austin, In re*, 46 L. J., Bk. 59 ; 4 Ch. D. 129 ; 35 L. T. 720 ; 25 W. R. 134—C. A.

—— **On Costs.**]—A solicitor's lien for his costs upon costs ordered to be paid to his client by the opposite party in a suit remains notwithstanding he has ceased to be the client's solicitor in the suit. *O'Brien* v. *Lewis*, 3 De G. J. & S. 606 ; 2 N. R. 536 ; 32 L. J., Ch. 665 ; 9 Jur. (N.S.) 764 ; 8 L. T. 683 ; 11 W. R. 973.

—— **On Balance of Alimony.**]—An order was made for the change of solicitors in a wife's suit for dissolution of marriage. At the date of the order the former solicitor had in his hands a sum of money being the balance of an amount received by him on account of alimony due to the petitioner :—Held, that the solicitor had no lien for his costs upon the balance of alimony in his hands. *Leete* v. *Leete*, 48 L. J., P. 61 ; 40 L. T. 788 ; 27 W. R. 921.

—— **New Trial—Solicitor not Entitled to be Heard.**]—Solicitors acting for a plaintiff in an action were discharged, but retained her papers in respect of their lien for costs incurred in the action. The plaintiff in order to obtain these papers charged any verdict she might get with the sum due to them for costs. At the trial a verdict for the plaintiff was found ; the defendant moved for a new trial :—Held, that the solicitors could not be heard to oppose the motion for a new trial on the ground that the plaintiff would consent to such a motion and so defeat their charge. *Wiedemann* v. *Walpole*, 56 J. P. 5—C. A.

—— **Production of Deed—Fund Recovered.**]—If a solicitor, whom his client had ceased to employ, by the production of a deed in his hands belonging to the client, and upon which he claims a lien as solicitor, enables the client to recover a fund in a suit, his lien over the fund so realised is confined to the costs of that suit, but is a lien which he is entitled actively to enforce. *Bozon* v. *Bolland*, 4 Myl. & C. 354 ; 9 L. J., Ch. 123 ; 3 Jur. 884 ; 4 Jur. 763.

Where a solicitor, whom his client has ceased to employ, produces a deed of the client, upon which the solicitor claims a lien for antecedent costs, and thereby enables the client to recover a fund in a suit in which the solicitor has acted, his lien upon that fund is confined to the costs due to him in the suit in which the fund was so recovered. *Bayly, In re, Humphrey, Ex parte*, 12 Ir. Ch. R. 315.

Order for Delivery up of Documents.]—Messrs. G., solicitors, having been requested by P., another solicitor, on behalf of a client for whom they had hitherto acted, to deliver up all deeds belonging to the client on the usual terms, sent the deeds to a relative of the client who held a power of attorney from him, with the bill of costs, the amount of which they retained out of moneys in their hands belonging to the client, and they then informed P. that they had no deeds in their possession, and no bill of costs against the client. An order of course was then taken out by P., on behalf of the client, for taxation and delivery up of deeds and papers, but it was not complied with, and a writ of attachment was issued against Messrs. G. :—Held, that they were not justified in refusing to deliver up the papers, or to give in their bill for taxation. *Gregg, In re*, and *Prance, In re*, 39 L. J., Ch. 107 ; L. R. 9 Eq. 137 ; 23 L. T. 234 ; 18 W. R. 589.

Upon an application for delivery over of all documents in a discharged solicitor's possession made by clients undertaking to pay into court a sum amply sufficient to secure the solicitor in respect of all demands, the court will make the order asked for provided that circumstances of pressing necessity are shewn. *South Essex Equitable Investment and Advance Co., In re*, 46 L. T. 280.

Priorities.]—*See* post, col. 1712.

b. *On Solicitor Discharging Himself or becoming Incapacitated.*

Rights of Solicitor.]—A solicitor declining to be further concerned in a cause is not entitled to compel payment of his costs by refusing to permit such inspection of the papers in his hands or such production of them before the court or the master as may be necessary in the conduct of the cause. *Commerell* v. *Poynton*, 1 Swan. 1.

If a solicitor withdraws from the conduct of a suit he cannot claim to retain the papers necessary for the prosecution of it till his costs are

paid, but will be ordered to deliver them up, without prejudice to his lien, to the new solicitor of the party. *Colegrave* v. *Manley*, Turn. & R. 400 : 2 L. J. (O.S.) Ch. 39 : 24 R. R. 83.

A solicitor who has declined to proceed with a cause will be ordered, though his bill of costs is not paid, to deliver up the papers to the present solicitor of the party, the latter undertaking to hold them, subject to the former solicitor's lien, for what shall be found due to him on the taxation of the bills. An offer on the part of the former solicitor, after the motion made, to proceed with the cause will not prevent the court from ordering him to deliver up the papers on the terms mentioned above. *Ib.*

If a solicitor discharging a client has a lien on the papers relating to a matter in progress, such papers must nevertheless be given up to his successor, the lien reviving on the completion of the business. *Rawlinson* v. *Moss*, 30 L. J., Ch. 797 ; 7 Jur. (N.S.) 1053 ; 4 L. T. 619 ; 9 W. R. 733.

After demurrer allowed, the plaintiff's solicitor refused to proceed until the payment of his bill : —Held, that he was bound to deliver over the papers to the new solicitor of the plaintiff on the usual undertaking as to lien and redelivery, but that the party ought, under the circumstances, to undertake to prosecute the case with due diligence. *Cane* v. *Martin*, 2 Beav. 584 ; 4 Jur. 500.

Solicitor refusing to act longer in cause ordered to permit client to inspect papers in his possession at all reasonable times, without any undertaking on his part to proceed to taxation of bill. *Moir* v. *Mudie*, 1 Sim. & S. 282 ; 1 L. J. (O.S.) Ch. 218.

A solicitor, having declined to act for his client, has no lien for his costs upon a fund in court. *Cresswell* v. *Byron*, 14 Ves. 271 ; 9 R. R. 275.

An attorney who refused either to proceed with a case, unless furnished by the plaintiff with the necessary funds for that purpose, or to hand over the papers to another attorney, unless repaid the costs out of the pocket, ordered, upon the petition of the plaintiff (his former client), to hand over to the new attorney such papers and documents connected with the cause, as, upon inspection, the latter might deem necessary to enable him effectually to prosecute the suit, the petitioner consenting that the respondent should have a lien upon any funds that might be thereby realised, and the new attorney undertaking to proceed without delay to bring the cause to a termination, unless counsel should otherwise advise, and in such case undertaking to hand back to the respondent all deeds and papers, immediately on receiving such advice. *Strangways* v. *Harman*, 1 Ir. Eq. R. 467.

Order made on a solicitor, who withdrew from the conduct of the plaintiff's cause, that he should deliver up to the plaintiff's new solicitor the briefs, the pleadings, counsel's opinions thereon, office copies of the several answers, and all such other papers and documents, connected with the cause, as, upon inspection, such new solicitor might deem necessary for the hearing, without prejudice to any right of lien for costs, and upon an undertaking to return them undefaced within ten days after the hearing. *Heslop* v. *Metcalfe*, 3 Myl. & C. 183 ; 7 L. J., Ch. 49 ; 1 Jur. 816.

Traders, before their bankruptcy, deposited their books with a solicitor, with a view to his effecting for them a compromise with their creditors. Terms were arranged, but the bankrupts were unable to comply with them, and the solicitor refused to act further in the matter. Adjudication in the bankruptcy followed :—Held, that the solicitor was entitled to the lien on the books. *Leah, In re, Jabet, Ex parte*, 6 Jur. (N.S.) 387 : 2 L. T. 72—L.JJ.

Where a solicitor has discharged himself of his retainer from acting further for his client, he will be compelled, if the client has resolved to further conduct his own case in person, to deposit the papers and documents in the cause which he has in his possession in the custody of the officer of court for a certain period in order that the client may have access to them, although the solicitor has still a lien upon such papers and documents for his unpaid bill of costs. *Wontner, In re, Scheyer, Ex parte*, 52 J. P. 183. Affirmed in C. A., W. N., 1888, p. 136.

When a solicitor applied to his client for funds to carry on a suit, and upon the client not furnishing any, declined to continue to conduct the litigation, and the client appointed fresh solicitors :—Held, that this was a discharge by the solicitor, and that he might be called upon to deliver to the new solicitors the papers relating to the matters in the suit on their undertaking to hold them without prejudice to his lien, and to return them undefaced within twelve days after the conclusion of the suit, and to allow the former solicitor access to them for the purpose of carrying on an action for his costs. *Robins* v. *Goldingham*, 41 L. J., Ch. 813 ; L. R. 13 Eq. 440 ; 25 L. T. 900 ; 20 W. R. 277. S. P., *Black* v. *Lovering*, 35 W. R. 232.

Agent of a solicitor held by the irregularity of his conduct to have discharged himself, and ordered, before taxation on payment of his bills, to deliver up all papers, &c., on an undertaking of the principal to redeliver them as the court should order. *Smith, In re*, 4 Beav. 309.

A solicitor who withdraws from the conduct of a suit, because his client will not furnish him with the funds necessary for carrying it on, has no such lien for costs already incurred, as will entitle him to withhold from his client and his new solicitor such of the client's papers as are necessary for the effectual prosecution of the cause. *Heslop* v. *Metcalfe* (3 Myl. & C. 183) considered, and similar order made. *Rutledge* v. *Rutledge*, 2 Ir. Eq. R. 290.

A dispute having arisen as to the mode and extent of a solicitor's remuneration, he refused to proceed in the cause until it had been settled. The solicitor was ordered to deliver up the papers in the cause to the new solicitor upon his undertaking to proceed with due diligence, and to hold them subject to existing lien thereon. *Wilson* v. *Emmett*, 19 Beav. 233.

A solicitor having discharged himself must give up the papers to the new solicitor without his lien thereon being discharged by payment, and only without prejudice to it, and according to the terms of the order in *Heslop* v. *Metcalfe* (3 Myl. & Cr. 183). *Ib.*

Where a solicitor discharged himself from acting as solicitor to a party to a cause, and retained the papers for the purpose of having his bill of costs taxed, and his former client refused to pay the bill of costs, the common order for delivery was made subject to lien, and on the undertaking to return them ; but the order was made without costs on account of the former client's refusal to pay the bill of costs. *Walker* v. *Beanlands*, 15 W. R. 168.

Where a solicitor agrees with his client to carry on a suit in chancery without requiring to be supplied with funds up to the hearing, that means the original hearing ; and subsequently

to that period he has a right to refuse to proceed without funds; but he has no right to withhold the papers from another solicitor to conduct an appeal. *Webster* v. *Le Hunt*, 9 W. R. 804.

When Incapacitated from Practising.] — A solicitor, who had been the solicitor of the plaintiff in the cause, being detained in prison for debt, ordered to deliver up to another solicitor appointed by the plaintiff the proceedings in the cause, notwithstanding he had become a mortgagee of three-fourths of the fund in question in the suit. *Scott* v. *Fenning*, 15 L. J., Ch. 88; 9 Jur. 1085.

A solicitor, in custody for debt, being by the 6 & 7 Vict. c. 73, s. 31, incapacitated from practising, was ordered to deliver up his client's papers in pending suits without payment of his costs, but to be held subject to his lien. *Williams, In re*, 28 Beav. 465; 30 L. J., Ch. 610; 6 Jur. (N.S.) 908; 8 W. R. 645.

A solicitor allowed himself to be arrested for debt and detained in prison. A client, for whom he was acting in a suit, presented a petition for delivery up of her papers, upon which he claimed to have a lien for costs:—Held, that he was not entitled to any such lien, although he alleged, and there was reason to believe, that his imprisonment had arisen from the default of the client to pay expenses out of pocket, which she had agreed to do. *Ib.*

Where a solicitor fairly carries on a suit, and there is no proof of misconduct or refusal on his part to proceed, although he becomes embarrassed and is changed, before final decree, that does not disentitle him to his lien for costs. *Smith, In re*, 4 L. T. 43; 9 W. R. 396.

c. *On Change of Solicitor by Order of Court.*

A solicitor, from whom the conduct of a cause has been taken by the court, must give the new solicitor an opportunity of making himself acquainted with the documents common to the cause, and the free use of such as are required for its prosecution. *Bennet* v. *Baxter*, 9 L. J., Ch. 137; 4 Jur. 50.

Order made on a solicitor, who had been by an order of the court discharged from acting as the plaintiff's solicitor in the suit, to deliver up to the plaintiff's new solicitor all abbreviated and office copies of pleadings, and all other papers and documents and copies of papers and documents, and also all letters and copies of letters relating to or concerning the suit, or which may or might have been used in relation thereto, &c., without prejudice to any question of lien for costs, and upon an undertaking by the plaintiff and his new solicitor not to part with any of them without the consent of the discharged solicitor or the order of the court and to abide by such order as the court might make in respect thereto. *Nainby* v. *Solomons*, 7 Jur. 527.

An assigned solicitor of a pauper, in consequence of delay in the prosecution of proceedings in the suit, was ordered to be discharged and to deliver up to the new solicitors all the papers, subject to his lien for what might be found due to him for costs upon taxation. *Hannaford* v. *Hannaford*, 24 L. T. 86; 19 W. R. 429.

d. *On Change in Partnership or of Client.*

Taking Fresh Partner.]—A solicitor's right of lien will not be affected by the circumstance of his taking a partner. *Pelly* v. *Wathen*, 7 Hare, 351; 18 L. J., Ch. 281; 14 Jur. 9.

After A. had employed Messrs. B. & C. as his solicitors, they took D. into partnership with them, and A. employed the new firm; in the course of that employment papers belonging to him came into their possession:—Held, that B. and C. had no lien on the papers for costs which A. owed them before they took D. into partnership. *Forshaw, In re*, 16 Sim. 121; 17 L. J., Ch. 61.

Partner becoming Bankrupt.] — One of two solicitors who were partners became bankrupt; the assignees excluded the other from interfering with the affairs of the partnership; the court, nevertheless, refused to order the assignees to deliver to him the papers belonging to the clients of the firm without consent of his clients. *Davidson* v. *Napier*, 1 Sim. 297; 27 R. R. 189.

Dissolution.]—A. was appointed solicitor of a company. B. entered into partnership with him, and they acted as joint solicitors for the company until it was wound up, when they acted for the liquidators. After the dissolution of their partnership, B. acted separately for the liquidators:—Held, that B. had no lien for costs on the documents of the company in his possession. *County Life Assurance Co., In re*, 38 L. J., Ch. 231.

A. and B., solicitors in partnership, had a bill of costs against C. On their dissolution of partnership, those costs were transferred to A. Afterwards A., at the request of the client, paid a debt for which she had deposited title deeds, and took possession of and afterwards retained the title deeds. He afterwards continued to act as her solicitor, and costs were incurred:—Held, that as to the joint bill of costs there could be no lien in favour of A., if otherwise, there would have been lien; and as to his separate bill of costs, he had taken the deeds as mortgagee, and not as solicitor, and therefore had no lien for costs. *Vaughan* v. *Vanderstegen*, *Annesley's Case*, 2 Drew. 409; 2 W. R. 642.

—— **Deed held in another Capacity—Ostensible Partnership.**]—Where property is conveyed to one of two solicitors, carrying on business ostensibly as partners, and the deed remains in his possession as a trustee, he acquires no lien upon it for costs due to his firm; and it is immaterial that as between the solicitors themselves there was no partnership. *Vaughan* v. *Vanderstegen*, *Annesley's Case* (2 Drew. 409), followed. *Gough, In re, Lloyd* v. *Gough*, 8 R. 290; 70 L. T. 725.

—— **Discharge of Client.**]—A dissolution of a firm of solicitors amounts to a discharge of the client. *Rawlinson* v. *Moss*, 30 L. J., Ch. 797; 7 Jur. (N.S.) 1053; 4 L. T. 619; 9 W. R. 733.

Where a party has employed as his solicitors in a cause a firm of two solicitors in partnership, the retirement from the business of one of such partners, under an arrangement with the other, operates as a discharge of the client by the solicitors, and the client is thereupon entitled to require that the papers in the cause, necessary for its prosecution, shall be delivered up to his new solicitor, upon the usual undertaking for saving the lien of the discharged solicitors. *Griffiths* v. *Griffiths*, 2 Hare, 587; 12 L. J., Ch. 397; 7 Jur. 573.

—— **Deposit in Court.**]—A firm of solicitors having declined to act for their client during the continuance of a suit, and refused to give up the deeds, &c., in their possession, alleging that they

had a lien for costs incurred to them, and also to their predecessors in the firm before the commencement of the suit, these costs having been previously taxed, an order was made upon motion for the deposit of the deeds in the master's office. *Gregory* v. *Cresswell*, 14 L. J., Ch. 300.

Change of Client — Cheques.] — H. having employed a solicitor to take proceedings in respect of certain shares of which H. was holder, deposited with him the certificates of such shares as security for the costs. H. afterwards transferred to a company his interest in the shares, with notice of the lien of the solicitor, and the solicitor accepted the retainer of the company to continue the proceedings, and the solicitor obtained certain cheques in exchange for the shares which the complainants claimed to have delivered to them :—Held, that the solicitor was entitled to retain those cheques as security for his costs due from H., notwithstanding that he had accepted a retainer from the company. *General Share and Trust Co.* v. *Chapman*, 46 L. J., C. P. 79 ; 1 C. P. D. 771 ; 36 L. T. 179.

8. Collusion to Deprive.

When Compromise Collusive.]—The compromise is collusive where the object of it is that the plaintiff should get more than he would in the ordinary course, while his attorney would get less. *Sullivan* v. *Pearson*, infra.

An action for unliquidated damages was compromised by the parties after the plaintiff, who was a labourer, had obtained a verdict for 25*l*., and a rule nisi for a new trial had been granted on the ground that the verdict was against the evidence :—Held, that the attorney had no ground for claiming the equitable interference of the court to enforce his right of lien. *Ib.*

In an admiralty action for wages the plaintiffs and defendants compromised the action by payment to each of the plaintiffs of a certain sum in discharge of the claim and costs. The plaintiffs left the country without paying their solicitors' costs :—Held, that as there was no evidence that the parties had made the settlement, with the intention of depriving the plaintiffs' solicitors of their lien for their costs, the defendants ought not to be ordered to pay the plaintiffs' taxed costs. *Brunsdon* v. *Allard* (2 El. & El. 19), *Sullivan* v. *Pearson* (L. R. 4 Q. B. 153), approved. *The Hope*, 52 L. J., P. 63 ; 8 P. D. 144 ; 49 L. T. 148 ; 32 W. R. 269 ; 5 Asp. M. C. 126—C. A.

If after verdict, and pending a rule to enter a nonsuit, the parties themselves settle the action, without the intervention of their attorneys, after which the rule is made absolute, the plaintiff's attorney is bound to give up the record. *Baber* v. *Harris*, 2 W. W. & H. 53.

Where there are cross actions, and the plaintiff in each has obtained judgment, it is competent for the parties to come to a bonâ fide settlement of the matter between themselves, although the consequence of such settlement may be, that the attorney for one party will lose his lien for his costs. But if such settlement is come to by collusion and fraud, for the purpose of depriving the attorney of his costs, he has a right to call for the interference of the court. *Brunsdon* v. *Allard*, 2 El. & El. 19 ; 28 L. J., Q. B. 306 ; 5 Jur. (N.S.) 596 ; 7 W. R. 581.

A plaintiff may, without consulting his attorney, compromise an action with a defendant, and take upon himself the payment of the costs to the attorney, if there is no fraudulent conspiracy to cheat the attorney of his costs. *Chapman* v. *Haw*, 1 Taunt. 341 ; 9 R. R. 786.

The attorney of a defendant has no such interest in the suit as to prevent the parties from compromising it without his consent. *Quested* v. *Callis*, 10 M. & W. 18 ; 1 D. (N.S.) 888 ; 11 L. J., Ex. 345 ; 6 Jur. 512.

Where the amount of damages sought to be recovered in an action is unliquidated, the parties may compromise, without regard to the plaintiff's attorney's claim to costs. *Hart, Ex parte*, 1 D. P. C. 324 ; 1 B. & Ad. 660.

An attorney is not justified in proceeding with an action after it has been settled between the parties themselves, though it is known that costs have been incurred, and that the plaintiff himself is not in a condition to pay them ; it must be shewn affirmatively, that the settlement was come to for the purpose of cheating the attorney. *Jordan* v. *Hunt*, 3 D. P. C. 666 ; 1 Gale, 159. S. P., *Nelson* v. *Wilson*, 4 M. & P. 385 ; 6 Bing. 568 ; 8 L. J. (O.S.) C. P. 226 ; *Anon.*, 9 L. J. (O.S.) Ex. 6 ; *Hubert* v. *Steiner*, 4 L. J., C. P. 233.

An attorney's lien on a judgment being merely a claim to the equitable interference of the court to have the judgment held as a security for his costs, he has no authority over the execution of a ca. sa. so as to carry it into effect against the order of the plaintiff, even though the plaintiff and defendant should collude to deprive him of his lien. *Barker* v. *St. Quintin*, 12 M. & W. 441 ; 1 D. & L. 542 ; 13 L. J., Ex. 144.

Enforcement of Lien by Court.] — When a judgment or a verdict which is not disturbed has been obtained, and, semble, where a debt is ascertained through the exertions of the attorney, and the parties make a collusive compromise, the court will enforce the attorney's right of lien for his costs. *Sullivan* v. *Pearson*, 9 B. & S. 960 ; 38 L. J., Q. B. 65 ; L. R. 4 Q. B. 153 ; 19 L. T. 430.

Where an arrangement is entered into for the compromise of an action by the plaintiff and defendant, without the knowledge of the plaintiff's solicitor, by the payment of a certain sum to the plaintiff in discharge of the claim and costs, the court has jurisdiction to give the plaintiff's solicitor liberty to continue the action for the recovery of his costs, on being satisfied that the purpose of the arrangement made by the parties included the purpose of depriving the plaintiff's solicitor of his costs. *Dunthorne* v. *Bunbury*, 24 L. R., Ir. 6—C. A.

A satisfaction piece collusively signed by the defendant at the instance of the plaintiff, whereby the defendant's attorney was deprived of costs, which were payable by the plaintiff, was set aside at the instance of the attorney. *Sharpley* v. *Carwood*, Ir. R. 7 C. L. 38.

If a plaintiff compromises the debt and costs with a defendant before the plaintiff's attorney has been paid, the court will not oblige the defendant to pay him, unless he gave notice to the defendant not to settle with the plaintiff till his bill should be paid. *Welsh* v. *Hole*, 1 Dougl. 238. See *Downes, In re, Verity* v. *Wild*, 4 Drew. 427 ; 28 L. J., Ch. 561.

Where a plaintiff and defendant collude in the settlement of an action, in order to deprive the plaintiff's attorney of his costs, and a bill for debt and costs is given by the defendant in

furtherance of that collusion, the court will compel the delivery up of that bill. *Gould* v. *Davies*, 1 D. P. C. 288; 1 C. & J. 415; 1 Tyr. 380; 9 L. J. (O.S.) Ex. 111

A plaintiff and defendant having settled an action, after verdict for the plaintiff, without the knowledge of his attorney, the defendant gave notice of the compromise to the attorney, who afterwards signed final judgment. The court, upon affidavits denying any conspiracy to deprive the attorney of his costs, made a rule absolute to set aside the judgment. *Clark* v. *Smith*, 1 D. & L. 960; 7 Scott (N.R.) 946; 6 Man. & G. 1051; 13 L. J., C. P. 97; 8 Jur. 406.

A plaintiff who had obtained judgment for his costs, in collusion with the defendant, and in order to defeat the lien of the plaintiff's attorney, gave him and the sheriff notice not to execute any process on pain of being treated as trespassers:—Held, that a judge had power, in the exercise of the equitable interference of the court, to order that the plaintiff "or the defendant" pay the attorney the costs. *Games, Ex parte*, 3 H. & C. 294; 33 L. J., Ex. 317.

A plaintiff sued in formâ pauperis, and after action executed a release to the defendants; the release having been pleaded puis darrein continuance, the court set it aside on the application of the plaintiff's attorney. *Wright* v. *Burroughes*, 4 D. & L. 226; 15 L. J., C. P. 277; 10 Jur. 860.

Where a plaintiff was nonsuited, and a rule nisi was afterwards granted to set aside the nonsuit on payment of costs, and then the parties entered into an arrangement, without the intervention of the defendant's attorney, to settle the action, by the defendant's giving a bill of sale and warrant of attorney to the plaintiff for his debt and costs, but without providing for the costs due by the defendant to his attorney, and the attorney thereupon got the rule discharged for setting aside the nonsuit:—Held, that he was justified in so doing. *Young* v. *Redhead*, 2 D. P. C. 119.

Where a client, who is the applicant in taxation proceedings, has with the knowledge of his solicitor, come to an arrangement with the respondent that the proceedings shall be dropped, and the court is of opinion that such arrangement was made collusively, and with the intention of depriving the solicitor of his costs, the solicitor will be entitled to an order against the respondent for the payment of his taxed costs of the proceedings. *Price* v. *Crouch* (60 L. J., Q. B. 767) followed. *Margetson and Jones, In re*, 66 L. J., Ch. 619; [1897] 2 Ch. 314; 76 L. T. 805; 45 W. R. 645.

Where a plaintiff and defendant compromise an action with the knowledge that they are so acting as to deprive the plaintiff's solicitor of his costs, such solicitor is entitled to an order for the payment of his taxed costs of the action by the defendant, or for continuance of the action for the recovery of such costs. *Price* v. *Crouch*, 60 L. J., Q. B. 767.

Where plaintiff's solicitor, with notice, suffers defendant to satisfy plaintiff's demand, without taking effectual security for payment of his costs, the court will not suffer him to proceed in suit against defendant for recovery of them. *Morse* v. *Cook*, M'Clel. 211; 13 Price, 437.

By the decree in the cause, certain of the defendant's estates were directed to be sold to meet the plaintiff's claim. Pending the preliminaries for a sale, the plaintiff's solicitors gave notice to the defendant that they claimed a lien against the plaintiff in respect of their costs. The suit was afterwards compromised, the defendant paying a certain sum to the plaintiff:—Held, upon petition of the plaintiff's solicitors, that they were entitled to be paid their taxed costs of suit, and of the petition, by the plaintiff and defendant, or one of them, not exceeding in the whole the sum paid by the defendant upon the compromise. *White* v. *Pearce*, 7 Hare, 276; 18 L. J., Ch. 462; 13 Jur. 999.

—— **Acting without Authority.**]—Where an attorney, without a regular authority from the plaintiff, commenced an action, and the plaintiff, with a knowledge of the proceedings, suffered the cause to be carried down to trial, but afterwards concerting with the defendant entered up satisfaction on the record without securing to the attorney his costs, the court refused to vacate the entry of satisfaction. *Abbott* v. *Rice*, 3 Bing. 132; 10 Moore, 489; 3 L. J. (O.S.) C. P. 202.

—— **Where Plaintiff Sues in Formâ Pauperis.**]—Where a pauper plaintiff settles the action behind the back of his attorney, it is entirely a question for the discretion of the court, under the particular circumstances of the transaction, whether they will interfere and set aside the proceedings. *Jones* v. *Bonner*, 2 Ex. 230; 5 D. & L. 718; 17 L. J., Ex. 343.

The court will not interfere, even in the case of a plaintiff suing in formâ pauperis, to prevent effect being given to a settlement between the parties, although it be evident that the attorney will lose his costs, unless the settlement is clearly collusive or fraudulent. *Francis* v. *Webb*, 7 C. B. 731. S. P., *Moore* v. *Angell*, 11 Jur. 455.

—— **Payment to Plaintiff by Defendant's Solicitor.**]—If a defendant's attorney pays to the plaintiff the debt and costs recovered, after notice from the plaintiff's attorney not to do so till his bill has been first satisfied, the former is liable to pay over again to the latter the amount of his lien on such debt. *Read* v. *Duppa*, 6 Term Rep. 361; 3 R. R. 200.

By Release.]—A release of all demands from the plaintiff to the defendant will not deprive the plaintiff's attorney of his lien upon the costs of an action awarded in favour of the plaintiff. *Gifford* v. *Gifford*, Forrest, 109. S. P., *Ormerod* v. *Tate*, 1 East, 464; 6 R. R. 327.

9. When Lost.

Loss of Possession.]—Where moneys have been recovered by a company in any action, although the solicitors would have a lien for their costs on such moneys while in their hands, yet after they have paid over such moneys to the company, and allowed them to be incorporated with the general assets, they have no lien on those assets in respect of costs. *Phœnix Life Assurance Co., In re, Howard and Dollman, Ex parte*, 1 H. & M. 433; 2 N. R. 548; 8 L. T. 728; 11 W. R. 984.

A firm of solicitors had a lien for costs upon certain documents in their possession. The partnership was dissolved, and the firm was reconstituted. Shortly after dissolution, the documents in question were removed from the office of the firm by a former partner without

their consent or permission :—Held, that the lien was not destroyed. *Carter, In re, Carter* v. *Carter*, 55 L. J., Ch. 230 ; 53 L. T. 630 ; 34 W. R. 57.

A mortgagor instructed his solicitor, to whom he was indebted in a bill of costs, to prepare a conveyance of the mortgaged property. They did so, and sent the engrossment to the mortgagee's solicitors, with an intimation that they had a lien on it, and a request that the mortgagee's solicitors would hold it on account of the mortgagor's solicitors. The engrossment was executed by the mortgagee. The mortgage money was not paid, but the mortgagor sold the property to purchasers, who agreed to pay it :—Held, that the mortgagor's solicitors had a lien on the engrossment, and that such lien was not prejudiced by their having parted with the engrossment under the above circumstances, nor by the execution of it as a deed, nor by a promissory note delivered to the solicitors not covering their whole demand, and that the purchaser had been properly restrained by injunction from proceeding at law to recover the deed. *Watson* v. *Lyon*, 7 De G. M. & G. 288 ; 24 L. J., Ch. 754 ; 3 W. R. 543.

—— **Undertaking to Pay.**]—Where solicitors of a company, after an order to wind up, delivered up documents to the official manager, on his undertaking that they should be paid out of the first moneys in their hands, and allowed nine years to elapse before delivering their bill (the official manager having until then had no funds in his hands :—Held, that the claim was not barred by the Statute of Limitations. *Gloucester, Aberystwith and Central Wales Ry., In re*, 2 Giff. 47 ; 29 L. J., Ch. 383 ; 6 Jur. (N.S.) 116 ; 1 L. T. 320 ; 8 W. R. 175.

Title Paramount.]—When a party claiming by title paramount to the client, enforces the production of the paper, semble, the benefit, thereby incidentally accruing to parties deriving under the client, cannot be taken from them, and the solicitor's lien is lost. *Blunden* v. *Desart*, 2 Dr. & War. 405 ; 2 Con. & L. 111 ; 5 Ir. Eq. R. 221.

Assignment of Judgment.]—A solicitor to whom a judgment has been assigned in trust for his client, afterwards assigning to a trustee of a settlement upon the marriage of his client's grandson, parts with his lien upon all documents relating to the title to the judgment of those claiming under the settlement. *Fitzgerald* v. *Bermingham*, 1 Con. & L. 405.

On Payment.]—On payment of his costs, a solicitor's lien on documents of his client in his possession ceases ; he is then bound to deliver them up on his client's demand, and cannot refuse delivery because third persons claim an interest in them. *Emma Silver Mining Co., In re, Turner, In re*, 24 W. R. 54.

No reservation of Lien.]—A solicitor employed by an administrator in the affairs of the administration, and also on his own account, having in the course of that employment obtained possession of documents relating to the intestate's leasehold estate, and having, by his client's directions, deposited deeds relating to part of that property with the executor of a deceased party, who was entitled to a distributive share of the intestate's estate, claimed, for his bill of costs due from the administrator, a lien on other documents in his possession relating to the same property as that to which the deeds related which were so deposited :—Held, that the security having been effected by the agency of the solicitor, without any reservation on his part in favour of his lien, he had no lien against the party entitled to the benefit of the security. *Hicks* v. *Keate*, 3 Jur. 1024.

Costs ordered to be paid to Client.]—Though order be made on petition in bankruptcy directing costs to be paid to the petitioner personally, solicitor does not lose his lien for his costs. *Bryant, Ex parte*, 1 Madd. 49 ; 2 Rose, 227.

Change of Solicitor.]—The plaintiff and his solicitors at the date of the decree can waive taxation and accept a gross sum in satisfaction of all costs without consulting the former solicitors ; in such a case the lien of the former solicitors upon a fund in court is gone, and their only remedy is by an action for money had and received against the solicitors who received the money. *Mornington* v. *Wellesley*, 4 Jur. (N.S.) 6.

Bankruptcy.]—Lien of solicitor upon fund in court, which is the result of the proceedings, cannot be defeated by the subsequent insolvency of the client. *Moule, Ex parte*, 6 Madd. 462.

Notice when requisite.]—Semble, that where a solicitor has a lien for costs on a fund in the hands of a third party, a notice of such lien is not alone sufficient to make the third party responsible for paying over the fund, without providing for the costs, if the solicitor has had an opportunity of taking other proceedings to secure the fund, and has neglected to do so. *Townsend* v. *Reade*, 4 L. J., Ch. 233.

A solicitor's lien on a policy of insurance is not lost by want of notice to the assurance company against assignees who give notice. *West of England Bank* v. *Batchelor*, 51 L. J., Ch. 199 ; 46 L. T. 132 ; 30 W. R. 364.

Release.]—Voluntary release by a party to his adversary, not to defeat the clerk in court for his lien for costs. If the suit had ended on a bonâ fide compromise for a reasonable consideration paid, it would have been otherwise. *Anon.*, 2 Ves. 25.

Taking Security—Waiver.]—Where a solicitor takes from his client a security for his costs, the primâ facie inference in default of evidence to the contrary is that he waives his lien. *Payne-Collier, Ex parte, Taylor, In re*, 60 L. J., Ch. 525 ; [1891] 1 Ch. 590 ; 64 L. T. 605 ; 39 W. R. 417—C. A.

Solicitor's lien is superseded by taking a security. *Balch* v. *Symes*, Turn. & R. 92 ; 23 R. R. 195. See *Tyler* v. *Drayton*, 2 Sim. & S. 309.

Solicitor's lien on papers superseded by taking security. *Cowell* v. *Simpson*, 16 Ves. 275 ; 10 R. R. 181.

If a solicitor takes a promissory note for his costs payable on demand, he loses his lien. *Roberts* v. *Jefferys*, 8 L. J. (O.S.) Ch. 137.

A solicitor, having a lien for costs on title deeds, took from the client a bond conditioned for the amount of the costs, with interest at 5 per cent., and regularly received the interest for several years afterwards, but still retained the deeds. In a general creditors' suit subsequently instituted, it appeared that the entire estate of the client would be insufficient for creditors

whose securities were prior to the bond, but should have been postponed to the lien. The solicitor stated on oath that he accepted the bond only as a collateral security, and never intended to give up his lien:—Held, that having taken a security for the amount of the costs, with interest, the lien was gone. Quære, whether the mere taking a security for the amount of costs, without more, extinguishes the lien. *Brownlow* v. *Keatinge*, 2 Ir. Eq. R. 243.

A firm of solicitors prepared and engrossed a reconveyance from a mortgagee to their client, the mortgagor in consideration, stated in the deed, of 398*l*. This deed was sent by the firm to the mortgagee's solicitors, with a letter desiring that it might be held by them on the account of the senders, who had a lien upon it for costs. The 398*l*. was not paid, and the mortgagee's solicitors retained the deed. The firm of solicitors received a promissory note, upon which part of the costs were paid. The land was sold, subject to the mortgage. The firm of solicitors filed a bill against the mortgagee and the purchaser for the delivery up of the deed:—Held, that they were entitled to hold the deed against the mortgagor; and that the taking of the promissory note for part of the debt due to them did not affect their lien for the money not covered by it. *Watson* v. *Lyon*, 7 De G. M. & G. 288; 24 L. J., Ch. 754; 3 W. R. 543.

A cheque is deposited, in pursuance of an agreement with a solicitor, to be applied in payment of the amount to be recovered by his client A. in an action against B., the party depositing the cheque. The action is proceeded with and judgment entered up for the amount subsequently ascertained by arbitration to be due to A. B. has a cross claim against A. which he is unable to plead in defence to the action brought against him. In proceedings taken under the bankruptcy of A., which happens subsequently to the award, B. is allowed to prove his debt against A.'s estate as a set-off:—Held, that the solicitor with whom the cheque had been deposited did not thereby lose his lien for costs, and a bill to recover from him the whole amount of the cheque was dismissed. *Hanson* v. *Reece*, 27 L. J., Ch. 118; 3 Jur. (N.S.) 1204; 6 W. R. 46.

Where C. gave his attorney a specific sum for the purpose of satisfying a debt, for which an execution had issued against his goods at the suit of B., and the attorney paid the money to B., who thereupon delivered to him a lease which had been deposited by C. with B. as a security for the debt:—Held, that the attorney had a lien on it for his general balance due from C.; and that such lien was not extinguished by his having taken acceptances from C. for the amount of that balance before the lease came to his hands, some of those acceptances, when the lease did come to his hands, having been dishonoured, and one of them taken up by the attorney. *Stevenson* v. *Blakelock*, 1 M. & S. 535; 14 R. R. 525.

By Attachment.]—A solicitor does not lose his lien on costs ordered to be paid to his client, by taking the client in execution under a ca. sa. for nonpayment of costs. *O'Brien* v. *Lewis*, 3 De G. J. & S. 606; 2 N. R. 536; 32 L. J., Ch. 665; 9 Jur. (N.S.) 764; 8 L. T. 683; 11 W. R. 973.

The statute 1 & 2 Vict. c. 110, ss. 16, 18, does not deprive a solicitor, who has attached his client for nonpayment of costs, of his lien upon the fund which the solicitor has recovered. An attachment of the client for the nonpayment of costs is not a waiver of the lien of the solicitor on the fund which he has recovered in the suit in which the costs were incurred. *Lloyd* v. *Mason*, 4 Hare, 132; 14 L. J., Ch. 257; 9 Jur. 772.

The execution of a writ of attachment for costs does not deprive the party issuing it of any lien or right of set-off he may possess for the payment of such costs. *Bawtree* v. *Watson*, 2 Keen, 713; 7 L. J., Ch. 183.

The solicitor is not deprived of his lien on the funds in court, for his costs in the cause, by having issued an attachment against his client, and committed him to gaol for nonpayment of his bill; but the costs which he may receive in the cause are to be taken in discharge of the attachment, pro tanto. *Davies* v. *Bush*, Younge, 353.

Judgment for Costs.]—A solicitor does not lose his retaining lien by suing his client and obtaining judgment for his costs. *Aikin's Estate, In re*, [1894] 1 Ir. R. 225.

10. Priorities.

Successive Solicitors—Insufficient Fund.]—Where successive solicitors are employed in an action, and the fund in court is insufficient for payment of all the costs, the solicitor who conducts the cause to its conclusion is entitled to be paid first, and the solicitor who was next previously employed is entitled to be paid next, and so on throughout, the latest in order of employment being entitled to priority; and it is immaterial that the previously employed solicitors may have obtained charging orders for their costs. *Wadsworth, In re* (34 Ch. D. 155) followed. *Knight, In re, Knight* v. *Gardner*, 61 L. J., Ch. 399; [1892] 2 Ch. 368; 66 L. T. 646; 40 W. R. 460.

In 1875 A. commenced an action against a colliery company on behalf of himself and all other debenture-holders. Shortly afterwards the company was ordered to be wound up, and the official liquidator was appointed receiver and manager in the action. In 1881 the plaintiff A. became bankrupt, and in 1882 B., another debenture-holder, was substituted as plaintiff in the action. An order was made directing A.'s solicitor to hand over the papers in the action to B.'s solicitor, without prejudice to his lien, if any. The colliery was carried on by the receiver and manager until 1883, when it was sold under an order obtained in the action by an auctioneer thereby appointed. The purchase-money, which was paid into court, was insufficient to pay the balance found due to the receiver, and the costs of all parties. The solicitors of A., the first plaintiff, claimed that, having given up the papers without prejudice to their lien, they were entitled to be paid their costs in priority to all parties to the action:—Held, that the solicitors of a plaintiff in a representative action, for whom another plaintiff was substituted, are not entitled to be paid their costs out of a fund recovered in the action in priority to the new plaintiff or other parties, by reason of any lien they might have upon the papers handed over by them in the action. *Batten* v. *Wedgwood Coal and Iron Co.*, 54 L. J., Ch. 686; 28 Ch. D. 317; 52 L. T. 212; 33 W. R. 303.

Over Garnishee Order.]—The plaintiffs were the solicitors for W. in an action in which he recovered a sum of money. The defendant was

a judgment creditor of W., and obtained, ex parte, on the day that judgment was signed in the above action, a garnishee order attaching all debts due to W. On the taxation of costs on the same day, the plaintiffs for the first time learned of the defendant's claim, and then gave notice to the defendant in the action in which W. was plaintiff, of their claim of lien :—Held, that the plaintiffs had a lien for their costs on the sum recovered by W. *Shippey* v. *Grey*, 49 L. J., C. P. 524; 42 L. T. 673; 28 W. R. 877—C. A. S. P., *Hamer* v. *Giles*, 48 L. J., Ch. 508; 11 Ch. D. 942; 27 W. R. 834.

A proctor's lien on a fund in court is not affected by a garnishee order, and he is entitled to be paid his costs in priority to the claim of the garnishee. *The Jeff Davis*, L. R. 2 Adm. 1; 17 L. T. 151.

An order obtained under the 61st section of the 17 & 18 Vict. c. 125, attaching a fund in the hands of a garnishee to answer a judgment debt, will not displace the prior lien for costs of a solicitor who has given notice to the garnishee. *Sympson* v. *Prothero*, 26 L. J., Ch. 671; 3 Jur. (N.S.) 711; 5 W. R. 814.

The attachment of a judgment debt overrides an attorney's lien on or control over the judgment in respect of general costs due to him from the garnishee. *Hough* v. *Edwards*, 1 H. & N. 171; 26 L. J., Ex. 54; 2 Jur. (N.S.) 814.

Costs awarded upon an interlocutory application are subject to the lien of the solicitor for the party to whom they are given, and cannot be attached by a judgment creditor of the party to the prejudice of the lien. *Cormick* v. *Ronayne*, 22 L. R., Ir. 140.

Acting for Company and Debenture-holders.]—The solicitor of a company who acts in the issue of debentures is not therefore debarred from setting up a retaining lien for costs due to him as solicitor of the company, against the debenture-holders in respect of documents which, if two solicitors had been employed, would not have been handed over to the solicitor acting for the debenture-holders. *Snell*, *In re* (6 Ch. D. 105), distinguished. *Brunton* v. *Electrical Engineering Corporation*, 61 L. J., Ch. 256; [1892] 1 Ch. 434; 65 L. T. 745.

Transfer of Fund with Notice.]—P. was entitled under a will to a life interest in 10,000*l*. He retained a solicitor to institute a suit for administration of the testator's estate. Orders had been made in the suit directing the costs of all parties to be taxed and paid out of funds in court, amounting together to about 100,000*l*., but this had not been done. P.'s life interest in the 10,000*l*. was transferred to a society, with notice that P.'s costs due to the solicitor had not been paid. More than two years had elapsed since the first order to tax and pay costs, but the solicitor's bill had not been delivered :—Held, that the solicitor was entitled to a charging order under 23 & 24 Vict. c. 127, s. 28, upon the life interest in the 10,000*l*., and also to retain the papers in the suit until he was paid. *Pilcher* v. *Arden, Brook, Ex parte*, 47 L. J., Ch. 479; 7 Ch. D. 318; 38 L. T. 111; 26 W. R. 163.

Creditors.]—A solicitor who had acquired the possession of deeds, &c., relating to the estate of a party deceased, for general purposes, was held, on the petition of the plaintiff in a creditors' suit, to have a general lien (beyond costs in the suit) on the documents prior to any general creditor of the estate; and the court cannot, on petition in the suit by the plaintiff or receiver, order any taxation of the solicitors' costs. *Warburton* v *Edge*, 9 Sim. 508; 8 L. J., Ch. 111; 3 Jur. 166.

A solicitor, who is in disburse for his client, has a right to be paid out of a duty decreed to an administrator, and has a lien upon it before the bond creditors of the deceased: nor can the administrator controvert this rule, by insisting on applying the assets in a course of administration. *Turwin* v. *Gibson*, 3 Atk. 720, 727.

R. S. devised his real estate, subject to his debts and legacies, to his only son, J. S., in tail, and died in 1773. In 1802 J. S. deposited the title deeds with his solicitor, and prior to the year 1813, incurred costs to a large amount, in suffering a recovery, and in the causes of A., B., and C. (the testator's younger children), instituted to raise charges to which they were entitled under the will, &c. In 1813 M., a specialty creditor of the testator on whose debt J. S. paid interest until 1811, filed his bill against J. S. and A., B. and C., &c., praying for the execution of the trust for payment of debts, and that his demand might be deemed charged on the testator's real estate. J. S. suffered the bill to be taken pro confesso against him, and died insolvent before the final decree. Some time before, the solicitor of J. S. became concerned in this cause for the representatives of B., and now refused to bring in the deeds for a sale under the decree, until J. S.'s costs incurred between the years 1802 and 1813 should be first paid. A., B. and C. were reported in priority to M., for whose demand the residue of the fund would be insufficient :—Held, that the costs now demanded, if rendered necessary by the will, should have been claimed upon the hearing of the cause, and provided for by the decree: and that, therefore, the claim could not now be entertained :—Held, also that as it did not appear that any of the costs had been incurred before the title deeds came into the solicitor's possession, and as he had full notice of the will when the costs were incurred, he was bound by the trust, and had not any lien upon the deeds as against M., the specialty creditor of the testator, who had proceeded bonâ fide and with due diligence. *Morgan* v. *Scott*, 2 Ir. Eq. R. 128.

When a judgment was obtained against a client subsequently to the deposit of his title deeds with his solicitor, and costs had become due for professional services rendered to the client both before and after the date of the entry of the judgment :—Held, that the solicitor's lien could not prevail against the judgment creditor for any portion of the costs incurred after the date of the judgment. *Blunden* v. *Desart*, 2 Dr. & War. 405; 2 Con. & L. 111; 5 Ir. Eq. R. 221.

11. How Enforced.

By what Method.]—If a solicitor, whom his client has ceased to employ, by the production of a deed in his hands belonging to the client, and upon which he claims a lien as solicitor, enables the client to recover a fund in a suit, his lien over the fund so realised is confined to the costs of that suit, but is a lien which he is entitled actively to enforce. Secus, as to his general lien upon his client's papers, which applies to all his bills of costs, but is merely a right to retain the papers, and cannot be actively enforced. *Bozon* v. *Bolland*, 4 Myl. & C. 354; 9 L. J., Ch. 123; 3 Jur. 884; 4 Jur. 763.

When all Matters in Dispute have been referred.]—The lien of an attorney cannot be affected by reference of the cause and all matters in dispute between the parties. *Cowell* v. *Bettley*, 4 M. & Scott, 265 ; 10 Bing. 432 ; 2 D. P. C. 780 ; 3 L. J., C. P. 148.

Trover for Documents.]—If an attorney having a lien on papers delivers them to an arbitrator for the purposes of the arbitration, he may maintain trover for them against the arbitrator though he has not expressly reserved his lien. *Whalley* v. *Halley*, 8 L. J. (O.S.) K. B. 6.

Award—Payment to Solicitor.]—Where the terms of an award were "to pay to the plaintiff or his attorney" and, the plaintiff having become insolvent, the attorney claimed a lien on the award for his costs, an order for the defendant to pay the amount awarded and costs to the plaintiff's attorney was refused. *Anon.*, 1 W. R. 150.

Costs.]—Where costs are ordered to be paid to the client, solicitors need not wait the result of process to compel the payment of such costs, but may insist upon the immediate benefit of their lien. *Pounset* v. *Humphreys*, C. P. Cooper, 142.

Out of Fund.] — Practice as to attorneys applying to be paid their costs out of the funds decreed to their clients. *Anon.*, 5 Ir. Eq. R. 38.

Lien of a solicitor upon a fund in court for his costs of suit protected by a stop order. *Hobson* v. *Shearwood*, 8 Beav. 486.

A solicitor who has established in a suit a claim by his clients to a sum of money may apply ex parte for an interim order to restrain the payment to the clients by the accountant-general of a dividend in the suit until he can apply for a charging order. *Gerrard* v. *Dawes*, 21 L. T. 322 ; 18 W. R. 32.

Where an attorney applies to be paid his costs out of a fund allocated to his client, he ought to state, in his affidavit, that he distinctly informed his client of his intention so to apply. *Redmond* v. *Gormley*, 4 Ir. Eq. R. 698.

An attorney has a lien for his costs on a judgment recovered by his client, and the court will lay hold of the fund where it exists, and when it does not thereby set aside any arrangement of the parties. *Slater* v. *Sunderland Corporation*, 33 L. J., Q. B. 37 ; 9 L. T. 422.

By the decree, the plaintiff's costs (319*l.*) had been ordered to be paid to her solicitors, out of a fund in court, in which she was interested ; but the plaintiff having in the course of the proceedings given to one of the firm of solicitors a bill for 300*l.*, which they had passed away, the order for the payment of the 319*l.* was stayed. *Moon* v. *Smith*, 14 Beav. 393.

Judgment.]—Interpleader on an attorney's claim of lien upon a sum awarded as damages under a judgment obtained by the client against the plaintiff. —— v. *Bolton*, 18 Ves. 292.

In whose Name.]—Where an administrator has recovered a chattel interest in lands, by a decree in equity declaring his costs to be duly charged on the estate, his solicitor cannot file a petition in his own name to realise his own portion of those costs. *M'Allister, In re*, 16 Ir. Ch. R. 134.

Application.]—Where papers had come into the hands of a solicitor prior to the institution of the suit (which was for an administration of a testator's estate), and he claimed a lien on them for other business relating to the administration, besides that done in the suit, a motion by a creditor for a reference, as to whether the solicitor had a lien on the papers, and that he might deliver them up to the receiver, or deposit them in court was dismissed. *Warburton* v. *Edge*, 9 Sim. 508 ; 8 L. J., Ch. 111 ; 3 Jur. 166.

—— **Time for.**]—An infant tenant in tail filed a bill by his next friend against his trustee, who was in possession of the title deeds of the estate. The defendant deposited the deeds in court for the inspection of the plaintiff. No decree was made, and when the infant came of age he repudiated the suit. The defendant then moved to have the deeds delivered up to him :—Held, that the defendant was entitled to the order, notwithstanding the opposition of the next friend. In the same case the defendant, having obtained possession of the deeds, gave them up to the plaintiff, who immediately mortgaged them. After they had been delivered to the mortgagee, the plaintiff's solicitor on the record presented a petition claiming a lien on the deeds for the costs incurred in the suit on behalf of the plaintiff : — Held, that he had no such lien. *Dunn* v. *Dunn*, 3 Drew. 17 ; 3 Eq. R. 129 ; 18 Jur. 1068. Affirmed, 7 De G. M. & G. 635 ; 24 L. J., Ch. 581 ; 1 Jur. (N.S.) 122 ; 3 W. R. 199.

By Bill.]—The court will entertain a bill by a solicitor, seeking to enforce a lien against certain title deeds in respect of his bills of costs, a decree for an account having been made in a suit instituted by the client against the solicitor, but under which decree the master was not at liberty to take into the general account what was due to the solicitor in respect of his bills of costs. *Hector* v. *Jolliffe*, 6 Jur. 120.

On a bill filed by a solicitor, seeking to establish a lien for costs upon a policy of assurance which a client had placed in his hands professionally, and upon which the court had, in another cause, directed an action to be brought, a special injunction was obtained, restraining all proceedings upon the policy ; but this injunction was dissolved, upon appeal, the Lord Chancellor holding that the plaintiff's proper course was to make an application in the other cause. Whether such a lien could be enforced by suit, and if so, to what extent, quære. *Steadman* v. *Webb*, 4 Myl. & C. 346 ; 8 L. J., Ch. 193 ; 3 Jur. 213.

Pending a reference for the taxation of a solicitor's bill against a married woman, the solicitor cannot maintain a suit to enforce a lien for his bill of costs on her separate estate. *Waugh* v. *Waddell*, 16 Beav. 521 ; 1 W. R. 206.

Non-production.]—An attorney having a lien on a deed for the costs of drawing it is not bound to produce it on a subpœna duces tecum for the client. *Kemp* v. *King*, 2 M. & Rob. 437 ; Car. & M. 396.

12. Production of Documents.

Solicitor—Subpœna.]—A solicitor claiming a lien on a deed cannot be compelled to produce it at the hearing of a cause, without a subpœna duces tecum. *Bush* v. *Lewis*, 6 Madd. 29.

—— **For Benefit of Stranger.**]—Whenever a client is bound to produce a deed for the benefit

of a third person, so also is his solicitor, though the latter may have a lien on it for costs against his clients. *Furlong* v. *Howard*, 2 Sch. & Lef. 115.

Claim of lien by solicitor for professional charges held to be no ground of objection to an order upon him to produce deeds in possession before the examiner, with a view to their being used as evidence between third parties. *Hope* v. *Liddell*, 7 De G. M. & G. 331; 3 Eq. R. 790; 24 L. J., Ch. 691; 1 Jur. (N.S.) 665; 3 W. R. 581.

A solicitor a defendant in a suit cannot refuse to produce documents belonging to his client, on the ground that he has a lien upon them, and that the party seeking inspection claims under his client. *Lockett* v. *Cary*, 3 N. R. 405; 10 Jur. (N.S.) 144.

A witness is bound to produce a document in order that it may be given in evidence, notwithstanding he may have a lien on it. *Cameron's Coalbrook Ry., In re*, 25 Beav. 1.

Distinction between the production of documents at the instance of the party who created the lien, and of a stranger, and between production and parting with the possession. *Ib.*

A solicitor cannot set up a lien acquired in a cause as against the right of other parties in the cause to production. *Vale* v. *Oppert*, 44 L. J., Ch. 579; L. R. 10 Ch. 340; 33 L. T. 41; 23 W. R. 780.

A solicitor who obtained possession of a lease from a client which was claimed by a third party, cannot refuse to answer a bill, filed against him upon an allegation that the information respecting the matters inquired into was obtained either in the character of solicitor, or as a creditor of his client, neither will his claim to be a purchaser for value without notice, in respect of a lien claimed upon the lease for a debt incurred by his client, prevent his being required to answer the bill. *Thomas* v. *Rawlings*, 28 L. J., Ch. 829; 5 Jur. (N.S.) 667.

—— **Effect of Order.**]—Where a party, claiming by title paramount to client, enforces the production of the papers, semble, the benefit thereby incidentally accruing to parties deriving under the client cannot be taken from them, and the solicitor's lien is lost. *Blunden* v. *Desart*, 2 Dr. & War. 405; 2 Con. & L. 111; 5 Ir. Eq. R. 251.

—— **Deed Impeached.**]—Where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and the defendant cannot resist the production upon the ground of lien. *Balch* v. *Symes*, Turn. & R. 87; 23 R. R. 195.

—— **Marriage Settlement.**]—Solicitors employed by the husband to prepare a marriage settlement:—Held, not bound to produce it to the trustees until their bill had been paid. *Gregson, In re*, 26 Beav. 87.

In an action by a married woman against her husband and the trustees of her marriage settlement, the solicitor who prepared the settlement was called as a witness for the plaintiff, and required to produce the settlement under a subpœna duces tecum. The solicitor objected to produce it on the ground that it had not been paid for, and asserted a general lien on it. The settlement was prepared on the instructions of the wife in contemplation of her marriage in 1873; i.e. between the dates of the Married Women's Property Act, 1870, and the Amendment Act, 1874:—Held, that the solicitor was bound to produce. *Fowler* v. *Fowler*, 50 L. J., Ch. 686; 44 L. T. 799; 29 W. R. 800.

To Trustees in Bankruptcy.]—*See* ante, col. 1693.

On change of Solicitor.]—The solicitors for the trustees of an estate which is under the administration of the court have not, after their discharge, such a lien for costs and for money advanced in the suit as will enable them to refuse the production of documents which are required by the receiver for the management of the estate. *Belaney* v. *French*, 43 L. J., Ch. 312; L. R. 8 Ch. 918; 29 L. T. 706; 22 W. R. 177.

A defendant, shortly after filing an affidavit as to documents, entered into liquidation of his affairs by arrangement. Some time afterwards he changed his solicitors. The plaintiff applied for production of the documents, which the defendant resisted on the ground that they were in the possession of his former solicitors, who claimed a lien on them:—Held, that an order for production must be made, with liberty to apply in case the defendant found it impossible to produce the documents, the plaintiff not to attach the defendant without leave of the court. *Vale* v. *Oppert*, 44 L. J., Ch. 579; L. R. 10 Ch. 340; 33 L. T. 41; 23 W. R. 780.

Documents in the possession of a former solicitor of a plaintiff who claimed a lien for costs upon them will not be ordered to be produced for the defendant's inspection. *Kettlewell* v. *Barstow*, 20 W. R. 621.

Order on Client.]—A party ordered to produce papers which are in the hands of his solicitor, must pay his bill of costs if he cannot otherwise procure them. *Shaw, Ex parte*, Jac. 272.

A defendant before answer became bankrupt. He put in his answer stating that certain books and letters were in the possession of his solicitor, who claimed a lien on them, and that he could not obtain possession thereof. The court ordered the defendant to produce them, with liberty to apply in case of need. *Rodick* v. *Gandell*, 10 Beav. 270.

Where an order for discovery has been made, it is no answer to a summons for production of documents that the documents are in the possession of former solicitors who claim a lien on them for costs, and that the person resisting production is unwilling to discharge the lien because he believes he has a good claim for negligence against such solicitors. The court, however, in making the order for production will give liberty to apply so as to provide for the contingency of the party called upon to produce documents finding a difficulty in obtaining them. *Lewis* v. *Powell*, 66 L. J., Ch. 463; [1897] 1 Ch. 678; 76 L. T. 282; 45 W. R. 438.

A defendant by his answer stated that a certain deed was in the possession of the personal representative of a solicitor who claimed a lien on it. The court ordered him to produce it, with liberty to apply, if production or inspection of the deed was refused by the party who had it. *Monsel* v. *Lindsay*, 13 Ir. Eq. R. 144.

Two defendants, one of whom was a solicitor, admitted by their answer that documents were in their power; their solicitor, with his partner, claimed a lien upon them for costs; and on a motion that the defendants should pay the costs in order to facilitate the production of the documents, the court declined to make the order. *Wroughton* v. *Barclay*, 11 Jur. 274.

Where documents belonging to a trust are in the hands of the solicitor to the trust, who claims a lien upon them, a trustee defendant cannot by answer refuse to disclose the deeds on the ground that the solicitor claims his lien, and will not produce them. The course is for the trustee to obtain an extension of time to put in his answer, which extension of time will be from time to time prolonged, until the trustee can pay off or procure a waiver of the lien. *Goodchap* v. *Weaving*, 16 Jur. 586.

Order not Obeyed.]—A defendant was committed for the non-production of documents admitted by him to be in his possession or power. It afterwards appearing that prior to the suit they had been deposited with a third party, who claimed a lien thereon which the defendant was unable to satisfy, he was discharged from custody without producing them. *North* v. *Huber*, 29 Beav. 437.

The non-delivery of documents left by an insolvent solicitor with counsel and law stationers, and retained by them for nonpayment of fees and charges :—Held, not a breach of an order upon the solicitor to deliver up to a new solicitor all deeds and documents in his possession or power, relating to the affairs of his client in the suit. *Williams, In re*, 3 De G. F. & J. 104 ; 30 L. J., Ch. 610 ; 7 Jur. (N.S.) 323 ; 4 L. T. 103 ; 9 W. R. 393.

Costs of Motion.]—A defendant was decreed to deliver up certain deeds to the plaintiff ; the deeds were in the possession of the defendant's solicitor, who claimed a lien on them for costs ; but the court, on motion, ordered him to deliver them up, and to pay the costs of the motion. *Bell* v. *Taylor*, 8 Sim. 216.

Solicitor refusing to allow deed in his possession to be proved on behalf of plaintiff, because he had lien on it for costs due from defendant : ordered to produce deed at his own expense, and pay all costs consequential on his refusal. *Brassington* v. *Brassington*, 1 Sim. & S. 455.

Payment under Protest.]—Where a bill of costs is paid under protest in order to obtain some document upon which a lien is claimed, the objectionable items in the bill should be specified before payment. *Darie, In re, White, Ex parte*, 8 W. R. 15.

13. Deposit of Deeds in Court.

In what Cases.]—A solicitor will not be ordered to bring into court the deeds of his client. *M'Cann* v. *Beere*, 1 Hog. 129.

Where a solicitor receives in his professional character muniments of title from his client, the court has jurisdiction, under a decree binding the client, to order his solicitor to bring in the deeds of his client in his possession, although he never appeared in the cause, and it is uncertain what time the deeds came into his possession. *Hargrave* v. *Holland*, 2 Ir. Eq. R. 137.

The plaintiff was trustee for sale of real estates. The decree directed the estates to be sold, and the title deeds (which were in the possession of the plaintiff's solicitor for the purpose of the suit) to be deposited. The solicitor refused to produce them, and claimed a lien on them for his costs of the suit ; but the court ordered him to deposit them. *Baker* v. *Henderson*, 4 Sim. 27.

After a decree for a sale, the solicitor of one of the defendants, a mortgagee, who had been paid off, but had not reconveyed, having the mortgage deed in his possession, being made a party by supplemental bill, and having admitted by his answer that he held the deed, having a lien thereon for costs incurred by the mortgagee, his client : on motion against the solicitor by plaintiff, ordered, that he should bring in the deed without prejudice to any claim he might have against his own client. *Plumtre* v. *O'Dell*, 1 Ir. Eq. R. 113.

An attorney who claims a lien for his costs upon the title deeds of a freehold estate decreed to be sold, which lien was acquired by him prior to the institution of the suit, will be ordered to deposit them in court, without prejudice to his lien, or to his making it available against the purchase-money of the lands ; and having established his claim, he is entitled to be paid it out of the purchase-money of the estate. *Little* v. *Little*, 2 Jones, 270.

On a petition, that certain bills of costs of a solicitor might be taxed after the amount had been paid and the papers had been delivered up : —Held, that the papers (which had been delivered up on the faith of a settlement), being necessary for the purpose of enabling the solicitor to support the bill of costs, must be placed in the master's office for a limited time for inspection, and be subject to the solicitor's right of lien ; but that the bill of costs be then taxed. *Downes, In re*, 5 Jur. 984.

A firm of solicitors having declined to act for their client during the continuance of a suit and refused to give up the deeds, alleging that they had a lien for costs incurred to them, and also to their predecessors in the firm before the commencement of the suit, these costs having been previously taxed, an order was made for the deposit of the deeds in the master's office. *Gregory* v. *Cresswell*, 14 L. J., Ch. 300.

14. Order for Delivery to Client—*See* ante, col. 1700.

15. Set-off of Costs—*See* COSTS.

c. RECOVERY AND PAYMENT.

When Retainer Determined.]—*See* ante, col. 1421.

When Solicitor Uncertificated.]—*See* post, col. 1757.

Agreement between Solicitor and Unqualified Person.]—An agreement by a solicitor to give to an unqualified person a share of profits on business introduced by the latter, gives no right to the client to deduct from the solicitor's bill the amount allowed by him to such unqualified person. *Gordon* v. *Dalzell*, 15 Beav. 351 ; 21 L. J., Ch. 206 ; 16 Jur. 186.

When Solicitor has discontinued Action.]—An attorney is not entitled to recover his bill of costs for conducting an action which he has not terminated, but which has been discontinued, unless he shews satisfactory reasons for not proceeding with it, and gives his client reasonable notice thereof. *Nicholls* v. *Wilson*, 11 M. & W. 106 ; 2 D. (N.S.) 1031 ; 12 L. J., Ex. 266. *See also* ante, col. 1421.

Solicitors to Company acting Ultra Vires.]—Solicitors to a company cannot recover costs in respect of business undertaken with full knowledge that it is beyond the powers of the company, nor can they appropriate money, belonging to the company, and received by them on a general account, to the payment of such costs. *Phœnix Life Assurance Co., In re, Howard and Dolman, Ex parte*, 1 H. & M. 433; 2 N. R. 548; 8 L. T. 728; 11 W. R. 984. S. P., *Cleverton* v. *St. Germains Union*, 56 L. J., Q. B. 83.

Costs Payable on Contingency.]—A declaration stated that the plaintiff was the attorney of a railway company; that it was intended to apply for an act for its incorporation; and that, in consideration that the managing committee of the railway would, by the permission and at the instance of the plaintiff, retain the defendant as attorney about performing certain business for the company, in preparing books of reference, serving notices on the landowners, and doing the conveyancing business consequent upon the act of parliament being obtained, if such act should be so obtained, he, the defendant, promised to allow the plaintiff one-third part of the profits of the business. And that the managing committee did, with the permission and at the instance of the plaintiff, retain the defendant as attorney in and about performing certain work and business for the company, in preparing books of reference, serving notices on landowners, and was ready and willing to retain the defendant in and about the conveyancing business consequent upon the intended act being obtained. Breach, nonpayment of the third part of the profits:—Held, that the declaration was bad, the meaning of the contract being, that the work to be done, and not the retainer, was to be contingent upon the passing of the act of parliament. *Sewell* v. *Allen*, 17 L. J., Ex. 246.

By a private act of parliament, the expenses attending its passing were directed to be paid out of the tolls raised or levied, or to be raised under it. The attorney who prepared and solicited the act sued the commissioners named in it for the amount of his bill:—Held, that he was bound to shew that there were sufficient funds in the hands of the commissioners, which had been raised or levied by tolls or otherwise, to satisfy his demand. *Andrews* v. *Dally*, 1 M. & P. 490; 4 Bing. 566; 6 L. J. (O.S.) C. P. 117. See *Nichols* v. *North Metropolitan Ry.*, 71 L. T. 836—C. A. Affirmed 74 L. T. 744—H. L. (E.)

Solicitor to Trustees—Rights of.]—A solicitor employed in trust business is the solicitor of the trustees personally, and has no direct claim on the trust estate for costs. *Staniar* v. *Evans*, 56 L. J., Ch. 581; 34 Ch. D. 470; 56 L. T. 87; 35 W. R. 286.

An executor or trustee who properly employs a solicitor or other agent to assist him in the execution of the trust enters into a contract in which he is personally liable, but he is entitled to be indemnified out of the trust estate, not merely against payments actually made, but against his liability, so that he has a right to resort to the trust estate in the first instance for making the necessary payments to the persons whom he employs, though he may commit acts which will deprive him of such right. *Blundell, In re, Blundell* v. *Blundell*, 57 L. J., Ch. 730; 40 Ch. D. 370; 58 L. T. 933; 36 W. R. 779. *See also* TRUST.

Solicitor a Party.]—Where a solicitor sues or defends an action in person, and obtains judgment with costs, he is entitled to recover from his adversary the same costs as would have been allowed if he were not a party to the action, but were acting as solicitor for another person, subject to this, that the costs to be allowed must not include any items which the union of the two characters renders impossible or unnecessary; and where any items are attributable to the fact that the solicitor is acting in the two characters, such items should be treated on taxation as attributable to his character as party to the action, and not to his character as solicitor. *London Scottish Permanent Benefit Society* v. *Chorley*, 53 L. J., Q. B. 551; 13 Q. B. D. 872; 51 L. T. 100; 32 W. R. 781—C. A.

Where one of a body of mortgagees is a solicitor, and acts as such in enforcing the mortgage security, he is entitled to charge profit costs against the mortgagor, whether the mortgagees are trustees or not. If in such a case the mortgagor, in applying to tax the bill of the solicitor-mortgagee, desires to raise the objection to profit costs, he should state his objection in his petition for taxation. *Donaldson, In re*, 54 L. J., Ch. 151; 27 Ch. D. 544; 51 L. T. 622.

—— **Solicitor-Mortgagee.**]—*See* MORTGAGE.

—— **Solicitor-Trustee.**]—*See* TRUST.

Taxation, whether Condition Precedent.]—It is not a condition precedent of a solicitor's right to sue a guarantor of costs to be incurred, that the costs should have been taxed. *Moore* v. *Walton*, 1 Cab. & E. 279.

Right of Assignee to Sign and Sue.]—A solicitor assigned his bill of costs and the right to recover on it, and the assignee gave notice of the assignment, and delivered the bill to the party to be charged, inclosed in a letter signed by himself. After the expiration of a month he brought an action in his own name on the bill of costs:—Held, that the plaintiff was an assignee within s. 37 of the Solicitors Act, 1843, and was entitled to maintain the action. *Ingle* v. *M'Cutchan*, 53 L. J., Q. B. 311; 12 Q. B. D. 518.

Partner not a Solicitor.]—An attorney carried on business under the firm of A. & Son; the son was not, in fact, a partner, but acted as clerk to his father, and received a salary:—Held, that A. might maintain an action in his own name to recover from a client the amount of a bill for business done. *Kell* v. *Nainby*, 10 B. & C. 20; 5 M. & Ry. 76; 8 L. J. (O.S.) K. B. 99.

Partners in Particular Matter.] — Where two solicitors, who are not in partnership, are employed in the same matter for a client, as in the defence of an action, the primâ facie inference of law is, that they are partners as to that particular matter, and entitled to an equal share of the joint profits, irrespective of the quantity of work performed by each. *Robinson* v. *Anderson*, 20 Beav. 98. Affirmed, 7 De G. M. & G. 239.

Nominal Partner—Set-off—Joint and Separate Debt.]—Spurr, an attorney, practised under the firm of Spurr & Chambers. Chambers, although an attorney, was not, in fact, a partner of Spurr, but only a clerk. Cass was a client of the nominal firm, and owed a bill of costs; and Spurr was personally liable to Cass on a bill of

exchange of less amount than the bill of costs. Spurr, without joining Chambers, sued Cass for the amount of the bill of costs; and Cass pleaded never indebted, and set off the sum due on the bill of exchange. Cass brought a cross-action on the bill of exchange, and Spurr set off the amount of the bill of costs. The two ctions being tried together, it was found by the jury that Chambers had authorised Spurr to contract on behalf of himself and Chambers with Cass, and that Spurr had so contracted:—Held, that Spurr, being the real principal, might take the benefit of the contract with Cass, and sue alone, and set off the bill of costs in the action against him. *Spurr* v. *Cass*, 39 L. J., Q. B. 249; L. R. 5 Q. B. 656; 23 L. T. 409.

Compromise — Laches.] — Where plaintiff's solicitor, with notice, suffers the defendant to satisfy the demands of his client, without making effectual provision for payment of his costs; the court will not suffer him to proceed in suit against defendant for recovery of them. *Morse* v. *Cooke*, M'Clel. 211; 13 Price, 473.

Statute of Limitations — From what Time running.] — Two attorneys in partnership having been retained to defend an action, it was decided in favour of the defendant, upon which the plaintiffs appealed. While the appeal was pending the partnership was dissolved, and the proceedings were continued by one of the partners separately:—Held, that the partners were not entitled to sue for their costs till the appeal was decided, so that the Statute of Limitations did not until then begin to run as against their claim. *Harris* v. *Quine*, 10 B. & S. 644; 38 L. J., Q. B. 331; L. R. 4 Q. B. 653; 20 L. T. 947; 17 W. R. 967.

The cause of action in respect of work done by a solicitor arises upon the completion of the work, and not at the expiration of one month from the delivery of a bill of costs, and therefore the Statute of Limitations runs from the completion of the work. *Coburn* v. *Colledge*, 66 L. J., Q. B. 462; [1897] 1 Q. B. 702; 76 L. T. 608; 45 W. R. 488—C. A.

The contract between a solicitor and his client is to carry on the action to its termination, unless the solicitor gives reasonable notice to determine his employment, and therefore the solicitor can recover all items of charge in respect of an action, though part of the bill relates to matters charged for more than six years before the commencement of the action by the solicitor. *Harris* v. *Osbourn*, 2 C. & M. 629; 4 Tyr. 445; 3 L. J., Ex. 182.

Effect of Negligence.]—Negligence in the conduct of a cause cannot be set up as a defence to an action on the attorney's bill. *Templer* v. *M'Lachlan*, 2 Bos. & P. (N.R.) 136.

A parliamentary agent, entrusted with the passing of a local bill through parliament, who puts a construction on an order of the House of Lords which is doubtful in its terms—such construction being different from that which is adopted by the Standing Orders Committee, and by the House, whereby it becomes necessary to abandon the bill—is not guilty of such gross negligence as to disentitle him to recover a remuneration for his labour in passing the bill through the House of Commons. *Bulmer* v. *Gilman*, 4 Man. & G. 108; 4 Scott (N.R.) 781; 11 L. J., C. P. 174.

An action having been brought against an attorney for negligence, in which action the jury gave a verdict for the plaintiff, finding also that he had been guilty of gross negligence, and then he brought an action for his bill of costs, the court refused to stay proceedings in the latter action. *Smith* v. *Rolt*, 2 D. P. C. 62.

An attorney employed to prosecute an appeal against an order for the removal of a pauper permitted the next sessions to pass without causing the appeal to be entered and respited; and failed to comply with the directions of the statute, as to the notice and statement of the grounds of appeal. The justices, at a subsequent sessions, having refused to entertain the appeal:—Held, that the attorney could not maintain an action for his costs in respect of his services. *Huntley* v. *Bulwer*, 8 Scott, 325; 6 Bing. (N.C.) 111; 3 Jur. 1105. *See also* NEGLIGENCE, ante, col. 1467.

—— **Service wholly Useless or Abortive.**]—Where a solicitor has been retained for the prosecution of a suit, and he has by crassa negligentia in the conduct of the suit caused the suit to be lost, he cannot recover any portion of his bill. *Stokes* v. *Trumper*, 2 Kay & J. 232; 3 W. R. 503.

An attorney being instructed to take proceedings against an acceptor of a foreign bill of exchange, brought an action against him in the name of his client, without first ascertaining whether his client's title was complete by special indorsement, as required by the law of the foreign country, and it being afterwards ascertained that there was no such indorsement, the action was discontinued:—Held, that he was guilty of such negligence as disentitled him from recovering the costs of the abortive proceedings. *Long* v. *Orsi*, 18 C. B. 610; 26 L. J., C. P. 127.

In an action upon a money bond, the defendant, after the writ issued, wrote a letter, stating that he had paid part, and was ready to pay the residue. The attorney for the plaintiff then delivered a declaration. When the cause was ready for trial an order was taken by consent for a reference to the master, who made his allocatur in favour of the plaintiff. In the meantime the defendant had become bankrupt. In an action by the attorney for his bill of costs, the judge directed the jury that it was his duty, on receiving the letter, to make an application for an order of reference as in a matter of account, and the jury found a verdict for the defendant:—Held, that the omission of the attorney to apply for an order was not evidence of negligence to disentitle him from recovering his bill of costs. *Chapman* v. *Van Toll*, 8 El. & Bl. 396; 27 L. J., Q. B. 1; 3 Jur. (N.S.) 1126; 6 W. R. 17.

A solicitor who, in order to gain some advantage for himself, induced his client to prosecute an appeal, which was dismissed with costs, and would not have benefited the client if it had succeeded, was ordered to repay to the client the respondent's costs, and declared not to be entitled to any costs against the client. *Harbin* v. *Masterman*, 65 L. J., Ch. 195; [1896] 1 Ch. 351; 73 L. T. 591; 44 W. R. 421—C. A.

In an action by an attorney for the costs of an action to recover a chattel, the subject of a specific bequest, but claimed by the possessor as a gift from the testator, the defence being that the action, which had failed, was only brought under the advice of the attorney, and that it was wholly useless, the proper course being to take out an administration summons in chan-

cery :—Held, that it was nevertheless for the jury to say, on the whole case, not whether the course was proper, but whether it was so wholly useless as that the client had derived no benefit from it. *Fletcher* v. *Winter*, 3 F. & F. 138.

In an action by attorneys for the costs of a defence, which failed, they having been absent on the day of trial, and some of the witnesses consequently not being in court :—Held, that they were entitled to recover, notwithstanding the verdict had passed against their clients, unless the jury thought that the absence of the witnesses had caused the loss of the verdict, and so made the services wholly valueless. *Dunn* v. *Hallen*, 2 F. & F. 642.

If an attorney conducting a suit commits an act of negligence, by which all the previous steps become useless in the result, he cannot recover for any part of the business done. *Bracey* v. *Carter*, 12 Ad. & E. 373.

Whether or not in such a case the work became wholly useless by his fault, is a question for the jury. *Ib.*

It is no defence that the defendant has derived no benefit from the suit, where the failure does not result wholly from the attorney's negligence, but partly from accident. *Daæ* v. *Ward*, 1 Stark. 409.

An attorney cannot charge for work which is useless towards accomplishing the object his client has in view, although performed through inadvertence or inexperience, and not with the design of imposing on his client. *Hill* v. *Featherstonhaugh*, 7 Bing. 569 ; 5 M. & P. 541.

The jury may discard an item for work entirely useless ; though, upon an item partly useless, or in respect of which there has been any negligence, the client's remedy is only by a cross-action. *Shaw* v. *Arden*, 9 Bing. 287 ; 2 M. & Scott, 341 ; 1 D. P. C. 705 ; 2 L. J., C. P. 1.

Action after Taxation — Contempt.]— The omission by a client to file a certificate of taxation of a solicitor's bill within the four days prescribed by the order of 29th October, 1692, does not render the order a nullity, but the client's representatives, after his death, may, notwithstanding the omission, obtain an order under the summary jurisdiction for the delivering up of the client's papers on payment of the amount of the bill as taxed, and an action by the solicitor on the bill, after such taxation, is a contempt, and will be restrained by injunction at the instance of the representatives. *Campbell, In re*, 3 De G. M. & G. 585 ; 22 L. J., Ch. 865 ; 17 Jur. 1171 ; 1 W. R. 204.

Order XIV.—Taxation—Form of Order.]— Where an action is brought on a solicitor's bill of costs, and the defendant admits his liability but desires that the bills should be taxed, the proper order to be made on an application for liberty to sign judgment under Ord. XIV. r. 1, is as follows :—"It is ordered that the bill of costs on which the action is brought be referred to the taxing-master, pursuant to the statute 6 & 7 Vict. c. 73, and that the plaintiff give credit at the time of taxation for all sums of money received by him from or on account of the defendant, and let the plaintiff be at liberty to sign judgment for the amount of the master's allocatur in the said taxation, and costs to be taxed." *Smith* v. *Edwardes*, 58 L. J., Q. B. 227 ; 22 Q. B. D. 10 ; 60 L. T. 10 ; 37 W. R. 112—C. A.

In an action by solicitors on an untaxed bill of costs, the court, on motion by the plaintiffs under Ord XIII. r. 2, referred the costs for taxation, subject to credits, and ordered judgment to be entered for the amount to be certified. *Larkin* v. *M'Inerney*, 16 L. R., Ir. 246.

Default of Defence.]—In an action on a solicitor's untaxed bill of costs, on default in delivering a defence, the plaintiff is entitled to enter judgment for the full amount claimed without a reference to tax such bill. *Gilsenan* v. *M'Govern*, 30 L. R., Ir. 300.

Non-appearance of Client at Trial.]—Solicitors brought an action against their client for the amount of their bill of costs delivered shortly before the commencement of the action. The defendant denied the retainer, alleged negligence, and counter-claimed for damages on the ground of negligence. At the trial the defendant did not appear and the plaintiffs proved their case, but the judge declined to make any other order than an order referring the bill for taxation under the statute 6 & 7 Vict. c. 73, reserving the costs of the action and adjourning the further hearing :—Held, on appeal, that the plaintiffs were entitled to have the counter-claim dismissed with costs, and to have judgment for the amount to be certified on the taxation, with costs of the action up to and including the hearing. *Lumley* v. *Brookes*, 58 L. J., Ch. 494 ; 41 Ch. D. 323 ; 61 L. T. 172 ; 37 W. R. 454—C. A.

Particulars.]—In an action on an attorney's bill, an order for better particulars was obtained on payment of costs :—Held, that a charge for drawing the bill, as part of the costs, was properly disallowed. *Jones* v. *Roberts*, 2 D. P. C. 374 ; 4 Tyr. 310.

Consolidation of Actions.]—Where an attorney did different kinds of professional work for a client, and after all the business was transacted, sent in a bill for one part of the business, and subsequently sent in a bill for the other part, and commenced an action for the first part of the business before the expiration of the month in respect of the delivery of the second bill, and after the expiration of that month commenced an action for the other part, the court made an order for the consolidation of the two actions. *Beardsall* v. *Cheetham*, El. Bl. & El. 243 ; 27 L. J., Q. B. 367 ; 6 W. R. 504.

Pleadings—Declaration.]—It is no ground of demurrer to a declaration in an action by an attorney, that he seeks to recover for "materials" supplied by him to his client. *Fisher* v. *Snow*, 3 D. P. C. 27.

Taxation by Jury.]—After an attorney's bill has been delivered a month, and no application has been made to have it taxed, the client will not be permitted to question the reasonableness of the items before a jury. *Williams* v. *Frith*, 1 Dougl. 198. S. P., *Hooper* v. *Till*, 1 Dougl. 198 ; *Anderson* v. *May*, 2 Bos. & P. 237 ; 3 Esp. 167.

In an action on an attorney's bill, when there is evidence of a general retainer, the judge will not allow the bill to be taxed in detail by the jury, although particular heads or items of charge not necessarily arising out of the retainer may be disallowed in toto, as not having been authorised by the client. *Dunn* v. *Hales*, 1 F. & F. 174.

Denial of Liability—Taxation after Action.]—If an action is brought on an attorney's bill, and after action it is taxed on the application of the defendant, without anything being inserted in the order to tax, as to the question of liability:—Semble, that the defendant could not afterwards deny his liability; but if in the order power was reserved to the defendant to amend his pleas after the taxation, he might still deny his liability, by so pleading as to raise that question. *Baker* v. *Meryweather*, 2 Car. & K. 737.

After Paying Money into Court.]—A defendant may, after a payment into court, shew that the work was to be done for costs out of pocket, and not for an attorney's accustomed fees and charges. *Jones* v. *Reade*, 5 D. P. C. 216; 5 A. & E. 529; 1 N. & P. 18; 2 H. & W. 382; 6 L. J., K. B. 9.

Evidence.]—An examined copy of a bill of costs, the original of which has been delivered to the client, may be admitted without proof of notice to produce the original; and is conclusive as to the reasonableness of the items. *Anderson* v. *May*, 2 Bos. & P. 237; 3 Esp. 167. S. P., *Colling* v. *Treweek*, 9 D. & R. 456; 6 B. & C. 394; 5 L. J. (O.S.) K. B. 132; 30 R. R. 366.

To a declaration for an attorney's costs, the defendant pleaded that he was always ready and willing to pay a just and reasonable sum in satisfaction of the demand, and that before action he offered to pay such just and reasonable sum. It was proved that he had offered to pay the costs when the bill was taxed:—Held, that such evidence did not support the plea. *Filmer* v. *Burnby*, 2 Scott (N.R.) 689; 9 D. P. C. 466; 2 Man. & G. 529.

After action an attorney's bill was, by a judge's order, referred to the master to be taxed, "without prejudice to any defence the defendant may have to this action." The master taxed the bill, and made his allocatur. The defendant pleaded nunquam indebitatus and payment:—Held, that, at the trial, the allowance of items in the bill by the master on the taxation was primâ facie evidence that those items so allowed for had been done by the plaintiff. *Whalley* v. *Glover*, 3 Car. & K. 13.

In an action on an attorney's bill, under never indebted, it is competent to the plaintiff to shew that a greater amount is due to him than the master allowed on taxation, pursuant to an order for changing the attorney in the course of the cause in which the costs were incurred. *Beck* v. *Cleaver*, 9 D. P. C. 111.

—— **Joint Retainer.**]—In an action on an attorney's bill, against two, it is not sufficient to prove a joint employment, and a joint promise to pay, after the delivery of the bill; but it must be shewn that the business was done for the joint benefit. *Hellings* v. *Gregory*, 10 Moore, 337; 1 Car. & P. 627.

Appropriation of Payments on Account.]—An attorney, who has several demands against his client, some of which are barred by the Statute of Limitations, has no right to appropriate, in payment of the demands so barred, a sum received by him on account of his client, for damages recovered in an action. *Waller* v. *Lacy*, 1 Man. & G. 54; 1 Scott (N.R.) 186; 8 D. P. C. 653; 9 L. J., C. P. 217; 4 Jur. 435.

Where directors of a company carry on business unauthorised by the deed of settlement, and moneys have been paid by the company to the solicitors on account of costs generally, the solicitors have no right post litem motam to appropriate such payments to the costs incurred in respect of the unauthorised business, but, on the contrary, the court will appropriate the payments to the costs which the company was liable to pay. *Phœnix Life Assurance Co., In re, Howard and Dolman, Ex parte*, 1 H. & M. 433; 2 N. R. 548; 8 L. T. 728; 11 W. R. 984.

A solicitor who has made disbursements for his client, and who has received from the client sums paid generally on account, but sufficient to cover those disbursements, is not entitled to appropriate the sums so received to costs for which he has not delivered a bill, in order that he may, under s. 17 of the Solicitors Act, 1870, claim interest on the disbursements. *Harrison, In re*, 55 L. J., Ch. 768; 33 Ch. D. 52; 55 L. T. 72; 34 W. R. 645; 50 J. P. 372.

To Solicitor of Trustees.]—A solicitor dealing with a trustee and having no notice of any breach of trust on his part, is entitled to deal with him on the footing that he is executing the trust and doing nothing which is wrong, and is not bound, before he accepts payment out of the trust estate, to call upon the trustee to produce his accounts, and satisfy himself that he has acted properly. To preclude a solicitor from accepting payment out of the trust estate, there must be brought home to him knowledge that at the time when he accepted it the trustee had been guilty of such a breach of trust as to prevent him altogether from resorting to the trust estate for payment of those costs, and that, in fact, such a payment was a breach of trust. *Blundell, In re, Blundell* v. *Blundell*, 57 L. J., Ch. 730; 40 Ch. D. 370; 58 L. T. 933; 36 W. R. 779.

Recovery by Client of Sum Overpaid.]—A plaintiff having paid to an attorney the amount of his bill, cannot, after the reduction of the bill by taxation, recover the difference by action. *Gower* v. *Popkin*, 2 Stark. 85; 19 R. R. 683.

IV. SECURITY FOR COSTS.

Past Costs—Amount.]—Bond obtained from infant's grandmother for the amount of bill of fees and disbursements, directed to stand as a security for money justly due on account, and the bill ordered to be taxed. *Brown* v. *Pring*, 1 Ves. 407.

Where a solicitor made an absolute conveyance to himself of 1,000*l.* from the plaintiff's wife, whilst she was parted from her husband, the consideration expressed in the deed being for service done, and favours shewn; on bill brought to set aside the deed as obtained by fraud, decreed, on all the circumstances of the case, that the deed should stand only as a security for such sum as was justly due to defendant. *Sanderson* v. *Glass*, 2 Atk. 296.

Mortgage by client to attorney, for costs due, and to become due:—Held, valid security for the costs then due only. *Williams* v. *Piggott*, Jac. 598. S. P., *Jones* v. *Tripp*, Jac. 322.

Attorney cannot take mortgage from client for amount of future bill; but, secus, for disbursement, and money to be advanced. *Pitcher* v. *Rigby*, 9 Price, 79.

—— **Untaxed.**]—Semble, it is no objection to an equitable mortgage given for costs due, that

they were not ascertained or delivered. *Boville, Ex parte*, (2 Mont. & Ayr. 382, n.), observed on. *Bristow* v. *Warner*, 10 Ir. Eq. R. 246.

Bonds in penalties payable with interest taken by an attorney from his client, pendente lite, for untaxed costs, shall only stand as securities for such sum of money as shall, upon taxation, appear to be due, without interest thereon. *Fowler* v. *Moore*, 2 Jones, 415.

—— **Enforcing Security.**]—Where a solicitor has taken a mortgage from his client to secure the payment of costs, he is entitled to maintain a bill for foreclosure, though an order for taxation has been obtained against him. *Thomas* v. *Cross*, 5 N. R. 148; 10 Jur. (N.S.) 1163; 11 L. T. 430: 13 W. R. 166.

A. contracts to sell to B. estates for 17,000*l*., B. agreeing therewith to pay certain specified debts of A., and among the rest his solicitor's bill, before a certain day, or to hand over to A. the purchase-money. B. executes a bond for the payment of the solicitor's bill after the day has elapsed, and a bill is filed by A.'s executrix against B. for the payment of his purchase-money into court, and the money is paid in. The solicitor commences an action against B. upon his bond:—Held, that B. cannot have the amount of the bond paid out of court, but the executrix of A. ordered to lend her name to tax. *Williams* v. *Williams*, 1 Jur. 839.

A company employed a solicitor who was not its ordinary solicitor, in a particular matter, and at his request gave him a mortgage of part of its property to secure the payment of his costs. The mortgage was not registered under the Companies Act, 1862, s. 43:—Held, that it was the duty of the solicitor to see that the mortgage was registered, and that as he had not done so, he could not claim the benefit of it in the winding-up of the company. *Patent Bread Machinery Co., In re, Valpy, Ex parte*, L. R. 7 Ch. 289; 20 W. R. 347.

—— **Validity.**]—A security which has been given to an attorney by his client for a debt really due, or as a reward for services already rendered, will not be set aside in equity. *Cheslyn* v. *Dalby*, 2 Y. & Coll. 170.

A. having paid off a debt secured by mortgage upon real estates, in the equity of redemption, of which his wife was, at the date of their marriage, entitled to a life interest to her separate use; afterwards, without her priority, assigned the mortgage to the solicitor of himself and wife, as security for a debt due to such solicitor for costs principally incurred in a suit in which he acted; first, for the wife before her marriage, and afterwards for both the husband and wife:—Held, that such assignment was a valid security as against the wife's life interest in the hereditaments assigned. *Nelson* v. *Booth*, 27 L. J., Ch. 110; 3 Jur. (N.S.) 951; 5 W. R. 722.

The solicitor, having subsequently purchased from the original mortgagee for 40*l*. a debt, for costs, of 175*l*., which the latter would have been entitled to have added to his mortgage debt, was held entitled as against the wife to the benefit of such purchase, but to the extent only of securing himself in respect of the debt due to him from the husband. *Ib.*

An account settled and a security taken by a solicitor from his client, though to be viewed with jealousy, is not to be treated as a nullity. *Jones* v. *Roberts*, 9 Beav. 419.

Principles on which the court acts in sustaining securities given by a client to his solicitor for bills of costs and moneys advanced. *Hiles* v. *Moore*, 17 L. J., Ch. 385.

Where the trust deed did not authorise the solicitor to charge costs against his cestui que trust, securities obtained by him from his cestui que trust, for untaxed costs and advances, were set aside, and ordered to stand as securities for the sum really due, notwithstanding letters from the cestui que trust recognising the right of the solicitor to charge such costs; the solicitor not having informed his client that he was entitled to any remuneration for his services in the trust, and the letters having been written under his influence. But the rule being a hard one, and the conduct of a cestui que trust exceptional, the relief was given without costs. *Gomley* v. *Wood*, 3 Jo. & Lat. 678; 9 Ir. Eq. R. 418.

Securities taken by an attorney from his client during the time of their connection as such for a present, the balance of accounts settled, for money lent and laid out, costs, and business done, and the price of a horse sold, void as to the present; and the plaintiff submitting to pay what should be actually due, the accounts were opened as to the whole; the horse being sold, soon after he was purchased from the attorney, for a price much less than was then stipulated, inquiry into his value directed. *Newman* v. *Payne*, 2 Ves. J. 199; 4 Bro. C. C. 350.

The plaintiff was solicitor for D., and at the time of his death D. was indebted to him for costs. On D.'s death he became solicitor for his executor, the defendant, who, being indebted to the plaintiff for costs of his testator, and further costs as executor, handed over to him the title deeds of certain leasehold premises of the testator, which had been left on special trusts, together with a letter making an equitable mortgage; there were funds applicable to the costs, which were misapplied:—Held, that the executor having committed a breach of trust in mortgaging, the solicitor dealing with him was affected by it, and could not recover without an inquiry as to the state of the assets, and, semble, was in no better condition than the executor himself would be. *Purcell* v. *Ruckley*, 12 Ir. Eq. R. 55.

Bill to set aside a security for a sum therein expressed to be due, but which was in fact the estimated amount of past costs in a suit, executed by a client in favour of his then solicitor pending the suit, and without the intervention of another legal adviser, dismissed with costs; there being no evidence of pressure or improper conduct on the part of the solicitor, and no evidence or averment of any specific error in the bill of costs; and it appearing that the defendant had delivered the bill of costs at the time agreed on between him and the plaintiff, and five years and a half before bill filed, and that the plaintiff had had ample opportunity for discovering errors, if any. *Blagrave* v. *Routh*, 2 Kay & J. 509. Affirmed 26 L. J., Ch. 86; 3 Jur. (N.S.) 399; 5 W. R. 95.

After a long and unsuccessful litigation to recover an estate, a younger brother of the unsuccessful party, and the next to him in an entail claimed in the estate, entered into an agreement with him to pay what should be due in respect of the solicitor's bills of costs, with interest, on the principal of annual rents, and to commence a new litigation at his own risk in the name of the elder brother, who agreed on these

terms to relinquish the estate to the younger brother. Shortly afterwards an agreement was entered into between the solicitor, who was also to conduct the new litigation, and the elder brother, that the solicitor should be paid in respect of the old costs a specified sum, being less than the costs out of pocket, unless the brothers, or one of them, came into possession of the estate, in which event the elder brother agreed that he or the younger brother would pay in respect of the old costs another specified sum, being the full amount of the bills, with interest calculated on the principal of annual rests. The bills had not been taxed, but had been examined, though not minutely, by a friend of the client, who had been a solicitor. The new litigation was conducted by the solicitor with his own capital. It succeeded, and the brothers came into possession of the estate. Seven years after the agreement with the solicitor had been entered into, they sought to set it aside, on the ground of undue influence and insufficient advice :—Held, that the agreement ought to be upheld. *Moss* v. *Bainbrigge*, 6 De G. M. & G. 292.

The court will not set aside a charge given by a client to his solicitor, without the intervention of any other legal adviser, to secure payment of costs in a suit expressed to be due to the solicitor who was acting for him in suits then pending, there being no evidence of any pressure upon the client, nor any averment of fraud or error in the charges, while the client has not filed his bill till six years after executing the charge, and five years and a half after he has had the bills of costs in his possession. *Hooper* v. *Cooke*, 25 L. J., Ch. 467 ; 2 Jur. (N.S.) 527.

Decree to set aside a mortgage taken by a solicitor from his client to secure a sum consisting partly of a gross sum agreed to be paid for professional services, and as to the rest of the balance recited to be due, or a settlement of accounts, where it appeared that the client, from his situation as to ill health, was unable to take an active part in managing his own affairs, and where there was no evidence of any improper statement or examination of the accounts. The mortgage was declared to stand as a security only for what should be found justly due on taxation of the bills of costs, and on an account of all dealings and transactions. *Morgan* v. *Higgins*, 1 Giff. 270 ; 5 Jur. (N.S.) 236 ; 7 W. R. 273.

—— **Assignment of Subject-Matter of Action.**]—After verdict and before judgment a plaintiff in ejectment assigned the subject-matter of the suit to his attorney, as a security for money advanced by him for carrying on the suit and other purposes and for the amount due to him for his professional services :—Held, that the assignment was not void as against public policy, or by reason of champerty and maintenance, being only a security and not an absolute purchase. *Anderson* v. *Radcliffe*, El. Bl. & El. 806 ; 29 L. J., Q. B. 128 ; 6 Jur. (N.S.) 578 ; 1 L. T. 487 ; 8 W. R. 283—Ex. Ch.

Future Costs.]—By 33 & 34 Vict. c. 28. s. 16, *an attorney or solicitor may take security from his client for his future fees, charges and disbursements to be ascertained by taxation or otherwise.*

Before this statute an attorney could not take a mortgage from client for the amount of a future bill. *Pitcher* v. *Rigby*, 9 Price, 79.

Deposit of Deeds—Merger in Mortgage.]—A solicitor took a deposit of a policy of assurance from a client to secure costs, but without a memorandum to that effect. Subsequently a mortgage was executed, assigning the policy as a security for sums already advanced and thereafter to be advanced, but it made no mention of the costs :—Held, that the deposit for costs merged in the subsequent mortgage, and that after the payment of the sums advanced by way of loan the solicitor had no further lien on the proceeds of the policy. *Vaughan* v. *Vanderstegen*, *Annesley, In re*, 2 Eq. R. 1257 ; 2 Drew. 289 ; 2 W. R. 293.

Where a client gave to his solicitor a mortgage to secure costs then incurred, and thereafter to be incurred, with interest thereon from the time of taxation ; and there were subsequent costs to a large amount, and afterwards the solicitor died ; on motion by the client that the personal representative of the late solicitor should be ordered to hand over the title deeds, &c., to the new solicitor, the client offering to confirm the mortgage as to the subsequent costs :—Held, that a security for costs to be incurred is void, as being against public policy, and therefore incapable of confirmation after the subsequent costs have been incurred, although a valid security for such costs may then be given ; and consequently that in this case, the lien was not avoided ; and the papers should not be taken by the client from the personal representative of his late solicitor (who preferred the lien to a new security), until the costs for which no valid security had been taken were paid. *Willens* v. *Tandy*, 5 Ir. Eq. R. 1.

A solicitor could not receive a deposit of title-deeds as security for future bills. *Laing, Ex parte, Dudderidge, In re*, 2 Mont. & Ayr. 381.

A mortgage was executed by N. to R., at that time N.'s attorney, to secure what was then due to R., and also future advances. This deed was made a first charge on N.'s property, and S., who had previously been N.'s attorney, obtained against N. a rule absolute for payment of costs found due on the master's allocatur ; he registered this rule, and thus became a second incumbrancer. R. then became largely N.'s creditor for costs subsequently incurred :—Held, on an order allowing S. to redeem R., that these subsequent costs could not be taken into the account. *Shaw* v. *Neale*, 6 H. L. Cas. 581 ; 27 L. J., Ch. 444 ; 4 Jur. (N.S.) 695 ; 6 W. R. 635.

An attorney or solicitor could not take a bond of his client for unliquidated costs. *Newman* v. *Payne*, 4 Bro. P. C. 350.

Nor could he take a security by mortgage for future bills of costs or business to be done. *Pitcher* v. *Rigby*, 9 Price, 83. S. P., *Jones* v. *Tripp*, Jac. 322.

A mortgage by a client to an attorney for costs due and to become due was a valid security for the costs then due only. *Williams* v. *Piggott*, Jac. 598.

It was a well-established rule that a solicitor could not take a mortgage from his client as a security for costs to be incurred. *Booth* v. *Creswicke*, 13 L. J., Ch. 217 ; 8 Jur. 323. S. P., *Uppington* v. *Bullen*, 2 Dr. & War. 184 ; 1 Con. & L. 291.

Nor apply a security already taken to the payment of costs, which may be subsequently incurred. *Foster, In re, Walker, Ex parte*, 29 L. J., Ch. 625 ; 6 Jur. (N.S.) 687 ; 2 L. T. 553 ; 8 W. R. 620—L.JJ.

So, a warrant of attorney given by a client to

his attorney to secure future costs was illegal. *Jones* v. *Hunter*, 1 D. P. C. 462.

But a warrant of attorney given to secure the payment of future costs, and also of costs and money already due and advanced, though void as to the client's future liability, was valid as to his actual liability. *Holdsworth* v. *Wakeman*, 1 D. P. C. 532.

—— **Promissory Note.**]—An attorney who has received a promissory note on account of costs may bring an action on the note, although the note includes future costs. *Jeffreys* v. *Evans*, 3 D. & L. 52; 14 M. & W. 210; 14 L. J., Ex. 363.

V. INDEMNITY FOR COSTS.

When Solicitor acting without Authority.]—If a solicitor gives a relator an indemnity for costs, or uses his name without authority (although afterwards assented to), the court will order the information to be taken off the file with costs, to be paid by the relator and attorney. *Att.-Gen* v. *Skinners' Co.*, C. P. Cooper, 7. *See also*, ante, col. 1451.

Enforcement by Bankrupt.]—The solicitor for the petitioning creditor, on the commission being superseded, writes to the bankrupt, "I am ready, and hereby offer, to allow and pay the costs" incurred by the bankrupt in petitioning for the supersedeas:—Held, that the solicitor was personally liable on this undertaking, and that the bankrupt might petition for an order on the solicitor to pay these costs, notwithstanding a subsequent commission had issued against him, under which he had not obtained his certificate, his assignees disclaiming all interest in the matter. *Bentley, Ex parte*, 2 Deac. & C. 578; 2 L. J., Bk. 39. See *Johnson* v. *Ogilby*, 3 P. Wms. 277.

Payment of.]—R. and C., at H. and T.'s request, paid to H. and T.'s country solicitors 350*l.* in part discharge of costs incurred by H. and T. in certain administration suits. Thereupon the country solicitors by indenture assigned to R. and C. certain documents on which they had a lien, and covenanted that they would hold any charging order they might obtain from the Court of Chancery for payment of their costs, in trust to indemnify R. and C. By a subsequent order of the court the costs were to be taxed and paid out of funds in court to the town agents of the country solicitors:—Held, that the costs must be paid to R. and C. in satisfaction of their claims under the indenture. *Cockayne* v. *Harrison*, 42 L. J., Ch. 660; L. R. 15 Eq. 298; 21 W. R. 520.

Validity of.]—Before the 33 & 34 Vict. c. 28, s. 16, it was improper for a solicitor to give his client a guarantee against the costs of a suit, either previously to its institution or during its continuance. *Fielden* v. *Northern Ry. of Buenos Ayres*, 22 L. T. 511; 18 W. R. 729.

But circumstances might be such as to allow of his doing so in the latter case without rendering himself personally liable to the other side. *Ib.*

Liability to pay Costs of other Side.]—A solicitor, who, in order to induce a plaintiff to go on with a suit, agrees to indemnify him against the costs; thereby makes the suit his own, and becomes liable to pay the costs of the defendant; and this, notwithstanding that by the abatement of the suit by the death of the plaintiff before the hearing and the non-revivor by his executor, the remedy against the plaintiff's estate may be gone. *Fielden* v. *Northern Ry. of Buenos Ayres, Jones, In re*, 40 L. J., Ch. 113; L. R. 6 Ch. 497; 23 L. T. 655; 19 W. R. 361.

Proceedings without Authority.]—A bill filed without the plaintiff's authority was dismissed, and the plaintiff was taken under an attachment for nonpayment of the costs. The court, on motion, ordered the solicitor to indemnify the plaintiff. *Hood* v. *Phillips*, 6 Beav. 176.

VI. INTEREST ON COSTS, &c.

Costs payable out of Fund.]—Where in an administration action, costs have been directed to be taxed, and when taxed to be paid by the trustees out of testator's estate, with a direction for division of the balance of the fund after such payment amongst the persons beneficially entitled, interest is not, in the absence of special directions, payable on the costs. *Marsden's Estate, In re, Withington* v. *Neumann*, 58 L. J., Ch. 260; 40 Ch. D. 475; 60 L. T. 696; 37 W. R. 525.

The court will give interest on costs payable out of a fund which cannot be immediately realised. *Campbell's Trusts, In re*, 19 W. R. 427.

Security for.]—A security taken for untaxed costs gives a solicitor no right to interest on them. *Shannon* v. *Casey*, Ir. R. 8 Eq. 307.

Who can Claim.]—The 23 & 24 Vict. c. 127, only applies to solicitors, and a party to a suit cannot claim under it interest on his costs. *Jenner* v. *Morris*, 11 W. R. 943.

From what Date.]—Interest on a bill of costs while under taxation not allowed. *Smith, In re*, 9 Beav. 342.

Where the payment of taxed costs was unavoidably delayed:—Held, that under s. 27 of the 23 & 24 Vict. c. 127, interest was payable on such costs from the date of the taxing-master's certificate, to the day of the payment thereof. *Fox* v. *Charlton*, 6 N. R. 352.

Where security is given for the payment of untaxed costs, interest is to be computed only from the date of the certificate of taxation. *Bloomfield, In re*, 3 L. R., Ir. 82.

When an order has been made for payment of costs after taxation, a court of equity will order the payment of interest on the amount found due by the master's certificate, under 23 & 24 Vict. c. 127, s. 27, from the date thereof to the date of the application where the payment has been unadvoidably delayed. *Carter* v. *Carter*, 2 N. R. 512; 8 L. T. 692.

Rate of.]—By orders of the court of chancery, made in 1862 and 1863, costs to which a petitioner was entitled were directed to be added to the moneys secured to him by a deed, and it was ordered that they should stand as a charge upon the property comprised in the deed. The deed referred to was a grant, in consideration of 400*l.*,

of an annuity of 40*l.* a year for lives to the petitioner, secured by the covenant of the grantor, and by a charge of the annuity upon specified real and personal estate. The order mentioned nothing about interest:—Held, independently of the Attorneys Act, 1860, that inasmuch as the costs were an equitable charge, they bore interest at 4*l.* per cent. *Lippard* v. *Ricketts*, 41 L. J., Ch. 595; L. R. 14 Eq. 291; 20 W. R. 898.

An agreement, pending a litigation, that a solicitor shall be entitled to compound interest on his demand, cannot be supported. In 1851 A. and B. agreed to charge their real estates, with the amount of costs due to their solicitor, with annual rests. The solicitor instituted a suit to enforce the lien, and the client presented a petition for taxation. The court made the usual order for taxation, with a direction to the master to ascertain the amount due in 1851, but held itself incompetent, on this occasion, to deal with the question of lien. *Moss, In re*, 17 Beav. 346.

Agreements for between Solicitor and Client.] —*See* ante, col. 1536.

On Disbursements.] — The Attorneys and Solicitors Act, 1870, is not retrospective, and, therefore, interest cannot be allowed under s. 17 on disbursements made prior to the passing of the act. *Ward* v. *Eyre*, 49 L. J., Ch. 657; 15 Ch. D. 130; 43 L. T. 525; 28 W. R. 712—C. A.

A solicitor took up his client's bills of exchange:—Held, that these payments could only be treated in the same light as any other ordinary cash advances made by the solicitor for the benefit of his client, and that the solicitor was not entitled to charge interest thereon. *May* v. *Biggenden*, 24 Beav. 207.

The provisions of the 33 & 34 Vict. c. 28, s. 17, as to the allowance upon taxation of interest on moneys disbursed or advanced by a solicitor for his client do not entitle a client whose costs, charges and expenses are ordered to be paid out of a fund in court belonging to other parties, to include in such costs, charges and expenses the interest on moneys disbursed for him by his solicitor. *Hartland* v. *Murrell*, 43 L. J., Ch. 94; L. R. 16 Eq. 285; 28 L. T. 725; 21 W. R. 781.

—— **Demand from Client.**]—By General Ord. VII. under the Solicitors' Remuneration Act, 1881, s. 5, the interest which a solicitor is entitled to recover under the order on the amount due on business transacted by him is not to commence till the amount due is ascertained, either by agreement or taxation; and it is provided that a solicitor may charge interest at 4 per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client. A solicitor delivered his bill to a client without claiming interest. The bill was taxed, and the client paid the amount allowed on taxation. On such amount being paid the solicitor claimed interest thereon at 4 per cent. from one month from the date of the delivery of the bill:—Held, that the solicitor was entitled to such interest. *Blair* v. *Cordner*, 56 L. J., Q. B. 642; 19 Q. B. D. 516; 36 W. R. 109.

In an action on an attorney's bill, the plaintiff gave notice, that he should claim interest from the date of the notice. After the writ was issued, the bill was referred for taxation at the instance of the defendant, no terms being made as to the allowance of interest:—Held, that the plaintiff could not afterwards have an assessment of damages for the purpose of recovering the interest. *Berrington* v. *Phillips*, 1 M. & W. 48; 1 Tyr. & G. 322; 4 D. P. C. 758; 5 L. J., Ex. 127.

—— **"Demand"—"Person liable."**] — The executor of a deceased testator is, within the meaning of r. 7 of the general order under the Solicitors' Remuneration Act, 1881, the "person liable" to pay a bill of costs due from the testator to his solicitor. Where, therefore, in the administration by the court of a testator's estate, the solicitor, by direction of the chief clerk, delivered his bill of costs to the creditor having the conduct of the action, and not to the executrix:—Held, that as there had been no "demand" for payment on the "person liable," the solicitor was not entitled to interest. *McMurdo, In re, Penfield* v. *McMurdo*, 66 L. J., Ch. 67; [1897] 1 Ch. 119; 75 L. T. 576; 45 W. R. 244.

On Balance in Solicitor's hands.] — A client mortgaged his interest in an administration suit to Messrs. S., to secure a sum of 150*l.*, which they were to pay for him, but though they omitted to make the payment, and retained that with other money in their hands, the court treated it as an ordinary sum of money in hand, and declined to direct the taxing-master to allow the plaintiff interest upon those sums, though the mortgage which was to include them was bearing interest. *Foley* v. *Smith*, 20 L. J., Ch. 621.

Where a solicitor, engaged in various suits, obtained payment out of court of a sum of money standing in trust in the cause, and retained it towards his costs, and upon a subsequent taxation of his bill it appeared that at the time he obtained payment of the money he had in fact been already overpaid:—The court refused, upon a motion for that purpose, to charge him with interest, the parties having made considerable delay before they taxed the costs, and there being no fraud or laches imputable to the solicitor. *Wright* v. *Southwood*, 1 Y. & J. 527.

Under the common order, the master is not authorised to allow interest on the balance of the moneys of the client from time to time in the hands of the solicitor, though such appears to have been the agreement between the parties. *Jones* v. *James*, 1 Beav. 307; 3 Jur. 310.

On taxation a solicitor cannot be charged with interest on balances in hand; but, a solicitor having debited himself with interest in his cash account rendered:—Held, that the master ought to have charged him. *Savery, In re*, 15 Beav. 58.

VII. ASSIGNMENT OF COSTS.

Effect on Lien.] — A solicitor's lien is a dormant security, in which it differs from a mortgage; but a solicitor may assign a debt due to him for costs, with the benefit of any lien he may have upon any document for such costs. The claim is equally valid whether the deeds are in the actual possession of the solicitor or of his assignee; and such lien may pass to the solicitor's assignee, if the deeds were handed

over in the solicitor's presence, and at his request, to his assignee, without his actually touching them. *Bull* v. *Faulkner*, 2 De G. & Sm. 772; 13 Jur. 93.

"Order and Disposition."]—A solicitor assigns his claim for costs to W., and becomes bankrupt, and W. gives notice to the London agents of the solicitor of their claim, and the assignees in bankruptcy petition for payment to them, subject to the London agents' claim:—Held, that the notice to the London agents, as far as costs became payable to them, took those costs out of the order and disposition of the bankrupt, the costs being ordered out of the fund in court. Petition refused. *Sharples* v. *Marsh*, 2 W. R. 400.

In June, 1854, T., a solicitor, assigned to A., for value, the costs payable to him in an administration suit in which he acted as solicitor for the plaintiff; and gave notice of such assignment to all proper parties. By the order on further directions made in the suit in August, 1854, a fund was directed to be paid into court, out of which the plaintiff's costs were thereby also directed to be paid to T. In October, 1854, T. became bankrupt, but the fund was not paid into court until January, 1855:—Held, that the fund was not in the order and disposition of T. at the time of his bankruptcy, with the consent of the true owner, and that A. was entitled thereto. *Day* v. *Day*, 1 De G. & J. 144; 26 L. J., Ch. 585; 3 Jur. (N.S.) 782; 5 W. R. 701.

Until the court has made an order for the payment of costs out of a fund in court, the solicitor has no lien on such fund for such costs: therefore, when the solicitor to a party in a suit assigned the costs due and to become due to him in the suit, and subsequently became insolvent, and an order was afterwards made for the payment of the costs out of a fund in court, and the official assignee in insolvency of the solicitor claimed the costs as against the person to whom they had been assigned, as being under the order and disposition clause, on the ground that (though notice had been given to the solicitors for the plaintiff in the suit) no stop order had been obtained on the fund in court:—Held, that it was not necessary to get a stop order on the fund in court, and therefore, that the person taking under the assignment was entitled to the costs. *Lord* v. *Colvin*, 2 Dr. & Sm. 82; 6 L. T. 211; 10 W. R. 420.

After Taxation and Payment.]—Where after an order of taxation and payment the solicitor has assigned his bill to a purchaser and absconded, the court was inclined to think that the purchaser could not stand in place of the solicitor until he had procured him to be examined under the order. *Wilson* v. *Williams*, Barnard. 263.

Taxation after Assignment.] — After the delivery by a solicitor of his bill, he executed a deed, assigning all his property for the benefit of his creditors, which became binding on all the creditors. The clients afterwards claimed the common order for taxation against the solicitor himself, notwithstanding the deed. He thereupon gave them notice of the deed, but went in before the taxing-master and opposed the taxation. There was a balance due from him. The court allowed the clients to complete the taxation, on their undertaking not to proceed personally against the solicitor. *Bartrum, In re*, 10 L. T. 313; 12 W. R. 699.

Whether an assignee of costs due to a solicitor is such an "assignee" of the solicitor as is, under s. 37 of the Solicitors Act, 1843, entitled to obtain a taxation of the costs, quære. *Ward, In re*, 54 L. J., Ch. 508; 28 Ch. D. 719; 33 W. R. 783.

Charging Order.] — An assignee of costs due to a solicitor can apply for a charging order under the Solicitors Act, 1860, s. 28. *Briscoe* v. *Briscoe*, 61 L. J., Ch. 665; [1892] 3 Ch. 543; 67 L. T. 116; 40 W. R. 621.

Right of Assignee to sign and sue.] — A solicitor assigned his bill of costs and the right to recover on it, and the assignee gave notice of the assignment, and delivered the bill to the party to be charged, inclosed in a letter signed by himself. After the expiration of a month he brought an action in his own name on the bill of costs:—Held, that the plaintiff was an assignee within s. 37 of the Solicitors Act, 1843, and was entitled to maintain the action. *Ingle* v. *M'Cutchan*, 53 L. J., Q. B. 311; 12 Q. B. D. 518.

L. CHANGE OF SOLICITORS.

[Order VII. r. 3.]

Necessity of obtaining Order for.]—It was an irregularity for a defendant to take a declaration out of the office by one attorney, and plead by another, without an order for changing the attorney. If no such order had been obtained and served, the court would set aside the plea. *King* v. *Archer*, 1 B. C. Rep. 219.

Where a defendant appeared and pleaded to an action by one attorney, he could not make any application to the court by another in the same cause, unless he obtained an order for changing his attorney. *Ginders* v. *Moore*, 1 B. & C. 654.

A party called upon to shew cause might oppose the rule in person, or by a new attorney, without notice to the other party of the order to change his attorney. *Lovegrove* v. *Dymond*, 4 Taunt. 669.

A plaintiff might sue out execution by a different attorney, without an order to change. *Tipping* v. *Johnson*, 2 Bos. & P. 357.

So a defendant could bring error without such an order. *Batchelor* v. *Ellis*, 7 Term Rep. 337.

Drawing up Order.] — When an order has been made for the change of the attorney in a suit, the order must be drawn up and filed in the registry before any step can be taken by the new attorney. *Grice* v. *Grice and Penfold*, 32 L. J., Mat. 134.

Made without Order—Effect of.]—A suit was instituted against a vessel, and an appearance entered by a firm of solicitors on behalf of the owner. A sum of money was paid into court in lieu of bail, and the solicitors thereupon procured the release of the vessel, and incurred costs in defending the suit on behalf of the owner. Whilst the suit was pending, and before any sum had been paid to the firm of solicitors on account of such costs, another firm of solicitors

entered a second appearance in the same suit on behalf of the same defendant. On an application on behalf of the firm of solicitors by whom the first appearance had been entered, the court made an order setting aside the second appearance, and condemned the defendant in the costs of the motion. *The Oneiza*, L. R. 4 Adm. 36; 27 L. T. 632; 21 W. R. 232.

An inoperative plea having been pleaded without authority, for a new attorney for a defendant, without an order to change the attorney, the judgment which had been signed as for want of a plea was set aside. *Perry* v. *Fisher*, 6 East, 549.

Payment made to the plaintiff's late solicitor, who has been changed without the leave of the court, is good. *Powell* v. *Little*, 1 W. Bl. 8.

It is no ground for treating a rule nisi for a new trial as a nullity, that it has been obtained by a different attorney from the one on the record, without an order to change the attorney. *Doe* d. *Bloomer* v. *Bransom*, 6 D. P. C. 490; 2 Jur. 700; 1 W. W. & H. 314. See *Lett* v. *Watkins*, 27 L. J., Ex. 319.

Failure to file Notice — Party and Party Costs.]—A party to an action changed his solicitor before the trial, but by a slip no notice of such change was filed under Ord. VII. r. 3:—Held, that this did not prevent such party from recovering from the other side the costs incurred after such change. *Norris* v. *Bailey*, 62 L. J., Q. B. 338; 5 R. 313.

After Cause set down—Duty of Solicitor.]—Where a change of solicitors has taken place, after a cause has been set down for trial, it is the duty of the new solicitor to inform the associate of the change, in order that the name of the solicitor responsible for the conduct of the cause may appear on the record. *Hunt* v. *Fineburg*, 58 L. J., Q. B. 167; 22 Q. B. D. 259; 60 L. T. 855; 37 W. R. 314—C. A.

Waiver of Irregularity.]—Taking a plea out of the office, and keeping it, waived the irregularity of its having been pleaded by a new attorney without an order. *Margerem* v. *Makilwaine*, 2 B. & P. (N.R.) 509.

If the attorney on the record is changed, without an order for that purpose, and the opposite party treats the new attorney as the attorney in the cause, he could not afterwards object that no order was obtained. *Farley* v. *Hebbs*, 3 D. P. C. 538; 1 H. & W. 203.

Application for Order.]—Upon an application to change the attorney, where the client is unacquainted with the English language, the affidavits must clearly shew that the purport and object of the motion are known to and sanctioned by the client. *Davies* v. *Lowndes*, 3 C. B. 808.

It is no objection to such an application that it is made after final judgment. *Ib.*

When a plaintiff in a creditor's suit sells his debt after decree, the purchaser has no right to an order of course to change solicitors. *Topping* v. *Searson*, 2 Hem. & M. 205.

The proper course, in such a case, is for the purchaser to bring all the facts before the court on a motion to obtain the conduct of the cause. *Ib.*

Semble, that the court would not entertain such a motion where the debt was insignificant, if it was opposed by the principal creditors. *Ib.*

An order of course had been obtained at the Rolls to change the solicitor of two of the defendants. The solicitor was a mortgagee of certain sums of money to which these defendants were entitled in the cause, and by the mortgage deed there were special powers given to him to conduct the suit on their behalf. On motion, the order of the Rolls discharged, with costs, as it ought to have been made the subject of a special application. *Jenkins* v. *Bryant*, 3 Drew. 70; 3 Eq. R. 61; 18 Jur. 992; 3 W. R. 30.

A country solicitor agreed to employ a town agent for fifteen years. Before the expiration of the term, he obtained an order of course, in a suit, to change the agent, suppressing the existence of the special contract. The order was discharged for irregularity, with costs. *Richards* v. *Scarborough Market Co.*, 17 Beav. 83; 22 L. J., Ch. 759; 17 Jur. 294; 1 W. R. 250.

—— **By Husband to change Wife's Solicitor.**]—Where a wife was beneficially interested in an annuity, and became a defendant in replevin to try her right, and her husband joined with her to sign the distress warrant on which the proceedings arose, the court would not entertain a rule moved for on behalf of the husband, to change the attorney selected by the wife, and who had conducted the suit through several stages; especially as it appeared that the husband was colluding with the plaintiff to prevent his wife from trying her right to the rent-charge as against the plaintiff. *Wynne* v. *Wynne*, 2 Scott (N.R.) 615; 9 D. P. C. 396; 5 Jur. 220.

—— **On what Condition made.**]—The rule as well at law as in equity, since the Judicature Acts, 1873 and 1875, is, that an order for changing a solicitor shall be made without any provision as to the payment of his costs. *Grant* v. *Holland*, 47 L. J., C. P. 518; 3 C. P. D. 180; 26 W. R. 742.

It was the invariable practice of the court not to allow the attorney on the record to be changed unless the costs of the first attorney had been paid, and the fact that such attorney had other sufficient security for his costs was no reason for departing from that rule. *Witt* v. *Ames*, 8 L. T. 425; 11 W. R. 751.

Where plaintiff changes his solicitor, the former solicitor has no right to stop him from proceeding till his costs are paid. *O'Dea* v. *O'Dea*, 1 Sch. & Lef. 315.

—— **By some Petitioners.**]—Three petitioners retained the same solicitor in an application to wind up a company. The order was made, and subsequently two of the petitioners served, and obtained an order of course at the Rolls to change their solicitor:—Held, that the two had no right to act separately, and the order to change solicitors must be discharged. *Norwich and Norfolk Provident Permanent Building Society, In re*, 22 W. R. 854. S. P., *Brown* v. *Brown*, 11 Beav. 562.

—— **Service of.**]—The order for changing an attorney must have been served on the opposite party. *Rex* v. *Middlesex (Sheriff)*, 2 D. P. C. 147.

Discharge and Delivery up of Papers.]—An assigned solicitor of a pauper, in consequence of

delay in the prosecution of proceedings in the suit, was ordered to be discharged and to deliver up to the new solicitors all the papers, subject to his lien for what might be found due to him for costs upon taxation. *Hannaford* v. *Hannaford*, 24 L. T. 86; 19 W. R. 429.

Where an order for changing an attorney on payment of costs is made, and the attorney gives up the client's papers without the costs being paid, the court will not grant an attachment for their nonpayment. *Handy* v. *Collett*, 7 D. P. C. 599; 2 W. W. & H. 63; 3 Jur. 870.

Where there is an order for changing upon payment of the first attorney's bill upon taxation, and delivery up of papers, the first attorney is entitled to the possession of it to enforce payment of his bill. *Alger* v. *Hefford*, 1 Taunt. 38.

Where a solicitor discharges himself from a suit he must deliver to the new solicitor all papers, on an undertaking to return them at the end of the suit. *Huntley* v. *Anglo-Californian Gold Mining Co.*, 1 F. & F. 211.

An action was brought for the administration of the estate of H. by his infant grandchildren. The action was brought with the approval of the infants' father, and the next friend was nominated and approved by him. The father having died pending the action, the mother of the infants, who was also their testamentary guardian, applied to be appointed next friend, in the place of the existing next friend, and an order was made appointing her. She changed the plaintiff's solicitors, and the new solicitors applied to the old solicitors for delivery of the papers in the action. The original solicitors refused to deliver them till their costs were paid:—Held, upon a summons, that the old solicitors must deliver them over to the new solicitors without prejudice to their lien for costs. The action being a very heavy one, and the taxation of costs not likely to come on for some years, the costs of the original solicitors were, under the special circumstances, ordered to be taxed at once. *Hutchinson, In re, Hutchinson* v. *Norwood*, 54 L. T. 842; 34 W. R. 637.

Affidavit — Costs not paid.]—A bankrupt having employed A., a solicitor, to procure signatures of creditors to his certificate, and then ceased to employ him, cannot oblige his, A.'s, clerk to make affidavit of witnessing the signatures without first paying A. his costs for such business. *Shore, Ex parte, Lucas, In re*, 1 Deac. & C. 509; Mont. & B. 268; 1 L. J., Bk. 115.

Taxation — Attempted ineffectual Sale.]—Schedule I. Part I., r. 2, of the general order to the Solicitors' Remuneration Act, 1881, applies only to cases where the attempted ineffectual sale and the subsequent effectual sale therein mentioned are conducted by the same solicitors. If there is a change of solicitors after an attempted ineffectual sale, the taxation of the costs of such sale must be made under general order, r. 2 (c). *Dean, In re, Ward* v. *Holmes*, 55 L. J., Ch. 420; 32 Ch. D. 209; 54 L. T. 266.

Rights of First Solicitor as to Costs.]—Upon a change of attorneys under a rule of court, the new attorney undertook to hold the record and papers in the cause, subject to the lien of the former attorney:—Held, that, the cause having been brought to a successful termination, the former attorney was entitled to call upon his successor to proceed with the taxation, issue execution, and pay him the amount of his lien, out of the first proceeds, subject only to the costs necessarily incurred on such taxation. *Newton* v. *Harland*, 4 Scott (N.R.) 769.

By an order of the court, the costs to be incurred by a married woman suing by her next friend in a future proceeding were ordered to be paid to A. B., her solicitor. Pending the proceedings, A. B. was discharged, and C. D. appointed solicitor. A. B. received the whole costs:—Held, that the court had jurisdiction, on petition, to order A. B. to pay over to C. D. his share of such costs. *Bailey and Hope, Ex parte, Barnard, In re*, 14 Beav. 18.

At the hearing, a plaintiff obtained an order for taxation of his costs of suit, and payment out of the fund in court. The plaintiff had, in the progress of the suit, employed three different sets of solicitors successively. The plaintiff and his solicitors, at the date of the decree, agreed to accept a gross sum in full of all costs, instead of proceeding to taxation, and received the sum accordingly, for which they gave a receipt to that effect. They applied the money to their own use, and never paid the former solicitors the costs incurred during the early period of the suit. The decree did not direct any distributive payment among the various solicitors of the plaintiff:—Held, that the plaintiff and his solicitors, at the date of the decree, had a right to waive taxation, and to accept of a gross sum, in satisfaction of all costs, without consulting the former solicitors. *Mornington* v. *Wellesley*, 4 Jur. (N.S.) 6.

It appearing that the gross sum was taken in satisfaction of all costs:—Held, that the lien of the former solicitors upon the fund in court was gone. *Ib.*

Semble, that the remedy of the former solicitors was by action against the solicitors who received the money, as for money had and received to their use. *Ib.*

Where a plaintiff changes his solicitor, and obtains judgment without having paid the first solicitor's costs, the taxing-master will be ordered to certify separately the costs incurred before the change, and the plaintiff will be restrained from proceeding to enforce payment of the costs until further order. *Pritchard* v. *Shuttleworth*, Ir. R. 4 C. L. 233; 18 W. R. 1200.

Where a defendant had changed his solicitor after an adverse decision, and the court of appeal had reversed the decision and given the defendant the costs of the proceedings in the court below, the substituted solicitor, who had obtained payment of the costs, was ordered to lodge them in court to meet the claims of the former solicitor. *Eastwood* v. *Eastwood*, 16 W. R. 942.

—— **Lien.**]—An order was made for the change of solicitors in a wife's suit for dissolution of marriage. At the date of the order the former solicitor had in his hands a sum of money, being the balance of an amount received by him on account of alimony due to the petitioner:—Held, that the solicitor had no lien for his costs upon the balance of alimony in his hands. *Leete* v. *Leete*, 48 L. J., P. 61; 40 L. T. 788; 37 W. R. 921. *See also* ante, cols. 1697 et seq.

—— **Priority.**]—Where a solicitor, by arrangement with his client, retired from the conduct of a suit in equity, and another solicitor conducted

it thenceforth to its conclusion :—Held, on there being a deficiency in the fund applicable to the payment of costs, that the latter solicitor had priority. *Cormack* v. *Beisley*, 3 De G. & J. 157.

A solicitor, through whose instrumentality property has been recovered or preserved in an action, is entitled, under s. 28 of the Solicitors Act, 1860, to a declaration of charge upon such property, although his client may have discharged him before the trial of the action. In such a case his charge will be subject to the lien for costs of the client's solicitor for the time being. *Wadsworth, In re, Rhodes* v. *Sugden*, 54 L. J., Ch. 638 ; 29 Ch. D. 517 ; 52 L. T. 613 ; 33 W. R. 558. *See also cases*, col. 1669 et seq.

Appointment of Solicitor after Proceeding in Person.]—If a party has been proceeding in person, and afterwards appoints an attorney, he may give the other side notice of the fact by the very step which the attorney takes in the cause as attorney, without any formal notice. *Jones* v. *King*, 2 B. C. Rep. 192 ; 5 D. & L. 412.

Death of Solicitor.]—Upon the decease of the solicitor employed by a party to a suit, proceedings taken by a new solicitor employed by him are regular, although the change of solicitor is not authorised by any special order of the court. *Whalley* v. *Whalley*, 22 L. J., Ch. 632 ; 17 Jur. 254.

Upon the death of the attorney in the cause, notice must be given to the opposite party of the appointment of the new attorney, before he can proceed in the cause. *Ryland* v. *Noakes*, 1 Taunt. 342.

A notice of trial was, on the 10th August, 1849, given to the defendant's attorney for the first sittings in Michaelmas term. On the 9th October the defendant's attorney died. In pursuance of such notice the cause was duly entered, and tried on the 3rd November, when a verdict was found for the plaintiff. On the 8th November notice of taxation of costs was given on behalf of the plaintiff, by leaving the same at the deceased attorney's office, the plaintiff being unaware of his death. On the 9th November the plaintiff signed judgment for the debt and costs ; and in March, 1850, the defendant being in custody, a detainer was lodged against him. A rule having been obtained to set aside all the proceedings subsequent to the 9th October, the defendant swearing that he had no notice of any proceedings subsequent to the plea until the detainer was lodged, but omitting to state the time he first received intimation of the attorney's death, the court discharged the rule. *Ashley* v. *Brown*, 1 L., M. & P. 451 ; 19 L. J., Q. B. 477 ; 15 Jur. 399. See *Lord* v. *Wardle*, 3 C. B. 295 ; 15 L. J., C. P. 259.

A defendant's solicitor having died, the plaintiff (being unable to find the defendant) could not proceed in the accounts directed by a decree. The court ordered substituted service of a subpœna to name a new solicitor ; and the defendant having failed to appoint one, the court directed the accounts to be taken in his absence. *Dean* v. *Lethbridge*, 26 Beav. 397.

Partnership Dissolved.]—One of two solicitors in partnership obtains an order in the name of a client ; the partnership is dissolved, and the client and the other partner come as co-petitioners to discharge the order, and for other relief :—Held, that it was a misjoinder for such other partner to unite in it. *Sangar* v. *Gardiner*, C. P. Cooper, 119.

Solicitor leaving Country.] — Defendants, whose solicitor has left the country, and who have neglected to appoint another, may be served personally with process. *Mathews* v. *Foote*, 19 L. T. 306.

M. COUNTRY SOLICITOR AND LONDON AGENT.

Employment of Agent.]—A country solicitor who is authorised to institute a suit, is justified in employing a London agent for that purpose, in whose name as agent, the bill may be filed. *Solley* v. *Wood*, 16 Beav. 370.

Co-plaintiffs may employ separate solicitors acting by a common agent. *Waldon* v. *Thompson*, 37 L. J., Ch. 751 ; L. R. 6 Eq. 7.

Articles—Construction—"Client."]—A country solicitor is the "client" of his London agent within the meaning of a covenant not to transact business with any person who has been a client of the London agent. *Reid* v. *Burrows*, 61 L. J., Ch. 448 ; [1892] 2 Ch. 413 ; 67 L. T. 183 ; 40 W. R. 620.

Authority of Agent.]—The acts of an attorney's agent in town, in matters relative to the suit, are binding upon the parties. *Griffiths* v. *Williams*, 1 Term Rep. 710.

An attorney, as such, is bound by the acts done on his behalf of his London agent. *Withers* v. *Parker*, 5 H. & N. 725 ; 29 L. J., Ex. 320 ; 6 Jur. (N.S.) 1033 ; 2 L. T. 602 ; 8 W. R. 550—Ex. Ch.

A retainer to a country solicitor does not justify an action in which his London agents are the solicitors on the record. A., an illiterate woman, being desirous of knowing whether there was any balance coming to her, as administratrix of C., her deceased husband, out of the proceeds of a sale by the mortgagee of property mortgaged by C., gave to B., a country solicitor (who had recovered judgment in an action against her, as administratrix, for a debt due to him from her deceased husband) this written retainer : "I hereby authorise you to act as my solicitor in the administration of my late husband's estate, and authorise you to investigate the accounts of the mortgagee, and take such steps as you may think proper in the matter on my behalf." A writ was subsequently issued by a London firm of solicitors in the names of A. and B., as plaintiffs, claiming an account of the proceeds of sale of the mortgaged property and payment of the balance, the claim by A. being "as legal personal representative of C.," by B. "as a creditor of C. who had obtained judgment against A., and had obtained execution by the appointment of a receiver of the balance due from C." Upon motion by A. that her name might be struck out of the writ as having been issued without her knowledge and without any authority on her part :—Held, that the retainer was not sufficient to justify the issue of the writ ; but whether sufficient or not, it was a retainer to B., and did not authorise the London firm to issue the writ in the name of A. as her solicitors. *Wray* v. *Kemp*, 53 L. J., Ch. 1020 ; 26 Ch. D. 169 ; 50 L. T. 552 ; 32 W. R. 334.

A receiver was appointed by the court upon the representation of the plaintiff's solicitor that

the receiver had entered into the usual recognizances, which he had not, in fact, done. A loss occurred, in consequence of the receiver's liability being only in the nature of a simple contract debt. The solicitor was, at the instance of a defendant, made personally liable for the loss occasioned by his neglect. *Simmons* v. *Rose, Ward, In re*, 31 Beav. 1.

Held, also, that the country solicitor was liable, though the representations were made by his London agents. *Ib.*

Payment by a defendant to the London agent of the plaintiff's attorney is a payment to the plaintiff. *Hanley* v. *Cussan*, 11 Jur. 1088.

Petition — Signature by Agent.] — London solicitors acting for country solicitors duly authorised, obtained an order for taxation of costs. The names of the London solicitors were indorsed on the petition for taxation as principals. The order for taxation was discharged on the motion of the client, without costs. *Scholes, In re*, 55 L. J., Ch. 626 ; 32 Ch. D. 245 ; 54 L. T. 466 ; 34 W. R. 515.

Notice of Appeal—Service on London Agent or Country Solicitor.]—In an action commenced in the high court the address for service mentioned on the writ was the address of certain London solicitors, agents for the plaintiff's solicitor. The action was remitted to a county court, and on the particulars which were duly lodged with the registrar and a copy of which was served upon the defendant's solicitors, the address for service was stated to be that of the plaintiff's country solicitor. After the action had been heard and judgment had been delivered in the plaintiff's favour, a notice of appeal on the part of the defendant was, on the last day for service of appeal, served upon the London agents, whose names appeared upon the writ :—Held, that the service was bad, on the ground that the address for service indorsed on the particulars was substituted for the address for service indorsed upon the writ. *Malley* v. *Shepley*, 62 L. J., Q. B. 31 ; 5 R. 78 ; 68 L. T. 294 ; 4 W. R. 63, 302.

In appeals from county courts where the solicitor for the respondent carries on business in the country, the notice of appeal should be served within the proper time upon the respondent's solicitor, and not on the solicitor's London agent. *Powell* v. *Thomas* ([1891] 1 Q. B. 97) followed. *Jackson* v. *Margrett*, 5 R. 181 ; 68 L. T. 91 ; 41 W. R. 267.

Semble, that in the case of an appeal from a county court where the solicitor to the respondent carries on business in the country, service of the notice of motion upon the London agent of the solicitor is not sufficient service to satisfy Ord. LIX. r. 12. *Powell* v. *Thomas*, [1891] 1 Q. B. 97 ; 63 L. T. 812 ; 39 W. R. 224.

Agent gives Credit to Solicitor, not to Client.] —A London agent of a country solicitor, acting in the ordinary course of business, is always taken to give credit to the country solicitor, not to the country solicitor's client. *Waller* v. *Holmes*, 1 Johns. & H. 239 ; 30 L. J., Ch. 24 ; 6 Jur. (N.S.) 1367 ; 3 L. T. 289 ; 9 W. R. 32.

An attorney employing an agent to do business for his client, is primarily liable to such agent for his bill, though the latter knows the business is to be done for the client ; but to whom the credit is given is a question for the jury. *Scrace* v. *Whittington*, 3 D. & R. 195 ; 2 B. & C. 11 ; 1 L. J. (O.S.) K. B. 221.

A country client employs an attorney or solicitor in the country in a cause in chancery ; the solicitor employs a clerk in chancery ; the client in the country pays his solicitor, but the clerk in chancery is unpaid. The client is not bound to pay the clerk in chancery ; but if the latter has any papers in his hands, he may retain them. *Farewell* v. *Coker*, 2 P. Wms. 460.

Death of Country Solicitor—Effect of.]—The death of the principal attorney, pending a suit, does not revoke his agent's authority to obtain possession of a postea, after a verdict for the client of the former. *Taunton* v. *Goforth*, 6 D. & R. 384 ; 3 L. J. (O.S.) K. B. 229.

A country attorney, being retained to conduct an action (on behalf of an infant), in which he obtained a verdict, employed, in the latter stages of it, a London attorney as his agent, and died before judgment was signed. The London attorney wrote to the client in the country, stating that he had acted as the agent, and proposing to continue so to do ; and, receiving no answer, taxed costs, and signed final judgment, without the knowledge of the client ; meanwhile the client, without any notice, either to him or to the defendant, had employed another attorney. The court refused a rule to set aside the taxation ; the plaintiff's remedy, if any, being against the attorney. *Davis* v. *Bowen*, 7 L. T. 739 ; 11 W. R. 282.

Change of Agent.]—A solicitor in the country employed an agent in London to conduct a suit under a special contract. He afterwards obtained an order of course to remove the agent without mentioning the special contract. The order was discharged for irregularity on the motion of the agent. *Richards* v. *Scarborough Market Co.*, 17 Beav. 83 ; 22 L. J., Ch. 759 ; 17 Jur. 294 ; 1 W. R. 250.

Wrong Procedure—Liability.]—If a bill is ordered to be taken off the file, on the ground that the plaintiffs assume to sue in a corporate character, to which they are not entitled, the costs will be ordered to be paid by the town agent of the plaintiffs, and not by their solicitor in the country. *Ruthin Corporation* v. *Adams*, 7 Sim. 345 ; 4 L. J., Ch. 167.

Where an affidavit is reported to be scandalous, the agent in London who filed the affidavit is responsible for the costs as between attorney and client, notwithstanding the country attorney may have himself drawn the affidavit. *Wake, Ex parte*, 3 Deac. & C. 246 ; Mont. & Bli. 259 ; 2 L. J., Bk. 38.

Misconduct of Agent—Remedy of Client.]—If a London agent receives money improperly, the remedy of the client is not against him but against his attorney. *Gray* v. *Kirby*, 2 D. P. C. 601.

If the agent does wrong, the client cannot make a summary application against him. *Jones, Ex parte*, 2 D. P. C. 161.

A., being defendant in an action brought by B., paid the debt and costs to his own country attorney, for transmission to B. The attorney sent a cheque exceeding the amount to his own town agent, directing him to pay the debt and costs out of it. The agent acknowledged the receipt by letter to the country attorney, and therein promised to apply the money as directed ; but he retained it in reduction of a debt due to him from the attorney :—Held, that there was

no sufficient privity to support an action for money had and received by A. against the agent. *Cobb* v. *Becke*, 6 Q. B. 930 ; 14 L. J., Q. B. 108 ; 9 Jur. 439.

Where a country attorney who is employed in a cause employs a London agent, there is not in general such privity between the client and the London agent as entitles the client to recover for money had and received against the agent in respect of proceeds of the cause which the agent has received in the ordinary course of his business. *Robbins* v. *Fennell*, 11 Q. B. 248 ; 17 L. J., Q. B. 77 ; 12 Jur. 157.

But if it appears that such proceeds have been received by the agent, without authority, either from the client or the country attorney, the court will, if the agent is an attorney of the court, compel him, upon application, to pay over the proceeds to the client, though the country attorney is indebted to the London agent in a greater sum on other accounts. *Ib.*

Where a town agent received moneys (not in any cause), belonging to B., the client of a country attorney, under a power of attorney from B., and placed them to the credit of the country attorney, the court refused a rule, on the application of B., to compel the agent to pay over the moneys to him, as the receipt of them did not establish the relation of attorney and client between the agent and B. *Baker, Ex parte*, W. W. & D. 591 ; 1 Jur. 894.

The town agent of the solicitor of the plaintiff, in an action in which judgment had been recovered for a debt, refused to pay over to the plaintiff the amount of the debt which had been received by him from the sheriff under a writ of fi. fa., on the ground that he was entitled to retain such amount for a debt due to him from the country solicitor of equal amount. The country solicitor had no lien on such amount against his client, the plaintiff :—Held, that the court, in the exercise of its summary jurisdiction over its own officers, would order the town agent to pay over the amount of the debt to the plaintiff. In such a case the court will exercise its summary jurisdiction, although there be no fraud imputed to the town agent. *Edwards, Ex parte, Johnson, In re*, 51 L. J., Q. B. 108 ; 8 Q. B. D. 262 ; 45 L. T. 578.

Proceedings for Account.]—Notwithstanding the definition of the word "client" in s. 3 of the Attorneys and Solicitors Act, 1870, that act does not apply to accounts between country solicitors and town agents. *Ward* v. *Eyre*, 49 L. J., Ch. 657 ; 15 Ch. D. 130 ; 43 L. T. 525 ; 28 W. R. 712 —C. A.

A bill by a country solicitor against a London solicitor, alleged that he had made a special agreement with the plaintiff to transact certain business for him on agency terms, and charged that the defendant falsely pretended that the agreement was one not for agency but for partnership in the particular business. The bill charged that, on either construction of the agreement, the plaintiff was entitled to an account, and prayed that the defendant might deliver his bills of costs as the plaintiff's agent, and also for a general account of all dealings and transactions between them. The defendant demurred, on the ground that the proper remedy of the plaintiff was by petition under 6 & 7 Vict. c. 73, s. 37 :—Held, that the demurrer ought to be overruled. *Ward* v. *Lawson*, 42 L. J., Ch. 273 ; L. R. 8 Ch. 65 ; 21 W. R. 88.

Attachment—Debtors Act.]—A solicitor, the London agent of a country solicitor, made default in payment of a sum ordered to be paid by him in an action for an account of his agency :—Held, that the defendant was liable to imprisonment under s. 4, sub-s. 3, of the Debtors Act, 1869, as a person acting in a fiduciary capacity, but not liable under s. 4, sub-s. 4, as a solicitor ordered to pay in his capacity of officer of the court. *Litchfield* v. *Jones*, 57 L. J., Ch. 100 ; 36 Ch. D. 530 ; 58 L. T. 20 ; 36 W. R. 397.

Costs—To whom Payable.]—At the request of the client of a country solicitor, R. paid to the solicitor a sum of money in part discharge of costs due to the solicitor in respect of administration suits to which the client was defendant, and the repayment was secured by a mortgage of the solicitor's lien. Afterwards the costs were ordered to be taxed, and paid out of a fund in court to the town agents of the solicitor :—Held, that the costs so ordered to be paid to the agent must be paid to R. in satisfaction of his claim under the mortgage. *Cockayne* v. *Harrison*, 42 L. J., Ch. 660 ; L. R. 15 Eq. 298 ; 21 W. R. 520.

—— **What Recoverable as between Solicitor and Client.**]—*See* ante.

—— **Letters.**]—A country solicitor with an office in town, conducting personally the business which would ordinarily be transacted by a London agent, is not entitled to charge for letters passing between the two offices. *Harle, In re*, 19 L. T. 305 ; 17 W. R. 21.

—— **What Recoverable as between Party and Party.**]—*See* Costs.

—— **Assignment — Bankruptcy — Order and Disposition.**]—A solicitor assigns his claim for costs to W., and becomes bankrupt, and W. gives notice to the London agents of the solicitor of their claim, and the assignees in bankruptcy petition for payment to them, subject to the London agents' claim :—Held, that the notice to the London agents, as far as costs became payable to them, took those costs out of the order and disposition of the bankrupt, the costs being ordered out of the fund in court. Petition refused. *Sharples* v. *Marsh*, 2 W. R. 400.

—— **Share of—"Usual Agency Terms"—Out-of-pocket Expenses—Interest on Costs.**]—As, according to the "usual agency terms" between a country solicitor and London agent, the London agent is only entitled to payment in full of all out-of-pocket expenses, and to a share (one-half or one-third, as may be agreed) of the profit charges, he is not, in the absence of special agreement, entitled to share in any other profits made by the country solicitor in the business, or in interest paid to the solicitor on unpaid costs. *Ward* v. *Lawson*, 59 L. J., Ch. 323 ; 43 Ch. D. 353 ; 62 L. T. 158 ; 38 W. R. 300—C. A.

An agreement by a country solicitor with a London solicitor, that the London solicitor should be his London agent on the usual agency terms, but that the London agent should not call upon the country solicitor to pay any of his agency bills until he had obtained payment of his bill of costs from his client, does not entitle the London agent to share in interest paid to the country solicitor on unpaid costs. *Ib.*

Taxation of Bill of Costs.]—The bill of the town agent of a solicitor cannot be ordered to be

taxed on motion of the client. *Wildbore* v. *Bryan*, 8 Price, 677.

An order for taxation obtained by a London agent was discharged on the ground of his having signed the petition for taxation as principal. *Scholes, In re*, 55 L. J., Ch. 626 ; 32 Ch. D. 245 ; 54 L. T. 466 ; 34 W. R. 515.

In an action for an attorney's bill, the town agent of the defendant's attorney obtains an order for taxing the bill. The plaintiff cannot call upon such agent to take up the master's allocatur and pay the fees. *Becke* v. *Cattell*, 3 Man. & G. 480 ; 4 Scott (N.R.) 246 ; 11 L. J., C. P. 49.

So, where part of the business is done in the House of Lords, and the certificate of the officer of the house is necessary for the purpose of enabling the taxing-master to complete his allocatur, the court will not compel the defendant's agent to take up such certificate. *Ib.*

A solicitor agreed to undertake the defence of another solicitor upon agency charges. On special petition a taxation of his bill was ordered "having regard to the agreement." *Gedye, In re*, 23 Beav. 347.

A solicitor agreed to conduct the defence of another solicitor upon agency terms, in case of the defence being unsuccessful. On entering into the agreement, the latter suppressed from the former the existence of a material correspondence, which was the principal ground of a decree being made against him. But the solicitor, after the discovery, still continued the defence without objection :—Held, that he was not released from the contract. *Ib.*

—— **Jurisdiction.**]—*See* ante, col. 1554.

—— **On Common or Special Order.**]—*See* ante, col. 1573.

—— **Practice on.**]—*See* ante, col. 1583.

—— **Agency Charges — Firms of Solicitors having Common Members.**]—Agency charges for work done by a London firm of solicitors as agents for a country firm—two partners out of three in each firm being the same—were disallowed on taxation :—Held, that it having been the practice of the chancery taxing-masters for forty or fifty years not to treat cases of two firms having certain partners in common as agency cases at all, the court could not overrule the practice, and the charges were properly disallowed. *Borough Commercial and Building Society, In re*, 63 L. J., Ch. 365 ; [1894] 1 Ch. 289 ; 7 R. 75 ; 70 L. T. 51 ; 42 W. R. 161—C. A.

—— **Part of Bill.**]—Under the Solicitors Act, 1843, the court has no power to direct that one item or one branch of a bill of costs delivered shall be taken and remitted to the taxing-master for examination. But, apart from the terms of the statute, the court has jurisdiction to direct that part of a bill should be taxed, where the circumstances make it right that such jurisdiction should be exercised, upon such terms as would prevent any injustice being done. *Storer* v. *Johnson and Wetherall*, 60 L. J., Ch. 31 ; 15 App. Cas. 203 ; 62 L. T. 710 ; 38 W. R. 756—H. L. (E.)

London solicitors acted as agents in London for a country solicitor during the years 1877 to 1884 inclusive. The agency was terminated in 1884. During the period of the agency the London agents delivered to the country solicitor, generally once a year but sometimes oftener, detailed bills of the charges which they claimed against him in each of the actions or other matters in which they had acted for him. They also delivered to him a cash account for each year, in which he was credited with all payments made by him to them, and all moneys received by them on his behalf, and was debited with all payments made by them to him or on his behalf, and with the gross amounts of the several bills of charges which had been delivered. The balance appearing to be due from him on each account but the last was carried on to the next account. Some of the actions continued during several years, and one of them (*Rhodes* v. *Jenkins*) continued during the whole period of the agency, and was not then concluded. After the close of the agency the country solicitor claimed a taxation of the whole of the bills :—Held, by Pearson, J., that only those bills which had been delivered within twelve months could be taxed, and that the earlier bills must be treated as having been settled in account and thus paid. Held, by the court of appeal, that the bills of costs in *Rhodes* v. *Jenkins* (to which the appeal was limited), notwithstanding the fact that all the costs in it had not yet been taxed, being in fact separate bills could not be treated as one continuous bill at the option of the country solicitor. *Nelson, In re*, 54 L. J., Ch. 998 ; 30 Ch. D. 1 ; 53 L. T. 415 ; 33 W. R. 645—C. A.

—— **Charge for Counsel's Fees not yet paid.**]—The London agents had charged the country solicitor with fees to counsel which had not yet been paid, but the country solicitor had not supplied them with sufficient funds to pay the fees :—Held, by Pearson, J., that this charge was not a circumstance sufficient to justify a taxation. *Ib.*

Lien between Town Agent and Client.]—A London solicitor acting as agent for a country solicitor has a general lien against the country solicitor upon any money recovered in an action, for all costs for agency business and disbursements due from the country solicitor, whether in the particular action or in any other proceedings ; but as between the town agent and the client, the lien of the former extends only to the costs of the particular action in which he is engaged. *Lawrence* v. *Fletcher*, 12 Ch. D. 858 ; 27 W. R. 937. S. P., *White* v. *Royal Exchange Assurance Co.*, 1 Bing. 20 ; 7 Moore, 249 ; 25 R. R. 574.

A client paid her country solicitor his bill of costs before receiving any notice that the town agent of the solicitor claimed a lien upon the documents in his possession for a balance alleged to be due to him from the country solicitor on accounts stated between them :—Held, that the town agent's lien did not attach, and that he must deliver up all the documents in his possession. *Vyse* v. *Foster*, 44 L. J., Ch. 344 ; L. R. 10 Ch. 236 ; 32 L. T. 219 ; 23 W. R. 413.

A town agent has no lien for the general balance due to him from a country attorney, upon money of a client of the latter coming to his hands in a cause in which he acts as such town agent, because he must have known that the money was received for the client's use. *Moody* v. *Spencer*, 2 D. & R. 6 ; 1 L. J. (O.S.) K. B. 1.

Where a client has paid the bill of his country solicitor before receiving notice of anything remaining due from the solicitor of the London agent, the latter has no lien on documents which have come into his hands in the course of the suit. *Waller* v. *Holmes*, 1 Johns. & H. 239 ; 30 L. J., Ch. 24 ; 6 Jur. (N.S.) 1367 ; 3 L. T. 289 ; 9 W. R. 32.

An attorney cannot set up the lien of his

London agent on the papers of his client, against the claim of that client, the client having paid his attorney's bill. *Andrew, In re*, 7 H. & N. 87; 30 L. J., Ex. 403.

A town agent of an attorney has a lien upon the money received in the particular cause, and upon the papers in the particular cause, for the account due to him by the attorney for the agency bill in that particular cause only, and he has this lien against all the world; and if he has had no payment made to him specifically on account of the cause, he is entitled to this lien, until his agency bill in the particular cause is satisfied. If the agent has parted with the possession of the papers by his own act, though by mistake, his lien is at an end; but if the papers did not get lawfully out of his possession, his lien continues. *Dicas* v. *Stockley*, 7 Car. & P. 587.

A decree was made in the usual form, ordering the payment of costs to the London agents of E. E.'s client had satisfied all claims of E. against him, and now prayed that the costs might be paid to him:—Held, that the order for payment to the London agents gave them no rights of lien or of set-off in respect of the costs, or in any way altered the rights of the principals. *Peatfield* v. *Barlow*, 38 L. J., Ch. 310; L. R. 8 Eq. 61; 20 L. T. 217; 17 W. R. 516.

A country client employs an attorney or solicitor in the country in a cause in chancery; the solicitor employs a clerk in chancery, the client in the country pays his solicitor, but the clerk in in chancery is unpaid. The client is not bound to pay the clerk in chancery, but if the latter has any papers in his hands he may retain them. *Farewell* v. *Coker*, 2 P. Wms. 460.

A clerk in court who lends money to the solicitor is not entitled thereby to detain a client's papers as a pledge. *Gray* v. *Cockeril*, 2 Atk. 114.

Where a clerk in court had obtained an order for taxing the costs of the solicitor who employed him, and afterwards another order for payment of the costs of taxation, he was allowed to detain the papers of the solicitor's client till the costs reported due under the first order were paid, but not for the costs of taxation. *S. C.*, Barnard. 264.

Lien of the agent in town upon the papers in his hands, for what was due to him, as agent in the cause from the solicitor in the country. *Ward* v. *Hepple*, 15 Ves. 297; 10 R. R. 80.

Where town agents of a country solicitor (since a bankrupt) had received papers from him belonging to his client, for purposes of his client's business, they have a lien against the client for amount of money due from him to solicitor, and from solicitor to them, on account of business done in that cause. And where client had, after the solicitor's bankruptcy, paid the agent his bill to obtain such papers, although an action had been previously commenced against him by assignees for recovery of it, the court granted and continued an injunction against the action on the ground of agent's lien. *Bray* v. *Hine*, 6 Price, 203; 20 R. R. 623.

Agents of country attorneys, who finally become attorneys in a cause, and in such character receive the costs, cannot retain a certain portion above their demand upon the client, on the ground that the country attorneys were not satisfied as to their claims and that they received the money as stakeholders for them, no demand being made by the country attorneys themselves. *Quarrington* v. *White*, 6 L. J., C. P. 253.

—— **Between Town Agent and Country Solicitor.**]—A town agent has a lien as against the solicitor in the country to the extent of his entire bill. *Steele, Ex parte*, 16 Ves. 164.

Charging Order.]—London agents of a country solicitor have no right to a charge for costs, as they are not the solicitors employed by the client. *Macfarlane* v. *Lister*, 57 L. J., Ch. 92; 37 Ch. D. 88; 58 L. T. 201—C. A.

A town agent is entitled to a charge on all property recovered in three suits for an unascertained balance due to him by the country solicitor. *Tardrew* v. *Howell*, 3 Giff. 381; 31 L. J., Ch. 57; 7 Jur. (N.S.) 1120; 5 L. T. 276; 10 W. R. 32. *See also* cases supra.

N. UNQUALIFIED PRACTITIONERS.

Acting in Name of a Qualified Solicitor.]—An unqualified person who acts as a solicitor commits an offence against 6 & 7 Vict. c. 73, s. 2, though he acts in the name and with the consent of a duly qualified solicitor. H., who had carried on the business of an accountant, arranged with C., who had been admitted as a solicitor, that he should use H.'s offices, and any business H. had he was to allow C. to attend to, H. to share in the profits, but in what proportion was not settled, or, according to H.'s version of the arrangement, H. was to be paid, as a commission, one half share of profits after deducting all expenses, including rent of offices, and was to find money and clerk to carry on the business. Pursuant to this arrangement, H., sometimes with C., and sometimes alone, transacted various matters which it was alone competent to a solicitor to transact, generally using the name of C. & Co., but sometimes not, and not always with the knowledge or express sanction of C.:—Held, that H. had been guilty of a contempt of court, and that an attachment must issue against him. *Abercrombie* v. *Jordan, Hunt, In re*, 8 Q. B. D. 187; 30 W. R. 810—C. A.

S., who carried on the business of an accountant, was instructed to collect a debt. Failing to recover the money he issued a writ which purported to be issued by Smale, a solicitor, but it was not signed by or on behalf of a solicitor, as required by Ord. V. r. 7, and the address for service given upon the writ was the address of S. After the writ was served, and after the summons had been taken out to stay proceedings on the ground that Ord. V. r. 7, had not been complied with, S. telegraphed to Smale, who was in London, asking for a reply that the writ was issued with his authority and privity. Smale replied that it was issued with his authority and privity, being under the impression that S. was acting as clerk to a solicitor, in whose service S. had formerly been, and with whom he had previously had transactions as his agent. The Incorporated Law Society obtained a rule calling upon S. to shew cause why a writ of attachment should not issue against him for contempt of court for having acted as a solicitor contrary to 6 & 7 Vict. c. 73, s. 2, and 23 & 24 Vict. c. 127, s. 26:—Held, that there was not sufficient evidence to shew that S. had put himself forward as actually acting as a solicitor, and on that ground alone the rule would be discharged upon S. paying all the costs. *Dockings* v. *Vickery, Symons, In re*, 46 L. T. 139.

Acting as Solicitor.]—An architect and surveyor entered a personal appearance on behalf of a defendant to an action for wrongfully refusing to accept a sub-lessee, paid the incidental court fees, obtained the defendant's signature to the necessary forms, and deposited them at the proper office; obtained and paid for duplicate copies, and forwarded them to the plaintiff's solicitor requesting a statement of claim. The architect who was also employed by the defendant in a dispute with the same plaintiff relating to certain house repairs, advised him to settle the action, and by correspondence and otherwise, negotiated with the plaintiff's solicitor to that end:—Held, that the architect in entering the appearance to the action, had committed a breach of s. 2 of the Solicitors Act, 1843, and was, therefore, liable to be attached for contempt of court, but that the provisions of the section did not extend to prevent his legally acting as he had done in the negotiations for the settlement of the action. *Incorporated Law Society, Ex parte, Hall, In re*, 5 R. 525; 69 L. T. 385.

Law stationers, not qualified as solicitors or proctors, were accustomed upon the instruction and in the names of London or country solicitors, to take to the registry of the probate division original wills and the engrossments thereof, with the proper affidavits, and if these were in order, to fetch away the probate; if any question arose as to the sufficiency of the documents the stationers communicated it to the solicitors. All the charges between solicitor and client were made by the solicitors, and the stationers charged the solicitors for their clerks' time only:—Held, that the stationers had not acted as solicitors or proctors, and were not liable to the penalties imposed by 23 & 24 Vict. c. 27, s. 26. *Incorporated Law Society* v. *Waterlow*, 52 L. J., Q. B. 674; 8 App. Cas. 407; 49 L. T. 141; 31 W. R. 754—H. L. (E.)

The respondent carried on business as a process server, and, in the course of such business, to support an order for substituted service, set out in the form of an affidavit the circumstances connected with the failure of his clerk to serve the writ. The affidavit was then sworn and sent to the solicitors employing him. A regular charge was made by him for effecting substituted service:—Held, that the respondent had not acted as a solicitor, and was not liable to be committed for contempt of court under the provisions of 23 & 24 Vict. c. 127, s. 26. *Incorporated Law Society, Ex parte, Lewis, In re*, 60 L. J., Q. B. 500; [1891] 1 Q. B. 649; 64 L. T. 565; 39 W. R. 511.

Every person who acts as a solicitor contrary to s. 2 of 6 & 7 Vict. c. 73, is liable to attachment for contempt of court under 23 & 24 Vict. c. 127, s. 26, whether he so acts in the name of any other person or in his own name, unless such person be duly qualified. Although the court will generally adopt the findings of the master as to such conduct, his report is not conclusive. *Simmons, In re*, 15 Q. B. D. 348; 53 L. T. 147; 33 W. R. 706; 49 J. P. 740.

—— **Indictment.**]—An indictment will lie against a person who acts as an attorney, without being admitted and inrolled pursuant to 6 & 7 Vict. c. 73, s. 2, although by s. 35, disabilities and penalties are imposed on a person so acting. *Reg.* v. *Buchanan*, 8 Q. B. 883; 15 L. J., Q. B. 227; 10 Jur. 736.

Pretending to Act as Solicitor.]—S., a partner in a firm of coal merchants, wrote to A., who was indebted to the firm for coals, a notice signed by himself, headed, "Final notice before proceeding in county court. Unless you pay the sum of 22*s.* 6*d.* to the firm of, &c., I shall proceed against you under the above act":—Held, the justices were wrong in convicting S. of pretending to be a solicitor contrary to 37 & 38 Vict. c. 68, s. 12. *Symonds* v. *Incorporated Law Society*, 49 J. P. 212.

B., an agent who used to issue county court summonses for people, was authorised by V. to write to a debtor of V. for payment. B. sent a notice signed by himself in the words, "County Courts. Unless the sum of 1*l.* 15*s.* 6*d.* due to V. is paid I shall proceed against you under the above acts." The real debt due to V. was only 1*l.* 6*s.* B. being summoned under 37 & 38 Vict. c. 68, s. 12:—Held, the magistrate was right in dismissing the summons, as there was no evidence that B. pretended, &c., to act as a solicitor. *Incorporated Law Society* v. *Bedford*, 49 J. P. 215.

Unqualified Person.]—Under 22 Geo. 2, c. 46, s. 11, a solicitor who had neglected to take out his certificate was not an unqualified person. *Ross and Hodgson, In re*, 4 N. & M. 763; 4 L. J., K. B. 264.

Acting as Agent for Unqualified Person.]—A solicitor made a verbal agreement with a debt collector to act for the debt collector as his solicitor in all county court matters, upon the terms that when the solicitor recovered a debt and costs he should bring the whole amount to the debt collector, and the debt collector should return half the costs to the solicitor, retaining one-half of the costs for himself, but taking the solicitor's receipts for the whole, and where no costs were recovered no division of costs should take place:—Held, that this agreement constituted the solicitor the agent of the debt collector, an unqualified person within s. 32 of the Solicitors Act, 1843. *Incorporated Law Society, Ex parte, Solicitor, In re*, 63 L. T. 350.

—— **Punishment—Suspension.**]—Sect. 32 of the Solicitors Act, 1843, enacts that if a solicitor shall wilfully and knowingly act as agent in any action for an unqualified person, then such solicitor "shall and may be struck off the roll, and for ever after disabled from practising":—Held, that the court, instead of striking off the rolls a solicitor who has brought himself within this section, has a discretion under its general authority over solicitors to inflict a minor punishment, such as suspension from practice. *Incorporated Law Society, Ex parte, Solicitor, In re*, 63 L. T. 350. See *Palmer, In re*, 4 N. & M. 529; 4 L. J., K. B. 110.

Semble, that the court, on being satisfied that a solicitor has been guilty of an offence under s. 32 of the Solicitors Act, 1843, has no discretion as to the punishment to be inflicted, but must strike such solicitor off the rolls. *Kelly, In re, Incorporated Law Society, Ex parte*, 64 L. J., Q. B. 129; [1895] 1 Q. B. 180; 15 R. 106; 71 L. T. 843; 43 W. R. 191.

Use of Name by Unqualified Person.]—When a solicitor employs a certificated conveyancer as his clerk, but both their names appear on the office door, the bills were made out in the joint names and the profits were divided equally, this

is enabling an unqualified person to practise for his own profit in the solicitor's name. *Jackson and Wood, In re*, 1 B. & C. 270; 1 L. J. (O.S.) K. B. 115.

The mischief against which s. 32 of the 6 & 7 Vict. c. 73, was directed is the practice or acting as an attorney or solicitor without being duly qualified. And the offence prohibited is not the mere permitting your name as an attorney or solicitor to be made use of in an action or suit "upon the account or for the profit of an unqualified person," but doing it in such a manner as thereby to enable such unqualified person to appear, act or practise in any suit at law or in equity. *Scott* v. *Miller*, Johnson, 220; 28 L. J., Ch. 584; 5 Jur. (N.S.) 858; 7 W. R. 470.

An agreement by an attorney with a certificated conveyancer, that in case the latter should introduce to the former any matters of professional business, for which the attorney would have a claim for costs, he would pay to the conveyancer a commission, is not, on the part of the attorney, such a permitting of his name to be made use of upon the account or for the profit of an unqualified person as was intended to be provided for by the section. *Ib.*

Such an agreement would not subject the parties to penalties for common barratry. *Ib.*

—— **Order Striking off Rolls — Appeal to Court of Appeal.**]—An appeal lies from an order of the high court made under s. 32 of the Solicitors Act, 1843, striking a solicitor off the rolls for having permitted his name to be used by an unqualified person, such an order not being a judgment in a criminal cause or matter within the meaning of s. 47 of the Judicature Act, 1873. *Ex parte, In re, Davy, Ex parte*, 59 L. J., Q. B. 376; 25 Q. B. D. 228; 38 W. R. 683—C. A.

—— **Treatment in Prison — "Criminal Prisoner."**]—A person committed to prison under 6 & 7 Vict. c. 73, s. 32, and 23 & 24 Vict. c. 127, s. 26, for acting as a solicitor, though not duly qualified, is a "criminal prisoner" within 28 & 29 Vict. c. 126, s. 4, which enacts that "criminal prisoner shall mean any prisoner charged with or convicted of a crime." Such a person is not entitled to be treated as a misdemeanant of the first class by 40 & 41 Vict. c. 21, s. 41. *Osborne* v. *Milman*, 56 L. J., Q. B. 263; 18 Q. B. D. 471; 56 L. T. 808; 35 W. R. 397; 51 J. P. 437—C. A. Reversing 16 Cox, C. C. 138.

Uncertificated Practitioner—Liability of.]—If an unprofessional man undertakes to conduct legal proceedings for another, he is liable to that other for negligence, although he may have employed an attorney to do part of the work. *Brown* v. *Tolley*, 31 L. T. 485.

B., being in difficulties, employed the defendant to take him through the county court in bankruptcy for reward. A petition for liquidation, signed by an uncertificated attorney, was filed, and the plaintiff was appointed trustee; the defendant partly employing an attorney in the matter. The necessary notices for the meeting of creditors not having been inserted in the Gazette, the registrar refused to register the proceedings, which became inoperative, so that B. was forced to pay debts which would otherwise have been barred:—Held, that the defendant was liable to the plaintiff. *Ib.*

—— **Proceedings taken by — How Client affected.**]—Proceedings taken by an uncertificated attorney are not, as affects his client, deemed void or irregular. *Brown* v. *Tolley*, supra.

Notice of motion given by one not allowed to act as a solicitor is not good. *Grosvenor, Ex parte*, 3 P. Wms. 104.

Application to strike out an appearance entered by an attorney after the determination of his certificate for the current year, and before payment of the duty on his fresh certificate, but, after it had been issued, refused with costs. *Sparling* v. *Brereton*, 35 L. J., Ch. 461; L. R. 2 Eq. 64; 12 Jur. (N.S.) 330; 14 L. T. 166; 14 W. R. 515.

A solicitor who has been duly admitted and inrolled, but who has neglected to take out his annual certificate in proper time, is nevertheless competent, while uncertificated, to bind a client ignorant of the want of the certificate, as between such client and third persons. *Ib.*

The objection, that an interlocutory proceeding has been taken by an attorney not on the record is of a strict nature, and it is incumbent on the party making it to establish it distinctly. *Lord* v. *Wardle*, 3 C. B. 295; 15 L. J., C. P. 259.

Jurisdiction of County Court Judge.]—The judge of a county court has no jurisdiction to commit for contempt a person who has acted as a solicitor in an action in his court without being duly qualified. *Reg.* v. *Brompton County Court Judge*, 62 L. J., Q. B. 604; [1893] 2 Q. B. 195; 5 R. 462; 68 L. T. 829; 41 W. R. 648; 57 J. P. 648.

Agreement between Solicitor and Unqualified Person.]—An agreement by a solicitor to give to an unqualified party a share of profits arising from business, in which he was employed through the intervention of the latter, is not illegal; and even if illegal, the client could not deduct from the solicitor's bill of costs the amount agreed to be paid by him to such unqualified person. *Gordon* v. *Dalzell*, 15 Beav. 351; 21 L. J., Ch. 206; 16 Jur. 186.

A solicitor agreed to act for B., another solicitor, in his personal business, on the terms of principal and agent. B. neglected to take out his certificate during part of the time:—Held, that the agreement was not invalid. *Foley* v. *Smith*, 11 Beav. 456; 20 L. J., Ch. 621.

Granting a moiety of the profits of the business of an attorney to an unqualified person, for the mixed consideration of the goodwill of the business, which descended from father of grantor, and the advancement of money and family affection, is not contrary to the policy of the 22 Geo. 2, c. 46, s. 11. *Candler* v. *Candler*, 6 Madd. 141; Jac. 225.

But it is otherwise to enter into partnership with an unqualified person. *Tench* v. *Roberts*, cited 6 Madd. 145, n.

An agreement to share profits, and act as a writer in the office, but not to be considered as a partner, is in fact, a partnership, and within the above statute. *Ib.*

A partnership between a solicitor of a superior court, and a solicitor of an inferior court, in which both undertook to divide the profits of their general business, to recommend clients to the other, and to keep the partnership secret, is illegal. *Gilfillan* v. *Henderson*, 2 Cl. & F. 1.

Assistant Clerk Practising in County Court.]—An assistant clerk of a county court is an

officer of the court within s. 29 of 9 & 10 Vict. c. 95, as explained by 13 & 14 Vict. c. 61, and is therefore liable to the penalty imposed by s. 30, if he practises as an attorney in the county court. *Ackroyd* v. *Gill*, 5 El. & Bl. 808; 25 L. J., Q. B. 111; 2 Jur. (N.S.) 184; 4 W. R. 204.

When in Prison.]—Conducting a plaint in a county court is "suing out process in a court of law," and subjects the solicitor to be struck off the roll who commences such proceedings whilst he is in prison. *Flint, Ex parte*, 1 B. & C. 254; 2 D. & R. 406; 1 L. J. (O.S.) K. B. 111.

Bankruptcy.]—The bankruptcy of a solicitor is no disqualification. *Brown, Ex parte*, 2 Ves. Jun. 68.

Libel—No Certificate.]—A solicitor may sue for libel reflecting on his profession and business, though he may have omitted to take out his certificate. *Jones* v. *Stevens*, 11 Price, 235.

Uncertificated Person — Right to recover Costs.]—The 6 & 7 Vict. c. 73, s. 26, only disables an uncertificated attorney from suing for fees, rewards or disbursements for any business, matter or thing done by him as an attorney or solicitor, in some suit or proceeding in one of the courts mentioned in the act, and not for business done, which had no reference to such suit or proceedings. *Greene* v. *Reece*, 8 C. B. 88. S. P., *Richards* v. *Suffield*, 2 Ex. 616; 6 D. & L. 22; 17 L. J., Ex. 362; 12 Jur. 731.

An attorney cannot recover for business done, unless he has obtained a certificate, which was in force for the period the work was done. *Brunswick (Duke) Ex parte, Crowl, In re*, 4 Ex. 492; 19 L. J., Ex. 112; 13 Jur. 1058.

An order for a new trial had been granted on payment of the costs by the defendant, the court refused to expunge the condition upon a suggestion that the plaintiff's solicitor was not on the roll. *Punter* v. *Grantley (Lord)*, 3 Scott (N.R.) 647; 3 Man. & G. 295.

If an uncertificated attorney acts as an attorney, his acts are valid as regards other persons, though he cannot maintain an action for the costs of business done while he is without a certificate. *Holdgate* v. *Slight*, 2 L. M. & P. 662; 21 L. J., Q. B. 74.

Semble, a solicitor on taking out his certificate, according to 37 Geo. 3, c. 90, will be entitled to his costs for business done previously in the same year. *Burchett* v. *Parsons*, 3 L. J., Ch. 24.

Where an attorney omitted to take out his certificate for more than a year after admission:—Held, that admission de novo was not necessary, but that having been readmitted without fraud, he was restored to a capacity of acting. *Chambers, Ex parte, Wilton, In re*, 2 Keen, 497; 9 L. J., Ch. 200; 2 Jur. 489.

If an attorney practises in a court in which he has not been admitted, he cannot maintain an action for his fees, nor even for money out of pocket; neither has he any lien for his costs, or for money disbursed, upon a judgment recovered; and therefore he cannot prevent the damages and costs in one action being set off against those in another, though his costs have not been paid. *Latham* v. *Hide*, 1 D. P. C. 594; 1 C. & M. 128; 3 Tyr. 143; 2 L. J., Ex. 72.

A solicitor cannot recover from his client brief fees and refreshers paid by him to counsel if, at the time when the briefs were delivered and the case was heard, he had not taken out his certificate, although he had taken out his certificate before he actually paid the fees. *Kent* v. *Ward*, 9 R. 593; 70 L. T. 612—C. A.

Semble, that a solicitor cannot allocate any part of a sum received by him from his client on account of costs generally to the payment of disbursements on account of acts done by him when not duly qualified. *Ib.*

A proctor retained to conduct a salvage suit may legally employ a person who is not a solicitor or proctor as his agent at the out-port, but for the performance of other than proctorial acts only; and charges for work done and disbursements made by such agents in the capacity of a clerk will, if unobjectionable in other respects, be allowed to the proctor on taxation. *The City of Brussels*, 42 L. J., Adm. 72; L. R. 4 Adm. 194; 29 L. T. 312; 22 W. R. 71.

An attorney who does not hold a certificate within the meaning of 6 & 7 Vict. c. 73, cannot recover his costs in respect of proceedings in the Probate Court. *Austin* v. *Davies*, 28 L. T. 567; 21 W. R. 884.

Where A. and B. delivered a bill in their joint names for business done as attorneys, and the master disallowed a part of the bill, on the ground that B. was not a certificated attorney during a portion of the time to which the bill referred, the court, on affidavit that B.'s name was used at the request of friends, but that he was really not a partner with A., allowed A. to deliver a fresh bill in his own name only for the items so disallowed. *Matchett* v. *Parkes*, 9 M. & W. 767; 1 D. (N.S.) 924; 11 L. J., Ex. 287.

A person not duly qualified as a solicitor, who nevertheless acts for parties in an action in the county court and does solicitor's work for them, is not entitled to recover his expenses and fees from those for whom he acts; the Solicitors Act, 1874, s. 12, having enacted that none but duly-qualified solicitors shall be entitled to do so. *Verlander* v. *Eddolls*, 51 L. J., Q. B. 55; 45 L. T. 543; 30 W. R. 104; 46 J. P. 229.

The Solicitors Act, 1843, s. 26, does not extinguish the debt of a solicitor or an attorney for costs in respect of business done while uncertificated, but only his remedy. *Jones, In re*, 39 L. J., Ch. 83; L. R. 9 Eq. 63; 21 L. T. 482; 18 W. R. 159.

Therefore, where a client had taken out an order of course for taxation of his solicitor's bill, with the usual submission to pay what should be found due, and the master had disallowed certain items for business done while his certificate had not been renewed:—Held, that he was entitled to be allowed the items in question. *Ib.* This was, however, before the passing of the 33 & 34 Vict. c. 97, and the 37 & 38 Vict. c. 68, s. 12.

—— **Right of Client to recover Costs against opposite Party.**]—The successful party in an action cannot, where the person employed by him as solicitor is a person unqualified to act as a solicitor, recover his costs and disbursements from the opposite party, since the 12th section of 37 & 38 Vict. c. 68, enacts that "no costs . . . in relation to any act or proceeding done or taken by any person who acts as attorney or solicitor without being duly qualified . . . shall be recoverable . . . by any person or persons whomsoever." The statute applies, although the solicitor on the record is duly qualified, if the proceedings are in fact taken by a person who is

not a solicitor. *Irvin* v. *Sanger*, 58 L. J., Q. B. 64; 59 L. T. 894.

The 6 & 7 Vict. c. 73, s. 26, merely prevents an attorney or solicitor from maintaining any action or suit for the recovery of his costs in respect of business done by him while uncertificated: but when a client has paid his solicitor his costs of business done while uncertificated, and the client's adversary is ordered to pay his taxed costs, the client is entitled to have the costs so paid to his solicitor included in the taxation. *Hope, In re*, L. R. 7 Ch. 766; 27 L. T. 670; 20 W. R. 1026.

Under the Attorneys and Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12—which enacts that no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor without being duly qualified so to act shall be recoverable in any action, suit, or matter by any person or persons whomsoever—the successful party in a legal proceeding cannot, where the solicitor employed by him was uncertificated, recover his costs or disbursements from the party otherwise liable. *Fowler* v. *Monmouthshire Ry. and Canal Co.*, 48 L. J., Q. B. 457; 4 Q. B. D. 334; 41 L. T. 159; 27 W. R. 659.

—— **Time for Objection.**]—A bill of costs having been referred to taxation, items were objected to before the master, on the ground that the attorney, at the time those items were incurred, was uncertificated; and the master disallowed them:—Held, that the master acted rightly in disallowing the items. *Angell, In re*, 6 D. & L. 144.

An objection that an attorney was not duly certificated with a properly-stamped certificate, at the time when certain work was done by him for his client, and cannot therefore recover his costs in respect of such work by reason of 6 & 7 Vict. c. 73, s. 26, comes too late if made after taxation of costs by the master, and made to the court in the first instance. *Fullalove* v. *Parker*, 12 C. B. (N.S.) 246; 31 L. J., C. P. 239; 8 Jur. (N.S.) 1078; 6 L. T. 353; 10 W. R. 581.

After the plaintiff's costs had been taxed and paid, it was discovered that their agent in the cause had never been admitted as a solicitor, and an order was thereupon made that the master should review his taxation and disallow all such items as did not consist of fees paid to the clerk in court, with a view to having them refunded. *Coates* v. *Hawkyard*, 1 Russ. & M. 746; contra, *Powrie* v. *Featherstone*, 3 W. R. 184.

J. M.

SOUTH AUSTRALIA.

See COLONY.

SOVEREIGNS AND STATES.

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See ESTATE.

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Generally.]—*See* EXECUTOR AND ADMINISTRATOR.

Arising from Breach of Trust.]—*See* TRUST.

SPECIFIC PERFORMANCE.

And see VENDOR AND PURCHASER—BILLS OF SALE—LANDLORD AND TENANT.

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i. In General. 1812.
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1. *Mistake*, 1822.
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C. INQUIRIES AND ACCOUNTS, 1866.

D. COSTS, 1868.

I. THE JURISDICTION.

A. CHARACTER AND EXTENT OF.

Discretion of Court.]—Specific performance is discretionary in the court. *Clowes* v. *Higginson*, 1 V. & B. 527; 12 R. R. 284. S. P., *Mortlock* v. *Buller*, 10 Ves. 294; 7 R. R. 417. Affirmed 2 Dow. 510.

A court of equity will not decree specific performance if by so doing injustice will be done. *Powell* v. *Lloyd*, 2 Y. & J. 372; 31 R. R. 598. See also *Martin* v. *Mitchell*, 2 J. & W. 420; 22 R. R. 184. *Mason* v. *Armitage*, 13 Ves. 25; 9 R. R. 131. *Drew* v. *Hanson*, 7 Ves. 35. *Omerod* v. *Hardman*, 5 Ves. 734. *See* 6 R. R. 19, n. *Goring* v. *Nash*, 3 Atk. 186. *Jones* v. *Statham*, 3 Atk. 389.

A bill for specific performance of an agreement is an application to the discretion, or rather the extraordinary jurisdiction, of the court, which cannot be exercised in favour of persons who have slept on their rights, or acquiesced for a long time in a title and possession adverse to their claim. *Moore* v. *Blake*, 1 Ball & B. 69.

The exercise of the jurisdiction is discretionary in the court; but the discretion is not arbitrary, but must be exercised according to the circumstances of the case. *Bennett* v. *Smith*, 16 Jur. 421.

Right to Relief.]—Specific performance is not of course because there is a contract, but a relief in the nature of indulgence peculiar to the jurisdiction of equity. *Coe* v. *Middleton*, 2 Drew. 290; 23 L. J., Ch. 618; 3 Eq. R. 631; 2 W. R. 284.

Specific performance of contract by competent party, and its nature and circumstances unobjectionable, are as much of course in equity as damages at law. *Hall* v. *Warren*, 9 Ves. 608; 7 R. R. 306.

Since Judicature Act, 1873.]—Since the Judicature Act, 1873, the court has jurisdiction (in any case in which the Statute of Frauds is not a bar), in one and the same action, to rectify a written agreement, upon parol evidence of mistake, and to order the agreement to be specifically performed. *Olley* v. *Fisher*, 56 L. J., Ch. 208; 34 Ch. D. 367; 55 L. T. 807; 35 W. R. 301.

Disentailing Assurance.]—The jurisdiction which the courts of equity had prior to the Fines and Recoveries Act of decreeing specific performance of a contract by a tenant in tail to bar the entail has not been excluded by s. 47 of the Fines and Recoveries Act, and the court can still as against the tenant in tail himself decree specific performance of a contract to execute a disentailing assurance. *Bankes* v. *Small*, 56 L. J., Ch. 832; 36 Ch. D. 716; 57 L. T. 292; 35 W. R. 765—C. A.

Where Action brought at Law.]—A plaintiff is not allowed to sue in equity for specific performance of an agreement for the breach of which he has brought an action at law. *Gedye* v. *Montrose (Duke)*, 5 W. R. 537.

Legal Remedy defective.]—Principle of specific performance that the legal remedy is inadequate or defective. *Flint* v. *Brandon*, 8 Ves. 159.

A court of equity will, in many cases, enforce the specific execution of agreements, where the deed will not enable the party to recover damages at law. *Chandos* v. *Brownlow*, 2 Ridgw. 416.

A seller of land, like a purchaser of it, is entitled to file a bill for specific performance, where he seeks a more complete remedy than he could obtain by an action for damages for the non-

performance of the contract. This rule applies equally to an incorporated company as to individuals. *Eastern Counties Ry.* v. *Hawkes*, 5 H. L. Cas. 331; 24 L. J., Ch. 601; 3 W. R. 609.

Specific execution of agreements decreed where damages would not answer the intention in making the contract, and a specific performance is therefore essential to justice; but equity will not decree specific performance of a covenant where, from circumstances, it is become unconscientious strictly to enforce specific performance of it. *Davis* v. *Hone*, 2 Sch. & Lef. 341; 9 R. R. 89.

Specific performance refused where the parties had treated the nonperformance of some of the stipulations as the subject of pecuniary compensation where the other stipulations might reasonably be dealt with in the same way. *Paris Chocolate Co.* v. *Crystal Palace Co.*, 3 Sm. & G. 119; 1 Jur. (N.S.) 720; 3 W. R. 267.

Where no Right at Law.]—In agreements, no relief in equity where an action at law would not lie by reason of a substantial defect, such as a contingency not happening. Covenant to settle when A. comes into possession. A. dies before coming into possession. His heir shall not be compelled to a specific performance. *Whitmel* v. *Farrel*, 1 Ves. Sen. 256.

Incomplete Contract.]—Equity has jurisdiction to compel the specific performance of a complete contract, but cannot supply any term not agreed on. *Ormond* v. *Anderson*, 2 Ball & B. 369; 12 R. R. 103.

Per Lord St. Leonards: It is no objection to the specific performance of an agreement that collateral circumstances necessarily flowing out of the agreement are not mentioned in it. *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; 27 L. J., Ch. 46; 5 W. R. 804.

B. EXERCISE OF.

1. In General.

Conduct of Parties.]—The court will not decree a specific performance of a contract, if any circumstances of suspicion exist which remain unexplained. *West* v. *Habgood*, 6 L. J., Ch. 369; 1 Jur. 259.

Where the manner of obtaining an agreement is not strictly just and regular, a court of equity ought not to decree a specific performance, although the agreement be in part executed. *Rockford* v. *Creswick*, 1 Bro. P. C. 171.

A bill for specific performance against the heir-at-law of a vendor was dismissed without costs, and the parties left to their remedy at law, the court not being satisfied as to the circumstances under which the contract was signed. *Valentine* v. *Dickinson*, 7 Jur. (N.S.) 857; 9 W. R. 625.

The rule that he who seeks equity must do equity is restricted to an equity in respect of the subject-matter of the suit. *Gibson* v. *Goldsmid*, 5 De G. M. & G. 757; 24 L. J., Ch. 279; 3 Eq. R. 106; 1 Jur. (N.S.) 1; 3 W. R. 79.

Statutory Engagement.]—A bill to enforce a right springing from a statutory engagement is analogous to a bill for specific performance, and the plaintiff must come into court with clean hands. *Fisher* v. *Tully*, 47 L. J., P. C. 59; 3 App. Cas. 627; 38 L. T. 236.

What Plaintiff must Establish.]—He who seeks relief in equity on the foot of an agreement must shew that he has performed his part. *Stratford* v. *Aldborough*, 1 Ridgw. 287.

When an agreement is entered into between two parties, and performance by the first party of his part goes to the root of the whole agreement, and the first party fails to perform his part, and the second party also fails to perform his part, the court will restrain the first party from bringing an action against the second party for nonperformance of his part until he (the first party) shall have performed his part. *Acraman* v. *Price*, 18 W. R. 540.

—— **Sale of Land.**]—A plaintiff in an action for specific performance of a contract for a sale of land must prove readiness and willingness on his own part, and repudiation of the contract on the defendant's part does not relieve the plaintiff from this obligation. *Ellis* v. *Rogers*, 50 L. T. 660.

Impossibility of Performance.]—A court of equity will relieve against a contract become impossible to be performed. *Smith* v. *Morris*, 2 Bro. C. C. 311.

Performance of Contract—Becoming Possible.]—When a party has entered into a contract without having the power to perform it, and afterwards acquires the right to do so, he is then bound to perform it. *Carne* v. *Mitchell*, 15 L. J., Ch. 287. *And see cases*, infra, col. 1785.

If a person contracts to do a thing which he may do himself, or has the means of compelling others to do, equity will compel him to do it, unless it be highly unreasonable, in which case the other party shall not be held to the contract. *Costigan* v. *Hastler*, 2 Sch. & Lef. 166.

—— **Hardship.**]—The fact that the performance of an agreement has, owing to circumstances which have subsequently occurred, become hard in its consequences to one of the parties, or that he is called upon to perform it under circumstances which he had not contemplated, so that a decree for specific performance would be more productive of injustice than justice, may be grounds for refusing to decree specific performance. *Webb* v. *Direct London and Portsmouth Ry.*, 9 Hare, 129; 1 De G. M. & G. 52; 21 L. J., Ch. 337; 16 Jur. 323.

—— **Agreement to Make a Road—Approval of Local Board—Requirements of Local Board inconsistent with Specification.**]—The defendants agreed to construct a road over land of the plaintiff, who was to grant the defendants a right of way over the road when completed, and to permit it to be declared a public highway by the local board. Defendants were to make the road according to a plan and specification already approved by the local board. The specification did not comply with the requirements of the Public Health Act, 1875, s. 152, and the board withheld their sanction to its being declared a public highway:—Held, that, inasmuch as to compel the defendants to construct the road so as to conform with the provisions of the act would be to enforce performance of terms at variance with the agreement and entirely outside the contemplation of the parties, specific performance could not be ordered. *Saunders* v. *Brading Harbour Improvement Co.*, 52 L. T. 426.

Unfair Contract.]—Where a contract between two companies proves to be one by which one of the contracting parties will gain considerable advantages, at the expense of the other, while the other will receive no corresponding benefit, whether such contract is or is not legally valid, equity will not aid in enforcing it by a decree for specific performance. *Shrewsbury and Birmingham Ry.* v. *L. & N. W. Ry.*, 6 H. L. Cas. 113; 26 L. J., Ch. 482; 3 Jur. (N.S.) 775.

Specific performance of an agreement, become useless to the defendant, refused. —— v. *White*, 3 Swanst. 108, n.; 19 R. R. 182.

Plaintiff by his own Act unable to Perform Contract.]—Statement of claim asked for specific performance or 160*l.* as liquidated damages, and plaintiff after pleadings closed resold the property:—Held, that the action must be treated as one for specific performance with a claim for damages in the alternative as a substitute for specific performance, and that the plaintiff, having by his own act rendered specific performance impossible, was not in such action entitled to damages. *Hipgrave* v. *Case*, 54 L. J., Ch. 399; 28 Ch. D. 356; 52 L. T. 242—C. A.

Informal Contract.]—A court of equity cannot, when called on to decree specific performance of an agreement, direct any act to be done whereby the agreement itself, if not already legally binding, can be made so, and therefore, where an agreement had clearly been come to by a public company, but was not executed in the statutory form as required by 8 & 9 Vict. c. 16, s. 97, the court could not make the directors sign it, and dismissed the bill. *Leominster Canal Co.* v. *Shrewsbury and Hereford Ry.*, 3 K. & J. 654; 26 L. J., Ch. 764; 3 Jur. (N.S.) 930; 5 W. R. 868. And see *Kidderminster* (*Mayor*) v. *Hardwick*, infra, col. 1771; *Oxford* (*Mayor*) v. *Crow*, infra, col. 1850.

Contract to Exercise Testamentary Power.]—The court will not decree specific performance of a contract to leave property by will entered into by a mere donee of a testamentary power of appointment. *Parkin, In re, Hill* v. *Schwartz*, 62 L. J., Ch. 55; [1892] 3 Ch. 510; 67 L. T. 77; 41 W. R. 120. And see *Maddison* v. *Alderson*, infra, col. 1769.

Indemnity.]—Special directions in a decree for specific performance against a company, providing for an indemnity to the company, and for works to be performed by the company. *Powell* v. *South Wales Ry.*, 1 Jur. (N.S.) 773.

When actual specific performance cannot be directed, and an indemnity is prayed, the court will decree indemnity as ancillary to the relief by specific performance. *Cruse* v. *Paine*, 19 L. T. 127.

Interest of Third Party.]—If two parties for a valuable consideration enter into a contract, of which one of the stipulations is for the benefit of a third person, who is a stranger to the consideration, the court will not enforce the contract without securing his interest under it. *Davenport* v. *Bishopp*, 2 Y. & C. C. C. 451; 12 L. J., Ch. 492; 7 Jur. 1077. Affirmed 1 Ph. 98.

The interest which a third party may have against the specific performance of a contract may preclude the execution of it, as between trustees and cestui que trust; as, where an insolvent tenant made over his lease to another who treated for a renewal under a secret agreement, in trust for the original tenant. *Featherstonhaugh* v. *Fenwick*, 17 Ves. 313; 11 R. R. 77.

Order to Sign Judgment.]—A judge's order giving liberty to sign judgment, with a stay of execution in the event of certain conditions being performed, is not an agreement to perform those conditions; and even if the terms are ordered substantively to be performed, the remedy for default is in the court where the order was made, and not by a bill for specific performance. *Thames Iron Works Co.* v. *Patent Derrick Co.*, 1 J. & H. 93; 29 L. J., Ch. 714; 6 Jur. (N.S.) 1013; 2 L. T. 208; 8 W. R. 408.

Felony.]—The court will not execute an agreement to grant a lease to a man who has committed a felony. *Willingham* v. *Joyce*, 3 Ves. 169.

Defaulting Defendant — Conveyance to be executed as an Escrow.]—In a vendor's action for specific performance the defendant, not having complied with the decree, was ordered to pay the purchase-money into court within a limited time. The defendant did not comply with this order, and efforts to enforce it by sequestration proved ineffective. An application was then made for an order for payment of the amount to the plaintiff, so that if default was made a writ of fi. fa. could issue. The court made an order for a conveyance to be executed as an escrow, and delivered on payment of the purchase-money and interest, and for payment to the plaintiff by the defendant, at a time and place to be fixed by the judge, after the execution of the conveyance; and by a subsequent order, the conveyance having been executed, the defendant was ordered to pay the purchase-money and interest to the plaintiff within one month from the date of the order. *Jessop* v. *Smyth*, [1895] 1 Ir. R. 508. And see *Hall* v. *Hall*, 51 L. T. 226, infra, col. 1820.

2. Part Performance.

a. General Principles.

Extent of Doctrine.]—The equitable doctrine of part performance taking contracts out of the operation of s. 4 of the Statute of Frauds cannot be extended by the High Court of Justice, under s. 24, sub-s. 7, of the Judicature Act, 1873, beyond the limits to which it was confined by the courts of equity. It is, therefore, applicable only to contracts for the sale and purchase of lands, and not to a contract of service. *Britain* v. *Rossiter*, 48 L. J., Ex. 362; 11 Q. B. D. 123; 40 L. T. 240; 27 W. R. 482—C. A.

When a part of the agreement is performed on one side, it is just it should be carried into execution on the other. *Walker* v. *Walker*, 2 Atk. 100.

Allegation of Fraud.]—If an agreement is in part performed by one of the parties, it is too late for the other to complain of fraud, surprise, &c., or attempt to set the agreement aside on that account; for a court of equity will decree a specific performance of the remaining part of it. *Anglesea* (*Earl*) v. *Annesley*, 1 Bro. P. C. 289.

Material Acts.]—If defendant has concurred in a material unequivocal act, by which he has

obtained a substantial part of his object, as taking possession or accepting a considerable part of the purchase-money, he shall not be allowed to retract, and plaintiff's right to a full execution of the contract has attached; but acts merely ancillary and introductory, though attended with some expense, will not sustain an agreement on the ground of part performance. Acceptance of a trifling earnest would probably not be deemed sufficient. See *Simmons* v. *Cornelius*, 1 Ch. Rep. 128; *Voll* v. *Smith*, 3 Ch. Rep. 16; *Anon.*, 2 Freem. 128; *Seagood* v. *Meale*, Pre. Ch. 560, infra, col. 1770.

—— **Acts of Ownership.**]—To maintain a contract on the ground that it is taken out of the Statute of Frauds by part performance, the court will require it to be shewn that the party seeking relief has expended money or otherwise acted in reliance on and in the execution of the agreement, and that nonperformance would amount to a fraud upon him. Specific performance will not be enforced merely because the defendant has done acts on the property which, unless construed as acts of ownership, would, in the absence of licence, amount to a trespass. *Phillips* v. *Alderton*, 24 W. R. 8.

—— **Repairs.**]—Acts of part performance avoiding the Statute of Frauds, as repairs, &c., must be in their nature almost necessarily done in pursuance of the contract alleged. *Hooper, Ex parte*, 19 Ves. 479; 2 Rose, 328; 1 Mer. 7; 13 R. R. 244.

Deposit of Title Deeds.]—Whether a deposit of title deeds, in pursuance of a contract to charge real estate, is a sufficient part performance to take a case out of the Statute of Frauds, quære. *Whitmore* v. *Farley*, 45 L. T. 99; 29 W. R. 825; 14 Cox, C. C. 617—C. A.

Evidence.]—On a bill for specific execution relying on part performance, the agreement must be proved as stated. *Savage* v. *Carroll*, 1 Ball & B. 451. *See* 12 R. R. 32.

Parol evidence is not to be admitted on the ground of part performance, unless the agreement stated appears clearly to be the very same with that which was partly performed. *Lindsay* v. *Lynch*, 2 Sch. & Lef. 8; 9 R. R. 54.

Specific performance of a parol agreement for the sale of an estate, proved by one witness, confirmed by part performance, by taking possession, and acts of ownership, refused, there being some inconsistencies in the testimony of the witness, which, with other circumstances, placed the terms of the contract in doubt. *Reynolds* v. *Waring*, Younge, 346.

When a person has contracted for the purchase of land by an agreement, the terms of which are partly written and partly verbal, and has obtained possession upon performance of the written terms, to attempt to retain possession and refuse to perform the verbal terms amounts to a fraud. *Jervis* v. *Berridge*, 42 L. J., Ch. 518; L. R. 8 Ch. 351; 28 L. T. 481; 21 W. R. 244.

Casus Omissus—Statute of Frauds.]—Part performance takes a case out of Statute of Frauds. *Aylesford's (Earl) Case*, 2 Str. 763.

A performance only on one side is not a dispensation of the Statute of Frauds, but casus omissus against which there is no provision. *Charlewood* v. *Bedford (Duke)*, 1 Atk. 497.

Parol Agreement.]—Plea of Statute of Frauds to discovery of a parol agreement not allowed where part performance. *Taylor* v. *Beech*, 1 Ves. Sen. 297.

Parol agreements in part performed, not resting on the agreement only, are in equity excepted out of the statute. *Kine* v. *Balfe*, 2 Ball & B. 343.

Equity will not decree upon a bare agreement by parol, without part performance. *Popham* v. *Eyre*, Lofft. 801.

Part performance of contract is not the mere tendering of conveyances, but it must be some act done, as in actual execution of contract, not towards the execution. Payment of earnest or delivery of possession of part are acts of part performance. *Ib.*

Parol agreement proved by one witness, corroborated by others, and not denied by answer, enforced upon the ground of part performance *Toole* v. *Medlicott*, 1 Ball & B. 393.

Where a parol agreement is begun to be put in execution, and intended to be continued, equity will enforce the execution of it, notwithstanding the Statute of Frauds. *Guernsey (Lord)* v. *Rodbridges*, Gilb. Eq. Rep. 4.

Recovery of Money Expended.]—Money expended on the alteration of premises, for the leasing of which an agreement has been entered into, but which is incapable of being enforced by reason of the Statute of Frauds, may be recovered back as on a failure of consideration. *Pulbrook* v. *Lawes*, 45 L. J., Q. B. 178; 1 Q. B. D. 284; 34 L. T. 95.

What is Sufficient.]—Specific performance of a parol agreement to sell land refused, notwithstanding many acts by which the defendant had treated the plaintiff as a purchaser. *Whaley* v. *Bagnal*, Wall. Lyn. 12, n.; 1 Bro. P. C. 345.

Agreement by parol, that upon plaintiff's procuring a release of right from a stranger, defendant would convey; plaintiff procures the release by paying a valuable consideration; that is not a part performance, and the Statute of Frauds may be pleaded to a bill for specific performance of such an agreement. *O'Reilly* v. *Thompson*, 2 Cox, 271; 2 R. R. 41.

A. and B. being joint lessees of a building lease, A., by parol, agrees to sell his interest to B., and accepts a pair of compasses in hand to bind the bargain. Quære, if within the Statute of Frauds. *Alsopp* v. *Patten*, 1 Vern. 472.

Specific performance decreed of a parol agreement in part performed for surrendering a lease and granting a new lease at a reduced rent. *Parker* v. *Smith*, 1 Coll. C. C. 608.

Acquiescence.]—Specific performance decreed of a parol agreement, made as a family compromise of doubtful rights, where there had been part performance by possession, and improvements, and acquiescence near nineteen years. *Stockley* v. *Stockley*, 1 V. & B. 23; 12 R. R. 184. S. P., *Stapleton* v. *Stapleton*, 1 Atk. 2.

Possession and Expenditure.]—A. gave the H. estate to his son, and signed a memorandum as follows: "H., together with my other freehold estates, are left in my will to my wife; but it is her wish, and I hereby join in presenting the same to our son for the purpose of furnishing him with a dwelling-house." The son took possession of the H. estate, and with the approbation.

of his father expended money on the erection of a dwelling-house thereon. Upon his death :—Held, that the son was entitled to have a conveyance to himself of the fee-simple of the H. estate. *Dillwyn* v. *Llewellyn*, 31 L. J., Ch. 658 ; 10 W. R. 742—L.C.

A., a tenant in possession, filed a bill against B. for the specific performance of a parol agreement for a lease of thirty years. A. had contracted to sub-let, and his sub-lessee had expended money in alterations and repairs with the knowledge and approval of B. :—Held, that the outlay by the sub-lessee was as much a part performance of the agreement as if made by A., who was therefore entitled to specific performance. *Williams* v. *Evans*, 44 L. J., Ch. 319 ; L. R. 19 Eq. 547 ; 32 L. T. 359 ; 23 W. R. 466.

Parol Agreement as to Easement of Light.]—The plaintiff and defendant, the owners of adjoining houses, being about to rebuild, entered into a verbal agreement. The plaintiff duly carried out his part of the agreement, but the defendant carried his out differently to the agreement, and so as to obstruct the light to the plaintiff's premises :—Held, that the plaintiff, having performed the agreement on his part, was entitled to have it enforced on the part of the defendant, and a mandatory injunction was granted. *McManus* v. *Cooke*, 56 L. J., Ch. 662 ; 35 Ch. D. 681 ; 56 L. T. 900 ; 35 W. R. 754 ; 51 J. P. 708.

Promise to Devise.]—Where a niece had been induced to render valuable services to her uncle on the faith of his representation that by so doing she would become entitled to the benefit of the trusts created in her favour by a codicil to his will, and the testator afterwards revoked such trusts :—Held, that he had no right to make such revocation, and a decree was made that the trusts in favour of the niece should be performed. *Loffus* v. *Maw*, 3 Giff. 592 ; 32 L. J., Ch. 49 ; 8 Jur. (N.S.) 607 ; 6 L. T. 346 ; 10 W. R. 513.

An intestate induced a woman to serve him as his housekeeper without wages for many years, and to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land, and afterwards signed a will, not duly attested, by which he left her the life estate :—Held, that even if there had been a contract, although the woman had wholly performed her part by serving without wages, yet her service was not unequivocally referable to any contract, and was not such a part performance as to take the case out of the operation of the Statute of Frauds, s. 4 ; and that she could not maintain an action against the heir for a declaration that she was entitled to a life estate in the land. *Loffus* v. *Maw* (supra) disapproved. *Maddison* v. *Alderson*, 52 L. J., Q. B. 737 ; 8 App. Cas. 467 ; 49 L. T. 303 ; 31 W. R. 820 ; 47 J. P. 821—H. L. (E.) And see *Parkin*, *In re*, supra, col. 1765.

Trust.]—In consideration of K. (a reversioner) allowing F. (a mortgagee) to make a lease of lands to W., the father-in-law of K., the following document was signed by W. and K. :—"It is agreed between W. and K. that the lease and lands of Largan, after the death of W., shall be and become, through his love for her, the property of Mrs. K. in trust for her child or children by K., if not, to be for her sole use or benefit" :—Held, firstly, that this was a declaration of trust by W. in favour of Mrs. K. and her children, and that, after W.'s death, his personal representative became a trustee for them. *Kelly* v. *Walsh*, 1 L. R. Ir. 275.

Held, secondly, that if it was not a valid declaration of trust, it was an agreement which should be specifically performed, upon the ground that the consent by K. was a part performance which took the case out of the Statute of Frauds. *Ib.* *And see cases*, infra, col. 1778.

b. By Payment.

Real Estate.]—Payment of money is not part performance to take an agreement touching lands out of the statute. *Clinan* v. *Cooke*, 1 Sch. & Lef. 40 ; 9 R. R. 3.

Earnest Money.]—Payment of money by way of earnest money is not a part performance of agreement. *Pengall* v. *Ross*, 2 Eq. Ca. Abr. 46.

A. agrees with B. for the purchase of nine houses which were in mortgage to J. and pays him a guinea in earnest ; B. writes a note to J., and desires him to deliver up the writings, he having disposed of them, which J. refused, unless all the mortgage money was paid him down, and afterwards purchases them himself. On a bill, brought by A. for a specific execution of the agreement, it was held, that neither the guinea paid down nor the note was sufficient to take it out of the Statute of Frauds. *Seagood* v. *Meale*, Pre. Ch. 560.

Though a payment of a substantial part of the purchase-money will take an agreement as to land out of the Statute of Frauds, on the ground of part performance, a small part, as five guineas, the purchase-money being one hundred, will not do. The plea of the statute was allowed, and the bill was dismissed with costs. *Main* v. *Melbourne*, 4 Ves. 720.

What is sufficient.]—A. and B. agreed that B. should assign a term for years in his house, and certain chattels for 200 guineas, whereof one guinea was paid down, and nineteen more next day. Part of the agreement was, that it should be reduced into writing. On a bill for performance, B. pleaded the statute, and insisted that the twenty guineas were paid for the lease. Plea overruled. *Leak* v. *Morris*, 2 Ch. Ca. 135.

A parol agreement, and 30*l.* paid for the sale of a house, was decreed, without further execution proved. *Anon.*, 2 Free. C. C. 128.

H. agreed with M. to convey her interest in a life estate for 300*l.* M. paid two-thirds, and then by accident the estate became more valuable, and M. agreed to give 140*l.* more ; H. died, and nothing further was done. The latter agreement, though not in writing, decreed to be executed in favour of M.'s administrator against his heirs. *Lacam* v. *Mertins*, 3 Atk. 1 ; 1 Ves. Sen. 312 ; Dick. 664.

—— **Ship.**]—H. contracted for the purchase of shares in a vessel, and paid part of the purchase-money to P. and obtained possession of the vessel, but no bill of sale was executed. The registered owners alleged that P. was not their agent to receive the money, and threatened to sell the shares. They were restrained from selling or proceeding in the admiralty court. *Hughes* v. *Morris*, 13 Jur. 1065.

—— **For Alterations.**]—W. lets premises to V. upon a contract written in pencil by V., and signed by him ; both act under the contract, but

V. ultimately alleges nonperformance by W. of certain things not contained in it, and W. makes like charges. The defendant had inter alia paid 25*l.* towards certain alterations and additions made by the plaintiff W., in accordance with the terms of the contract. Decree for specific performance made without costs. *Waller* v. *Vigurs*, 2 W. R. 51.

—— **Auction Duty.**]—Payment of the auction duty does not satisfy the Statute of Frauds, upon the general ground of part performance. *Buckmaster* v. *Harrop*, 13 Ves. 456; 6 R. R. 132.

Nudum Pactum.]—Promise to renew a lease in consequence of money already laid out is nudum pactum, and will not be specifically performed, and money laid out afterwards will not vary it; on this ground a demurrer allowed. *Robertson* v. *St. John*, 2 Bro. C. C. 140.

Release.] — Agreement by parol, that upon plaintiff's procuring a release of right from a stranger defendant would convey. Plaintiff procures the relief by paying a suitable consideration; that is not a part performance, and the Statute of Frauds may be pleaded. *O'Reilly* v. *Thompson*, 2 Cox, 271; 2 R. R. 41.

Monthly Rent.]—Where a corporation leased tolls by agreement not under seal, the payment of a monthly rent in advance was held insufficient to constitute a part performance. *Kidderminster Corporation* v. *Hardwicke*, 43 L. J., Ex. 9; L. R. 9 Ex. 13; 29 L. T. 612; 22 W. R. 160.

Payment of Wages.]—Articles of agreement are executed between the crew of a vessel, of the one part, and the captain, of the other part, containing a stipulation that the seamen are not to have any demand against the owner of the ship; the owner subsequently acts under the agreement, and, in pursuance of it, makes payment to the seamen out of the proceeds of the cargo:—Held, that the owner, by such conduct, becomes a party to the agreement, and that a bill for the performance of the agreement may be maintained against him. *Gostling* v. *Smith*, 3 L. J. (O.S.) Ch. 5.

c. By Taking Possession.

In General.]—Delivery of possession is part performance of an agreement not reduced into writing. *Lacam* v. *Mertins*, 3 Atk. 4; 1 Ves. Sen. 312; Dick. 664.

A purchaser being let into possession is enough to take a contract out of the Statute of Frauds, whether the vendor or the purchaser is seeking specific performance. *Wilson* v. *West Hartlepool Ry.*, 2 De G. J. & S. 475; 34 L. J., Ch. 241; 11 Jur. (N.S.) 124; 11 L. T. 692; 13 W. R. 361.

In cases of part performance of contracts not formerly binding in themselves, the court gives relief by decreeing specific performance, on the ground of protecting against fraud, and this principle applies as much to companies as to individuals. *Ib.*

In a suit for specific performance, where possession and expenditure are fairly referable to an express agreement with the landowner to give an adequate consideration, to be calculated on a principle sufficiently defined in the agreement, the court will, in favour of the possession and expenditure, endeavour to decree a specific performance; but not where the plaintiff, after filing his bill, but before the hearing, has obtained by an act of parliament the means of securing and keeping his possessions without the aid of the court. *Meynell* v. *Surtees*, 3 Sm. & G. 101. Affirmed 25 L. J., Ch. 257; 2 Jur. (N.S.) 737; 3 W. R. 535.

When Referable to Contract.] — Possession taken, referable only to a contract of sale, is part performance, and parol evidence may be given of the terms of such contract. *Savage* v. *Carroll*, 1 Ball & B. 451.

Possession, to be effective, must be a possession under the contract, and such that the vendor must be taken to know that it is claimed under the contract. *Mills* v. *Haywood*, 6 Ch. D. 196—C. A.

Where possession delivered under an agreement, and money expended in permanent improvements, parol evidence admitted to prove the agreement. *Toole* v. *Medlicott*, 1 Ball & B. 401.

Where possession taken was referable either to an alleged parol contract, or to a written memorandum:—Held, that the possession was not such as to constitute part performance, though the plaintiff had been let into possession some days previously to the date of the memorandum. *Cunning* v. *Catling*, 4 N. R. 259.

Possession of Part.] — There being a parol agreement for the purchase of a farm and farmhouse, the possession of the farm by the purchaser will be held an act of part performance sufficient to authorise the court to execute the contract, even though the house should have been occupied adversely to him. *Gunter* v. *Halsey*, Amb. 586.

Cutting Crops.]—Part performance by taking possession, cutting the crops, &c. *Buckmaster* v. *Harrop*, 13 Ves. 456; 6 R. R. 132.

Promise to give House—Charge.]—A. verbally promised, in consideration of his daughter's marriage, to give her a house as a wedding present, and immediately after the marriage he put the daughter and her husband into possession. A. was then the owner of the house, which was leasehold, and was subject to a charge payable by instalments. The father paid the instalments which fell due during his lifetime, and at his death there remained a balance of 110*l.*:—Held, that the verbal promise to give the house having been established, the possession took the case out of the Statute of Frauds; that the contract was to give the house free from incumbrances; and that the 110*l.* was payable out of the father's estate. *Ungley* v. *Ungley*, 46 L. J., Ch. 854; 5 Ch. D. 887; 37 L. T. 52; 25 W. R. 733—C. A.

—— **Payment of Rates and Taxes.**]—The plaintiff, who was proposing to enter into business, was induced by C. to abandon the project, C. promising her verbally that she should occupy a leasehold house of C.'s during her (the plaintiff's) life, the plaintiff to pay the ground-rent, rates and taxes, and maintain herself by letting lodgings. The plaintiff thereupon entered into possession of C.'s house, and continued there for several years until C.'s death, paying the ground-rent, rates and taxes. C. bequeathed the house

to P. :—Held, that there had been a part performance of the contract between the plaintiff and C. sufficient to take the case out of the Statute of Frauds. *Coles* v. *Pilkington*, 44 L. J., Ch. 381; L. R. 19 Eq. 174; 31 L. T. 423; 23 W. R. 41. And see *Millard* v. *Harvey*, infra, col. 1780.

d. By Preparation of Conveyance.

Vendor Purchasing Mortgage on Estate.]—On the sale of an estate A.'s verbal offer was accepted, conveyances ordered to be got ready, and A. was put into possession, but disputes arose relative to the settling the conveyance. A. got an assignment of the mortgage to which the estate was subject, and refused to go on with the purchase. A. was decreed to proceed in the purchase. *Pyke* v. *Williams*, 2 Vern. 455.

Visits to the Property.]—A. verbally agreed for the purchase of an estate, and gave orders for conveyances to be drawn up, and went several times to view the estate:—Held, the Statute of Frauds may be pleaded to a bill for specific performance. *Clerk* v. *Wright*, 1 Atk. 12.

Escrow.]—Trustees of a settlement having power to lease, with written request of a married woman, in pursuance of a parol agreement, executed a lease, and delivered it to their solicitor to exchange for the counterpart, but before the exchange was made she refused to part with the deed:—Held, that the execution of the deed was not a part performance of the parol agreement, and that the deed was delivered as an escrow. *Phillips* v. *Edwards*, 3 N. R. 658; 33 Beav. 440.

Instructions to Solicitor.]—Putting a deed into the hands of a solicitor to prepare a conveyance of the estate to a son-in-law (after marriage) not a part performance of a parol agreement, so as to take it out of the Statute of Frauds. *Redding* v. *Wilkes*, 3 Bro. C. C. 400.

The defendant, during negotiations for the sale of lands and chattels, delivered a particular of the whole signed by him. The agreement was afterwards made at a less price. Both parties gave instructions to an attorney to prepare the conveyance: and the defendant delivered to him the particular, as instructions for the deed which was prepared:—Held, not sufficient to take it out of the statute, and being void as to the lands, void in toto. *Cooke* v. *Tombs*, 2 Anst. 420.

Fees—Drafts.]—Payment of fees to counsel, drawing drafts and engrossing them, and providing purchase-money, under circumstances, held a part performance. *Child* v. *Comber*, 3 Swanst. 427.

Rent-roll.]—A. agrees by parol with B. for the purchase of lands; B. delivers a rent-roll, which was dated and altered in his own handwriting, and shewed an agreement between them for the sale of the estate, at twenty-one years' purchase. An abstract of the title was also delivered to A., together with the deeds, in order to be compared with the rent-roll. B. likewise wrote letters to several of his creditors, informing them that he had contracted with A. for the sale of his estate, at twenty-one years' purchase, and sent the tenants to treat with A. for a renewal of their leases. Upon A.'s filing a bill for specific execution of this agreement, B. pleaded the Statute of Frauds, and the plea was allowed. *Whaley* v. *Bagnel*, 1 Bro. P. C. 345; Wall. Lyn. 12, n.

Admeasurement.]—Admeasurement not a part performance of an agreement to exchange lands. *Pembroke* v. *Thorpe*, 3 Swanst. 442; 19 R. R. 254.

3. In Particular Cases.

a. Contracts with a Parol Variation.

In General.]—A suit for specific performance of an agreement with a variation cannot be supported. *Nurse* v. *Seymour* (*Lord*), 13 Beav. 254. S. P., *Jordan* v. *Sawkins*, 4 Bro. C. C. 477.

Court of equity has no power to alter the contracts of parties from an eventual change not contemplated at the time. *Revell* v. *Hussey*, 2 Ball & B. 288; 12 R. R. 87.

Though a parol waiver of a written contract, amounting to a complete abandonment and clearly proved, would bar a specific performance, or even parol variations so acted upon that the original agreement could no longer be enforced without injury to one party, variations verbally agreed upon are not sufficient to prevent the execution of a written agreement; the situation of the parties, in all other respects, remaining the same. *Price* v. *Dyer*, 17 Ves. 356; 11 R. R. 102.

Defendant held to the offer in his answer, though the circumstances of the case were varied from what they were at the time of answer put in. *Holford* v. *Burnell*, 1 Vern. 448.

Different Agreement.]—Bill for specific performance of an agreement dismissed: the agreement appearing from letters produced to have been different from that set up by the bill, and proved by one witness. *Legh* v. *Haverfield*, 5 Ves. 452; 7 R. R. 199.

Part of Agreement omitted.]—Specific performance of a written agreement refused, on parol evidence that one term of the actual agreement was omitted. *Garrard* v. *Grinling*, 2 Swanst. 244; 1 Wils. 460.

What Relief granted.]—Quære, can a court of equity decree the performance of a written agreement where the bill states that the written agreement was subsequently varied by parol, and prays, in the alternative, either that the agreement, with these variations, may be executed, or that it may be executed as it stands in writing. *Wright* v. *Howard*, 1 L. J. (o.s.) Ch. 94; 24 R. R. 169.

Original bill prayed execution of an agreement; defendant denied the agreement as in bill, but admitted a different agreement; plaintiff amended his bill, continuing to insist on the original agreement, but praying in the alternative, if not entitled to that, to have execution of the admitted agreement. Bill dismissed without prejudice to a bill for performance of the admitted agreement. *Lindsay* v. *Lynch*, 2 Sch. & Lef. 1; 9 R. R. 54.

No relief under an agreement stated by the answer, the bill not being adapted to that agreement, but framed upon a different ground, which failed. *Pilling* v. *Armitage*, 12 Ves. 78; 8 R. R. 295.

Bill for performance of written agreement, parol evidence read of different agreement, dismissed with costs; and plaintiff cannot resort to agreement set up by defendant; parol evidence

allowed where a hard agreement, or in part executed. *Legal* v. *Miller*, 2 Ves. Sen. 299.

Upon a bill praying the performance of an agreement duly signed, but offering to the defendant the benefit of certain variations contained in an unsigned memorandum of a subsequent date, the court will decree a specific performance of the agreement with those variations, if the defendant elects to take advantage of them; and if the defendant does not so elect, it will decree specific performance of the original agreement. *Robinson* v. *Page*, 3 Russ. 114.

A bill for a specific performance insisted on the literal construction of a written agreement, which was proved to be contrary to the real intention of the parties; and the bill contained a false statement as to a fact which would have been inconsistent with the plaintiff's representation of the case. The bill was dismissed on the parol evidence. *Molloy* v. *Egan*, 7 Ir. Eq. R. 590.

Specific performance of an agreement refused, the plaintiff having, after the defendant had signed the agreement, attempted to vary the terms of it, though he ultimately acquiesced in the defendant's terms. *Thornbury* v. *Bevill*, 1 Y. & C. C. C. 554; 6 Jur. 407.

Variation not clear.]—Where the original agreement has been subsequently varied, unless there be certainty as to those variations as affecting the original agreement, so that both together should form one consistent agreement, the court will not grant an injunction prayed for in a bill for specific performance. *Paris Chocolate Co.* v. *Crystal Palace Co.*, 3 Sm. & G. 119; 1 Jur. (N.S.) 720; 3 W. R. 267.

A parol addition to an agreement must be established without doubt or ambiguity before equity will assist in carrying the additional provision into effect. *Vouillon* v. *States*, 25 L. J., Ch. 875; 2 Jur. (N.S.) 845.

Inquiry.]—Where a party has failed to prove the terms of the agreement he relies on, equity will not assist him by directing an issue to ascertain the terms. If he be plaintiff, it is incumbent on him to state in his bill the agreement of which he calls on the court to decree the performance, and to prove the agreement as stated. *Savage* v. *Carroll*, 2 Ball & B. 451; 12 R. R. 108.

Where a parol agreement varying the terms of the written agreement is set up by the defendants in a suit for specific performance, and supported by evidence affording a presumption or suspicion of its existence, an inquiry will be directed. *Van* v. *Corpe*, 3 Myl. & K. 269; 6 L. J., Ch. 208; 1 Jur. 149.

Semble, in a suit for specific performance of a written agreement a parol variation in the terms of the contract, being not such a one as would defeat the right to specific performance, not set up by answer, but coming out on cross-examination of one of plaintiff's witnesses, who was defendant's agent, is a proper subject of inquiry; but the plaintiff accepting the variation, specific performance was decreed with costs. *London and Birmingham Ry.* v. *Winter*, Cr. & Ph. 57.

Evidence.]—Parol evidence admissible on the part of a defendant resisting the specific performance of an agreement to prove fraud, mistake or omission in the article, and also to shew the situation of the parties as connected with it. *Flood* v. *Finlay*, 2 Ball & B. 15; 12 R. R. 55.

Though a defendant, resisting specific performance, may go into evidence to shew that by fraud the true terms were not expressed in the written agreement, yet plaintiff cannot do so for the purpose of obtaining specific performance, with a variation of the contract. *Woollam* v. *Hearn*, 7 Ves. 211; 6 R. R. 113.

Distinction between admission of parol evidence to support or resist specific performance of contract for land: admissible for latter purposes on mistake and surprise, as well as fraud, but not to vary, add to, or explain the written contract. *Clowes* v. *Higginson*, 1 V. & B. 524; 12 R. R. 284.

Quære, whether a defendant, resisting the specific performance of an agreement, on the ground of alleged surprise and fraud, will be allowed to give parol evidence of a term of the contract, said to have been made at the same time with, but contradictory to, those terms of it which were reduced into writing, and signed by him. *Bunning* v. *Bunning*, 1 L. J. (O.S.) Ch. 56.

Parol evidence admissible in opposition to specific performance of written agreement upon heads of mistake or surprise, as well as of fraud, and upon such evidence the bill was dismissed. Another bill for specific performance of agreement corrected according to same evidence, contradicted by answer, was also dismissed. *Townsend* (*Marquis*) v. *Stangroom*, 6 Ves. 328; 5 R. R. 312.

Parol evidence of declarations of auctioneers at sale, warranting quantity, received as defence to bill for specific performance on ground of fraud, though not for purpose of enforcing specific performance. *Winch* v. *Winchester*, 1 V. & B. 375; 12 R. R. 238.

Parol evidence in aid of a specific performance upon the sale of the estate by auction, to explain, by declarations of the auctioneer, an ambiguity on the face of the particular, and also special provisions, the agreement, signed on the back of the particular, binding the purchaser, defendant, "to a strict fulfilment of this article, and to abide by the condition and declarations made at the sale," rejected; distinction where evidence is to resist a specific performance. *Higginson* v. *Clowes*, 15 Ves. 516; 10 R. R. 112.

Though a paper, as the particular upon a sale by auction, may by reference be engrafted into a contract within the Statute of Frauds, that will not authorise the introduction of parol evidence to shew what part was read. *S. C.*, 15 Ves. 522.

Construction of a contract, that a reference of the expenses was confined to expense of the conveyance; but the evidence of the attorney was admitted for the defendant to prove the intention of both parties, according to verbal instructions that the plaintiff, the purchaser, should also pay the expense of making out the defendant's title. *Ramsbottom* v. *Gosden*, 1 V. & B. 165; 12 R. R. 207.

Where the plaintiff, in a suit for specific performance, had assigned over a lease to the defendant (the latter being a surety for the rent), in consideration of a parol agreement for an annuity, which was denied in the answer, but such agreement or consideration was not expressed in the assignment:—Held, not an objection to a decree for specific performance. *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138; 14 L. J., Ch. 390.

Where persons sign a written agreement, and there has been no fraud or mistake, the written

agreement binds at law and in equity according to its terms, although verbally a provision was agreed to which has not been inserted in the document, subject to this, that the defendant in equity may call upon the court to be neutral unless the plaintiff will consent to the omitted term. *Martin* v. *Pycroft*, 2 De G. M. & G. 785; 22 L. J., Ch. 94; 16 Jur. 1125; 1 W. R. 27, 58.

Where, therefore, the defendants agreed in writing to grant a plaintiff a lease at a specified rent and for a specified term, the plaintiff filed a claim for specific performance, stating the above agreement, and that it was further agreed that he should pay a premium of 200*l.*, which by his claim he offered to do:—Held, that this additional term did not render the Statute of Frauds a valid defence to the claim. *Ib.*

By the terms of a written agreement J. agreed to lease to W. a shop and premises which were to be built at a cost not to exceed 400*l.*, at the annual rental of 75*l.* J. expended 750*l.* in building the premises, and refused to grant a lease to W. at the annual rent of 75*l.* In an action by W. against J. for specific performance of the written agreement, the defendant set up as a defence a contemporaneous parol proviso to the agreement, to the effect that, if the outlay exceeded 400*l.*, the rent was to be raised in proportion:—Held, that, as such parol proviso did not contradict, but merely explained the terms of the written instrument, evidence of it was admissible; and, as the evidence proved that the plaintiff had agreed to such parol proviso, that the action must be dismissed. *Williams* v. *Jones*, 36 W. R. 573.

Different Estates.]—By a written agreement the plaintiff agreed to sell, and the defendant to purchase, the Leigh estate; and by the same agreement the defendant agreed to sell, and the plaintiff to purchase, another estate called the Haresfield estate, and it was not expressed that the two contracts were to be dependent on each other. The defendant was unable to make a good title to the Haresfield estate:—Held, that the plaintiff was entitled to a specific performance of the contract as to the Leigh estate. Evidence aliunde was not admitted to shew that it was the real intention of the parties that the agreement should take effect on the basis of a mutual exchange. *Croome* v. *Lediard*, 2 Myl. & K. 251; 3 L. J., Ch. 98.

Quantity of Estate—Costs.]—Where an agreement is entered into for the sale of an estate, and the parties differ as to the quantity agreed to be sold, and the vendor files a bill for specific performance of the agreement as to part, and the vendee offers to complete the contract as to that part; but the vendor adds, as a condition, that the vendee shall pay the costs of the bill:—The court will refuse a decree for specific performance. *Spence* v. *Mawson*, 9 L. J. (o.s.) Ch. 10.

New Agreement.]—W. D., by indenture, agreed to guarantee a certain composition to all the creditors of J. D. who should, before a fixed day, execute a release of their debts. The plaintiff, a creditor of J. D., did not execute by the time named, but insisted that this delay had taken place in consequence of an arrangement entered into between him and the agent of W. D. to allow him to postpone his execution of the release:—Held, that, the agreement being within the Statute of Frauds, any alteration in its terms must have been evidenced by writing; that, the condition in the original agreement not having been performed by the plaintiff, the agreement never took effect, so far as he was concerned; and that, in the absence of fraud, no parol agreement could be substituted. *Emmet* v. *Dewhirst*, 3 Mac. & G. 587; 21 L. J., Ch. 497; 15 Jur. 1115.

Reservation shewn on Contract, not on Receipt.]—A purchaser and his assignees sued for specific performance of a contract to sell land. The vendor pleaded that the contract, if any, reserved mines. The plaintiff denied any reservation. The contract signed by the purchaser contained a reservation; the receipt for deposit signed by the vendor stated the other terms, and was silent as to the reservation. Specific performance of the agreement with such reservation was decreed. *Smith* v. *Wheatcroft*, 47 L. J., Ch. 745; 9 Ch. D. 223; 39 L. T. 103; 27 W. R. 42.

b. Parol or Voluntary Agreements.

Voluntary Agreement.]—In general, a court of equity will not interpose in voluntary agreements made without fraud. *Morris* v. *Burroughs*, 1 Atk. 401. S. P., *Wycherley* v. *Wycherley*, 2 Eden, 177; *Brownsmith* v. *Gibbourne*, 2 Str. 738.

Parol Agreements in General.]—Under some circumstances, a mere parol agreement is binding, and will be carried into specific execution by a court of equity. *Herbert* (*Lady*) v. *Powis* (*Earl*), 1 Bro. P. C. 355.

Sale of Copyholds.]—Parol agreement for the sale of copyhold lands carried into execution. *Borrett* v. *Gomesserra*, Bunb. 94.

Testamentary Papers.]—Six documents were found amongst the papers of a testator written by his sister, and expressing a wish that he should benefit certain members of the family:—Held, that there was not sufficient evidence of a promise by the testator to enable the court to enforce specific performance of the sister's wish as against the testator's estate. *Chester* v. *Urwick*, 23 Beav. 407.

An unattested paper signed by A. and by him handed to B. stated that as a mark of his esteem and great friendship he agreed to allow B. 500*l.* a year, and that after his (A.'s) death he had in lieu thereof bequeathed to him 10,000*l.* B. took this document to C., who thereupon consented to the marriage of her daughter with B., such consent having hitherto been withheld on the ground of B.'s want of means. The marriage took place, but no settlement was made by B. on his wife. A. died about six months after signing the paper, having paid B. the first quarter of the allowance of 500*l.* a year. His will contained no provision whatever in favour of B.:—Held, that, assuming the consent of C. to her daughter's marriage with B. to have been given on the faith of the engagement contained in the paper, there was no such connection between A.'s promise or representation, and the consent given by C., as to sustain a claim against A.'s estate. *Dashwood* v. *Jermyn*, 12 Ch. D. 776; 27 W. R. 868.

Promise to Bequeath.]—One promised his brother's children that, if they would execute a deed, he would bequeath to them "at least as much as they would get under their father's will":—Held, that such promise, though verbal, constituted a binding obligation, and ought to be specifically performed. *Ridley* v. *Ridley*, 6 N. R. 11; 34 L. J., Ch. 462; 11 Jur. (N.S.) 475; 12 L. T. 481; 13 W. R. 763.

If a legatee promises a testator, that, in consideration of a disposition in her favour, she will do an act in favour of a third person, she who undertook to do the act must perform it. *Drakeford* v. *Wilks*, 3 Atk. 539.

Where a testator induced his niece to reside with him as his housekeeper on the verbal representation that he would leave her property by his will, which he accordingly caused to be prepared and executed, but subsequently by a codicil revoked, the court directed the trusts of the will to be performed. *Laffus* v. *Maw*, 3 Giff. 592; 32 L. J., Ch. 49; 8 Jur. (N.S.) 607; 6 L. T. 346; 10 W. R. 513.

A gift made by a revocable instrument in pursuance of a verbal representation, whereby the donee is influenced, and on the faith of which he confers a benefit on the donor, becomes irrevocable. *Ib.*

But see *Maddison* v. *Alderson*, supra, col. 1769.

Separation Deed.]—A husband, upon a treaty for separation from his wife, agreed with a trustee to pay his wife an annuity for her separate use, and also, during their separation, to permit their daughter to reside with, and be under the control of, and educated and supported by, her mother, in consideration whereof the wife (who was entitled under her marriage settlement to property, settled to her separate use without power of anticipation) agreed with the trustee to indemnify her husband in respect of any debt on her own account or on account of their daughter:—Held, first, that this was a voluntary agreement on the part of the husband, no consideration moving from the trustee, and the wife having no power to contract so as to bind property as to which she was restrained from anticipation. *Walrond* v. *Walrond*, 1 Johns. 18; 28 L. J., Ch. 97; 4 Jur. (N.S.) 1099; 7 W. R. 33.

Held, secondly, that the agreement being voluntary on the part of the husband, the court could not decree specific performance of it by him, or order him to account in respect of arrears. *Ib.*

Will.]—An old gentleman, who had several children and grandchildren, had made and executed two wills, and disputes having arisen in the family about them, some of the oldest members of it entered into an agreement amongst themselves for a division of his real and personal estate. This was to be taken the next day to the testator for his approbation, and he was to be desired to cancel both wills. In the night the testator died. The personal property was divided according to the agreement, and a deed of covenant was executed with respect to the appropriation of the real estate, which deed the party, whose rights under the last will would be much diminished by it, understood to be a deed for carrying the first agreement into execution; but, in fact, the two instruments differed in many particulars:—Held, that the first agreement was only a recommendation to the testator, and could not be carried into effect in equity:—Held, also, that the second agreement differing from the first agreement, whilst it was understood to contain corresponding provisions, could not be carried into effect. No costs given, the defendant having secluded the testator from the other members of the family. *Beastall* v. *Swain*, Tam. 288.

Contract partly Executory.]—A voluntary contract in favour of a mother and her children:—Held, to be executory only as related to the children, and executed as to the mother, and therefore enforced for the benefit of the mother absolutely. *Burrows* v. *Greenwood*, 4 Y. & Coll. 251.

Bond.]—Though a parol agreement to give a bond might have been specifically enforced against an ancestor, yet, where terms of bond were not specified, court of equity will not enforce it against the heir. *Brizeck* v. *Manners*, 9 Mod. 284.

Use of House.]—The plaintiff moved his place of business to a house belonging to the defendant, his father-in-law, upon the faith of a parol promise by the defendant, that he should occupy the house rent-free during his life. During his occupation he spent money in repairs. The defendant brought an ejectment, and the plaintiff filed a bill for relief:—Held, that the change of the plaintiff's place of business did not constitute a sufficient consideration to support the parol agreement. *Millard* v. *Harvey*, 10 Jur. (N.S.) 1167; 13 W. R. 125.

Held, also, that he was not entitled to any lien in respect of the moneys spent in repairs. *Ib.*

The plaintiff's wife, without his knowledge, asked the defendant to sell a field belonging to him. She paid the defendant 150*l.*, but he refused to sell the field, and nothing further was then done. A short time afterwards the defendant let the plaintiff into possession, and plaintiff, without knowing of the transaction between the defendant and his wife, continued in possession for ten years, without paying any rent. During this time no interest upon the 150*l.* was paid by the defendant:—Held, that there was sufficient evidence of a contract, and a decree was made for specific performance. *Ib.*

And see *Ungley* v. *Ungley*, and *Coles* v. *Pilkington*, supra, col. 1772.

Lease—Indemnity to Lessee.]—Specific performance decreed after a trial at law of parol undertaking, by the assignee of a lease, to indemnify the original lessee, the vendor, against the rents and covenants; a presumption arising from the nature of the transaction of the assignment being subject to the rents and covenants on the part of the lessee, although the conditions under which the lease was sold by auction expressed no such engagement. *Pember* v. *Mathers*, 1 Bro. C. C. 52; Dick. 550.

Grant of Underlease.]—A builder entered into a building agreement under which leases of plots of land were to be granted on completion of houses on them. He built a house on one plot, and verbally agreed on getting his lease to grant an underlease to M., who gave valuable consideration for the underlease, and entered into possession. Subsequently the builder, without the knowledge of M., obtained a lease of the

house, and deposited it with the defendant to secure an advance made without notice of M.'s title. After this the builder, as agent for the plaintiff (who claimed under M.'s will), let the house to a tenant. Subsequently the builder granted to the defendant a legal mortgage to secure the previous advance:—Held, that the tenancy gave the defendant constructive notice at the time of taking the legal mortgage that the builder was a trustee for M., and that the legal estate was no protection to the defendant against the prior equity; and a decree was made for specific performance, but having regard to the negligence of M., without costs. *Mumford* v. *Stohwasser*, 43 L. J., Ch. 694; L. R. 18 Eq. 556; 30 L. T. 859; 22 W. R. 833.

Building Agreement.]—The plaintiff, a builder, agreed with the defendant, an owner of freehold land, to erect houses on the land on the terms of such agreement, and also of a parol understanding communicated to the plaintiff on behalf of the defendant prior to the signing of the principal agreement. A stipulation of the parol understanding was the advance of moneys in definite instalments by or through the defendant to the plaintiff for the purposes of the buildings. The plaintiff afterwards took leases of the unfinished houses and executed two successive mortgages to enable defendant to raise money on them as a security for the same purposes. The defendant failed to supply the plaintiff with the required funds as stipulated under the parol agreement, which, however, had been successively departed from:—Held, in a bill for specific performance of the parol understanding, together with damages, or at all events damages, that the plaintiff was entitled to neither. *Thorpe* v. *Hosford*, 20 W. R. 922.

See cases under PART PERFORMANCE IN GENERAL, supra, col. 1766; and INADEQUACY OF CONSIDERATION, infra, col. 1845.

c. Contracts Incapable of Complete Performance.

General Rule.]—It is fully settled that a contract cannot be specifically performed in part; it must be wholly performed or not at all. *Ford* v. *Stuart*, 15 Beav. 493; 21 L. J., Ch. 514. S. P., *Wood* v. *Rowe*, 2 Bligh. 595; 21 R. R. 119; *Gervais* v. *Edwards*, 2 Dr. & War. 80; 1 Con. & L. 242; 4 Ir. Eq. R. 555.

The courts will not decree a partial performance of articles; but when some parts appear unreasonable they always dismiss the bill. *Goring* v. *Nash*, 3 Atk. 189.

Accounts.]—The court will not direct an account as to a part of an agreement where it cannot decree a specific performance of the whole. *Holmes* v. *Eastern Counties Ry.*, 3 K. & J. 675; 3 Jur. (N.S.) 737.

Ship.]—A firm of shipbuilders agreed to alter a vessel according to a specification; and in case of their failing to execute the alterations according to the agreement, the owners of the vessel should be at liberty to enter on the shipbuilders' yard, and themselves complete the alterations. The shipbuilders were adjudicated bankrupts before the vessel was completed:—Held, that the court could not specifically perform the whole agreement, and therefore would not restrain the trustee under the bankruptcy from selling the dock in which the vessel was lying, although the owners might thus be prevented from entering and completing the vessel. *Merchants' Trading Co.* v. *Banner*, 40 L. J., Ch. 515; L. R. 12 Eq. 18; 24 L. T. 861; 19 W. R. 707.

Partnership.]—Where the articles provided for the continuance of the partnership for twenty-one years, determinable upon the death of both, and also for the introduction of a relation of either of them, but made no provision for the death of one of them during the term, or for the amount of capital to be used:—Held, that the provisions for the continuance of the partnership during the remainder of the term could not be enforced against the representatives of the deceased partner. *Downs* v. *Collins*, 6 Hare, 418.

An owner of a coal wharf agreed to let it, and at the same time agreed to act as agent in the coal business for the tenant, and not to act for any other person:—Held, that these agreements were inseparable, and that specific performance of the agreement to let would not be decreed, because the court could not enforce performance on the other side. *Ogden* v. *Fossick*, 4 De G. F. & J. 426; 1 N. R. 143; 32 L. J., Ch. 73; 9 Jur. (N.S.) 288; 7 L. T. 515; 11 W. R. 128.

The agreement having been acted on for some time made no difference. *Ib.*

Sale of Estate and Timber.]—A contract for the purchase of copyhold land at a certain price, and the timber upon it at a specified valuation, enforced as one entire contract, although the vendor could not shew any licence from the lord or custom in the manor enabling the tenant of the manor or himself, or his assignees, to fell the timber. *Crosse* v. *Keene*, 9 Hare, 469.

Where, upon a contract for the sale of an estate, a separate and distinct contract is made for the sale of the timber upon it, the court will not enforce the latter contract, unless the vendor can give the purchaser such possession and dominion over the timber as will entitle him to fell and remove it. *Crosse* v. *Lawrence*, 9 Hare, 462; 21 L. J., Ch. 889; 16 Jur. 142.

Marriage Settlement.]—In a marriage settlement of the property of the wife, there was a covenant to convey after-acquired property of the wife to certain uses, including a life estate for her husband. After the death of the wife, the husband filed a bill against her heir-at-law, praying that a real estate to which she had become entitled during her lifetime might be conveyed to the uses of the settlement:—Held, that the right of the husband to a specific performance of part of the covenant drew with it the right to a specific performance of the whole, at least as against the heir of the settlor, whatever it might have done as against a purchaser for value. *Davenport* v. *Bishopp*, 1 Ph. 698. Affirming 2 Y. & C. C. C. 451; 12 L. J., Ch. 492; 7 Jur. 1077.

Construction of Railway.]—The defendants agreed with the plaintiffs to undertake to execute a branch railway according to the terms of a specification to be prepared by the plaintiffs' engineer for the time being, and to give a bond to secure the performance of their contract. The plaintiffs had at the date of the agreement a bill pending to enable them to make the branch, and holding them to complete within a specified time, on pain of a suspension of dividends on the

capital of their entire line. The specification was prepared by the company's engineer, but prices having risen, the defendants repudiated their agreement. The plaintiffs then filed their bill for a specific performance of the agreement according to the terms of the specification, and to have the bond executed. On demurrer, it was held, first, that the agreement could not be enforced as regards the construction of the railway, because, from the nature of the works, it was an agreement the execution of which the court could not superintend, and the plaintiffs would have an adequate remedy in damages; secondly, that as the court could not superintend the general execution of the whole works, the execution of the bond would be a piecemeal performance of the agreement, which the court would not direct, and the demurrer was allowed. *South Wales Ry.* v. *Wythes*, 1 K. & J. 186. Affirmed 3 Eq. R. 153; 5 De G. M. & G. 880; 24 L. J., Ch. 87; 3 W. R. 133.

Whether in the simple case of an advance of money, with an agreement to execute a bond for its repayment, such an agreement would be executed in this court, quære. *Ib.*

Contract Partly Executed.]—The court will not decree specific performance of a contract unless it can enforce the whole; but the difficulty seems to be removed where the part which it is impossible to enforce has already been performed. *Hope* v. *Hope*, 22 Beav. 351; 8 De G. M. & G. 731; 26 L. J., Ch. 417; 3 Jur. (N.S.) 454; 4 W. R. 583.

Application to Parliament.]—By an agreement between three companies, A., B., and C., it was agreed that A. should purchase the other two railways when completed, and that, in the meantime, their capitals should be amalgamated for the purpose of such completion; and it was provided that all the three companies should concur in applications to parliament for the necessary powers to carry the agreement into effect. Powers to sell their railways were obtained, but before powers to amalgamate had been obtained by B. or C. a large majority of B.'s shareholders had become adverse to the project, so that no such act could be obtained; and the directors of that company, with the sanction of the shareholders, were proceeding to construct and dispose of their railway in a manner inconsistent with the agreement. On a bill by A. for specific performance and an injunction, an injunction was granted; it being clear that, for the completion of the purchase, no further parliamentary powers were necessary, and it being at least doubtful whether the defendants could be heard in this court to say that the plaintiffs were not entitled to the performance of that part of the agreement, merely because there was another part (viz., the provision for amalgamation) which required additional parliamentary powers to give effect to it, which powers they refused to apply for. *G. W. Ry.* v. *Birmingham and Oxford Jn. Ry.*, 2 Ph. 597; 5 Railw. Cas. 241; 17 L. J., Ch. 243; 12 Jur. 106.

Accessory Agreement.]—Where the principal agreement cannot be enforced, the specific performance of the accessory agreement will not be decreed. *Scottish North Eastern Ry.* v. *Stewart*, 3 Macq. H. L. 382.

The court will not compel specific performance of an agreement by a company to employ a person as their broker; and the contract being at an end, that which is merely an adjunct to the principal relief sought—viz., an injunction to restrain the company from advertising, in breach of a stipulation contained in the agreement, the name of any other person as their broker, will not be granted. *Brett* v. *East India and London Shipping Co.*, 10 L. T. 187; 12 W. R. 596.

If an agreement is capable of being carried out as a whole, the court will decree specific performance, although there may be collateral subordinate provisions which would not be enforced independently. *Blackett* v. *Bates*, 2 H. & M. 270; 34 L. J., Ch. 515; 11 Jur. (N.S.) 500; 12 L. T. 44; 13 W. R. 736.

Although a court of equity will not make a decree for the specific performance of an agreement to repair a railway simpliciter, it will do so if the agreement forms a collateral part only of a larger agreement, and the relation of lessee and lessor has been created between the parties. *Ib.*

An agent of a railway company, without direct authority, agreed to sell to the plaintiff a piece of land of the company at a certain price per acre. Some of the terms were, that the company should lay down a branch railway to the land; that the plaintiff, who was going to erect ironworks on the land, should use the company's railway in preference to others. The company's surveyor measured the land, the company's engineer laid down the branch railway to it, the plaintiff was let into possession, and his machinery was brought in the company's waggons to the land, and there deposited. After this the company refused to complete the sale:—Held, that the stipulations as to the use of the railway by the plaintiff did not render a decree for specific performance improper; for that the insertion of a covenant to that effect would effectuate what the parties must be held to have contemplated. *Wilson* v. *West Hartlepool Ry.*, 2 De G. J. & S. 475; 5 H. L. Cas. 40; 5 N. R. 289; 34 L. J., Ch. 241; 11 Jur. (N.S.) 124; 11 L. T. 692; 13 W. R. 361.

Held, though the agent contracted without sufficient authority, the company had by its acts ratified the contract, and it was binding on them though not executed under seal nor according to 7 & 8 Vict. c. 16, s. 97. *Ib.*

Separate Terms.]—Parts of an agreement can be separately enforced if an intention to separate the parts appears in the agreement. *Odessa Tramways Co.* v. *Mendel*, 47 L. J., Ch. 505; 8 Ch. D. 235; 38 L. T. 731; 26 W. R. 887—C. A.

The fact that an agreement is carried out by two instruments affords a presumption that the contracts in the two instruments are separable. *Ib.*

By a written agreement the plaintiff agreed to sell, and the defendant agreed to purchase, upon the terms stated, a certain property called L.; and by the same agreement the defendant agreed to sell, and the plaintiff agreed to purchase, another estate called H., and it was not expressed that the two contracts were to be dependent on each other. The defendant was unable to make a good title to H.:—Held, that the plaintiff was entitled to a specific performance of the contract as to L. *Croome* v. *Lediard*, 2 Myl. & K. 251; 3 L. J., Ch. 98.

When the conditions of an agreement between landlord and builder, whereby the landlord agrees to grant leases of successive plots of land as the houses upon each of them are built to a certain stage, are by the terms of the contract

separable, there is no rule of equity to prevent them from being separately enforced. *Wilkinson* v. *Clements*, 42 L. J., Ch. 38; L. R. 8 Ch. 96; 27 L. T. 834.

Waiver of Part.]—Plaintiff may have a specific performance in part, waiving the rest, and the defendant cannot object. *Mestaer* v. *Gillespie*, 11 Ves. 640; 8 R. R. 261.

Impossibility of Performance.]—Difficulty of decreeing a partial performance of a contract where a vendor has not the power of fully performing it. *Graham* v. *Oliver*, 3 Beav. 124. And see *Williamson* v. *Wooton*, 3 Drew. 210.

Where a person contracts to grant a certain interest, which it afterwards appears he cannot carry into execution to the extent agreed on, yet the grant shall be available as far as his interest will permit. *Stapleton* v. *Stapleton*, 1 Atk. 2.

Performance becoming possible.]—A defendant agreed to become tenant to the plaintiff, with a right to lease for a term when he desired it. He wished to take possession speedily. At the date of the contract the plaintiff was unable to make the lease, but after bill filed, and before the hearing, he acquired power to do so:—Held, that he could not enforce specific performance. *Forrer* v. *Nash*, 6 N. R. 361; 11 Jur. (N.S.) 789; 14 W. R. 8. And see *Carne* v. *Mitchell*, supra, col. 1764.

Tenants in Common.]—Though specific performance might have been decreed against original parties holding as tenants in common, yet where an alteration prevented a decree as to one moiety, the court would not direct a performance as to the other, the contract being entire, and an execution of half of it inadequate to the prime object. *Att.-Gen.* v. *Day*, 1 Ves. Sen. 218.

Tenant from Year to Year.]—In an agreement for the purchase of an estate, one of the stipulations was, that the vendor should be tenant from year to year to the purchaser:—Held, that the inability of the vendor to perform this stipulation by reason of embarrassments of which the purchaser must have had some notice was no bar to the specific performance of the contract. *Lord* v. *Stephens*, 1 Y. & C. 222.

Sale at a Valuation.]—A contract for the sale of an estate for 24,000*l.*, and that certain furniture and other articles on the estate, the value of which was about 2,000*l.*, should be valued by valuers mutually agreed upon, and that the purchaser would take a part of the furniture and articles at that valuation. The vendor refused to appoint a valuer, and to complete. A decree made at the suit of the purchaser for specific performance of the contract, except so far as it related to the furniture and articles. *Richardson* v. *Smith*, 39 L. J., Ch. 877; L. R. 5 Ch. 648; 19 W. R. 81.

Building Lease.]—Under an agreement to grant a building lease, including a covenant to insure in a particular office in the joint names of lessor and lessee, and to give the lessee an option to purchase for 500*l.*, the lessee built a house and insured in his own name only, and in the wrong office. The lessor brought ejectment, and the lessee thereupon claimed to exercise his option of purchase, and specific performance of that part of the agreement was decreed. *Green* v. *Low*, 22 Beav. 625; 4 W. R. 669.

Agreement in part legal.]—Where there is an agreement to make the tithe rent-charge payable by the tenant, and the agreement rests in fieri, the court may, in favour of the intention, add the amount of the rent charge to the rent. Semble, where parties enter into an agreement for the letting of the lands, which is legal, to a certain extent, to which extent they mean that the agreement should be executed by an actual lease; and stipulate that something further, not malum in se, but which is merely prohibited, should rest in understanding, the court will decree the performance of the agreement as far as it is capable of legal execution. *Carolan* v. *Brabazon*, 3 Jo. & Lat. 200; 9 Ir. Eq. R. 124. *And see cases* infra, col. 1802.

d. Foreign Contracts.

Lands Abroad.]—Specific performance decreed of articles executed in England concerning boundaries of two provinces in America. *Penn* v. *Baltimore*, 1 Ves. Sen. 444.

Original jurisdiction as to bounds of proprietary governments is in the king in council; but by the contract of parties it is brought within this jurisdiction. *Id.* 446.

The court has jurisdiction to carry out an agreement entered into by persons in England and relating to lands abroad, although such agreement is not made in a form which by the foreign law would affect the land. *Sichel* v. *Raphael*, 3 N. R. 662; 34 L. J., Ch. 106; 10 Jur. (N.S.) 1165; 11 L. T. 433; 13 W. R. 191—L.C.

Subject-matter in the Jurisdiction.]—The court will specifically enforce against a foreigner a contract of sale made abroad, if the subject-matter of the contract is within its jurisdiction. *Hart* v. *Herwig*, 42 L. J., Ch. 457. Affirmed L. R. 8 Ch. 860; 29 L. T. 47; 21 W. R. 663.

Therefore, when a contract was made abroad for the sale of a foreign vessel to be delivered in this country, the court granted an interim injunction to restrain the removal of the ship from an English port, allowing substituted service of the notice of motion on the captain. *Ib.*

Foreign Marriage Contract.]—A contract made in France, on the marriage of two people of that nation, who afterwards take refuge and live in England, shall be carried into a specific execution here, although the terms of it refer to the custom of Paris. *Foubert* v. *Twist*, 1 Bro. P. C. 129; Pre. Ch. 207.

Lien on Property Abroad.]—A suit between parties residing here to enforce a lien on immovable property situate out of the jurisdiction requires that some special state of circumstances should exist, in order to enable the court to give any relief. *Norris* v. *Chambres*, 29 Beav. 246. Affirmed 3 De G. F. & J. 583.

Contract of Foreign Government.]—An English court of equity has no jurisdiction to enforce the contracts of a foreign government against the property of such government in England. *Smith* v. *Wequelin*, 38 L. J., Ch. 465; L. R. 8 Eq. 198; 20 L. T. 724; 17 W. R. 904.

When the government of a state contracts a loan in another country, the contract is governed by the law of the state whose government contracts the loan, and not by the law of the country in which the contract is made. *Ib.*

4. Of Particular Contracts.

a. Agreements to Refer.

General Rule.]—Bill for specific performance of agreement to refer to arbitration will not lie. *Street* v. *Rigby*, 6 Ves. 818. S. P., *Gourlay* v. *Somerset*, 19 Ves. 431; 13 R. R. 234.

Specific performance of agreement to refer to arbitration, or to substitute master for arbitrators, refused. *Agar* v. *Macklew*, 2 Sim. & S. 418; 4 L. J. (O.S.) Ch. 16.

—— **Death of Arbitrator.**]—Although a court of equity will not in general decree the specific performance of an agreement to refer to arbitration, or, on the death of an arbitrator, substitute the master for the arbitrator, yet, where matters of account have been referred to arbitration, which fails by the death of the arbitrator, a party who refuses to supply the defect, by naming a new arbitrator, will receive no relief from a court of equity, except upon the terms of his doing equity; and those terms may consist in his consenting to the accounts being taken by the master. *Cheslyn* v. *Dalby*, 2 Y. & C. 170.

Conditional Reference.]—The court refused specific performance of a contract containing a reference to arbitration in the event of the defendant suffering damage by the execution of the contract. *Gervais* v. *Edwards*, 2 Dr. & War. 80; 1 Con. & L. 242; 4 Ir. Eq. R. 555.

Suit Instituted after Award Made.]—Effect of an agreement for a reference to arbitration of a dispute between a vendor and purchaser as to certain terms of the contract, and of an award thereupon, in a suit subsequently instituted for the specific performance of the contract. *Clay* v. *Rufford*, 8 Hare, 290; 19 L. J., Ch. 295; 14 Jur. 803.

Where no Arbitration.]—A contract for the sale of land provided that A. and B., or their nominees, should have power to decide any question as to certain houses to be built thereon. There having been no decision, specific performance was refused. *Tillett* v. *Charing Cross Bridge Co.*, 26 Beav. 419.

b. Awards.

Decree made.]—Award ordered to be performed. *Reignolds* v. *Latham*, Cary, 106.

Performance of award enforced by subpœna. *Baker* v. *Baker*, Cary, 57.

Suit to have award by assent decreed; both parties must have notice. *Wakefield* v. *Hawson*, Cary, 64.

Award not Binding.]—An award, though extra-judicial, and not binding in strictness of law, yet decreed to be performed in specie. *Norten* v. *Mascall*, 2 Vern. 24.

Award not legally binding is sometimes, in cases of part performance, enforced in equity, but not without such part performance. *Bishop* v. *Webster*, 1 Eq. Ca. Abr. 51.

Acquiescence.]—If the terms of an agreement are to be ascertained by an award, being so ascertained, it shall be specifically performed; not if the acts done towards executing it are not valid at law, unless there has been acquiescence or part performance. *Blundell* v. *Brettarch*, 17 Ves. 241.

—— **Parties not Agreeing.**]—Bill will not lie to carry an award into execution where the parties to the submission do not acquiesce in it, nor agree afterwards to have it executed; but it must be enforced at law. *Thompson* v. *Noel*, 1 Atk. 62.

Held, that, although one party had to some extent acted on the award, there had not been such an acquiescence as to justify the court in enforcing it against him, no one appearing to have been misled by his acts. *Nickels* v. *Hancock*, 7 De G. M. & G. 300; 3 Eq. R. 689; 1 Jur. (N.S.) 1149.

A bill lies for specific performance of award where party submitting has received purchase-money. *Hall* v. *Hardy*, 3 P. Wms. 187.

Unreasonable Terms.]—The specific performance of an award may be compelled on the principle that the award only ascertains the terms of a previous agreement between the parties; the court considering an award as the decision of judges chosen by the parties, will not examine whether it is unreasonable. *Wood* v. *Griffith*, 1 Swanst. 43; 1 Wils. 34; 18 R. R. 18.

Parol Agreement for Lease.]—In the course of the proceedings before an arbitrator the parties agree by parol that arbitrator shall determine as to a lease to be granted; such an agreement is within the Statute of Frauds, and the award, having directed a lease to be made, cannot be enforced. *Walters* v. *Morgan*, 2 Cox, 369.

Submission made Rule of Court.]—The court of chancery has jurisdiction to entertain a suit for specific performance of an award, although the submission has been made a rule of a court of law. *Blackett* v. *Bates*, 35 L. J., Ch. 324; L. R. 1 Ch. 117; 12 Jur. (N.S.) 151; 13 L. T. 656; 14 W. R. 319. *And see* 12 Jur. 874, n.

The award was made in June, 1863; a bill for specific performance was filed in July, 1864; the interval was filled up by legal proceedings, which the plaintiff could not accelerate, whereby he sought to set aside the award. Semble, such circumstances alone disentitled the plaintiff to specific performance. *Ib.*

Upon a reference by order of this court, the award may be enforced before it has been made a rule of court. *Wood* v. *Taunton*, 11 Beav. 449; 18 L. J., Ch. 207; 13 Jur. 954.

Award of arbitrators enforced in equity, although the submission to arbitration was to be made a rule of a court of common law. *Hawksworth* v. *Brammall*, 5 Myl. & Cr. 281.

The ground on which the court of chancery interferes to decree specific performance of an award not made a rule of that court is, that the award is an agreement between the parties to the submission, and that most, if not all, of the principles regulating specific performance are applicable. If, therefore, the arbitrator exceeds his authority, specific performance cannot be decreed, as the award, to that extent, does not embody an agreement between the parties. *Nickels* v. *Hancock*, supra.

Semble, the court cannot in such a case separate that part of the award which cannot be enforced, and decree specific performance of the rest. *Ib.*

Award as to Part of Matters.—Although an award of part of matters referred may be good, equity will not enforce it, unless of all matters referred. *Hide* v. *Pettit*, 1 Ch. Ca. 185.

Uncertainty.] — Uncertainty in award or valuation is ground for refusing specific performance. *Hopcraft* v. *Hickman*, 2 Sim. & S. 130 ; 3 L. J. (O.S.) Ch. 43.

An award which leaves some of the questions undecided, or leaves in doubt whether some of the questions have been decided, cannot be enforced. *Wakefield* v. *Llanelly Ry. and Dock Co.*, 11 Jur. (N.S.) 456; 12 L. T. 509 ; 13 W. R. 823.

To pay Money.]—Difference between award to pay money, and to do anything collateral, and why a bill may be proper only to compel specific performance of the latter. *Hall* v. *Hardy*, supra.

Bond.]—Bond put in suit for performance of an award stayed by injunction. *Knight* v. *Hartwell*, Cary, 104.

Charity Lease.]—The jurisdiction to give effect to an award confirmed by a decree of the court in the case of a charity is doubtful, but the renewal of a lease upon the terms of the award, having been twice directed by the court, was again enforced. *Att.-Gen.* v. *Clements*, Turn. & R. 58.

c. Building Agreements.

Preliminary Agreement.]—The court will not decree the specific performance of a preliminary building agreement, nor give damages for the breach of such an agreement. *Wood* v. *Silcock*, 50 L. T. 251 ; 32 W. R. 845.

Work Defined.]—The court has jurisdiction to enforce the specific performance of a contract by a defendant to do defined work upon his property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages. *Storer* v. *G. W. Ry.*, 2 Y. & C. C. C. 48 ; 3 Railw. Cas. 106 ; 12 L. J., Ch. 65.

Specific performance of an agreement to build may be decreed if sufficiently certain ; but a general covenant to lay out a certain sum in a building of a certain value cannot be so executed. *Mosely* v. *Virgin*, 3 Ves. 134.

Though the court will not, as a rule, specifically enforce contracts to build or repair, it will do so in cases where the contract for building is in its nature defined. *Hepburn* v. *Leather*, 50 L. T. 660.

In a suit for specific performance of an agreement, vague in its language, a court of equity, having regard to the terms of such agreement, will consider the surrounding circumstances, and conduct of the parties in dealing with the property comprised in it, in the interval between the making of the agreement and the commencement of the suit for its enforcement. *Oxford* v. *Provand*, 5 Moore, P. C. (N.S.) 150 ; L. R. 2 P. C. 135.

P. & Co. entered into an agreement with O. & Co. for the transfer to them of the unexpired term of a lease held by P. & Co. of land and houses at Shanghai, and to build or finish certain houses thereon, to proceed with the building at once, to consult O. & Co.'s wishes in building the houses then in progress, and in building other houses not then commenced. Possession was given, and the buildings altered by P. & Co. at O. & Co.'s instance :—Held, decreeing specific performance of such agreement, that the terms of the agreement expressed with sufficient clearness the intentions of the parties. *Ib.*

Held, also, that that part of the agreement which provided that the wishes of O. & Co. should be consulted in erecting the buildings was not so vague or indefinite as to render the contract impossible to be enforced. *Ib.*

To Build House.]—Specific performance of a contract to build a house. *Pembroke* v. *Thorpe*, 3 Swanst. 437 ; 19 R. R. 254.

Plaintiff's father, seised in fee of land, articles to pay J. 1,000*l.* to build a house on the premises, and dies before the house is built. The plaintiff, the heir, may compel the builder to build it, and his father's executor to pay for it. *Holt* v. *Holt*, 2 Vern. 322 ; 1 Ch. Ca. 190.

Proceedings taken towards the fulfilment of a contract for the erection of a certain building may enable the court to decree a specific performance of the contract. *Price* v. *Penzance Corporation*, 4 Hare, 509.

A lessor agreed with the lessee to grant a lease of certain specified property if within a specified time the lessee erected certain specified buildings ; the time having nearly expired and the buildings not having been begun :—Held, at the suit of the lessor, that the court could not decree specific performance of this contract. *Female Orphan Asylum* v. *Waterlow*, 16 W. R. 1102.

Building Lease.]—An agreement for a lease containing a stipulation that the lessees should execute certain building works, and that the lessors should advance 1,000*l.* on mortgage to a company, was executed by the directors and secretary of the company as lessees :—Held, that the directors and secretary who signed the agreement were personally liable, and decree made for specific performance of the agreement to take a lease, but specific performance of the building stipulations refused, and an inquiry as to damages granted in respect thereof. *Kay* v. *Johnson*, 2 H. & M. 118.

Specific performance of agreement to grant building lease decreed generally, though plaintiff had erected brewhouse on land, injurious to lessor's property. *Gorton* v. *Smart*, 1 Sim. & S. 66 ; 1 L. J. (O.S.) Ch. 36.

Deviations from Plan.]—Small deviations from a plan agreed upon for building not material ; otherwise if obstinate or corrupt. *Craven* v. *Tickell*, 1 Ves. J. 60.

S. agreed to erect a house according to a plan to be approved by the lessors, and to the regulations of the Metropolitan Building Act. A plan was sanctioned by the lessors, but the Metropolitan Board of Works objected to it. Decree for specific performance of the agreement modified so as to make it conformable to the regulations of the Metropolitan Building Acts. *Cubitt* v. *Smith*, 10 Jur. (N.S.) 1123 ; 11 L. T. 298.

Party-wall — Award.] — The court will not decree specific performance of a building contract which provides that a party-wall shall be pulled down and rebuilt, after the adjoining owner has had the matter referred to arbitration under the Metropolitan Building Act, and an award has been made declaring that it is not necessary to

take down such party-wall. *Seawell* v. *Webster*, 29 L. J., Ch. 71 ; 7 W. R. 691.

Rebuilding.]—Where a man in a building lease covenants to new-build the messuages, rebuilding some and repairing others is not sufficient, for the lessee must rebuild the whole ; neither is pulling down and rebuilding the fore and back fronts a rebuilding within the covenant ; upon such a covenant the lessors are entitled to a specific performance. Sed secus of a covenant to repair. In this case, however, the court, instead of decreeing a specific performance, left it to a jury to ascertain the damages sustained, and directed an issue accordingly. *London* (*City of*) v. *Nash*, 3 Atk. 512 ; 1 Ves. Sen. 12.

Repairing Lease.]—Agreement to grant a lease of copyhold premises for twenty-one years, and to put the same in repair, there being no evidence that to grant such lease would work a forfeiture, or that the licence of the lord could not be obtained :—Decreed, to be specifically performed. *Paxton* v. *Newton*, 2 Sm. & G. 437.

Though the court will not ordinarily decree specific performance of an agreement to repair, it is the habit of the court to decree specific performance of agreements involving the execution of leases or other instruments containing covenants to repair. *Ib.*

Covenant to Supply Water.]—A purchaser of a piece of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building sites, to erect a pump and reservoir, and to supply water from the well to all houses built on the vendor's land :—Held, that, though the covenant was not one of which the court would decree specific performance directly, as being for the construction of works which the court could not superintend, it could be enforced indirectly by an injunction restraining the defendant from allowing the work to remain unperformed. *Cooke* v. *Chilcott*, 3 Ch. D. 694 ; 34 L. T. 207.

d. Debts.

Sale of Debts.]—Court will not decree specific performance of contract for purchase of debt. *Wright* v. *Bell*, 5 Price, 325.

Specific performance decreed, at suit of vendor, of contract for sale of debts proved under commission of bankruptcy. *Adderly* v. *Dixon*, 1 Sim. & S. 607 ; 2 L. J. (O.S.) Ch. 103 ; 24 R. R. 254.

Assignment to Creditor.]—A. stipulated that he would transfer and assign all his property to B., as his chief creditor, on B.'s discharging A. from all obligations then existing relating to the business, and particularly a debt due to a creditor, from which B. was to obtain a release :—Held, that A. had a right to a specific performance of the agreement in a court of equity. *Clowes* v. *Garraway*, 7 L. T. 243.

Substitution of Parties in Contract.]—The payee of two promissory notes being about to sue the maker, the brother of the maker agreed to pay 200*l.* to the payee, in trust for E., or 6*l.* 10*s.* per quarter, so long as the 200*l.* should be unpaid, so that the notes should be suspended and rendered inoperative so long as the brother continued to pay the 6*l.* 10*s.* a quarter to the payee, and on payment of the 200*l.* all claim on the notes to cease, and the same to be given up :—Held, that the brother was entitled to the specific performance of the agreement in equity, on the ground that this court, by modifying its decree, could give to all parties the benefit of the agreement which a court of law could not do. *Beech* v. *Ford*, 7 Hare, 208.

Verbal Agreement to Pay.]—The agent of a railway company made a verbal agreement with the contractor that if he would build on land of the company certain cottages and would leave them for the use of the company, then the company would pay him 5,000*l.* The cottages were built, and when the railway was completed the contractor left them on the land, and the agent of the company made an agreement with the contractor that he should be paid 500*l.* a year for the cottages by way of rent, with an option to the company to purchase them for 5,000*l.* This agreement was confirmed by a resolution of the board of directors. The company paid the 500*l.* a year some years, and then refused to pay :—Held, that the claim of the contractor being simply for payment of money could not be enforced in the Court of Chancery. *Crampton* v. *Varna Ry.*, 41 L. J., Ch. 817 ; L. R. 7 Ch. 562 ; 20 W. R. 713.

e. Chattels.

Remedy at Law Inadequate.]—The principle of courts of equity in regard to cases of contracts concerning mere chattels is, that where courts of law, by awarding damages, can give adequate compensation, courts of equity will not interfere. Therefore that principle cannot apply where the defaulting party has become insolvent ; and the court of review acts on this principle. *Masterman, Ex parte*, 4 Deac. & C. 751 ; 2 Mont. & Ayr. 209 ; 4 L. J., Bk. 54. S. P., *Withy* v. *Cottle*, 1 Sim. & S. 174 ; Turn. & R. 78 ; 1 L. J. (O.S.) Ch. 117. *And see* 1 L. J. (O.S.) Ch. 5.

Chattels have a Peculiar Value.]—The court will enforce specific performance of a contract for the sale of a chattel where pecuniary damages would not be a sufficient compensation for the breach of the contract, as where the chattel is of unusual distinction and curiosity, and of doubtful value. *Falcke* v. *Gray*, 4 Drew. 651 ; 29 L. J., Ch. 28 ; 5 Jur. (N.S.) 645 ; 7 W. R. 535.

But where the contract, although not actually fraudulent, was one in which the parties were not on equal footing, the plaintiff knowing, and the purchaser being ignorant of the value of the thing sold, and the price appeared to be inadequate, the court refused relief. *Ib.*

Where a chattel, from being used in business or otherwise, has a peculiar value, the court will entertain a bill for an injunction to restrain its sale or detention. *North* v. *G. N. Ry.*, 2 Giff. 64 ; 29 L. J., Ch. 301 ; 6 Jur. (N.S.) 244 ; 1 L. T. 510.

And see *Pusey* v. *Pusey*, 1 Vern. 273 ; *Somerset* (*Duke*) v. *Cookson*, 3 P. Wms. 389 ; 2 Eq. Ca. Abr. 164.

Specific Chattels.]—Specific performance of agreement, made on dissolution of partnership, that peculiar book used in trade should become exclusive property of one of the partners, and that copy of it should be delivered to other, will be decreed. *Lingen* v. *Simpson*, 1 Sim. & S. 600 ; 24 R. R. 249.

If there has been an engagement to appropriate to a certain individual a particular cargo, or a particular part of a larger cargo; in either of these cases equity will interfere to enforce performance of the engagement. *Hoare* v. *Dresser*, 7 H. L. Cas. 290.

Although the court will not in general entertain a bill for specific performance of an agreement simply for the delivery of specific chattels, yet specific performance of an agreement of which one clause provides for the delivery of specific chattels will not of necessity be refused. *Marsh* v. *Milligan*, 3 Jur. (N.S.) 979.

Trust.]—A court of equity will not enforce the specific performance of ordinary contracts for the sale of chattels, unless there is something very special in the nature of the contract. On the other hand, if a trust is created, the circumstance that the subject-matter is a personal chattel will not prevent the court from enforcing the due execution of the trust. *Pooley* v. *Budd*, 14 Beav. 34.

Sale of Goods for Export only.]—D. & Co. are manufacturers of fabrics, of which the patterns are supplied by their own artists. Every spring and autumn they introduce new patterns into the English market; and after the season is over they are in the habit of selling their surplus stock at a reduced price, for the purpose of having it shipped to foreign countries, where its sale could not injuriously affect the home trade of the plaintiffs. G., the plaintiff's agent, sold some surplus stock to P., at Manchester, upon the express agreement that the goods were to be shipped by P. to the United States and were not to be sold in the home market. Upon a bill for specific performance, and praying for an injunction to restrain P. from selling the goods in England:—Held, that the evidence of the contract was insufficient, and the proper remedy in such a case is at law. *Dollfus* v. *Pickford*, 2 W. R. 204.

Held, that an injunction will not be granted to restrain breach of agreement where damages at law are adequate. *Id.* 220.

Instalments.]—Semble, that the court will not decree specific performance of a contract for delivery of a chattel by instalments where mutual duties of a complicated nature are imposed upon the parties. Mere vicinity and convenience of situation will not induce the court to decree specific performance of a contract for supply of goods. Observations upon *Buxton* v. *Lister* (3 Atk. 383). *Pollard* v. *Clayton*, 1 K. & J. 462; 1 Jur. (N.S.) 342; 3 W. R. 349.

Coals.]—A contract to sell a quantity of coal to be raised and delivered is a simple contract for the sale of chattels, and will not be enforced in equity, damages to be ascertained by a jury being the proper remedy. *Fothergill* v. *Rowland*, 43 L. J., Ch. 252; L. R. 17 Eq. 132; 29 L. T. 414; 22 W. R. 42.

Cargo.]—Property in a cargo transferred by bill of sale signed by vendor and vendee; but by a new agreement signed by them before they parted, that it shall be sold and accounted for by the factor for vendor, it is reduced to agreement, and therefore remedy in equity. *Weymouth* v. *Boyer*, 1 Ves. J. 416.

Ship.]—An agreement was entered into for the sale of a ship to A. and B. Possession of the ship was delivered to the purchasers by the vendors. On a bill filed by the vendors against B., who had become the sole owner of the ship by purchase from A.'s assignee, the court held that it had jurisdiction, and decreed an account and payment of the unpaid purchase-money by B., or a resale of the ship in default of payment in a limited time. *Lynn* v. *Chaters*, 2 Keen, 521.

Barge and Stores.]—Specific performance of a contract for the sale of a barge, stores, &c., decreed in equity upon a claim. *Claringbould* v. *Curtis*, 21 L. J., Ch. 541.

Timber.]—Articles by a guardian for sale of timber have been carried into execution by a court of equity. *Clavering* v. *Clavering*, Moseley, 224; *Buxton* v. *Lister*, 3 Atk. 383.

In a contract for the purchase of timber, time is of the essence of the contract; and if, by difficulties improperly raised by the vendor, the timber is prevented from being felled and carried away at the time limited by the agreement, the court will not enforce the performance of the contract. *Arkwright* v. *Stoveld*, 3 L. J. (O.S.) Ch. 49.

Copyright.]—A court of equity has jurisdiction to enforce specific performance of an agreement relating to a copyright. *Thombleson* v. *Black*, 1 Jur. 198.

Bill of Sale.]—In an action to enforce specific performance of a parol agreement to execute a bill of sale of personal chattels, upon an ex parte motion, there being evidence of immediate danger of the chattels in question being disposed of, an order was made appointing the plaintiff (without security) interim receiver for fourteen days, or until a receiver should be appointed under a reference to chambers. The plaintiff undertook to deal with the property only under the direction of the court, and to abide by any order which the court might make. *Taylor* v. *Eckersley*, 45 L. J., Ch. 527; 2 Ch. D. 302; 34 L. T. 637; 24 W. R. 450—C. A. And see *Donnell* v. *Bennett*, infra, col. 1807.

f. Loans.

Agreement to Advance Money.]—A court of equity will not decree specific performance of a mere agreement to advance money. *Larios* v. *Gurety*, L. R. 5 P. C. 346.

A court of equity will not decree the specific performance of a contract to borrow a sum of money on mortgage. *Rogers* v. *Challis*, 27 Beav. 175; 29 L. J., Ch. 240; 6 Jur. (N.S.) 334.

Partnership.]—An agreement to join the firm as partner, or otherwise to lend the firm 5,000*l.* for two years on the acceptances of the firm, is not a contract which can be specifically performed. *Sichel* v. *Mosenthal*, 30 Beav. 371; 31 L. J., Ch. 386; 8 Jur. (N.S.) 275; 5 L. T. 784; 10 W. R. 283.

A bill does not lie for specific performance of a partnership agreement, where the sole relief sought is the payment of a sum of money, for which there is a remedy by action. *Bagnell* v. *Edwards*, Ir. R. 10 Eq. 215.

Payment by Instalments.]—A court of equity will not decree specific performance of an agreement, to pay in a certain event, which has happened, an annual sum by quarterly instalments.

Brough v. *Oddy*, 1 Russ. & M. 55; Tam. 215; 8 L. J. (O.S.) Ch. 23.

Where Remedy at Law.]—The court will not grant specific performance of an agreement for a purely money demand, the amount of which, if ascertained, the plaintiff would be entitled to recover by an action at law. *Ord* v. *Johnston*, 1 Jur. (N.S.) 1063; 4 W. R. 37.

Bond to secure Repayment.]—Whether in the simple case of an advance of money with an agreement to execute a bond for its repayment, such an agreement would be executed in this court, quære. *South Wales Ry.* v. *Wythes*, 1 K. & J. 186. *S. C.*, on appeal, 3 Eq. R. 153; 24 L. J., Ch. 87; 3 W. R. 133.

Absolute Conveyance.]—Where a person advancing money refuses after an absolute conveyance to execute a defeasance, the court will relieve. *Walker* v. *Walker*, 2 Atk. 100.

g. Bonds.

To Convey Lands.]—A bond, conditioned to convey lands for money received, is considered in equity as articles, and the condition shall be performed in specie. The obligee having been in possession twenty years, need not prove the money paid. *Anon.*, Moseley, 37.

To Lease.]—Under a marriage settlement tenant for life had power to grant leases for ninety-nine years in possession. Twenty-eight years after the marriage the husband gave a bond conditioned for the granting a lease for ninety-nine years, upon the expiration of a subsisting lease. As soon as the subsisting lease determined, the obligee of the bond entered into possession, and for some years paid rent:—Held, that the representatives of the obligee were entitled to a decree for specific performance of the agreement contained in the bond. *Butler* v. *Powys*, 2 Coll. C. C. 156; 9 Jur. 959. And see *South Wales Ry.* v. *Wythes*, supra.

h. Stock and Shares.

Transfer of Stock.]—No specific performance of agreement for transfer of stock. *Nutbrown* v. *Thornton*, 10 Ves. 161; *Mason* v. *Armitage*, 13 Ves. 37; 9 R. R. 131.

A bill in equity will not lie for specific performance of an agreement to transfer stock; secus, where the thing contracted for may be particularly commodious to the party. *Cud* or *Cuddee* v. *Rutter*, 1 P. Wms. 570; 5 Vin. Abr. 538, pl. 21.

A bill in equity will not lie for specific performance of covenant to transfer South Sea stock. *Ib.*

On a bill to compel specific performance of an agreement to transfer 5,000*l.* York Buildings stock at 7*l.* 5*s.* per cent., demurrer overruled, for the case might be attended with such consequences as would make it just to decree specific performance of the parties' own agreement, or at least to pay the difference. *Colt* v. *Netervill*, 2 P. Wms. 304.

In 1814 the Grand Canal Company created certain stock with peculiar advantages to the subscribers, the legality of which was doubtful. In 1831 they empowered the court of directors to exchange for new stock such stock of 1814 as the holders thereof were willing to bring in, upon certain terms. Upon a bill filed for specific performance of the terms of the resolution of 1814 relief refused on the ground that the plaintiff's conduct might have induced other stockholders of 1814 to accept of the arrangement proposed by the resolution of 1831. *Corballis* v. *Grand Canal Co.*, 3 Ir. Eq. R. 29.

Bill for a specific performance of a contract for 1,000*l.* York Buildings stock, at 105*l.* per cent., dismissed, for equity will not execute these contracts, but leave the parties to their remedy at law. *Dorison* v. *Westbrook*, 5 Vin. Abr. 510, pl. 22.

If an agreement or contract for South Sea stock be executed, the court will not break into it; if it be executory, the plaintiff must seek his remedy at law. *Cappur* v. *Harris*, Bunb. 135.

—— **Delivery of Certificates.**]—Bill will lie for specific performance of agreement to purchase government stock, where it prays delivery of certificates which give legal title to stock. *Doleret* v. *Rothschild*, 1 Sim. & S. 590; 2 L. J. (O.S.) Ch. 125; 24 R. R. 243.

—— **Account of Dividends.**]—One is bound to transfer 300*l.* East India stock before the 30th September then next; though the stock was much risen, yet the defendant decreed to transfer the 300*l.* stock in specie, and to account for all dividends from the time it ought to be transferred. *Gardner* v. *Pullen*, 2 Vern. 394.

Agreement to take Shares.]—The defendant agreed in writing to take shares in a joint-stock company (which were transferable), "and to execute the deed of settlement when required." Specific performance was refused. *Sheffield Gas Consumers' Co.* v. *Harrison*, 17 Beav. 294.

Directors of a company proposed to a shareholder to relieve him from further liability, on his consenting to an absolute forfeiture. He assented, but the directors, having afterwards discovered that he was in good circumstances, refused to complete:—The court declined to compel the directors specifically to perform the contract. *Harris* v. *North Devon Ry.*, 20 Beav. 384.

The court will decree a specific performance of an agreement for the sale of a certain number of shares in a railway company. *Duncuft* v. *Albrecht*, 12 Sim. 189.

Where there is a clear contract to accept shares, and the remedy at law is shewn to be inadequate, the court will decree specific performance. *Oriental Inland Steam Co.* v. *Briggs*, 2 J. & H. 625.

But where the validity of a contract to accept the shares was doubtful, and the inadequacy of the legal remedy not clearly made out, and there having been an unexplained delay of two years, a demurrer to a bill for specific performance of a contract to accept shares was allowed, with costs. *Ib. S. C.*, 4 De G. F. & J. 191; 31 L. J., Ch. 241; 8 Jur. (N.S.) 201; 5 L. T. 477; 10 W. R. 125.

The court has no jurisdiction under the Companies Act of 1862, s. 35, to grant specific performance of an agreement to transfer shares or to enforce against the company an equitable claim to be registered as a shareholder. *Tahiti Cotton Co., In re, Sargent, Ex parte*, 43 L. J., Ch. 425; L. R. 17 Eq. 273; 22 W. R. 815.

The plaintiff agreed to transfer certain shares to the defendant, who agreed to take the same, and accept a transfer thereof, and to indemnify the plaintiff from future calls. No deposit had been paid by the plaintiff on the shares. A bill,

filed for specific performance of the agreement, demurred to on the ground of no consideration. The demurrer overruled. *Cheale* v. *Kenward*, 3 De G. & J. 27; 27 L. J., Ch. 784; 4 Jur. (N.S.) 984; 6 W. R. 810.

—— **Where Special Formalities required.**]—Specific performance was decreed of a contract to sell shares in a company, although the deed of settlement provided that no shareholder should be at liberty to transfer his shares except in such manner as the board should approve; and the board refused to give its consent to the transfer. *Poole* v. *Middleton*, 7 Jur. (N.S.) 1262; 4 L. T. 631; 9 W. R. 758.

The deed of settlement of a company provided that the liability of a vendor of shares in the company should cease after the approval of the purchaser by the directors, and entry of his name in the share register book. A. verbally agreed with B. to sell him certain shares in the company, and received the purchase-money for them, but the deed of transfer was not executed until after an order had been made for the winding-up of the company. The official assignee refused to acknowledge the purchaser as proprietor of the shares:—Held, that the agreement was conditional on the approval of the purchaser by the directors, and that the vendor could not enforce specific performance of it. *Bermingham* v. *Sheridan*, *Waterloo Life, &c., Insurance Co., In re*, 33 Beav. 660; 33 L. J., Ch. 571; 10 Jur. (N.S.) 415; 10 L. T. 256; 12 W. R. 658.

Removing Name from Register.]—A shareholder in a company whose articles of association contained a clause prohibiting the directors from carrying on the business of the company or making calls, until all the shares were taken up, except after a resolution to continue the company, successfully resisted an action for calls, on the ground that the whole of the shares were not taken up, and that no such resolution had been passed. He then applied to have his name removed from the register:—Held, that the power of the court to remove a shareholder's name from the register only existed in the two cases of his name having been improperly entered, and of his having ceased to be a member; and that neither circumstance occurred here. *Ward, Ex parte*, 37 L. J., Ex. 83; L. R. 3 Ex. 180; 18 L. T. 445; 16 W. R. 763.

And see COMPANY.

i. Personal Service.

General Principle.]—The court will not decree specific performance of a simple contract of hiring and service: and if one party abandons such a contract, however wrongfully, he will not be restrained from committing a breach of a negative covenant which was part of the contract. *Brett* v. *East India and London Shipping Co.*, 2 H. & M. 404; 3 N. R. 688; 10 L. T. 187; 12 W. R. 596. And see *Stocker* v. *Brocklebank*, 3 Mac. & G. 250; 20 L. J., Ch. 401; 15 Jur. 591.

Specific performance cannot be enforced of an agreement, the essence of which is that it is one for personal services. *White* v. *Boby*, 37 L. T. 652; 26 W. R. 133.

A plaintiff will not obtain damages instead of specific performance, unless he can shew that he had an equity at the time of issuing the writ. *Ib.*

A suit cannot be sustained which seeks to enforce an agreement for the continuance of the plaintiff's duties or personal services to the defendant, inasmuch as those services might be rendered in a manner productive of injury rather than benefit to the latter; and the court does not possess the means of compelling a person to fulfil his duty to his employer under such a contract. *Fitzpatrick* v. *Nolan*, 1 Ir. Ch. R. 671.

Receiver of Rents.]—A grant was made by Y., Bishop of Ely, in 1801, to P. for his life of the office of receiver of the rents belonging to the see. For a long time the receiver had not only received the rents, but had prepared and registered leases and assignments of leases in a register kept by the bishop, and had made searches in the muniment room in the residence of the bishop, for all which duties he received fees. In 1836, Dr. A., immediately after his appointment as bishop, refused to continue P. in his office:—Held, no relief could be given to P. in equity, on the grounds of the hardship of forcing the services of a stranger in an office of trust upon the bishop. *Pickering* v. *Ely (Bishop)*, 2 Y. & C. C. C. 249; 12 L. J., Ch. 271; 7 Jur. 479.

Manager of Baths.]—A contract by plaintiff to take the management of baths at a fixed salary:—Held, inter alia, that, the contract being for personal services, the court would not decree performance of it. *Gillig* v. *M'Ghee* 13 Ir. Ch. R. 48.

Agency.]—An owner of a coal wharf agreed to let it, and at the same time agreed to act as agent in the coal business for the tenant, and not to act for any other person:—Held, that these agreements were inseparable, and that specific performance of the agreement to let would not be decreed, because the court could not enforce performance on the other side. *Ogden* v. *Fossick*, 32 L. J., Ch. 73; 9 Jur. (N.S.) 288; 7 L. T. 515; 11 W. R. 128.

The fact of the agreement having been acted on for some time made no difference. *Ib.*

And see *Chinnock* v. *Sainsbury*, infra, col. 1801.

Carriers.]—An agreement had been entered into by carriers and a railway company, by which duties were to be performed by the carriers in loading and unloading goods at the termini of the railway:—Held, that the court would not interfere by injunction to restrain the company from acting contrary to the agreement which involved personal service. *Chaplin* v. *North-Western Ry.*, 5 L. T. 601.

Agreement with reference to goods traffic. Injunction to restrain company from determining it irregularly, refused, as it involved personal service. *Horne* v. *L. & N. W. Ry.*, 10 W. R. 170.

Agreement to work Line.]—A railway company agreed with contractors that the contractors should work the line and keep the engines and rolling plant in repair at a specified remuneration:—Held, that the agreement was not of such a kind as to be enforceable by injunction restraining the company from determining the contract and resuming the possession of their line. Quære, whether such an agreement is consistent with public policy. *Johnson* v. *Shrewsbury and Birmingham Ry.*, 3 De G. M. & G. 914; 22 L. J., Ch. 921; 17 Jur. 1015.

Observations on the application of the principle of specific performance to contracts respecting personal services. *Ib.*

Manager and Overseer.]—The partners in certain brass works enter into articles with A., that he shall serve them as their manager and overseer during his life; and besides a stipulated yearly salary, he was to have 3*s.* 6*d.* for every hundredweight of brass wire made by him during his life:—Held, that the plaintiff was entitled to all the advantages thereby stipulated for by him. *Bull* v. *Coggs*, 1 Bro. P. C. 140.

To act as Servant.]—The defendant had agreed to act as servant to the plaintiff, and no other person, for seven years, with power to either party to determine the agreement on payment of 500*l.*, and subsequently engaged himself to another master without paying the 500*l.* An injunction having been granted by the Vice-Chancellor, on appeal, it was dissolved on the defendant bringing into court 600*l.* *Thornton* v. *Kendall*, 11 W. R. 352.

To act as Porter.]—The court will not enforce specific performance of a covenant to appoint a resident porter to attend on tenants of flats. *Ryan* v. *Mutual Tontine, Westminster, Chambers Association*, 62 L. J., Ch. 252; [1893] 1 Ch. 116; 2 R. 156; 67 L. T. 820; 41 W. R. 146—C. A.

Personal Services Consideration for Contract.]—A bill was filed for the specific performance of an agreement, by which the plaintiff was to receive a percentage upon bottles of mineral water, imported by the defendant, in consideration of personal services rendered by him to defendant for procuring the right of exportation. An agreement was also made that a deed should be executed to carry out the terms of the agreement. The defendant appeared to the bill, and applied for an extension of time to answer. The defendant then died, and upon a bill of revivor and supplement being filed against his personal representative a general demurrer was put in:—Held, that the court might direct the execution of a deed for carrying out an agreement of this nature, but the demurrer could not be sustained, since the defendant had applied for further time to answer, and his representative was bound by that act. *Granville* v. *Betts*, 18 L. J., Ch. 32.

Sale of Patents.]—The plaintiff, being owner of certain patents, entered into a written agreement with other persons to form a company for working these patents, he agreeing on his part to sell the patents in foreign countries, and to give his whole services to the company for two years, and to do his best to improve the invention, and to impart such improvements to the company:—Held, that he could not obtain specific performance because from the nature of his own part of the agreement, the court could not compel specific performance of it by him. *Stocker* v. *Wedderburn*, 3 K. & J. 393; 26 L. J., Ch. 713; 5 W. R. 671.

Specific performance of an agreement between four persons, regulating the right to all their future inventions, refused, on the ground that it involved a contract for personal services of an uncertain duration. *Firth* v. *Ridley*, 33 Beav. 516.

Articles of Apprenticeship.]—The court has no jurisdiction to order the cancellation of articles of apprenticeship, and the return of a portion of the premium, on the ground of the wrongful refusal of the master to continue to instruct his apprentice in his trade, according to his agreement. *Webb* v. *England*, 29 Beav. 44; 30 L. J., Ch. 222; 7 Jur. (N.S.) 153; 3 L. T. 574; 9 W. R. 183.

A bill for the specific performance of articles of apprenticeship cannot be maintained. The proper remedy is to sue at law for damages. *Ib.*

Reports of Cases.]—The court cannot specifically perform an agreement, whereby A. agrees to compose and write reports of cases determined in a court of justice, to be printed and published by a particular individual for a stipulated remuneration, nor interfere by injunction to restrain the party from permitting reports written by him to be published by another person. The remedy, if any, is at law. *Clarke* v. *Price*, 2 Wils. 157; 18 R. R. 159.

And see cases infra, col. 1856.

j. Indemnity.

Principal and Surety.]—Covenant to save harmless decreed in specie; to wit, the principal was decreed to indemnify the surety. *Ranelagh* v. *Hayes*, 1 Vern. 189.

Covenant.]—Where a bill is filed to enforce a covenant for a simple indemnity the court will not decree specific performance; but where the indemnifying party also covenants to do an act, the doing of which will constitute a complete indemnity, specific performance will be decreed. *L. & S. W. Ry.* v. *Humphrey*, 6 W. R. 784.

Indemnity on Transfer of Business.]—Where one insurance company, A., transferred all its business, property, effects and liabilities to another company, B., on the terms of A. shareholders being indemnified, on a bill, by A., for specific performance of the agreement, the court decreed such indemnity. *Anglo-Australian Life Assurance Co.* v. *British Provident Society*, 3 Giff. 521. *S. C.*, 4 De G. F. & J. 341; 8 Jur. (N.S.) 628; 6 L. T. 517; 10 W. R. 588—L.JJ.

k. Other Contracts.

To procure Conveyance.]—Agreement to procure A. to convey to B., decreed to be performed in specie. *Bradshawe* v. *Sutton*, Colles' P. C. 25.

To quit Possession.]—A bill for an execution of agreement to quit the possession, and not extending to convey the lands, was dismissed. *Gerrard* v. *Vaux*, 1 Vern. 121.

To grant Deputation.]—Bill for specific performance of an agreement to grant a deputation of the office of register of a consistory court. *Wheeler* v. *Trotter*, 3 Swanst. 174; 19 R. R. 195.

To execute Mortgage.]—When a person had agreed to execute a mortgage of leasehold premises in the usual form, containing an absolute power of sale, in consideration of money due, and had, when requested to do so, failed to execute such mortgage:—The court made a decree for specific performance. *Ashton* v. *Corrigan*, 41 L. J., Ch. 96; L. R. 13 Eq. 76.

The court will decree specific performance of an agreement to execute a mortgage with an immediate power of sale. *Hermann* v. *Hodges*, 43 L. J., Ch. 192; L. R. 16 Eq. 18; 21 W. R. 571.

To give Bill of Sale.]—On the 13th March, A. commenced an action against B. to enforce specific performance of an agreement to execute a bill of sale of chattels. On the 16th March, A., on his ex parte application, was appointed interim receiver, pending a reference for the appointment of a receiver, and the same day he took possession and left a man in charge. The same night B. left, and the next day filed a liquidation petition:—Held, that the Bills of Sale Act did not apply, that the agreement created a good equitable charge in favour of A., and that the possession taken by A. as interim receiver took the chattels and effects out of the order and disposition of B. *Taylor* v. *Eckersley*, 5 Ch. D. 740; 36 L. T. 442; 25 W. R. 527.

Sale of Medical Practice.]—Whether the court can enforce specific performance of a contract to sell a medical practice, where the practice is non-dispensing, quære:—Semble, that there would be power to do so, if it were a dispensing practice. *May* v. *Thomson*, 51 L. J., Ch. 917; 20 Ch. D. 705; 47 L. T. 295—C. A.

Sale of Business of Attorney.]—Specific performance of an agreement to purchase the business of an attorney refused upon a bill by the vendor. *Bozon* v. *Farlow*, 1 Mer. 459.

Whether such an agreement void at law, upon ground either of morality or of public policy. *Ib.*

Quære, if legally a valid agreement, whether it is of such a nature as is capable of being enforced in equity. *Ib.*

To employ Auctioneers.]—Auctioneers advanced a sum of money to S., who agreed to put property in their hands for sale, from the proceeds of which they were to retain the money advanced. A part only of the property was delivered and sold, but it realised less than the sum advanced; S. refused to part with the remainder:—Held, that the court would not compel the performance of the contract for an agency; and that the claims of the agents must be determined in a court of law. *Chinnock* v. *Sainsbury*, 30 L. J., Ch. 409; 6 Jur. (N.S.) 1318; 3 L. T. 258; 9 W. R. 7.

To Execute Separation Deed.]—An agreement between a husband and the father of the wife, that the husband and wife should live apart, and that the husband should execute a deed of separation, will be decreed to be specifically performed. *Gibbs* v. *Harding*, 39 L. J., Ch. 374; L. R. 5 Ch. 336; 18 W. R. 361.

Semble, in an action for specific performance of an agreement to execute a separation deed, the court will not go into evidence whether the provisions agreed upon are for the benefit of the children. *Evershed* v. *Evershed*, 46 L. T. 690; 30 W. R. 132.

A married woman can contract to live apart from her husband, and the husband is entitled to come to the court to enforce specific performance of such a contract, and is not debarred from enforcing a deed of separation and from obtaining an order restraining his wife from commencing an action for the restitution of conjugal rights by reason of trifling breaches of the covenants on his part. *Besant* v. *Wood*, 12 Ch. D. 605; 40 L. T. 445.

Right to Dig for Stones.]—Bill for a specific performance of a covenant, whereby the plaintiff was solely to have a pit in the defendant's ground, for digging black stones. Proved that the defendant had for above sixty years been in quiet possession of another pit for digging black stones. Bill dismissed. *Scholefield* v. *Whitehead*, 2 Vern. 127.

To Construct Siding.]—Specific performance of an agreement to construct and maintain a siding on land, was decreed, although the owner of the land had previously entered into negotiations for compensation in respect of the breach of the agreement. *Greene* v. *West Cheshire Ry.*, 41 L. J., Ch. 17; L. R. 13 Eq. 44; 25 L. T. 409; 20 W. R. 54.

A railway company, as compensation for injury to the plaintiff's mill by the construction of their railway, agreed to lay down a siding from their line to the mill. The siding was made, but the plaintiff not having used it, the railway company removed the points and the rails, and the plaintiff having required them to be replaced, its secretary, on the 27th November, 1879, wrote to the plaintiff that the rails had been removed under misapprehension, and would be replaced at once, or that the directors would undertake to do so at any time when called on. On the 17th September, 1880, the plaintiff required the railway company to replace the siding. The secretary replied denying the liability of the company. In an action for specific performance of the agreement to replace the siding:—Held, first, that the non-user of the siding, and the expenses caused thereby, under the regulations of the Board of Trade, was not a defence to the action, and that the company was not entitled to any indemnity against those expenses. *Todd* v. *Midland Gt. Western Ry.*, 9 L. R., Ir. 85.

Held, secondly, that the plaintiff was entitled to a decree to replace the siding and keep it in working order, the court considering damages an insufficient remedy. *Wilson* v. *Northampton and Banbury Jn. Ry.* (infra), *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry.* (L. R. 9 Ch. 331), considered and distinguished. *Ib.*

To Erect Station.]—A railway company agreed for valuable consideration with a landowner to erect, construct and fit up a station on certain lands which they had bought from him. The company refused to erect a station in the specified place, and substituted one at a distance of two miles:—Held, that the case was one in which justice could be better done by an inquiry as to damages than by a decree for specific performance. *Wilson* v. *Northampton and Banbury Jn. Ry.*, 43 L. J., Ch. 503; L. R. 9 Ch. 279; 30 L. T. 147; 22 W. R. 380.

C. WHAT RELIEF GRANTED.

1. INJUNCTION.

a. In general.

As to Part of Agreement.]—If an agreement consists of two distinct parts, one of which the court can enforce, but not the other, and a bill is filed simply for an injunction to restrain the violation of the former part, the court will grant the injunction, notwithstanding it would not enforce the agreement in toto. *Rolfe* v. *Rolfe*, 15 Sim. 88; 1 Coop. t. Cott. 87, n.; 10 Jur. 61.

W. agreed with L. to sing at his theatre during a certain period of time, and not to sing elsewhere without his written authority:—Held, on

a bill filed to restrain her from singing for a third party, and to grant an injunction for that purpose, that the positive and negative stipulations of the agreement formed but one contract, and the court would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract. *Lumley* v. *Wagner*, 1 De G. M. & G. 604; 21 L. J., Ch. 898; 16 Jur. 871. See *Mapleson* v. *Bentham*, infra, col. 1809, and *Montague* v. *Flockton*, infra, col. 1808.

The court cannot specifically perform an agreement whereby A. agrees to compose and write reports of cases determined in a court of justice, to be printed and published by a particular individual for a stipulated remuneration, nor interfere by injunction to restrain the party from permitting reports written by him to be published by another person. The remedy, if any, is at law. *Clarke* v. *Price*, 2 Wils. 157; 18 R. R. 159.

Protection of Rights.]—Consideration of the principle on which the court may, in certain cases, interpose to prevent a contract from being performed in specie; protecting the legal or supposed legal right of the party seeking such assistance, and preserving to the other party the substantial benefit of the specific performance. *East Lancashire Ry.* v. *Hattersley*, 8 Hare, 72.

Protection of Property.]—In an action for specific performance of an agreement to grant a colliery lease where the lessee had long retained possession, and had worked the coal and then threatened to cease pumping:—Held, that a motion for an injunction to restrain the lessee from ceasing pumping was a proper motion for preservation of the property pending the action under Ord. LII. r. 3. The motion having been ordered to stand over until the trial, the colliery had become drowned before the motion could be heard, owing to a cross-examination of the plaintiff's witness by the defendant:—Held, that it was proper at the trial to make the costs of the motion costs in the action. *Strelley* v. *Pearson*, 49 L. J., Ch. 406; 15 Ch. D. 113; 43 L. T. 155; 28 W. R. 752.

b. In aid of Suit for Specific Performance.

Restraining Action at Law.]—It is not the course of the court, when it entertains jurisdiction in specific performance, to permit an action at law to proceed for the same subject-matter. *Beaufort (Duke)* v. *Glynn*, 3 Sm. & G. 213.

A plaintiff who comes to a court of equity is bound to put under the control of the court his legal rights relating to the subject-matter of litigation. *Prothero* v. *Phelps*, 25 L. J., Ch. 105; 2 Jur. (N.S.) 173; 4 W. R. 189—L.JJ.

Therefore where a party brought a suit for specific performance of an agreement, and after obtaining a decree brought an action to recover damages for injury sustained in consequence of breaches of the agreement, an injunction was granted. *Ib.*

—— **Balance of Convenience.**]—Where there is a contract for the sale of land, the court will restrain the owner of the land from dealing with it until a suit for the specific performance of the contract has been disposed of; but when a plaintiff sues for specific performance, and there is a serious question whether any contract exists, the court will not interpose. *Hadley* v. *London Bank of Scotland*, 3 De G. J. & S. 63; 11 Jur. (N.S.) 554; 12 L. T. 747; 13 W. R. 978.

In a suit by a purchaser for specific performance, an injunction to restrain the vendor from selling the property was dissolved, it not being clear that he would be able to establish his right to specific performance, and it appearing that the granting the injunction would, in case of his ultimately failing, be more injurious to the vendor than the refusal of it would be to the purchaser, in the event of his ultimately succeeding. *Ib.*

The court will not, by interlocutory injunction, restrain one of the parties to a contract from an act for which, if wrongful, the plaintiff can obtain compensation in damages at the hearing of the cause, and where the contract is one of which specific performance cannot be decreed as against the plaintiff. *Garrett* v. *Banstead and Epsom Downs Ry.* 4 De G. J. & S. 462; 11 Jur. (N.S.) 654; 12 L. T. 654; 13 W. R. 878.

Where on motion for an interlocutory injunction the rights of the parties are doubtful on the evidence, the court will act on the consideration of the comparative injury which may arise from granting or withholding the injunction. *Ib.*

In a question on the effect of a contract in the circumstances of the case, where the court had concurrent jurisdiction with a court of law, and had assumed such jurisdiction by interfering to protect the rights of the parties, the court restrained the parties to the contract from bringing actions at law founded on the facts with regard to which the court had interfered, and in which actions the same question, of the legal effect of the agreement, in the circumstances, would necessarily arise. *Brenan* v. *Preston*, 10 Hare, 331.

—— **Title of Party seeking Relief.**]—It is not necessary for a party who seeks to continue an injunction to the hearing, to shew an indefeasible right to the decree prayed by bill; where, therefore, assignees of a bankrupt sought a specific performance of an agreement for a lease against a party who was herself a lessee, and restrained from assigning without the consent of the lessor in writing thereto obtained, the court continued the injunction to restrain proceedings at law, there being a probability of obtaining the consent of the lessor to the assignment. *Powell* v. *Lloyd*, 2 Y. & J. 427; 31 R.R. 598.

—— **Equitable Plea.**]—If a defendant in an action pleads an equitable plea, he cannot come for an injunction to restrain the action upon the same ground which is the subject of the plea, provided the court of law can give such relief as a court of equity will give. *Waterlow* v. *Bacon*, 35 L. J., Ch. 643; L. R. 2 Eq. 514; 12 Jur. (N.S.) 614; 14 L. T. 724; 14 W. R. 855.

But if it cannot, then the equitable plea is no bar to the defendant coming to a court of equity, subject, however, to the costs of the plea being controlled by the court of equity. *Ib.*

A court of equity will restrain an action for damages where the defence relied upon is an alleged agreement between the parties for the performance of certain acts, which a court of law cannot give effect to. *Ib.*

Primâ facie, a defendant, by pleading an equitable plea, thereby makes his election of the tribunal in which his case is to be tried; but if the case is such that the court of law cannot give full relief, then his having pleaded an equitable plea is no bar to his coming into equity. *Ib.*

Disposing of Property.]—Injunction granted, restraining sale of estate, till answer to a bill, alleging parol agreement to exchange, partly performed by plaintiff having purchased estate for that purpose. *Curtis* v. *Buckingham* (*Marquis*), 3 V. & B. 168; 13 R. R. 174.

Injunction restraining vendor defendant to a bill for specific performance, from conveying the legal estate. *Echliff* v. *Baldwin*, 16 Ves. 267; 10 R. R. 178.

Injunction in a suit for specific performance to restrain a vendor from letting or selling the estate, refused. *Turner* v. *Wight*, 4 Beav. 40.

Injunction to restrain the vendor of copyhold premises after delivery of possession, and receipt of part of the purchase-money, from surrendering them to persons other than the purchaser. *Spiller* v. *Spiller*, 3 Swanst. 556; 19 R. R. 276.

In general, during a suit for specific performance, the court will not restrain the owner from dealing with his property. *Ib.*

Owner Dealing with Property.]—A contract having been entered into for a purchase of land, it is not competent to the purchaser, before the title has been accepted, to obtain an injunction restraining the vendor from using or continuing to use the external wall of the building, the subject of the contract, as a party wall, or from encroaching on the land, or from building so as to obstruct the light or air coming to the premises contracted to be purchased. *Heath* v. *Maydew*, 11 L. T. 473.

In a suit for specific performance of an agreement for the sale of the next presentation to a living, the court will restrain the bishop of the diocese from taking advantage of a lapse pending the suit. *Nicholson* v. *Knapp*, 9 Sim. 326; 7 L. J., Ch. 219.

Cutting Timber.]—Purchaser before conveyance is the owner in equity for almost every purpose as to profit and loss, but, before payment, may be restrained from cutting timber: as between his representatives, it is real estate. *Rawlins* v. *Burgis*, 2 V. & B. 287.

Injunction against cutting timber in the case of trespass, viz. by a person having got possession under articles to purchase. *Crockford* v. *Alexander*, 15 Ves. 138; 10 R. R. 44.

Obstructing Light.]—A tenant under an agreement for a lease having filed a bill to restrain his lessor from obstructing the ancient lights in the premises comprised in the agreement, but not asking to have the agreement specifically performed, a motion for injunction was refused. *Fox* v. *Purssell*, 3 Sm. & G. 242.

Interference with Possession.]—When a contract is complete, the money paid, and possession given, the court will prevent the possession being interfered with by the vendor, although the purchaser does not ask for the specific performance of the contract. *Hervey* v. *Smith*, 22 Beav. 299.

Illegal Distress.]—Where a vendor has executed a legal assignment of property to a purchaser, the Court of Chancery will not, on the application of the latter, interfere by injunction to restrain the former from illegally distraining upon the tenants of the property assigned, for alleged arrears of rent accrued since the assignment. *Drake* v. *West*, 22 L. J., Ch. 375.

Ejectment — Insolvency.]—Bill for specific performance of parol agreement to grant farm lease, and injunction to prevent ejectment, plaintiff having taken possession. Upon answer, stating insolvency of plaintiff and various breaches of agreement, during possession, the injunction was continued, on undertaking to give judgment in ejectment, go to commission, and set down cause. *Boardman* v. *Mostyn*, 6 Ves. 467.

Upon a contract for a lease, the solvency or insolvency of the tenant is an objection of weight, depending upon the circumstances: upon that and other circumstances, an injunction against an ejectment by the landlord was dissolved, *Buckland* v. *Hall*, 8 Ves. 92; 7 R. R. 1.

—— **Absolute Order refused.**]—A bill was filed by a person in possession of certain lands, for the specific performance of an illegal parol agreement to grant him a lease for seven years, and for an injunction to restrain an ejectment; the defendant, by his answer, expressly denied that any such agreement had been made; and he insisted that the plaintiff was only tenant from year to year, and had done many acts which would have been breaches of the covenants of the lease supposed to have been contracted. The court, upon this answer, refused to make the order nisi absolute, and continued the injunction upon terms. *Attwood* v. *Barham*, 2 Russ. 186.

—— **Evidence of Agreement.**]—In a correspondence between lessor and lessee, the latter having spoken of the renewal of the old lease, the lessor did not object to this expression, but adverted to other subjects connected with the subject. On a bill filed for the specific performance of the agreement for renewal alleged to be contained in these letters:—Held, that they were so far evidence of such agreement, as to warrant the continuance of an injunction against an action of ejectment brought by the lessor against the lessee. *Price* v. *Assheton*, 1 Y. & C. 82; 4 L. J., Ex. Eq. 3.

Railway.]—Under a contract, with a condition that if the contractor failed to proceed with the works as required by the engineer of the company, the contract should be void, the company took possession of the works. The contractor alleged breaches of the contract:—Held, that the court would not restrain the company by interlocutory injunction until the questions between the company and the contractor were decided. *Munroe* v. *Wivenhoe and Brightlingsea Ry.*, 4 De G. J. & S. 723; 11 Jur. (N.S.) 612; 12 L. T. 655; 13 W. R. 880.

Sale of Newspaper.]—Proprietors of a newspaper dissolved partnership, and one of them agreed to purchase the whole. Before the completion, and pending a suit for specific peformance, the purchaser published statements as to the profits and loss of the paper, in order to establish a company to carry it on. A motion for an injunction to restrain him was refused. *Marshall* v. *Watson*, 25 Beav. 501.

Sale of Opera House—Reservation of Box.]—W., in 1816, agreed to sell his term and interest in a certain opera house to C., reserving to himself, W., his executors, administrators and assigns, the right to a certain box therein, during the continuance of the said term. In an action to establish W.'s right to the box or to damages, an injunction was granted to restrain the defendant, &c., from preventing the plaintiff from enjoying the said box, without prejudice to the right of the plaintiff to compensation, in case it should appear that his right to enjoyment of the box had been actually lost through the act of the defendant. *Helling* v. *Lumley*, 3 De G. & J. 493; 28 L. J., Ch. 249; 5 Jur. (N.S.) 301; 6 W. R. 758.

Buying another Estate.] — A vendor is not entitled to an injunction to restrain a purchaser from buying another estate on the ground that it will incapacitate him from completing his first purchase. *Syers* v. *Brighton Brewery Co.*, 11 L. T. 560; 13 W. R. 220.

c. Negative or Quasi-Negative Covenants.

General Principle.]—Where a contract contains an express negative covenant, and complete justice can be done between the parties, a court of equity will grant an injunction to restrain a breach of the negative covenant; but the court rarely interferes where there is no distinct negative stipulation, but the negative obligation is inferred only from the positive contract. *Peto* v. *Brighton, Uckfield and Tunbridge Wells Ry.*, 1 H. & M. 468; 32 L. J., Ch. 677; 11 W. R. 874.

If a bill states a right or title in the plaintiff to the benefit of a negative agreement on the part of the defendant, the court will equally interfere by injunction, whether the right be at law or under an agreement, which cannot be otherwise brought under its jurisdiction. *Dietrichsen* v. *Cabburn*, 2 Ph. 52; 1 Coop. t. Cott. 72; 10 Jur. 60. And see *Hills* v. *Croll*, 2 Ph. 60; and see also *Id.* 62, n.

Covenant in Terms Positive.]—The plaintiff sold a piece of land to a society, who covenanted with him that he should have the exclusive right of supplying beer to any public-house erected on the land, but the plaintiff did not enter into any covenant to supply it. The defendant, a member of the society, acquired a portion of the land with notice of the covenant, and erected on it a public-house, which he supplied with his own beer:—Held, that the covenant was in substance negative, and that the court could interfere by injunction to restrain the defendant from acting in contravention of it. *Catt* v. *Tourle*, 38 L. J., Ch. 665; L. R. 4 Ch. 655; 21 L. T. 188; 17 W. R. 939.

In considering whether to grant or to refuse an injunction to restrain a breach of a particular clause of an agreement, the court will look to the substance of the act to be performed, and not merely to the presence or absence of negative words. *Wolverhampton and Walsall Ry.* v. *L. & N. W. Ry.*, 43 L. J., Ch. 131; L. R. 16 Eq. 433.

Where no Specific Performance.]—A contract for the sale of chattels to the plaintiff contained an express negative stipulation not to sell to any other manufacturer. The court granted an injunction to restrain the breach of the negative stipulation, although the contract was one of which specific performance would not have been granted. *Wolverhampton and Walsall Ry.* v. *L. & N. W. Ry.* (supra) considered. *Donnell* v. *Bennett*, 52 L. J., Ch. 414; 22 Ch. D. 835; 48 L. T. 68; 31 W. R. 316.

The ground upon which a court of equity goes in enforcing, by injunction, a negative term in an agreement, the positive terms in which cannot be enforced by decree for specific performance, is, that the injunction is dependent upon the plaintiff performing his part of the contract, and will be dissolved upon his failing to do so. *Stocker* v. *Wedderburn*, 3 K. & J. 393; 26 L. J., Ch. 713; 5 W. R. 671.

The difference in the cases where a negative term of an agreement has been enforced by injunction, although the rest of the agreement could not have been specifically performed in equity, is, that the court could, at any time, upon a breach of any other term in the agreement, restore the parties to their former position, or nearly so, by dissolving the injunction. *Ib.*

The court will grant an injunction restraining defendants from acting contrary to a negative agreement, although it cannot specifically enforce the performance of the whole of the agreement. *G. N. Ry.* v. *Manchester, Sheffield, and Lincolnshire Ry.*, 5 De G. & Sm. 138; 16 Jur. 146.

—— **Vague Agreement.**]—Where party agrees not to do a particular act, and there are other terms in the agreement which are so vague that the court cannot enforce them, it will not grant an injunction to restrain the breach of the negative term. *Kimberley* v. *Jennings*, 6 Sim. 340; 5 L. J., Ch. 115.

—— **Theatrical Contract.**]—The proprietors of Covent Garden theatre agreed with an actor, that he should act for twenty-four nights, during a certain period of time, at their theatre, and that, in the meantime, he should not act at any other place in London:—Held, that the court cannot enforce the positive part of the contract, and therefore it will not restrain by injunction a breach of the negative part. *Kemble* v. *Kean*, 6 Sim. 333.

A lady agreed with a theatrical manager to sing at his theatre for a definite period. She engaged "not to use her talents at any other theatre, nor in any concert or reunion, public or private, without the written authorisation of" the manager. The lady engaged with the manager of a rival theatre to sing at his theatre within the defined period:—Held, notwithstanding *Kemble* v. *Kean* (6 Sim. 333), that the court would prevent the violation of the negative term, and restrain the lady from singing at the rival theatre, though the positive term of the agreement could not be enforced. *Lumley* v. *Wagner*, 5 De G. & Sm. 485. Affirmed, 1 De G. M. & G. 604; 21 L. J., Ch. 898; 16 Jur. 871.

Kemble v. *Kean* (supra), and *Kimberley* v. *Jennings* (6 Sim. 340), overruled. *Ib.*

Any actor who enters into a contract to perform for a certain period at a particular theatre may be restrained by injunction from performing at any other theatre during the pendency of his engagement, notwithstanding that the contract contains no negative clause restricting the actor from performing elsewhere. *Montague* v. *Flockton*, 42 L. J., Ch. 677; L. R. 16 Eq. 189; 28 L. T. 580.

D., an actor, contracted with the manager of a theatre to play at his theatre for twelve consecutive nights, but there was no express condition that he should not act elsewhere during the twelve nights. On a quarrel arising, D.

advertised himself to act at another theatre on the night appointed for the commencement of his engagement:—Held, that an injunction might be granted to prevent D. acting during the twelve nights at any other theatre. *Webster* v. *Dillon*, 3 Jur. (N.S.) 432.

A singer, by agreement dated 1870, agreed to sing at a theatre for the whole London season, and nowhere else in the kingdom of Great Britain "pending l'année" 1871. The salary did not extend beyond the season, which ended on the 5th August. On motion for an injunction to restrain him singing elsewhere after the season was over, but during 1871:—Held, that the court would not grant an injunction on an interlocutory application. *Mapleson* v. *Bentham*, 20 W. R. 176.

A manager of a theatre engaged an actor for two years. Though there was nothing expressed, the court inferred an engagement on the part of the manager to employ the actor for a reasonable time, and on his part not to perform elsewhere. The manager delayed the actor's appearance for five months; he broke his engagement and went to another theatre:—Held, that he had a right so to do, and the manager was not entitled to an interlocutory injunction. *Fechter* v. *Montgomery*, 33 Beav. 22.

Incidental Clause.]—When the principal portion of an agreement is incapable of specific enforcement by the court, and it appears that the entire agreement has been broken, no relief will be granted in respect of a negative clause therein contained, which is merely incidental to the general relief sought. *Brett* v. *East India and London Shipping Co.*, 2 H. & M. 404; 3 N. R. 688; 10 L. T. 187; 12 W. R. 596.

An agreement between a railway company and railway contractors for the construction of a branch railway, provided that the contractors should give a bond to secure the performance of the contract, and undertake to execute the works for a double line of railway, and the ballasting and permanent way for a single line:—Held, that this agreement was too uncertain to be enforced in a specific performance suit, and that the stipulation as to the execution of a bond could not be enforced apart from the rest, being merely an incidental and a subsidiary part of the agreement, and not within the principle of *Lumley* v. *Wagner* (supra), where the negative stipulation was a distinct and substantive part of the contract. *South Wales Ry.* v. *Wythes*, 5 De G. M. & G. 880; 3 Eq. R. 153; 24 L. J., Ch. 87; 3 W. R. 133. And see *S. C.*, 1 K. & J. 186.

Protecting Rights of Parties.]—The court will, in some cases, by means of an injunction in a negative form, compel parties who have begun to take away the rights of others, in some measure to restore them before the hearing of the cause. *Spencer* v. *London and Birmingham Ry.*, 8 Sim. 193; 7 L. J., Ch. 281.

The lessee of an inn covenanted to use and keep it open as an inn during the term, and not to do any act whereby the licences might become forfeited. The lessee having threatened to do certain acts inconsistent with the first branch of the covenant:—Held, that the court had no jurisdiction to restrain a person from discontinuing to use premises as an inn, no intention having been shewn on the part of the defendant to violate the negative part of the covenant. *Hooper* v. *Brodrick*, 11 Sim. 47; 9 L. J., Ch. 321.

Charterparty.]—Where property is disposed of, with notice of a prior contract entered into by the person disposing of it, the person taking it with such notice may be restrained from using it. *De Mattos* v. *Gibson*, 4 De G. & J. 276.

The court will not affirmatively enforce a charterparty, but a mortgagee with notice of a prior charterparty effected with the mortgagor will be in general restrained from doing anything to prevent its performance. *Ib.*

The Court of Chancery cannot decree the specific performance of a charterparty, but it can restrain the parties from employing the ship in a manner inconsistent with the rights under a charterparty. *Le Blanch* v. *Granger*, 35 Beav. 187. S. P., *Sevin* v. *Deslandes*, 30 L. J., Ch. 457; 7 Jur. (N.S.) 837; 9 W. R. 218.

Exclusive Right to Sell.]—When the owners of a public building contracted with the plaintiff that he, renting a stall from them, shall have the exclusive right to exhibit and sell certain goods, an injunction will lie against them for permitting the exhibition and sale by other renters of stalls of goods so specified. *Altman* v. *Royal Aquarium Society*, 3 Ch. D. 228.

Agreement not to set up Business.]—The defendant agreed to sell his business premises and goodwill to the plaintiff, and not to set up in the same business in the neighbourhood, the plaintiff agreeing to employ the former. The defendant was employed for a short time, and then dismissed for alleged neglect of his work. Some months afterwards the defendant committed a breach of the negative covenant. The court granted an injunction to restrain the breach, but, not being satisfied as to the bona fides of the dismissal, without costs. *Daggett* v. *Ryman*, 17 L. T. 486; 16 W. R. 302.

Agreement not to Build.]—Injunction granted to restrain the commissioners of woods from building on part of a site, in violation of the terms of an agreement entered into by them with the plaintiffs for a building lease of an adjoining part of the site. *Rankin* v. *Huskisson*, 4 Sim. 13.

Agreement not to Ring Bell.]—The plaintiff, annoyed by the ringing of a church bell, agreed, in writing with the churchwardens and inhabitants that she should erect a cupola and a clock at the church, in consideration of which the bell was not to be rung in the morning. This agreement good, and an injunction granted. *Martin* v. *Nutkin*, 2 P. Wms. 266.

Partnership Agreement.]—Where an agreement had been entered into between A. and B., and persons in their employ, containing terms and provisions of a harsh description, and one of the partners had filed a bill against the other for a dissolution of the partnership, the court refused to restrain the breach of the negative terms of the agreement. *Croft* v. *Haw*, 5 L. J., Ch. 305.

Secret Arrangement.]—A corporation advertised for tenders for the supply of stone. A., C., D. and E., quarry owners, entered into an arrangement that A. should send in the lowest tender, so that it should be accepted, that C. should not send in any tender, and that D. and E. should send in tenders higher than A.'s; it was also arranged that A. should purchase from C., D. and E. certain quantities of stone. C. sent in a tender, which was accepted:—Held, that a bill for an

injunction would lie against C. to restrain him from supplying any stone to the corporation under his contract with them. *Jones* v. *North*, 44 L. J., Ch. 388; L. R. 19 Eq. 426; 32 L. T. 149.

2. Damages.

a. Before 21 & 22 Vict. c. 27.

Damages alone.]—The jurisdiction of equity is never exercised to decree compensation singly without other relief. As to the jurisdiction in cases of compensation generally, see *Newham* v. *May*, 13 Price, 749; M'Cle. 511.

Compensation for nonperformance of an agreement is not a mode of equitable relief. *Clinan* v. *Cooke*, 1 Sch. & Lef. 25; 9 R. R. 3.

In general, a court of equity will not direct any inquiry as to damage sustained by the nonperformance of an agreement. *Williams* v. *Hignett*, 6 L. J. (o.s.) Ch. 125.

Plaintiff, in a bill for specific performance of a contract, is not entitled generally to satisfaction by way of damages for the nonperformance, to be ascertained by an issue, or a reference to the master. *Todd* v. *Gee*, 17 Ves. 273; 11 R. R. 76. See also *Blore* v. *Sutton*, 3 Mer. 237; 17 R. R. 74.

In a case decided before 21 & 22 Vict. c. 27:—Held, that the court has jurisdiction to award damages for the want of a literal performance of a contract, of which it directs the specific performance; it will in general do so rather than compel the parties to resort to another forum. *Phelps* v. *Prothero*, 7 De G. M. & G. 722; 25 L. J., Ch. 105; 2 Jur. (N.S.) 173; 4 W. R. 189.

A certain estate is covenanted to be conveyed, and is not so; the breach is remediable in damages. *Wade* v. *Paget*, 1 Bro. C. C. 364. For the judgment, see *S. C.*, 1 Cox, 74.

Subject of Contract gone.]—When circumstances prevent the court from giving a decree for specific performance, the court may at the hearing award damages, although the subject-matter of the contract has then expired. *Oakeley* v. *Ramsay*, 27 L. T. 745.

A sub-lessee, having been evicted on the expiration of the term granted by his lease, sued on a covenant to grant an additional term; but the term covenanted to be granted having nearly expired at the time of the decree, instead of a specific performance, an account in the nature of an inquiry quantum damnificatus was directed. *M'Nulty* v. *Hamill*, Beat. 541.

On a bill for a specific performance of an agreement for the sale of a house, it appeared that the defendant had actually sold the house to another person for a valuable consideration, and without notice. The court directed the master to inquire what damage the plaintiff had sustained by the nonperformance of the agreement, and that such damages, together with the costs of the suit, should be paid by defendant. *Denton* v. *Stewart*, 1 Cox, 258.

Vendor, upon objection to the title, sold to another, after notice that she would do so if the title was refused. Under a bill for a specific performance, or an issue or reference to ascertain the loss of the first purchaser, a reference was directed upon the authority of *Denton* v. *Stewart* (supra). As to the principle, quære. *Greenaway* v. *Adams*, 12 Ves. 395.

How Assessed.]—In an action for specific performance, where, on an inquiry as to damages, it was necessary to examine witnesses, the inquiry was referred to an official referee. *Stafford* v. *Coxon*, 25 W. R. 788.

Where a bill for specific performance asks also for the damages consequential on nonperformance, and the defendant specifically performs his contract before the hearing, the court has, nevertheless, jurisdiction at the hearing to direct a reference as to the damages. *Cory* v. *Thames Ironworks and Shipbuilding Co.*, 2 N. R. 16; 8 L. T. 237; 11 W. R. 589.

Simple questions, like the assessment of damages, are not such as the court will try by jury, but it will refer them to a court of law. *Ib.*

b. Since 21 & 22 Vict. c. 27.

i. *In General.*

Concurrent Remedies.]—The power conferred by 21 & 22 Vict. c. 27, s. 5, on the Court of Chancery, of directing an inquiry as to damages, was not intended to be exercised concurrently with the ancient jurisdiction of the court for granting an inquiry as to profits. Therefore a plaintiff cannot obtain an inquiry both as to damages and also as to profits. He must be put to his election between the two inquiries. *De Vitre* v. *Betts*, 42 L. J., Ch. 841; L. R. 6 H. L. 319; 21 W. R. 705.

Where no former Right at Law.]—The object and intention of Lord Cairns' Act (21 & 22 Vict. c. 27) was not to give any new right to damages, but to prevent the mischief arising from two distinct methods of procedure which, previously to the time of its passing, were in existence. In no case where damages could not previously have been recovered at law can they now be obtained under Lord Cairns' Act. *Rock Portland Cement Co.* v. *Wilson*, 52 L. J., Ch. 214; 48 L. T. 386; 31 W. R. 193.

The 21 & 22 Vict. c. 27, has not conferred upon the court a jurisdiction to assess damages in cases where it did not before exist. *Lawrence* v. *Austin*, 34 L. J., Ch. 598; 11 Jur. (N.S.) 576; 13 L. T. 759; 13 W. R. 981.

Under Judicature Act, 1873.]—Under the Judicature Act, 1873, the court has complete jurisdiction both in law and in equity; so that, whether the court could in a particular case grant specific performance or not, it could give damages for breach of the agreement. *Elmore* v. *Pirrie*, 57 L. T. 333.

Under Lord Cairns' Act, the plaintiff had first to make out that he was entitled to specific performance before he could get damages at all; now he may come to the court and say, "If you think I am not entitled to specific performance of the whole or any part of the agreement, then give me damages." *Ib.*

The Judicature Act, 1873, s. 25, sub.-s. 11, does not extend the equity jurisdiction so as to enable the court to grant damages in a case wherein before the act damages were not recoverable, e.g. in the case of an oral agreement not capable of specific performance in equity, and in respect of which, in an action at law for damages, the defendant could have successfully pleaded the Statute of Frauds. *Northumberland Avenue Hotel Co., In re, Sully's Case*, 54 L. T. 76.

The equitable jurisdiction of part performance cannot be made use of for the purpose of

obtaining damages on a contract, the specific performance of which is no longer possible; neither has the Judicature Act, 1873, extended the equitable jurisdiction so as to enable the court to give damages in cases where, before the act, specific performance would not have been decreed. *Lavery* v. *Pursell*, 57 L. J., Ch. 570; 39 Ch. D. 508; 58 L. T. 846; 37 W. R. 163.

Mistake.]—When an action is dismissed on the ground of mistake, the court will now consider the question of damages. *Tamplin* v. *James*, 15 Ch. D. 215; 43 L. T. 520; 29 W. R. 311—C. A.

Measure of—Compromise of Prior Action—Impossibility of Performance.]—Where an action for trespass has been compromised on the terms that the defendant should buy the land in dispute at a price to be fixed by arbitration, on the plaintiff shewing a good title, that each party should pay his own costs, and that all other claims by the defendant against the plaintiff should be thus settled—the measure of damages for non-performance of the contract by the vendor, owing to his inability to shew a good title, is the costs incurred by the purchaser in the arbitration and the investigation of title, exclusive of his costs in the compromised action. *Bayley* v. *Birch*, 8 R. 647.

ii. *In addition to or Substitution for Specific Performance.*

For Part of Agreement.]—When the court has jurisdiction to decree the specific performance of an agreement, but is unable to decree specific performance of certain parts of it which are merely incidents to the agreement, and do not affect its substance, it has power to provide for them by assessing the damages which, by reason of their non-performance, the plaintiff may have sustained. *Middleton* v. *Greenwood*, 2 De G. J. & S. 142; 3 N. R. 694; 10 Jur. (N.S.) 350; 10 L. T. 149.

After Decree.]—The court has no power, under 21 & 22 Vict. c. 27, upon motion, after a decree for specific performance of a covenant, to add an order for assessing damages for breach of the covenant. Such an order would be a supplemental decree upon facts which had subsequently occurred. *Hythe Corporation* v. *East*, 35 L. J., Ch. 257; L. R. 1 Eq. 620; 13 L. T. 788; 14 W. R. 273.

Decree for specific performance on an agreement for a lease, without prejudice to the question of damages. *Tomlinson* v. *Dixon*, 14 W. R. 528.

With Injunction.]—On a bill for specific performance of a negative contract, or, in the alternative, for damages, the plaintiff having come in time for an injunction as to part, an inquiry as to damages, under 21 & 22 Vict. c. 27, was directed in respect of the rest of the contract, the breach of which was complete at the time of filing the bill. *Hindley* v. *Emery*, 11 Jur. (N.S.) 874; 13 L. T. 272; 14 W. R. 25.

In Addition to Specific Performance.]—A plaintiff agreed to grant a lease to the defendant so soon as he should have built a new house on the land; and the defendant agreed to accept such lease when required, and by a certain day to pull down an old house and build a new one on the site:—Held, that the 21 & 22 Vict. c. 27, applied, and that the plaintiff was entitled to damages for the non-building of the house, and to specific performance of the contract to accept the lease. *Soames* v. *Edge*, 1 Johns. 669.

The defendant agreed with the plaintiffs by a certain day to pull down an old house and build a new one on the site, and the plaintiffs agreed, when the new building should be completed, to grant a lease of the premises, the defendant agreeing to accept such lease when required:—Held, that the plaintiffs, waiving the specific performance of that part which related to the building of the house, might be entitled to damages for the breach thereof, and to specific performance of the other part, viz. the contract to accept the lease. *London Corporation* v. *Southgate*, 38 L. J., Ch. 141; 20 L. T. 107; 17 W. R. 197.

Held, also, that such waiver might be made at the bar, and need not be offered by the bill. *Ib.*

A plaintiff agreed to take a house and premises for three years, and the defendant agreed to put the same in substantial and decorative repair, and keep the same so during the term. The plaintiff entered into possession, but the defendant refused to perform his part of the agreement. The court decreed specific performance, and directed an inquiry whether the agreement as to decorative repairs had been performed, and if not, decreed that the lessor should compensate the lessee in damages. *Samuda* v. *Lawford*, 4 Giff. 42; 8 Jur. (N.S.) 739; 6 L. T. 890.

A mortgagor agreed to grant a lease of a shop; the lessee entered into possession and commenced alterations; the mortgagees refused to confirm the lease or to allow him to proceed with the alterations. Upon a bill against the lessor for specific performance:—Held, as damages had clearly been sustained, that the court would make an order to assess them, though the 21 & 22 Vict. c. 27, in simple cases never intended to transfer the jurisdiction from a court of law to a court of equity. *Howe* v. *Hunt*, 31 Beav. 420; 32 L. J., Ch. 36; 8 Jur. (N.S.) 834; 7 L. T. 124; 10 W. R. 813.

—— **How Assessed.**]—The plaintiff agreed with the defendant to take a lease of premises belonging to the defendant for the purpose, as the defendant knew, of carrying on a trade which the plaintiff was about to commence. In consequence of his wilful refusal to fulfil his agreement, the plaintiff was unable for fifteen weeks to commence his trade:—Held, that in addition to judgment for specific performance of the agreement, damages must be awarded in respect of the loss of profits from his trade during the fifteen weeks; and 250*l.* damages were awarded. *Jaques* v. *Millar*, 47 L. J., Ch. 544; 6 Ch. D. 153; 37 L. T. 151; 25 W. R. 846.

—— **Covenant not to Underlet.**]—A., a lessee under a lease containing a covenant not to assign or underlet without a licence from the lessor, and a proviso for re-entry on breach of the covenant, agreed to grant an under-lease, but his lessor requiring a consideration for a licence which A. considered excessive, A. refused to complete. In a suit by the proposed under-lessee against A., the court made a decree for specific performance, with a reference as to damages in case the defendant should be unable to procure the licence. *Hilton* v. *Tipper*, 18 L. T. 626; 16 W. R. 888.

In every case where there is a valid contract and an unexceptionable subject, and the parties are under no disability, the court has power to decree damages. *Ib.*

In Substitution for Specific Performance.]—Semble, that the court will not enforce against a mortgagee specific performance of an agreement for a lease in which the mortgagor refuses to concur, but will give damages in substitution for the specific performance, where the concurrence of the mortgagor is no part of the agreement. *Franklinski* v. *Ball*, 4 N. R. 128; 10 Jur. (N.S.) 606; 10 L. T. 446; 12 W. R. 845.

And see *Howe* v. *Hunt*, supra.

A railway company agreed for valuable consideration with a landowner to erect, construct and fit up a station on certain lands which they had bought from him. The agreement contained no further description of the station, nor any stipulations as to the use of it. The company having refused to erect a station in the specified place, and substituted one at a distance of two miles:—Held, that the case was one in which justice could be better done by an inquiry as to damages than by a decree for specific performance. *Wilson* v. *Northampton and Banbury Jn. Ry.*, 43 L. J., Ch. 503; L. R. 9 Ch. 279; 30 L. T. 147; 22 W. R. 380.

No Special Injury.]—The court will not, under the terms of the 21 & 22 Vict. c. 27, award any damages to a plaintiff, in addition to specific performance, where it does not appear that he has suffered any special injury from the delay which has occurred in the completion of the contract. *Chinnock* v. *Ely* (*Marchioness*), 2 H. & M. 221; 34 L. J., Ch. 399; 13 W. R. 178.

Defendant agreed to let premises for one year, with option for a lease for seven, fourteen or twenty-one years. Plaintiffs, having gone into possession under the agreement, and having laid out money in alterations, at the end of the year gave notice of their intention to exercise the option. The defendant could only shew title to a moiety of the premises. The defendant was decreed to perform specifically so much of the contract as she was able to perform, with an abatement of one moiety of the rent. An inquiry as to damages was refused, there being no evidence to shew that the plaintiffs had sustained any damage. *Burrow* v. *Scammell*, 51 L. J., Ch. 296; 19 Ch. D. 175; 45 L. T. 606; 30 W. R. 310.

S. contracted with J. for the purchase of a leasehold interest. S. entered into possession, with J.'s consent, in February, 1867, and on the 27th November J. forcibly turned S. out of possession. S. brought an action for specific performance and for damages. A decree was made for specific performance with costs against J., but the court refused an inquiry as to damages. *Johnston* v. *Johnston*, 17 W. R. 278.

iii. *Where an Action for Specific Performance is not Maintainable.*

What Relief granted.]—Under the 21 & 22 Vict. c. 27, damages, independent of relief, cannot be given by a court of equity, but the usual account of interest and rent will be directed. *Chinnock* v. *Sainsbury*, 30 L. J., Ch. 409; 6 Jur. (N.S.) 1318; 3 L. T. 258; 9 W. R. 7.

The court has power to entertain questions of compensation for damages under 21 & 22 Vict. c. 27, only in those cases where it has power to enforce specific performance. *Rogers* v. *Challis*, 27 Beav. 175; 29 L. J., Ch. 240; 6 Jur. (N.S.) 334. S. P., *De Brassac* v. *Martyn*, 9 L. T. 287; 11 W. R. 1020.

Where a plaintiff has, by delay in prosecuting a suit, allowed the term in an agreement for the lease of a house to expire before the cause can be heard, the court will not direct an inquiry as to damages. *Ib.*

Where a plaintiff fails to establish any covenant, contract or agreement of which specific performance can be directed, the court has no jurisdiction to grant relief in damages. *Lewers* v. *Shaftesbury* (*Earl*), L. R. 2 Eq. 270; 12 Jur. (N.S.) 389; 14 L. T. 855.

It is not the intention of 21 & 22 Vict. c. 27, s. 3, to enable a party to have damages for breach of specific performance assessed, where he has good reason to believe that a bill for specific performance cannot be sustained; but where on a bill for the specific performance of an agreement to grant a lease, it appeared that the defendant could not grant the lease on account of the mortgagees refusing to concur, the court directed an inquiry what damages the plaintiff had sustained by reason of the defendant's breach. *Howe* v. *Hunt*, 31 Beav. 420; 32 L. J., Ch. 36; 8 Jur. (N.S.) 834; 7 L. T. 124; 10 W. R. 813.

Plaintiff with no Title to Relief.]—Where in the result it appears that at the time of the plaintiff filing a bill for specific performance, he had no title to any equitable relief, the court has no power to assess damages under the 21 & 22 Vict. c. 27. *Ferguson* v. *Wilson*, 12 Jur. (N.S.) 912; 15 L. T. 230; 15 W. R. 80.

The act 21 & 22 Vict. c. 27, was never intended to transfer the jurisdiction of a court of law to a court of equity, but to enable a court of equity to do complete justice between the parties in matters actually within its own jurisdiction. *Ib.*

—— **Breach by Assignee.**] — Although the Chancery Division of the High Court exercises both legal and equitable jurisdictions, those jurisdictions still exist, and the court still acts upon the rule that there could be no damages at law for a breach by the assignee of an agreement. *White* v. *Boby*, 37 L. T. 652; 26 W. R. 133.

Damages instead of specific performance will only be given when a plaintiff had an equity at the time of issuing the writ. *Ib.*

As Consequential Relief.]—Although relief by award of damages, under 21 & 22 Vict. c. 27, is in the nature of consequential relief, yet the court has jurisdiction to grant it, notwithstanding that it may not be in a position at the hearing to grant an injunction or a specific performance on which the right to damages depends. *Cory* v. *Thames Ironwork and Shipbuilding Co.*, 2 N. R. 16; 8 L. T. 237; 11 W. R. 589.

—— **Acquiescence.**]—A plaintiff, though barred by acquiescence or otherwise from his remedy by injunction, may obtain damages under the 21 & 22 Vict. c. 27, and that even though no action would be maintainable by the plaintiff. *Eastwood* v. *Lever*, 33 L. J., Ch. 355; 3 N. R. 232; 9 L. T. 615; 12 W. R. 195—L.JJ.

Damages not asked for.]—In a case for an injunction which, from circumstances arising after the bill was filed, could not be granted, the

court, under the 21 & 22 Vict. c. 27, s. 2, awarded damages, though not specifically prayed for by the bill. *Catton* v. *Wyld*, 32 Beav. 266.

Agreement Court could not enforce.]—Where there was an implied covenant by lessor to procure land by certain compulsory powers and these powers expired:—Held, that as the court could not have compelled the defendant to provide the land, it had no jurisdiction to award damages. *Acraman* v. *Price*, 24 L. T. 487; 19 W. R. 364.

Agreement to Repair.]—A. agreed with the plaintiff to grant a lease of premises, and to execute such repairs as they should jointly agree upon; upon the performance of which stipulation the plaintiff agreed to accept a lease. The plaintiff entered, and, after several years, A. died without any joint agreement having been come to as to the repairs, and having, shortly before his death, sold the premises. On a bill against the purchaser and A.'s executors, for specific performance and damages:—Held, that the 21 & 22 Vict. c. 27, did not apply. *Norris* v. *Jackson*, 1 J. & H. 319; 7 Jur. (N.S.) 540; 4 L. T. 503.

Several Agreements.]—The plaintiffs claimed the specific performance of an agreement for the composition of a literary work by the defendant, contained in three written documents. At the trial the first and third of the documents were proved; the second was not produced, nor was any evidence given of its contents. The defendant, by his statement of defence, denied that he had agreed with the plaintiffs as alleged by them with reference to the second document:—Held, that the plaintiffs were not entitled to specific performance of the agreement or to damages for the breach of it. *Post* v. *Marsh*, 50 L. J., Ch. 287; 16 Ch. D. 395; 43 L. T. 628; 29 W. R. 198.

Agreement to Advance Money.]—A Gibraltar firm entered into a contract with A., in Spain, to open a credit in his favour and to honour his drafts. After advancing him some sums of money, they refused to make any further advances. Proceedings were thereupon commenced by him in the Supreme Court of Gibraltar to enforce a specific performance of the contract, and to obtain an award of damages under 21 & 22 Vict. c. 27, for the non-performance of the contract:—Held, that a court of equity will not decree the specific performance of a mere agreement to advance money. Moreover, that that being so, it has no jurisdiction to award damages. *Larios* v. *Gurety*, L. R. 5 P. C. 346.

Though the Supreme Court of Gibraltar may be bound, in administering the law, to follow the prinicples which govern English courts of law, and, in administering equity, to follow the principles which govern English courts of equity, yet where a suit for specific performance is wrongly begun, it may amend the pleadings and continue as if the action were for damages. *Ib.*

Contract to pay Money.—The court will not entertain a bill for specific performance of a contract to pay a sum of money, either on the ground of part performance, or on the ground that for want of formality the contract is not enforceable at law; nor in such a case can the court give damages in lieu of specific performance under 21 & 22 Vict. c. 27. *Crampton* v. *Varna Ry.*, 41 L. J., Ch. 817; L. R. 7 Ch. 562; 20 W. R. 713.

Agreement for Partnership.]—Upon a bill for specific performance of agreement for a partnership:—Held, that the court would not grant damages under 21 & 22 Vict. c 32, there being a difficulty in suing at law, and no case which would have entitled the plaintiff to relief before the act. *Scott* v. *Rayment*, 38 L. J., Ch. 48; L. R. 7 Eq. 112; 19 L. T. 481.

Sale of Land to Railway—Bridges over Land.]—A railway company contracted with A. to purchase not less than eight acres of his land, for which they were to pay at the rate of 1,000*l.* an acre over and above the compensation to be awarded to him for severing and otherwise injuring his estate. The company took more than the eight acres, for which they paid him the price agreed for, and also 2,660*l.*, being the amount awarded for injuring and severing his property. Some years after the railway was made A. alleged that by the true construction of the agreement he was entitled to receive payment at the above rate of 1,000*l.* an acre, for portions of his roads, amounting to about three roods, over which the railway company had thrown bridges:—Held, that, assuming the construction of the agreement to be as A. contended, it was such a contract as the court would not decree specific performance of, but would leave A. to his legal remedy. *Ingram* v. *Midland Ry.*, 3 L. T. 533.

Covenant to employ Porter to perform certain Duties.]—The defendants demised to the plaintiff a residential flat, and covenanted to appoint a resident porter who should be constantly in attendance, either by himself or, in his temporary absence, by some trustworthy assistant. The defendants appointed as porter a man who did not do his duties:—Held, that this was not a contract of which the court would decree specific performance, and that the plaintiff must be left to his remedy in damages. *Ryan* v. *Mutual Tontine Westminster Chambers Association*, 62 L. J., Ch. 252; [1893] 1 Ch. 116; 2 R. 156; 67 L. T. 820; 41 W. R. 146—C. A.

Ejectment.]—The defendant, in December, 1873, demised to the plaintiff premises for twenty-one years. In October, 1874, the defendant commenced an action of ejectment against the plaintiff for breach of covenant. The plaintiff then had the premises examined, and found that in several respects the provisions of the Metropolitan Building Act, 18 & 19 Vict. c. 122, had been violated. The plaintiff by his bill sought to have the lease cancelled, the action of ejectment stayed, and damages awarded:—Held, that as the bill was filed before the Judicature Acts came into operation, and was really for damages and not for the rescission of a contract, as the defendant did not seek to enforce the contract, it could not be sustained. The plaintiff's remedy was at law and not in equity. *Thorley* v. *Glossop*, 34 L. T. 169. *And see cases* supra, col. 1806.

3. Rescission.

When Decree not Obeyed.]—A plaintiff in a specific performance suit may obtain a rescission of the contract on the defendant's default to obey the decree. *Watson* v. *Cox*, 42 L. J., Ch. 279;

L. R. 15 Eq. 219; 27 L. T. 814; 21 W. R. 310.

After decree against a purchaser for specific performance, the defendant made default in payment of the purchase-money:—Held, that the vendor was entitled to rescind the contract. *Foligno* v. *Martin*, 16 Beav. 586.

A decree for specific performance was made against a purchaser in possession, but he was unable to complete the purchase. The court rescinded the contract and ordered the purchaser to pay to the vendor the rents received by him, together with the costs of suit and those occasioned by the non-completion of the purchase. *Clark* v. *Wallis*, 35 Beav. 460.

A decree for specific performance was made against a purchaser. Not having paid the purchase-money, he was ordered, on motion, to pay it within a limited time, and in default, that the contract should be rescinded and all proceedings stayed. He was also ordered to pay the costs of the motion. *Simpson* v. *Terry*, 34 Beav. 423. S. P., *Dunn* v. *Vere*, 23 L. T. 432; 19 W. R. 151.

—— **Damages.**]—On default by purchaser after decree for specific performance:—Held, that the plaintiffs were only entitled to have the agreement rescinded, and could not at the same time claim damages for its breach. *Henty* v. *Schröder*, 48 L. J., Ch. 792; 12 Ch. D. 666; 27 W. R. 833.

After decree, on default by defendant and an attachment for default, the court rescinded the contract and stayed all proceedings except as to such application as the plaintiff might make to assess damages caused by breach of contract. *Sweet* v. *Meredith*, 4 Giff. 207; 32 L. J., Ch. 147; 9 Jur. (N.S.) 569; 7 L. T. 664.

—— **Lien.**]—A vendor obtained judgment for specific performance, a declaration of lien, and liberty to apply to enforce it; on the purchaser making default:—Held, that the agreement might be rescinded, instead of enforcing the lien. *Henty* v. *Schröder* (supra) distinguished. *Baker* v. *Williams*, 62 L. J., Ch. 315; 3 R. 305; 68 L. T. 634; 41 W. R. 375.

—— **Default of Party obtaining Decree—Costs.**]—After a decree for specific performance, if the party in whose favour the decree has been made is unable or neglects to carry the decree into effect, the person against whom the decree was made is entitled to an order for rescission of the contract, retaining the benefit of any direction as to costs of the action, but not to damages or to occupation rent. He is also entitled to the costs of obtaining the order for rescission. *Henty* v. *Schröder* (supra), *Foligno* v. *Martin* (supra), and *Watson* v. *Cox* (supra), explained and followed. *Sweet* v. *Meredith* (supra) not followed. *Hutchings* v. *Humphreys*, 54 L. J., Ch. 650; 52 L. T. 690; 33 W. R. 563.

Order to Pay Purchase-Money.]—After a decree, the defendant, the purchaser, refused to complete by payment of the purchase-money. At the instance of the plaintiff, who had executed the conveyance, which had been approved in chambers, an order was made appointing a time and place for the defendant to pay the purchase-money on delivery to him of the conveyance executed by the plaintiff. *Morley* v. *Clavering*, 30 Beav. 108; 9 W. R. 801.

Attachment.]—When a person has been directed to execute a lease, but refuses to do so, the court can only enforce such execution by attachment, the Trustee Act, 1850, having omitted to provide for such a case. *Grace* v. *Baynton*, 25 W. R. 506.

Execution of Lease.]—A decree for specific performance of an agreement to grant a new lease, and the defendant was ordered to execute such new lease. The defendant having refused to obey the order, the plaintiff moved for leave to issue a writ of attachment against her:—Held, that there having been a decree for specific performance, the court had jurisdiction under s. 30 of the Trustee Act, 1850, to appoint a person to execute the lease in place of the defendant. The motion having been amended, an order was made declaring the defendant a trustee of the premises within the meaning of the Trustee Act, and a person was appointed in place of the defendant to execute the lease to the plaintiff. *Hall* v. *Hall*, 51 L. T. 226. *See now* 47 & 48 Vict. c. 61, s. 14. And see *Jessop* v. *Smyth*, [1895] 1 Ir. R. 508, supra, col. 1766.

Delivery of Deeds.]—The decree in a vendor's action for specific performance directed that, on the plaintiff executing an assignment and delivering to the defendant the deeds and writings relating to the property, the defendant should pay to the plaintiff the amount certified to be due for purchase-money, interest and costs. The plaintiff executed the assignment, and tendered the deeds to the defendant. The defendant refused to receive the deeds, or to pay the money. The plaintiff moved for leave to issue execution for the amount certified to be due, on the ground that he had performed the condition:—Held, that the plaintiff must deposit the executed assignment and the deeds in court, and on such deposit an order should be drawn up that the defendant should pay the amount certified and the costs of the motion within four days. *Bell* v. *Denvir*, 54 L. T. 729; 34 W. R. 638.

Form of Order.]—Form of order on further consideration in an action for specific performance by vendor where the defendant has persistently endeavoured to evade the judgment. *Morgan* v. *Brisco*, 55 L. J., Ch. 194; 31 Ch. D. 216; 53 L. T. 852; 34 W. R. 193.

Form of four-day order in an action by vendor for specific performance, where the defendant has persistently endeavoured to evade both the judgment and the order on further consideration. *S. C.*, 32 Ch. D. 192; 54 L. T. 230; 34 W. R 360.

Motion for Payment into Court.]—By the judgment in an action by vendors it was ordered that an account should be taken of what was due to the plaintiffs; that the plaintiffs should be at liberty to prepare and execute a conveyance of the property to the defendant (as an escrow to be delivered to the defendant on payment of the balance of purchase-money, interest and costs within the time limited); and that the defendant should pay to the plaintiffs the balance of the purchase-money, interest and costs, and thereupon the plaintiffs should deliver to the defendant the conveyance and the title deeds. This order was not served on the defendant. The plaintiffs attended on the day fixed with the conveyance and title deeds, but the defendant did not attend:—Held, that an order for payment into court

could not be made, but that the plaintiffs were entitled to a new order for payment to themselves of the amount found due within seven days after service of such new order for the purpose of working out the former order. *Robinson* v. *Galland*, 60 L. T. 697; 37 W. R. 396.

The Metropolitan Board of Works agreed to purchase houses of the plaintiffs. They afterwards claimed an abatement of the purchase-money on the ground that plaintiffs' lease was shorter than he had represented. The plaintiff refused to make the abatement, and brought an action against the board for specific performance of the agreement. The board then moved for an order giving them possession of the houses on their paying into court the amount of the agreed price with interest, and the judge made the order:—Held, on appeal, that the judge had no power to make the order as the statutory requirements had not been complied with. *Bygrave* v. *Metropolitan Board of Works*, 55 L. J., Ch. 602; 32 Ch. D. 147; 54 L. T. 889; 50 J. P. 788—C. A.

Appointment of Receiver.]—In an action for specific performance of an agreement to execute a bill of sale, the plaintiff applied ex parte, and before the appearance of the defendant, for the appointment of a receiver, and the usual order was made directing a reference to chambers to appoint a receiver:—Held, that the plaintiff was entitled to have the property protected in the meantime, and the order of the court below varied by directing the appointment of the plaintiff as interim receiver without security for fourteen days, or until a receiver should be appointed under the order. *Taylor* v. *Eckersley*, 45 L. J., Ch. 527; 2 Ch. D. 302; 34 L. T. 637; 24 W. R. 450—C. A.

And see *Cook* v. *Andrews*, 66 L. J., Ch. 137; [1897] 1 Ch. 266; 76 L. T. 16.

Defendant not Appearing.]—In a vendor's action the defendant delivered a defence admitting that he was unwilling to complete, and did not appear at the trial:—Held, that the plaintiff was not entitled to immediate judgment rescinding the contract and forfeiting the deposit, but only to the usual judgment for specific performance. *Stone* v. *Smith*, 56 L. J., Ch. 871; 35 Ch. D. 188; 56 L. T. 333; 35 W. R. 545.

Where a condition of sale empowered vendor on purchaser failing to complete, to forfeit deposit and resell, and the defendant did not complete at the time fixed, and did not appear to the writ:—Held, that, in lieu of judgment for specific performance, a declaration may be made that the vendor is entitled to forfeit the deposit and resell the property, if the writ has claimed such a declaration in the alternative. But held, that the order should direct plaintiff to pay the costs of the action. *Stone* v. *Smith* (supra) distinguished. *Kingdon* v. *Kirk*, 57 L. J., Ch. 328; 37 Ch. D. 141; 58 L T. 383; 36 W. R. 430.

Writ of Execution.]—Where a covenant in an agreement for a lease was broken, and a verdict obtained for 1,500*l.* as damages for the breach, but the plaintiff in the action died before the judgment was perfected, so that the damages were lost at law, the court, on a bill by his representatives for specific performance of the agreement, refused a writ of ne exeat regno for the amount. *Jenkins* v. *Parkinson*, 2 Myl. & K. 5; Coop. t. Brough, 179; 3 L. J., Ch. 36.

II. DEFENCES.

A. FROM CONDUCT OF PARTIES.

1. Mistake.

General Principle.]—Principles on which the court proceeds in refusing specific performance in cases of mistake. *Swaisland* v. *Dearsley*, 29 Beav. 430; 30 L. J., Ch. 652; 7 Jur. (N.S.) 984; 4 L. T. 432; 9 W. R. 526.

When the description of property sold is ambiguous, and the purchaser swears he made a mistake, and this is not disproved, the contract will not be enforced; but if there appears no ground on the particulars for the mistake, it is not sufficient for the purchaser to swear that he has made a mistake. *Ib.*

Where, upon a sale by public auction, there was in the description of the property something about which a person might bonâ fide make a mistake, and the purchaser swore positively that he did make a mistake, the court refused to enforce specific performance of the contract against him. *Ib.*

Specific performance of an agreement the subject of discretion, refused in the case of mistake, though no fraud. *Mason* v. *Armitage*, 13 Ves. 25; 9 R. R. 131.

Where a contract cannot be performed specifically, the court will not interfere, in the absence of any step taken to reform the agreement, so as to make a new contract, even although there has been a virtual mistake, but will leave the plaintiff to his relief in damages. *Raphael* v. *Thames Valley Ry. Co.*, 35 L. J., Ch. 659; 12 Jur. (N.S.) 656; 14 L. T. 652; 14 W. R. 750.

Caused by one Party.]—The purchaser may escape from his bargain on the ground of mistake, if it was a mistake which the vendors contributed to; if the mistake was entirely his own, then the court ought not to let him off his bargain. *Goddard* v. *Jeffreys*, 51 L. J., Ch. 57; 45 L. T. 675; 30 W. R. 270.

Specific performance of a contract will not be enforced where the defendant has contracted under a mistake to which the plaintiff has by his acts even unintentionally contributed. *Bashcomb* v. *Beckwith*, 38 L. J., Ch. 536; L. R. 8 Eq. 100; 20 L. T. 862; 17 W. R. 812.

The owner of an estate put up the whole estate, except a small piece of land, for sale in lots, subject to conditions which provided that no public-house should be built and no trade carried on upon the property:—Held, that a purchaser of a mansion-house a hundred yards distant from the excepted piece of land, who had purchased in the belief that the whole of the vendor's estate would be subject to the restrictive conditions, could not be compelled to complete his purchase unless the vendor would enter into restrictive covenants as to the excepted piece of land. *Ib.*

It is a settled principle, that if a purchaser contracts under a bonâ fide mistake, not attributable to any negligence of his own, the court will not enforce specific performance; and if that mistake is in any degree occasioned or confirmed by erroneous statements on the part of the vendor, although innocently made, the court will not decree a specific performance. *Mowey* v. *Bigwood*, 4 De G. F. & J. 351; 8 Jur. (N.S.) 803; 10 L. T. 466; 12 W. R. 811.

Where a purchaser contracts under a natural

mistake, which is not attributable to any negligence on his part, it is the duty of the vendor to relieve him from that mistake. *Ib.*

Where a purchaser, after an inspection of some property, had entered into a contract under a mistake that a piece of ground was to form part of the conveyance, and the mistake was not attributable to any neglect upon his part, but was in some degree occasioned by statements of the vendor:—Held, that the vendor was not entitled to have a specific performance of the contract. *Ib.*

Where the boundary of an estate was denoted by stumps hid by shrubs, and a purchaser after inspection bought in the belief that the boundary was an iron fence surrounding the shrubs, which fence was not indicated on the plan:—Held, that the purchaser inspecting the property with the plan in his hand would naturally conclude the iron fence to be the boundary; that there was nothing to put him on inquiry whether it was not; that he had been misled by the fault of the vendors: and that specific performance could not be decreed against him. *Denny* v. *Hancock*, L. R. 6 Ch. 1; 23 L. T. 686; 19 W. R. 54.

Purchaser Negligent.]—Mistake of fact is not the less a ground for relief because the person who has made the mistake had the means of knowledge. *Willmott* v. *Barber*, 15 Ch. D. 96; 43 L. T. 95; 28 W. R. 911.

In an agreement for the sale of shares of a coal mine there was an article stating two conveyances by which six undivided shares of the land, beneath which the coal lay, had been conveyed to the vendors' predecessor in title, but stating that there was no express mention in the conveyances of the minerals under the land, and requiring that the purchasers should assume that six undivided shares of the minerals passed by the conveyances of the land, and thereby became absolutely vested in the vendors' predecessor in title. In the abstract furnished mention was made of a deed, and on inquiry the purchasers were told it was lost and it was believed that it did not affect the vendors' title. Subsequently, the deed was found and shewed that the six undivided shares belonged to some person quite different from the vendors, and that neither they nor their predecessor in title had ever had any title to those shares. The purchasers refused to proceed, whereupon the vendors brought this action for specific performance:—Held, that as there had been no fraud in the matter, but the vendors had acted under a bonâ fide mistake, and the purchasers had had the fact that there was a doubt as to the title brought to their notice before entering into the agreement, and had thought fit to run the risk of taking the property without having the matter cleared up, specific performance of the agreement ought to be decreed with a deduction from the purchase-money as compensation to the purchasers for the loss of the six shares. *English* v. *Murray*, 49 L. T. 35; 32 W. R. 84.

Where a purchaser relying on his knowledge of the property, purchased an inn and a saddler's shop in the belief that two pieces of garden ground at the back, in the occupation of the tenants of the inn and shop, were included in the sale, though this was not so stated in the description of the property:—Held, that the purchaser could not resist specific performance on the ground of mistake. *Tamplin* v. *James*, 15 Ch. D. 215; 43 L. T. 520; 29 W. R. 311.

Where specific performance is refused on the ground of mistake by the defendant, so that under the old practice a bill for specific performance would have been dismissed without prejudice to an action, the court will proceed to consider the question of damages. *Ib.*

Where defendant purchased a public-house in the belief that the freeholder had effectively released a restrictive covenant, but the abstract delivered shewed that the consent of another party was necessary, and, notwithstanding this, the defendant paid his purchase-money and took possession:—Held, that the defendant, not having discovered the mistake till after completion through his own negligence, was too late in taking his objection, and specific performance was decreed. *Allen* v. *Richardson*, 49 L. J., Ch. 137; 13 Ch. D. 524; 41 L. T. 614; 28 W. R. 313.

Two sets of particulars were issued, the second only stating that lot eight was subject to a mortgage. Defendant attended sale with a copy of the first particulars, and bought lot eight. The contract was signed on a copy of the second particulars, which the auctioneer had read out. The defendant refused to complete his contract, on the ground that he had supposed the lot to be free from incumbrances:—Held, that, if he had made any mistake, it was owing to his own gross negligence, and the vendor was entitled to specific performance. *Goddard* v. *Jeffreys*, 51 L. J., Ch. 57; 45 L. T. 674; 30 W. R. 269.

The particulars described the lot as let to a responsible tenant for a term of which seventeen years were unexpired. It appeared that only fifteen years of the term were unexpired, and it was determinable in 1881 or 1888, at the option of the tenant:—Held, not to entitle the purchaser to resist specific performance. *Ib.*

Condition inserted by Mistake—Sale under Foreclosure Decree.]—A mortgagee, with power of sale, obtained a foreclosure decree, and then entered into an agreement to sell the estate, with a clause providing that as the vendor was mortgagee, with power of sale, she would only enter into the usual covenant that she had not incumbered. The purchaser objected to the validity of the foreclosure decree, and insisted upon having the conveyance under the power of sale; and on the vendor declining to convey in that form, instituted a suit for specific performance, in which the vendor adduced evidence, shewing that the above-mentioned clause was inserted by inadvertence, and that she never intended to incur the risk of opening the foreclosure by conveying under the power:—Held, that the misapprehension was a sufficient defence to the enforcement of a conveyance under the power. *Watson* v. *Marston*, 4 De G. M. & G. 230.

Contract in fieri.]—Where one party seeks the execution of a contract which is still in fieri, the other may shew that the contract was not conformable to the real intention of the parties. *Law* v. *Warren*, 1 Dr. 31; 6 Ir. Eq. R. 299.

But where the contract has been executed, it is not open to a party, by way of defence, to allege that the instrument does not truly contain the real contract of the parties. *Ib.*

To sustain such a defence, the defendant must file a bill to reform the contract. *Ib.*

Contract completed.]—Semble, that the court will, even in the case of a completed contract, give relief against a common mistake without fraud. *Jones* v. *Clifford*, 45 L. J., Ch. 809; 3 Ch. D. 779; 32 L. T. 93.

Contract Ambiguous.]—Where an agreement is in writing and is unambiguous, it is the duty of the court to construe it quite independently of the ideas of the parties as to what it means, but where an agreement is ambiguous or capable of two constructions, semble, it would be very strange indeed if a plaintiff, who had always acted on the one construction, should succeed in persuading the court to grant specific performance on the footing that it ought to bear the opposite construction. *Marshall* v. *Berridge*, 51 L. J., Ch. 329; 19 Ch. D. 241; 45 L. T. 599.

A contract for the sale and purchase of an uncertain thing, the extent and value of which is understood to be unknown to both parties, is valid, and neither party can resist completing, merely because the reality has turned out to be different from what was anticipated. *Baxendale* v. *Seale*, 19 Beav. 601; 24 L. J., Ch. 385; 1 Jur. (N.S.) 581.

But where something different from what is claimed by the purchaser was intended to be sold by the vendor, the court will not compel the latter specifically to perform the contract, which, in substance, though not in terms, is really different from that which was entered into. *Ib.*

Where the terms of a contract are ambiguous, and, by adopting the construction of the purchaser, would compel the vendor to convey property not intended, or believed by him to be included in the contract, the court will not decree a specific performance. *Ib.*

Construction of Contract in Dispute.]—Where in an action for specific performance the parties disputed the construction of the agreement, the defendant swearing that his intention at the time of executing the agreement was not according to the construction contended for by the plaintiff, the court being satisfied that there had been no concord between the parties, dismissed the bill. *Griffin* v. *Coleman*, 28 L. T. 493.

The owner of a mill and piece of ground adjoining a canal, sold the mill. By the Canal Act, owners of land within twenty yards of the canal were authorised to draw water for the sole purpose of condensing steam. The contract was silent as to the right to the water; but the plaintiff alleged that he bought on the faith of having the water, while the defendant alleged that he never intended to sell it:—Held, that he was not entitled to a decree for specific performance, as it was a case of mistake. *Butterworth* v. *Walker*, 11 L. T. 436; 13 W. R. 168.

The court will not decree a specific performance against a party who has mistaken a material fact in the agreement. Where, on an agreement for the sale of a garden, it was clear that the vendor could never have intended that buildings which had been erected on part of the garden, and necessary to the enjoyment of his own premises, were within the agreement, and formed part of the premises to be conveyed, a specific performance was refused. *Neap* v. *Abbott*, C. P. Cooper, 333.

Term Omitted.]—Specific performance of an agreement which is clearly worded, cannot be resisted on the ground that other terms must have been in contemplation of the parties, shewn by the improvidence of the express contract. *Sullivan* v. *Jacob*, 1 Moll. 473.

The proof must be very clear which should induce a court of equity to refuse to enforce a written agreement, upon the ground that a term of the real agreement between the parties has been omitted by mistake. *Clay* v. *Rufford*, 8 Hare, 281; 19 L. J., Ch. 295; 14 Jur. 803.

Specific performance of a written agreement refused, on parol evidence that one term of the actual agreement was omitted. *Garrard* v. *Grinling*, 2 Swanst. 244; 1 Wils. 460.

Where the defendant asserted that there had been a verbal agreement as to a premium which was not mentioned in the written agreement, and this was disproved, but in the defendant's letter containing the first offer of terms to the plaintiffs there was the following passage: "I am giving to all the brewers who have left cards the offer in rotation"; and it was proved, that immediately before the offer to the plaintiffs the defendant had offered the premises to another brewer on the same terms as to the plaintiffs, viz., with the additional term of the premium:—Held, that this was sufficient evidence of a mistake by the defendant in accidentally omitting the premium in the terms first mentioned to the plaintiffs. *Wood* v. *Scarth*, 2 K. & J. 33; 1 Jur. (N.S.) 1107; 4 W. R. 31.

The defendant was not prevented from setting up the defence of mistake in his original proposition because he had also set up the defence (which failed) that the plaintiffs had agreed to vary the terms of that original proposition. *Ib.*

Before the sale a second set of particulars reserving a right of way were issued. These particulars were read by the auctioneer. The contract was signed by the auctioneer (inadvertently) and by the purchaser on a copy of the particulars of sale not containing the reservation. After the purchase-money was paid and possession given, the purchaser filed his bill for a specific performance of the contract without the reservation; and the bill was dismissed without costs. *Manser* v. *Back*, 6 Hare, 443.

As to Legal Effect of Contract.]—It is no answer to a suit for specific performance for the defendant to say that, though he understood what the words of the agreement were, he was under a mistake as to their legal effect. *Evershed* v. *Evershed*, 46 L. T. 690; 30 W. R. 132. S. P., *Hart* v. *Hart*, 50 L. J., Ch. 697; 18 Ch. D. 670; 45 L. T. 13; 30 W. R. 8; *Powell* v. *Smith*, 41 L. J., Ch. 734; L. R. 14 Eq. 85; 20 W. R. 602.

Where a written agreement has been signed, though it is in some cases a defence to an action for specific performance according to its terms that the defendant did not understand it according to what the court holds to be its true construction, the fact that the plaintiff has put an erroneous construction upon it, and insisted that it included what it did not include, does not preclude the plaintiff from waiving the question of construction and obtaining specific performance according to what the defendant admits to be its true construction. *Preston* v. *Luck*, 27 Ch. D. 497.

Result of Mistake Proved.]—Though a defendant to a bill for specific performance may have a decree for performance, according to its construction, if adopted by the court, without a cross-bill, the decision being, not according to his

construction, but only that he had contracted under a mistake, created by the plaintiff, the bill was merely dismissed. *Higginson* v. *Clowes*, 15 Ves. 516; 10 R. R. 112.

Evidence.]—Parol evidence admissible in opposition to specific performance of written agreement upon heads of mistake or surprise, as well as of fraud, and upon such evidence the bill was dismissed. Another bill for specific performance of agreement, corrected according to the same evidence, contradicted by answer, was also dismissed. *Townsend* v. *Strangroom*, 6 Ves. 328; 5 R. R. 312.

Verbal declarations of an auctioneer at the time of sale not to be received in contradiction to the printed particulars. But quære as to the effect of personal information of a mistake in the particulars. *Ogilvie* v. *Foljambe*, 3 Mer. 53; 17 R. R. 13.

Mistake as to Extent of Property.]—Where a vendor instructed an auctioneer to sell certain premises, and by mistake on the part of the vendor, such instructions were wide enough to take in certain premises to which the vendor had no title, and a person who heard the particulars read at the auction became the purchaser, in the belief that he would obtain the whole of the premises:—Held, that mistake was no defence. *Dyas* v. *Stafford*, 7 L. R., Ir. 590.

Mistake as to Authority.]—Where a vendor made a bonâ fide mistake as to the authority which he had given to an auctioneer, and the property was knocked down to a purchaser for a less sum than that at which the vendor considered that he had instructed the auctioneer to sell, the court refused to decree specific performance at the instance of a purchaser. *Day* v. *Wells*, 30 Beav. 220; 7 Jur. (N.S.) 1004; 9 W. R. 857.

Mistake as to Price.]—Trustees not to be compelled to perform an agreement entered into under mistake, to sell for an inadequate consideration. *Bridger* v. *Rice*, 1 J. & W. 74.

A., by letter, offered to sell some property to B. for 1,250*l.* by mistake, intending 2,250*l.* B., by letter, accepted the offer. The court refused to enforce the contract. *Webster* v. *Cecil*, 30 Beav. 62.

Property unsuitable for Building.]—A. offered for sale a plot of land fronting the street, 176 feet deep, possessing a frontage of about 40 feet, which he described as well adapted for a carriage factory. B. contracted to purchase it as a site for a carriage factory, but discovered that he would not be able to build within 62 feet 3 inches of the street, by reason of the Metropolis Local Management Act, 25 & 26 Vict. c. 102, s. 75:—Held, that B. could resist specific performance on the ground that he had purchased under a misapprehension. *Bray* v. *Briggs*, 26 L. T. 817; 20 W. R. 962.

Mistake in Parcels.]—A vendor contracted to sell a certain leasehold messuage, but through a mistake in the parcels actually conveyed the next door to it, which also belonged to him:—Held, on an application to compel the purchaser to accept the title and pay the purchase-money into court, that the purchaser must do so. *Grissell* v. *Peto*, 2 Sm. & Gif. 39; 18 Jur. 591; 2 W. R. 178.

Contract by a railway company to grant a lease of the whole of a house No. 1, and part of a house No. 2; but only part of No. 1 was designated in the plan:—A bill to compel a lease of the whole house dismissed. *Richards* v. *North London Ry.*, 20 W. R. 194.

Wrong Lot.]—Where a party by mistake bid for the wrong lot, and was declared the purchaser:—Held, that as it was a clear mistake, the court would leave the party to his remedy at law, and the bill dismissed, without costs. *Malins* v. *Freeman*, 2 Keen, 25; 6 L. J., Ch. 133.

Clerical Error.]—A. agrees to be bound in a bond as a surety to B., and signs and seals it accordingly; but, by neglect, A.'s name was not inserted. The obligee shews the condition, and his name and seal, demands payment and threatens to sue him unless he would give fresh security, which A. agrees to, but after finding the mistake, refused, equity will compel him. *Crosby* v. *Middleton*, Pre. Ch. 309.

In the draft articles of an agreement a mistake of a name had been made. The court of chancery, on a consideration of what appeared in the bill and answer, and on a consideration of the articles themselves, directed the specific performance of them according to what appeared to be their plain intention:—Held, that the decree of the court of chancery was correct. *Wilson* v. *Wilson*, 5 H. L. Cas. 40; 23 L. J., Ch. 697.

Intoxication.]—Evidence that the defendant, a farmer, was incapable through intoxication of contracting when agreement was signed for sale of forty-five acres, and that he only owned thirty-five acres:—Held, that the circumstances were such as to bring the case within the rule of surprise and mistake, and bill dismissed with costs. *Cox* v. *Smith*, 19 L. T. 517.

2. MISREPRESENTATION AND MISDESCRIPTION.

Rescission or Specific Performance.]—Misrepresentation, though in a slight degree, is an objection to a specific performance. Distinction upon a bill to rescind the contract. *Cadman* v. *Horner*, 18 Ves. 13; 11 R. R. 135.

—— **Possession and Acts of Ownership.**]—There may be a degree of unfairness in obtaining articles for the purchase of an estate, for which this court will not set them aside; but will refuse its aid to carry them into execution. And if the party who obtained such articles hath been in possession, and made lasting improvements, he shall be allowed for them on consenting to deliver up the articles and account for the profits; otherwise, if he goes to law, and fails there. *Savage* v. *Taylor*, Cas. t. Talbot, 234.

—— **Acquiescence.**]—Misrepresentation, whereby one has been induced to enter into an agreement, may afford a good defence to a suit for specific performance of the agreement, although it is not such a clear and direct misrepresentation as would afford a good ground for a suit to set the agreement aside, or for an action for damages upon it. *Lamare* v. *Dixon*, 43 L. J., Ch. 203; L. R. 6 H. L. 414; 22 W. R. 49.

Where on agreement to take a lease the proposed tenant went into possession, and for two years called on the landlord from time to time to fulfil promises alleged to have been the inducement for the contract, and always paid his rent under protest:—Held, not such an acquiescence as to prevent the tenant from ultimately refusing to perform the contract. *Ib.*

Conduct of Parties.]—Unless it appear that the party seeking a specific execution of an agreement has acted not only fairly, but in a manner clear of all suspicion, equity will not interfere; for if there be a reasonable doubt on the transaction, the party will be left to his legal remedy for nonperformance of the contract. *O'Rourke* v. *Percival*, 2 Ball & B. 58; 12 R. R. 68.

The jurisdiction of the court to decree specific performance will not be exercised in favour of the vendor who fails to satisfy the court that he has done all he can to avoid misrepresentation. *Turquand* v. *Rhodes*, 37 L. J., Ch. 830; 18 L. T. 844; 16 W. R. 1074.

Equity will not decree an execution of articles unless fairly obtained, and without surprise or circumvention. *Phillips* v. *Bucks* (*Duke*), 1 Vern. 227.

Where an estate was devised to trustees to convert and hold upon certain trusts, and the trustees did not sell, but the cestuis que trustent sold to an annuitant, upon a bill filed by the purchaser against the trustee, and cestuis que trustent for a conveyance of the legal estate:—Held, that the purchaser must prove the transaction fair and perfect, before the court will interfere to give a complete title; and the bill was dismissed against the defendants, without costs, but as against the trustee with costs. *Hannah* v. *Hodgson*, 30 L. J., Ch. 738; 9 W. R. 129.

A party contending for specific performance must shew that his conduct has been fair. If he has made material misrepresentations to the defendant, it is no answer to say that the defendant might have found out that they were misrepresentations. *Cox* v. *Middleton*, 2 Drew. 209; 2 Eq. R. 631; 23 L. J., Ch. 618; 2 W. R. 284.

Misrepresentation voids Contract.]—Party obtaining an agreement by a partial misrepresentation, not entitled to a specific performance, on waiving the part affected by the misrepresentation. The effect of partial misrepresentation is not to alter or modify the agreement, pro tanto, but to destroy it entirely, and to operate as a personal bar to the party who has practised it. *Clermont* (*Viscount*) v. *Tasburgh*, 1 J. & W. 112; 20 R. R. 243.

Knowledge of Parties.]—Where misrepresentation is alleged, the plaintiff is barred by proof that he was from the beginning cognisant of all the matters complained of, or after full information of them continued to deal with the property. *Vigers* v. *Pike*, 8 Cl. & F. 650.

A purchaser, offering to perform his part of the contract, required, by notice, the vendor to complete within a month:—Held, that the purchaser could not afterwards set up, as a defence, misrepresentation of the vendor, of which he was aware at the time of giving the notice. *Macbryde* v. *Weeks*, 22 Beav. 533; 2 Jur. (N.S.) 918.

Where a purchaser can shew that he entered into a contract in reliance on the truth of representations which turn out to be false, and without resort to other means of information, he will not be compelled to perform it; but if, not satisfied with the representations, he investigates and inquires for himself, and has a fair opportunity of testing the accuracy of them, the vendor is relieved from responsibility. *Clarke* v. *Mackintosh*, 4 Giff. 134; 1 N. R. 160; 9 Jur. (N.S.) 114; 7 L. T. 558; 11 W. R. 183. Afterwards compromised on appeal, 11 W. R. 652.

Specific Performance with Abatement of Price.]—It is a general principle that where a misrepresentation is made by a vendor as to a matter within his knowledge, even though it may be founded upon an honest belief in the truth of what he states, and the purchaser has been misled by such misrepresentation, the purchaser is entitled to have the contract specifically performed so far as the vendor is able to do so, and to have compensation for the deficiency. *Durham* (*Earl*) v. *Legard* (34 Beav. 611) must be treated as an exception to the general rule. *Connor* v. *Potts*, [1897] 1 Ir. R. 534.

Caveat Emptor.]—The court will not apply the maxim, caveat emptor, to cover a false and positive representation, essentially material to the subject. *Lowndes* v. *Lane*, 2 Cox, 363.

Where a misrepresentation has been made by a vendor, the court applies the rule caveat emptor with great caution. *Colby* v. *Gadsden*, 34 Beav. 416; 17 L. T. 97; 15 W. R. 1185.

Where a purchaser agreed to buy an estate upon a statement that it lay upon coal, which coal afterwards proved to have been mostly worked out:—Held, that the doctrine of caveat emptor applied, and that it was the business of the purchaser to inquire as to the extent to which the coal had already been worked. *Ib.*

Value Misrepresented.]—Misrepresentation of value of estate sufficient ground to refuse specific performance. *Walls* v. *Stubbs*, 1 Madd. 80; 15 R. R. 210. S. P., *Brereton* v. *Cowper*, 1 Bro. P. C. 211.

Erroneous Balance Sheet.]—A purchaser cannot be compelled to complete a contract entered into by him, on the faith of a balance sheet produced by the vendor, as being, though subject to slight errors, substantially correct: where errors were in fact so serious that the business was barely solvent. *Charlesworth* v. *Jennings*, 11 L. T. 439.

Statements by Agent.]—An agent, commissioned by a vendor to find a purchaser, has authority to describe the property, and to state any fact or circumstance which may affect the value, so as to bind the vendor: and if an agent so commissioned makes a false statement as to the description or value (though not instructed so to do), which the purchaser is led to believe, and upon which he relies, the vendor cannot recover in an action for specific performance. *Mullens* v. *Miller*, 52 L. J., Ch. 380; 22 Ch. D. 194; 48 L. T. 103; 31 W. R. 559.

Intended Improvements.]—Specific performance refused on the ground of representations having been made at the sale on the part of the vendor, of improvements, affecting the value

of the premises, intended by him, which were not carried into effect. *Beaumont* v. *Dukes*, Jacob, 422; 23 R. R. 110.

A. agreed to purchase part of an estate, on the faith of representations made to him by the vendor's agent, that the vendor would do certain acts on the remainder of the estate. Those acts, however, were not done; in consequence of which the value of the land purchased was considerably diminished. A bill for specific performance dismissed with costs. *Myers* v. *Watson*, 1 Sim. (N.S.) 523.

Assertion of Good Title.]—The mere assertion by a vendor that he has a good title, on the faith of which the purchaser relies without investigating the title, is not necessarily such a misrepresentation as will preclude the vendor from enforcing the contract. *Hume* v. *Pocock*, 35 L. J., Ch. 731; L. R. 1 Ch. 379; 12 Jur. (N.S.) 445; 14 L. T. 386; 14 W. R. 681.

Representations, which a purchaser has chosen to accept from the vendor's agent on the subject of the vendor's title, and which turn out, in fact, but not when made, to have been known by the agent to be untrue, do not amount to such fraud as absolves a purchaser from his contract. *Ib.*

Property not Identified.]—Where the abstract of the property to be sold excepted a small piece of land but this piece of land was in no way identified and the vendors' solicitors refused to mark it on the plan and stated that the premises were too distinctly defined to admit of any mistake:—Held, that the purchaser was not bound to inquire further as to this excepted piece; and that, as the representation of the vendors' solicitor had tended, not to remove, but to confirm the error, a bill by the vendors for a specific performance ought to have been dismissed with costs. *Moxey* v. *Bigwood*, 4 De G. F. & J. 351. Affirmed 10 Jur. (N.S.) 957; 10 L. T. 466; 12 W. R. 811—H. L. (E.)

Sale by Administrator.]—Purchase at an auction of leaseholds stated to be sold "by order of executors"; the vendor was really administrator de bonis non cum testamento annexo durante absentiâ A., who was the next of kin to the testator, and also to his last surviving trustee and executor, A. being in Canada. Bill for specific performance by the vendor dismissed. *Webb* v. *Kirby*, 26 L. J., Ch. 145; 3 Jur. (N.S.) 73; 5 W. R. 189.

Lessors not stated.]—Leaseholds were described in the particulars of sale as in the occupation of a company under a lease. At the sale C. asked to see the lease, which was not produced, but he was informed by the vendors' solicitor that he did not remember the name of the lessees, but believed N. and M. to be two of them. C. became the purchaser. The lease had been in fact granted to N., M. and another as trustees for the company. C. refused to complete on the ground of misrepresentation. Specific performance decreed against C. *Farebrother* v. *Gibson*, 1 De G. & J. 602.

Underlease described as Lease.]—By an agreement, the committee of Verulam church agreed to purchase from W. "his interest in the lease held by him of Verulam church for the sum of 550*l.*" W. brought an action for specific performance, and judgment was given directing the usual inquiry whether a good title could be made. The chief clerk's certificate found that a good title could be made to a derivative term:—Held, that the words of the agreement took the case out of the authority of *Madeley* v. *Booth* (2 De G. & Sm. 718), and that the plaintiff was entitled to specific performance. *Waring* v. *Scotland*, 57 L. J., Ch. 1016; 59 L. T. 132; 36 W. R. 756.

Life Interest.]—On a sale of a life interest, the life was described in the particulars of sale to be that of a very healthy gentleman, aged forty-eight. In a subsequent part of the particulars, the life was described as that of a healthy gentleman, aged forty-eight, whose life was insurable. On a bill by the vendors for specific performance it was proved the vendors had insured the life shortly before the sale at a rate higher than the highest rate charged in London for a healthy life of that age:—Held, that, with the knowledge of this fact, the vendors were not justified in describing the life as a healthy life; and the bill was dismissed with costs. *Brealey* v. *Collins*, Younge, 317.

Sale of Brickfield.]—In the negotiations for sale of a brickfield R., when asked by S., said falsely that he had not put the property into the hands of an agent to sell for less money than he was then asking:—Held, that this was such a material misrepresentation as to prevent the court enforcing the contract in an action brought by R. *Roots* v. *Snelling*, 48 L. T. 216.

Proof of Misrepresentation.]—Where it is alleged that the person seeking specific performance had represented the house to be substantially and well built, and the plaintiff on his examination merely says he was never asked, and the defendant swears such representations were made, and his statement is corroborated:—Held, that the misrepresentations of the plaintiff were proved. Bill dismissed with costs. *Cox* v. *Middleton*, 2 Drew. 209; 2 Eq. R. 631; 23 L. J., Ch. 618; 2 W. R. 284.

Performance by Vendor becoming possible.]—A. agreed to purchase all B.'s interest in a coal and fire-clay pit, in the belief that B. had some lease from R., owner of the mine; and A. had been let into possession, and had worked the mine for four years under the agreement. At the date of the agreement B. had no lease from R., but two years after B. obtained a lease:—Held, that the agreement could be specifically enforced against A., subject, however, to the court finding on an inquiry that B. had made no substantial misrepresentation to A. as to the area of the workings. *Southern* v. *Harriman*, 12 W. R. 704.

Held, also, that a question of misrepresentation as to the area of the workings round a coal pit is not waived by the purchaser taking possession and working the pit. *Ib.*

Purchase by Third Party.]—When A. has refused to sell to B., except for ready money, and C. clandestinely attempts to purchase for B., and money is not ready, court will not enforce agreement. *Popham* v. *Eyre* Lofft, 786.

If A. in contracting with B. falsely represents himself to be the agent of C., and thereby obtains better terms, the court will, notwithstanding, enforce the contract, unless A. knew that such would be the effect of the misrepresentation. *Fellows* v. *Gwydyr* (*Lord*), 1 Sim. 63; 5 L. J.

(O.S.) Ch. 43 ; 27 R. R. 166. Affirmed, 1 Russ. & M. 83.

No Solicitor employed by Party.]—Where a solicitor purchases from A. B., who was ignorant of his legal position, an estate at a low price, informing A. B. that the nature and title of the property were such as that no one but a professional man would purchase it—such representation being false, and no solicitor having been employed on behalf of A. B., specific performance of the contract refused. *Davis* v. *Abraham*, 5 W. R. 465.

Specific performance was decreed in favour of a purchaser, though no solicitor acted for the vendor, and though the contract was executed under circumstances which might easily have led to fraud, no fraud being proved in the vendor or his agent. *Lightfoot* v. *Heron*, 3 Y. & C. 586.

Where a person having a clear title to 12*l.* for rent, and claiming the property of the land, is induced, by the representations of two professional persons, that he had no right to either rent or land, to agree to accept 10*l.* in full, for rent and land, the court will not entertain a bill for the specific performance of the agreement. *Stanley* v. *Robinson*, 1 Russ. & M. 527.

And see cases under preceding section.

3. Fraud and Concealment.

General Principle.]—A court of equity will not decree a specific execution of articles where they appear to be unreasonable, or founded on fraud. *Young* v. *Clerk*, Pre. Ch. 538. And see *Tilly* v. *Peers*, cited 10 Ves. 301.

A purchase obtained by fraud would be, in effect, no purchase, and could not acquire any validity by the Confirming Statute, 54 Geo. 3, c. 173, and 57 Geo. 3, c. 100. *Beaden* v. *King*, 2 Hare, 523.

Same Solicitor employed by both Parties.]—It is not a defence to a purchaser's suit for specific performance that the vendor's solicitor and agent in the sale had a short time previously been professionally employed by the purchaser in relation to his intended purchase. *Hesse* v. *Briant*, 2 Jur. (N.S.) 922.

Concealment by Vendor.]—Specific performance not decreed where there is a concealment on the part of the vendor. *Skirley* v. *Stratton*, 1 Bro. C. C. 440.

Disclosure by Purchaser.]—It is not generally the duty of a purchaser to inform a vendor of any circumstances which may make it desirable for him to purchase, such as a contract for re-sale at a higher value. *Dalman* v. *Nokes*, 22 Beav. 402.

There being no fiduciary relation between a vendor and a purchaser in a negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge, which would influence the price of the subject sold. *Walters* v. *Morgan*, 3 De G. F. & J. 718 ; 4 L. T. 758.

Simple reticence does not amount to legal fraud ; but if a purchaser in any manner induces a vendor to believe the existence of a non-existing fact, which might influence the price of the subject contracted to be sold, the contract cannot be supported. *Ib.*

Where, therefore, an intended lessor and lessee of minerals were in the above position as to knowledge, and the intended lessee brought to the lessor a lease ready prepared, without previous negotiation as to the details of it, and induced the latter to sign it, saying that he might trust to the proposed lessee for making a fair allowance if the minerals turned out more valuable than was supposed :—Held, that a bill for specific performance by the intended lessee, offering to make a fair extra allowance, could not be sustained, and its dismissal was confirmed on appeal. *Ib.*

The owners of a colliery entered into a contract with an adjoining landowner for the purchase of his estate, without disclosing the fact, of which he was ignorant, that they had, without authority, gotten a considerable quantity of coal from under it :—Held, that the court would not enforce the contract. *Phillips* v. *Homfray*, L. R. 6 Ch. 770.

Outgoings not disclosed.]—A contract having been made for sale of an estate, it afterwards appeared that there were several outgoings from the estate which were not disclosed at the time of the contract, yet these being matters which lie in compensation, the contract shall be carried into execution, with an allowance only to the purchaser for those particulars which diminish the value. *Howland* v. *Norris*, 1 Cox, 59.

A small incumbrance which may be the subject of compensation, no objection to a specific performance. *Guest* v. *Homfray*, 5 Ves. 818 ; 5 R. R. 176.

Excessive Price.]—Where a purchaser (who was a solicitor), after viewing a farm, and being informed of the rent at which it was let, agreed to buy at 5,000*l.* :—Held, first, that the difference between this price and 3,500*l.*, which the court considered to be the value of the property, was not a defence to a suit for a specific performance. Secondly, that the refusal by the defendant to complete having arisen from a cause other than that of insufficiency of title, he ought to pay the general costs of the suit, though title was first shewn in the master's office. *Abbott* v. *Sworder*, 4 De G. & Sm. 448 ; 22 L. J., Ch. 235.

The court will not decree specific performance, neither will it rescind a contract at an excessive price where there are no circumstances of fraud or surprise. *Day* v. *Newman*, 2 Cox, 77 ; 2 R. R. 1.

Misleading Conditions of Sale.]—Property was sold by auction. The conditions of sale were, inter alia, (8) that the purchaser shall not object to the title in connection with the sale of the premises to R., to whom the assignment of them, dated the 29th January, 1870, was made, but should assume that R. acquired under and by virtue of the deed a valid title to the premises by the deed expressed to be assigned to him. The title was bad on the ground that R., the assignee of the deed of 1870, had purchased the premises sold for X. and others, X. being one of the trustees for sale of the property so bought :—Held, in a suit for specific performance by the vendor, that the eighth condition was so framed as to deceive the purchaser, and entirely throw him off his guard by unwarrantably suppressing and masking a fatal defect in the title. *Boyd* v. *Dickson*, Ir. R. 10 Eq. 239.

At a sale a solicitor for an intending purchaser objected to one of the conditions as one which the contemplated purchaser could not be advised to assent to. The property was bought in. On the following day the proprietor of the estate

called upon the contemplated purchaser, and persuaded him to sign an agreement for the purchase of the estate, as it was alleged, at a most exorbitant price, and containing a reference to the objected condition of sale:—Held, that specific performance of the agreement could not be enforced. *Lee* v. *Dawson*, 4 L. T. 464.

Sale by Auction — Fictitious Bidding by Stranger.]—It is no defence to an action for specific performance brought by the vendors against the purchaser at a sale by auction, that unknown to the vendors a fictitious bidding was made, and that the purchaser was thereby induced to give more than he had previously bid, which was more than the reserved price. *Union Bank* v. *Munster*, 57 L. J., Ch. 124; 37 Ch. D. 51; 57 L. T. 877; 36 W. R. 72; 52 J. P. 453.

And see VENDOR AND PURCHASER; FRAUD AND MISREPRESENTATION.

4. HARDSHIP AND DURESS.

General Principle.]—The court will not give any assistance to a party seeking to enforce a hard bargain. *Kimberley* v. *Jennings*, 6 Sim. 340; 5 L. J., Ch. 115. And see *Faine* v. *Brown*, cited 2 Ves. Sen. 307; *Talbot* v. *Ford*, 13 Sim. 173.

In cases of specific performance, courts of equity exercise a discretion. In cases of great hardship they will not interfere, but will leave the plaintiff to his remedy by recovery of damages at law. *Wedgwood* v. *Adams*, 6 Beav. 600.

Personal Services.]—A grant was made by Dr. Y., bishop of Ely, in 1801, to P. for his life of the ancient office of receiver of the rents of the lands belonging to the see of Ely. The services rendered by the receiver were in the nature of personal services. In 1836 Dr. A., immediately after his appointment as bishop, sent a notice to P. not to act as receiver:—Held, that whatever might be the legal right of P. to the office, and to its alleged appurtenances, no relief could be given to him in equity, on the grounds of the hardship of forcing the services of a stranger in an office of trust upon the bishop. *Pickering* v. *Ely* (*Bishop*), 2 Y. & C. C. C. 249; 12 L. J., Ch. 271; 7 Jur. 479.

Advowson.] — Where father is possessed of advowson, which he apparently intended for his son, and is prevailed on, when in an infirm state, to enter into articles for sale of it. Specific performance was refused, though no fraud was imputed to purchaser. *Bell* v. *Howard*, 9 Mod. 302.

Covenants.]—Specific performance refused of covenants by dean and chapter leases of long standing. *Ely* (*Dean*) v. *Stewart*, 2 Atk. 44; Barnard. 170.

Insurance of Leaseholds.]—Leasehold property was sold by auction on the 8th June, 1858, with a condition for completion on the 20th June following. The completion did not take place till the 26th August. The purchaser then discovered that the property became uninsured on the 24th July, and thereupon became forfeited to the lessors. On the 7th September the purchaser absolutely repudiated the contract. The vendors subsequently renewed the insurance, and obtained a waiver of the forfeiture from the lessors, and filed a bill for specific performance:—Held, that, although the vendors were not bound to renew the insurance, yet having done so in so unusual a manner, the court would not decree specific performance, and the bill was dismissed, but without costs. *Dowson* v. *Solomon*, 1 Dr. & Sm. 1; 29 L. J., Ch. 129; 6 Jur. (N.S.) 33; 1 L. T. 246; 8 W. R. 123.

What is Sufficient.] — On the question of executing an agreement, hardship cannot be regarded, unless it amounts to a decree of inconvenience and absurdity so great as to afford judicial proof that such could not be the meaning of the parties. *Prebble* v. *Boghurst*, 1 Swanst. 329.

Events happening after Contract.]—The fact that the performance of an agreement has, owing to circumstances which have subsequently occurred, become hard in its consequences to one of the parties, or that he is called upon to perform it under circumstances which he had not contemplated, is no objection to the specific performance of the contract in equity, there being nothing doubtful in the meaning of the agreement, and nothing hard or oppressive in its terms at the time it was made, semble. *Webb* v. *Direct London and Portsmouth Ry.*, 9 Hare, 129; 1 De G. M. & G. 52; 21 L. J., Ch. 337; 16 Jur. 323.

A sub-lessee demised to the plaintiff, covenanting to renew, and to use his best endeavours to obtain a renewal from his immediate lessor. He afterwards purchased his immediate lessor's estate. The lessor refused to renew, except at a greatly increased fine, which he paid:—Held, that he was bound to renew to the plaintiff without any contribution. *Lawder* v. *Blackford*, Beat. 522.

Where the equitable title is complete, a legal conveyance will be decreed, though the property may have been much enhanced or depreciated in value. Subsequent events will not in equity vary a contract fairly entered into. *Revell* v. *Hussey*, 2 Ball & B. 287; 12 R. R. 87.

A. holding under a corporation and in the habit of obtaining renewals on favourable terms, demised to B. at a certain rent, with a covenant to renew at the same rent, as often as the corporation should renew to him. The corporation at length raised the rent payable by A. A. was bound, notwithstanding, to renew to B. on the former terms. *Evans* v. *Walshe*, 2 Sch. & Lef. 519. *See* 12 R. R. 88, n.

Property Bought for Specific Purpose.]—A contract in writing for sale of land by trustees to a Roman Catholic priest, did not specify the use that was to be made of the land, but the court was satisfied by the evidence that there had been an understanding that a church should be built on it. Before completion the purchaser contracted to sell the land to a third party, who intended to erect a manufactory on it, and the trustees then refused to complete:—Held, on a bill filed against the trustees, that the court would not, under the circumstances, compel them to complete the contract. *Trappes* v. *Cobb*, 16 W. R. 117.

B. treats with A. for a piece of land, having an intention to build a mill, to which the consent of the corporation is necessary; but A. refuses to treat on condition. B. fails in obtaining consent: this failure in his speculation is no defence against a bill for specific performance. *Adams* v. *Weare*, 1 Bro. C. C. 567.

No Right of Way.]—A contract was entered into for the sale of a piece of land described as

arable land, not stating anything as to the existence of a right of way to it. It turned out that it was extremely doubtful whether there was any right of cartway to it:—Held, that specific performance ought not to be decreed at the suit of the vendor. *Denne* v. *Light*, 8 De G. M. & G. 774; 26 L. J., Ch. 459; 3 Jur. (N.S.) 627; 5 W. R. 430.

Mining Lease.]—A person contracting for the lease of a mine cannot resist its performance, on the ground of his ignorance of mining matters, and of the mine turning out worthless. *Haywood* v. *Cope*, 25 Beav. 140; 27 L. J., Ch. 468; 4 Jur. (N.S.) 227; 6 W. R. 304.

Taking possession of a mine by intended lessee:—Held, not to be an acceptance of the title. *Ib.*

Nuisance known to Vendor.]—Whether the existence of a nuisance in the neighbourhood of a house contracted to be purchased for a residence, which nuisance is known to the vendor, and is one which a provident purchaser could not discover, is a ground for refusing a decree for specific performance of the contract. Quære. *Lucas* v. *Jones*, 7 Hare, 410; 18 L. J., Ch. 329; 13 Jur. 912.

Intoxication.]—In a suit for specific performance of a contract for sale of property, the defence was, that at the time the contract was entered into the vendor was so intoxicated that he was not conscious of what he was doing. No fraud was alleged:—Held, that such a defence was of no avail. *Shaw* v. *Thackray*, 1 Sm. & G. 537; 17 Jur. 1045.

A court of equity will not decree specific performance of an agreement more favourable to the plaintiff than to the defendant, involving hardship upon the defendant and damage to his property, if he entered into it without advice or assistance, and there is reasonable ground for doubting whether he entered into it under intoxication. *Vicers* v. *Tuck*, 1 Moore, P. C. (N.S.) 516; 9 L. T. 554.

The fact that a party was considerably in liquor when he entered into an agreement, is no reason for the court refusing a decree for specific performance, if there was no fraud. *Lightfoot* v. *Heron*, 3 Y. & C. 586.

Evidence.]—Bill for performance of written agreement, parol evidence read of different agreement, dismissed with costs; and plaintiff cannot resort to agreement set up by defendant; parol evidence allowed where a hard agreement, or in part executed. *Legal* v. *Miller*, 2 Ves. Sen. 299.

Contract advised by Solicitor.]—A., having a general shop, agreed with B., against whom he had actions pending, to abandon them on condition that B. should execute a bond not to be concerned in any trading establishment within a certain range:—Held, that B. having entered into the arrangement by advice of his solicitor, could not be regarded as acting under duress. *Avery* v. *Langford*, 2 Eq. R. 1097; 1 Kay, 663; 23 L. J., Ch. 837; 18 Jur. 905; 2 W. R. 615.

5. Delay and Laches.

General Principle.]—A bill for specific performance of an agreement is an application to the discretion, or rather the extraordinary jurisdiction, of the court, which cannot be exercised in favour of persons who have slept on their rights, or acquiesced for a long time in a title and possession adverse to their claims. In cases seeking a specific execution, laches is equally as strong against a plaintiff in not prosecuting as in not commencing suit. *Moore* v. *Blake*, 1 Ball & B. 69: 4 Dow, 230.

There is no distinction between laches on the part of a vendor and laches on the part of a purchaser as a bar to a suit for specific performance. *Rich* v. *Gale*, 24 L. T. 745.

The tendency of the court in modern cases has been to restrict the exercise of its jurisdiction in enforcing specific performance of contracts to those cases in which the plaintiff has been prompt in seeking his equitable remedy. *Southcomb* v. *Exeter (Bishop)*, 6 Hare, 213; 16 L. J., Ch. 378; 11 Jur. 725.

A contract for sale was made on the 16th October, 1840. Objections were taken to the title, and a correspondence between the solicitors continued until the 20th August, 1841, when the purchaser gave notice to the vendor that, the title being defective, he rescinded the contract. The correspondence with reference to the title still proceeded until the 17th January, 1842. The bill was filed on the 30th August, 1843:—Held, that the interval between the 20th August, 1841, and the 17th January, 1842, ought not to be regarded in the question of laches, but that the delay after the 17th January, 1842, before the bill was filed, precluded the vendor from sustaining his suit for specific performance. The possession of part of the property, taken under a mutual arrangement, and in ignorance of the objection to the title, which was afterwards discovered and relied on, did not affect the question of laches. *Ib.*

Specific performance refused for laches of plaintiff, the vendor. *Guest* v. *Homfray*, 5 Ves. 818; 5 R. R. 176.

Specific performance refused for gross laches of plaintiff, the purchaser. *Harrington* v. *Wheeler*, 4 Ves. 686.

When a contract has lain dormant for many years, and nothing done by either party in pursuance of it, a court of equity ought not to decree a specific performance. *Wingfield* v. *Whaley*, 1 Bro. P. C. 200. S. P., *Ridgway* v. *Wharton*, 2 Eq. R. 839; 6 H. L. Cas. 238; 27 L. J., Ch. 46; 5 W. R. 804.

Statute of Limitations.]—The Statute of Limitations cannot be pleaded to a suit for specific performance. *Talmarsh* v. *Mugleston*, 4 L. J. (O.S.) Ch. 200.

If there has been such a lapse of time that the court, proceeding upon a rule adopted by analogy to the Statute of Limitations, would refuse to enforce specific performance; these circumstances, if not disclosed in the bill so as to enable the defendant to demur, ought to be stated in the plea; and the court, for the purpose of applying its own rule, will advert to the statute; though not pleaded. *Ib.* S.P., *Ally* v. *Deschamps*, 13 Ves. 225.

Position affected by Delay.]—Where one party to an agreement trifles or shews a backwardness in performing his part of it, equity will not decree a specific performance in his favour; especially if the circumstances and situation of the other party are materially altered in the meantime. *Hayes* v. *Caryll*, 1 Bro. P. C. 126.

Where the object of one of the parties contracting would be defeated by delay in the execution

of it, if the other party delay, he shall not afterwards be allowed to insist on performance. So, if the delay were injurious to one of the parties. *Crofton* v. *Ormsby*, 2 Sch. & Lef. 604; 9 R. R. 107.

Delay of both Parties.]—If the plaintiff in a suit for specific performance has delayed for a length of time to enforce the agreement, acquiescence in a breach of the agreement, or in a misrepresentation on the faith of which the defendant entered into the agreement, will not be imputed to the defendant by reason of a similar delay on his part in repudiating it, though accompanied by possession. *Lamare* v. *Dixon*, 43 L. J., Ch. 203; L. R. 6 H. L. 414; 22 W. R. 49.

When a suit is instituted for specific performance of a contract, and the defence set up is, that the contract was made in consideration of certain promises which the plaintiff has not fulfilled, a delay to defeat that defence must be such as amounts to an acquiescence in the non-fulfilment of the alleged promises. *Ib.*

Held, also, that as there had been delay on both sides, the plaintiff's bill ought to be dismissed, without costs. *Ib.*

Submission not Bar to Action.]—Semble, that mere submission to a wrongful act which has been completed without the knowledge or assent of the person whose right is infringed cannot, without some conduct amounting to accord and satisfaction, or a release under seal being shewn, bar his right of action; although, under the name of laches, it may afford a ground for refusing relief under some particular circumstances. *De Bussche* v. *Alt*, 47 L. J., Ch. 381; 8 Ch. D. 286; 38 L. T. 370—C. A.

Time of the Essence.]—The time at which a contract is to be performed, is not essential in equity as at law. The relief against the lapse of time is in the discretion of the court upon the circumstances, as if the contract is abandoned. *Radcliffe* v. *Warrington*, 12 Ves. 326.

Specific performance, the lapse of time being trifling and the result of fraud. *Savage* v. *Brocksopp*, 18 Ves. 335.

Lapse of time, if not an essential object of the contract, is no objection to a specific performance. *Hearne* v. *Tenant*, 13 Ves. 287. S. P., *Jessop* v. *King*, 2 Ball & B. 91; *Reynolds* v. *Nelson*, 6 Madd. 290; 22 R. R. 225.

—— **Valuation.**]—The time of valuation is of the essence of a contract to sell at a price to be fixed by that valuation, but defendant cannot take advantage of it, if he improperly occasioned the delay. *Morse* v. *Merest*, 6 Madd. 26; 22 R. R. 226.

Negotiations Continued.]—Laches will not be imputed to a vendor on account of delay, however long, in filing his bill for specific performance, where negotiations respecting the title have been going on the whole time. *M'Murray* v. *Spicer*, 37 L. J., Ch. 505; L. R. 5 Eq. 527; 16 W. R. 332.

H., in 1839, contracted with I. for the purchase of a piece of land, and subsequently sold his bargain to M. In May, 1839, the abstract of title was delivered. A covenant, not in the draft, was inserted in the ingrossment by the vendor, and objected to on behalf of the purchaser; and a correspondence on the subject was carried on down to 1843, when H. and M. filed a bill for specific performance:—Held, that there had been no abandonment of the contract. *Moxhay* v. *Inderwick*, 11 Jur. 837.

Agreements for sale to be completed by 29th September, 1846. The vendor made two requisitions to the purchaser to complete, the second on the 25th January, 1847, and intimated that non-compliance with the requisitions would be treated as a breach of the agreements. The purchaser did not comply, but his solicitors reiterated claims to certain deductions and abatements. On the 13th February, 1847, the purchaser filed a bill seeking specific performance: — Held, that the delay did not constitute such default by the plaintiff as to preclude him from a title to specific performance; but it appearing that the cause of delay was the purchaser's inability to pay the purchase-money up to the date of filing the bill, the court held that the purchaser had lost the right to enforce a specific performance, and dismissed his bill; but declined giving the costs, except upon the terms of his returning the deposit. *Gee* v. *Pearse*, 2 De G. & Sm. 325.

Descent of Estate during Delay.] — Great delay in the completion of a contract is no defence to a purchaser who has himself been accessory to that delay. *Gunter* v. *Halsey*, Amb. 386.

Where delay is occasioned by the purchaser, and the legal estate descends to an infant heir, the purchaser cannot avail himself of that to protect himself from specific performance. *Ib.*

Quære, whether the descent of the legal estate to an infant heir, after the contract, will prevent the court from decreeing specific performance, where there has been no improper delay on the part of the purchaser. *King* v. *Turner*, 3 L. J. (O.S.) Ch. 58.

Possession given.]—Delay and laches, on the part of the plaintiff, are a good defence to a suit for specific performance; but they are inapplicable where the contract, though incomplete, has continued to be acted on, as by giving possession. *Sharp* v. *Milligan*, 22 Beav. 606.

The fixed rule of equity that specific performance of an agreement for a lease will not be granted after a long lapse of time will not be relaxed merely on account of possession and payment of rent during the whole of such time. *Powis* v. *Dynevor (Lord)*, 35 L. T. 940.

A purchaser was let into the receipt of rents before completion, and without payment of purchase-money. Great delay having occurred, and no payment having been made to the vendor, he gave notice to the tenants, and prevented any further receipt of the rents by the purchaser:—Held, that this did not deprive the vendor of his right to have the contract specifically performed. *Colby* v. *Gadsden*, 34 Beav. 416; 5 N. R. 456; 11 Jur. (N.S.) 760; 12 L. T. 197.

And see *Mills* v. *Hayward*, 6 Ch. D. 196—C. A.

Demand of Deposit.]—If the purchaser demand his deposit at the day for completing the contract, and the vendor has not delivered his abstract before that time, and also neglects to deliver it until after an action brought for the deposit, it is evidence of an abandonment of the contract by the vendor, who shall not be entitled afterwards to a specific performance. *Lloyd* v. *Collett*, 4 Bro. C. C. 469.

Specific performance of an agreement to purchase may be decreed after considerable delay, if the vendee has not demanded his deposit or shewn a determination not to proceed in

the purchase. *Pincke* v. *Curteis*, 4 Bro. C. C. 329.

No Title shewn.]—Bill for performance of articles for the purchase of an estate dismissed with costs, the title not having been laid before the vendee's counsel within the time limited, and the South Sea stock, from whence the money was to be raised, having fallen in the meantime 16*8* per cent. *Lewis* v. *Lechmere* (*Lord*), 10 Mod. 503.

No Objection to Title.]—Specific performance decreed against purchaser without reference as to title on ground of possession, a correspondence, and no objection to title till two years after delivery of abstract. *Anspach* (*Marquis*) v. *Noel*, 1 Madd. 310 ; 16 R. R. 227.

Possession and Payment of Rent.]—In 1855 A. agreed with B. that "in the event of B. marrying his daughter," he would grant him a ninety-nine years' lease of a shop at C., "should he at any time require it," at a rent. B. was let into possession of the shop, and married A.'s daughter, and duly paid the rent to A. and his assigns until March, 1874, when his then landlord gave him notice to quit. Specific performance of the agreement refused on the ground of B.'s laches. *Davenport* v. *Walker*, 34 L. T. 168.

In July, 1857, B. signed an agreement to accept from A. a new lease at the same rent as was reserved by the old lease, and payment of 600*l.* on 1st August, 1857, with interest if the lease should not be completed on the day fixed. A draft lease was sent to B., but was not returned, and no steps were taken by A. to press for completion. B. remained in possession and paid rent, but no payment of the 600*l.* or interest was ever demanded. In 1871 A. died :—Held, that as B.'s possession and payment of rent must be referred to the new agreement, and not to a holding over after the expiration of the former lease, specific performance was decreed, with interest on the 600*l.* from the 1st of August, 1857. *Shepheard* v. *Walker*, 44 L. J., Ch. 648 ; L. R. 20 Eq. 659 ; 33 L. T. 47 ; 23 W. R. 903.

Payment of Incumbrances.]—B. contracts for purchase of estate, and is let into possession. The estate being greatly incumbered, B. pays off some of the incumbrances. Great delay on part of vendor in clearing other incumbrances and making good title :—Held, not sufficient to discharge purchaser from contract. *Smith* v. *Dolman*, 6 Bro. P. C. 291.

Condition for Resale.]—On a sale of real estate the purchaser paid 500*l.* "as a deposit, and in part payment of the purchase-money." The contract provided that the purchase should be completed on a day named, and that if the purchaser should fail, the vendor should be at liberty to resell. The purchaser was not ready with his purchase-money, and after repeated delays the vendor resold the property for the same price :—Held, that the purchaser had lost by his delay his right to enforce specific performance. *Howe* v. *Smith*, 53 L. J., Ch. 1055 ; 27 Ch. D. 89 ; 50 L. T. 573 ; 32 W. R. 802 ; 48 J. P. 773—C. A.

What Delay Sufficient.]—Delay of ten weeks held no bar to relief. *Rummens* v. *Robins*, 3 De G. J. & S. 88 ; 11 Jur. (N.S.) 631 ; 14 L. T. 717 ; 13 W. R. 979.

Delay, after the parties were at arm's length, of three calendar months and thirteen days, held a bar to relief. *Glashrook* v. *Richardson*, 23 W. R. 51.

When a plaintiff to a bill for specific performance has allowed five months to elapse after the defendant has rescinded the contract before filing his bill, it is not a sufficient explanation of the delay to state that the defendant's solicitor was suffering from mental alienation. Leave, however, to amend may be given. *Huxham* v. *Llewellyn*, 28 L. T. 577 ; 21 W. R. 776.

A delay from May to December in filing a bill for specific performance, is sufficient to deprive a vendor of his right to have the contract enforced. *Colby* v. *Gadsden*, supra.

Bill by a company against proprietors of coal mines for specific performance of an agreement to sell to the company, at a fixed price per ton, all of certain beds of coal, at the rate of 500 tons per week. Demurrer allowed, mainly on ground of laches, the company having neglected to file their bill until eleven month after they discovered that defendants had ceased to deliver the coal, and were referred by defendants to their solicitors. *Pollard* v. *Clayton*, 1 K. & J. 462 ; 1 Jur. (N.S.) 342 ; 3 W. R. 349.

In contracts relating to commodities fluctuating from day to day in market price, the court expects persons to be unusually vigilant and active in asserting their right to specific performance, which it is inequitable to grant after such an interval, and when the parties may be no longer in the same position. *Ib.*

Observations on *Taylor* v. *Neville*, and the reports of *Burton* v. *Lister* (3 Atk. 383). *Ib.*

Plaintiff filed his bill a year after notice that purchaser abandoned his contract ; the bill was dismissed on the ground of unreasonable delay. *Watson* v. *Reid*, 1 Russ. & M. 236.

A vendor cannot come at any distance of time for a performance ; but a bill filed fourteen months after the correspondence upon the objection to the title ceased, was referred to the master. *Hertford* (*Marquis*) v. *Boore*, 5 Ves. 719 ; 5 R. R. 149.

Vendor gave notice to rescind on 7th April, 1869. The purchaser filed a bill for specific performance on the 30th August, 1870 :—Held, that the delay was fatal to his claim for relief. *Rich* v. *Gale*, 24 L. T. 745.

Claim filed in November, 1853, for specific performance of a contract to purchase made in February, 1852, dismissed (without costs) on the ground of plaintiff's laches. *Lloyd* v. *Wilkes*, 2 Eq. R. 1081 ; 2 W. R. 501.

A company contracted to purchase lands, but did not enter into possession, or commence works, for two years ; suit for specific performance dismissed. *Bodington* v. *G. W. Ry.*, 13 Jur. 144.

Persons entitled in remainder on death of tenant for life agree to sell, and W., one of the persons, contracts in April, 1851, to sell to F. No deposit is made, nor any step taken. An abstract is first asked for by the purchaser in February, 1852, and delivered by W. on behalf of all parties. B., another of the persons, denies W.'s authority to act. The tenant for life died in September, 1852, and R., one of the persons, then confirmed the sale to F. In May, 1854, F. filed a bill against B. for a conveyance of the property :—Held, that, on the ground of delay, the purchaser was not entitled to a specific performance against B., except as to the share of B. Bill dismissed, with costs, as to B.'s original share ; no costs as to the other shares. *Firth* v. *Greenwood*, 1 Jur. (N.S.) 866 ; 3 W. R. 358.

Specific performance refused on ground of delay for three years and a half. *Eads* v. *Williams*, 4 De G. M. & G. 674; 3 Eq. R. 244; 1 Jur. (N.S.) 193; 3 W. R. 98.

In 1827, A. wrote to B., that he had credited B.'s account with 220*l.* in consideration of an agreement by B. to convey two houses. The abstract was delivered but there was no acceptance in writing on the part of B. Five years afterwards, B. filed a bill against A. for specific performance. The court dismissed the bill on the ground of the delay. *Williams* v. *Williams*, 17 Beav. 213.

In June, 1846, A. agreed to sell his share in a mine to B. and four months afterwards he agreed to sell it to C., who paid part of the purchase-money. In the month following, A., having given notice to B. that he repudiated the first contract, conveyed to C. No steps were taken by B. for ten and a half years, when a suit was instituted against C. alone, to have a declaration that C. was a trustee, and for a conveyance:—Held, that the right was barred by lapse of time and laches. *Alliway* v. *Braine*, 26 Beav. 575.

A specific performance will not be decreed after a delay of ten years, when nothing has been done in the meantime. *Ib.*

Equity will not decree specific execution of agreement upwards of fifteen years after it is dated, under which plaintiff had never been in possession, nor paid any consideration. *Gill* v. *Fleming*, 1 Ridgw. 420.

Acquiescence for fifteen years, held under the circumstances a bar. *Cood* v. *Cood*, 3 N. R. 275; 33 L. J., Ch. 273; 9 Jur. (N.S.) 1335.

After bill, answer and replication, no further steps were taken in a cause for upwards of twenty years. This is not of itself sufficient ground for refusing specific performance, there being acquiescence on both sides. But a good reason for refusing costs. *Cane* v. *Allen* (*Lord*), 2 Dow, 289.

Vendor being in possession for upwards of fifty years, and purchaser having done acts inconsistent with the notion of his being the owner, specific performance of agreement to sell was refused, as amounting to a waiver. *Ross* (*Earl*) v. *Stirling*, 4 Dow, 442.

6. Bankruptcy.

Of Purchaser.]—Bankruptcy of a person who has agreed to purchase does not discharge the contract. *Brooke* v. *Hewitt*, 3 Ves. 255. *See* 8 R. R. 377, n.

An act of bankruptcy and a docket struck, though no commission issued, a sufficient objection to a bill for specific performance for the sale of an estate to the plaintiff, in a case where part of the money had been paid, and sub-contract for sale of part entered into by the plaintiff; and the defendants had agreed to convey accordingly. *Franklyn* v. *Brownlow* (*Lord*), 14 Ves. 550; 9 R. R. 346.

Purchaser discharged on motion upon affidavit of imprisonment for debt and insolvency. *Hodder* v. *Ruffin*, 1 V. & B. 544.

Secret Trust.]—A., being in insolvent circumstances, suffers another person to become the apparent owner of his farm (though under a secret trust for him). A. shall not have against the landlord, a specific execution of an agreement made by him with the trustee, the landlord supposing the trustee to have been the rightful owner, and confiding in his solvency. *O'Herlihy* v. *Hedges*, 1 Sch. & Lef. 123; 9 R. R. 23.

Assignment before Bankruptcy.]—Action for specific performance by trustees to whom a trader had conveyed all his property to sell for the benefit of his creditors; before answer the trader becomes bankrupt, and his assignees file a supplemental bill to enforce the contract, and specific performance was decreed. *Goodwin* v. *Lightbody*, Daniell, 123.

7. Acts inconsistent with continuance of Contract.

Agreement for Lease—Breach of Covenant.]—Where a tenant has entered into possession of premises under an agreement for a lease void as a lease, the tenant is, until payment of rent, merely tenant at will. The court will not decree specific performance of such an agreement where the tenant has committed a breach of one of the covenants contained in the draft lease which has been signed as approved by both the parties; and the matter is in no wise affected by s. 14 of the Conveyancing Act, 1881. *Coatsworth* v. *Johnson*, 55 L. J., Q. B. 220; 54 L. T. 520—C. A.

A tenant having violated the conditions of an agreement for a lease under which he had taken possession, the landlord brought an ejectment against him. Upon a bill by the tenant for a specific performance of the agreement, and to restrain proceedings at law, the court refused an injunction, on the ground that the tenant had himself violated the agreement. *Perrett* v. *Barnes*, 2 L. J. (O.S.) Ch. 142.

Covenant as to use of adjoining Lands.]—Where land is conveyed in fee by deed of feoffment, subject to a perpetual ground rent, and the feoffee covenants for himself, his heirs and assigns with the feoffor, the owner of adjoining lands, his heirs, executors, administrators, and assigns, not to use the land in a particular manner, with a view to the more ample enjoyment by the feoffor of such adjoining lands, and the subsequent acts of the feoffor, or of those claiming under him, have so altered the character and condition of the adjoining lands, that with reference to the land conveyed, the restriction in the covenant ceases to be applicable according to the intent and spirit of the contract, a court of equity will not interpose to enforce the covenant, but will leave the parties to law. Whether upon such a covenant there could be any remedy at law against the assignees of the covenantor, quære. *Bedford* (*Duke*) v. *British Museum Trustees*, 2 My. & K. 552; 2 L. J., Ch. 129.

Company unable to purchase the Land agreed.]—Quære, whether a court of equity will decree the specific performance of a contract by a railway company to purchase land, if the company should afterwards so exercise their powers as to disable themselves from taking the same land; and whether the vendor has any and what remedy in such a case. *Tomlinson* v. *Manchester and Birmingham Ry.*, 2 Railw. Cas. 104.

Agreement as to Maintenance.]—A., by deed, contracted with B., in consideration of 100*l.* to maintain, educate, and apprentice B.'s child, and if he had no child of his own, on B.'s child attaining twenty-one years to give him all his real and

personal estate at his death, subject to a life interest for his widow. There was some evidence that the child was at A.'s house after the date of the deed, but it appeared doubtful whether the child ever lived with A. in the manner provided by the contract, and he soon after was residing with his father (B.), and the court was satisfied that A. and B. abandoned the contract, and that the status of the child had not been altered by anything done by A. in pursuance of the contract:—Held, that the contract, having been abandoned by the contracting parties, could not be enforced by the child. *Hill* v. *Gomme*, 5 Myl. & Cr. 250; 9 L. J., Ch. 54; 4 Jur. 165. Affirming 1 Beav. 540.

Revocation of Authority to Auctioneer.]—Where a person agrees with auctioneers for the sale by them of property in a particular manner, and he then changes his mind, the rule is that, subject to the claims of the auctioneers for their expenses incurred, the court will not enforce such an agreement. *Chinnock* v. *Sainsbury*, 30 L. J., Ch. 409; 6 Jur. (N.S.) 1318; 3 L. T. 258; 9 W. R. 7.

Notice of Abandonment.]—W. contracted to sell a dwelling-house to H.; possession to be given on the 26th of February; H. wanted the house for immediate occupation. On February 26th the vendor had not made a good title, and the purchaser did not enter into possession. He continued, however, to negotiate for some time longer, when he gave a peremptory notice of immediate abandonment of the contract:—Held, that there must be a decree for specific performance. *Webb* v. *Hughes*, 39 L. J., Ch. 606; L. R. 10 Eq. 281; 18 W. R. 749.

B. FROM NATURE OF THE CONTRACT.

1. Inadequacy of Consideration.

General Principle.] — Specific performance is a matter of discretion, to be exercised, however, according to fixed rules, and the mere inadequacy of consideration is not a ground for exercising such discretion by refusing a specific performance. *Haywood* v. *Cope*, 25 Beav. 140.

Inadequacy of value is not an objection to decreeing specific performance, unless the inadequacy is so great as to prove fraud, or that the parties could not have intended to execute the contract. *Callaghan* v. *Callaghan*, 8 Cl. & F. 374; 4 Ir. Eq. R. 441.

Where the defendant agreed to sell certain cottages and gardens to the plaintiff for an annuity payable to the defendant during his life:—Held, that the consideration being dependent on the uncertainty of life, although gross inadequacy might be a ground for refusing a specific performance, yet that a difference of 7 or 8 per cent. was not such inadequacy; and performance of the agreement decreed. *Bower* v. *Cooper*, 2 Hare, 408; 11 L. J., Ch. 287; 6 Jur. 681.

Inadequacy of consideration is not sufficient for refusing specific performance of purchase by auction, without something more, as fraud or surprise, &c. *White* v. *Damon*, 7 Ves. 30; 6 R. R. 71.

Contract executed though the consideration was inadequate; not amounting to fraud; but without costs. *Burrowes* v. *Lock*, 10 Ves. 470; 8 R. R. 33, 856. S. P., *Coles* v. *Trecothick*, 9 Ves. 348; 1 Smith, 233; 7 R. R. 107; *Collier* v. *Brown*, 1 Cox, 428; 1 R. R. 70; *Griffith* v. *Spratley*, 1 Cox, 383.

Inadequacy of consideration no ground for resisting the execution of a contract to sell, the vendor not being under any incapacity, deficiency of judgment, or led by accident or design into a misapprehension of the value. *Western* v. *Russell*, 3 V. & B. 187; 13 R. R. 178.

The executrix of a lessee agreed without advice to sell to A. the residue of her term (except a day) and the fixtures for 400*l*. Subsequently the landlord, knowing that there had been a negotiation, if not an agreement, between the executrix and A., agreed with her for the purchase of the residue of the term for 550*l*. A., on hearing of this, offered the executrix, if she would complete her contract with him, 1,000*l*. as purchase-money, and indemnity against any proceedings on the part of landlord. She accepted the offer, and demised the premises to A. for the whole term, wanting a day:—Held, that the original agreement with A. was in its nature not of any validity in equity, unless the price was shewn to be equal or more than equal to the value of the property; and that as this was not shewn the landlord was entitled to a specific performance, not only against the executrix, but against A. *Goodwin* v. *Fielding*, 4 De M. & G. 90, 255; 1 W. R. 343.

Where no fiduciary relation exists between two parties dealing for the sale and purchase of an estate, mere inadequacy of consideration, or irregularity in the statement of it in the conveyance, is not sufficient to impeach the contract. *Harrison* v. *Guest*, 8 H. L. Cas. 481.

Value how Estimated.]—Principles upon which the court acts in considering the question of value. *Brinkley* v. *Hann*, 1 Dr. 175.

Purchaser from Expectant Heir.]—It is incumbent on purchaser of reversionary interest from an expectant heir, to make out a case of adequacy of consideration. *Ryle* v. *Swindells*, 1 M'Cle. 519; 13 Price, 758.

Price Adequate at time of Sale.]—Equity will enforce a specific performance of an agreement for a purchase, if the price was reasonable at the time of the sale, however disproportionable after-accidents might make it. *Keen* v. *Stukeley*, Gilb. Eq. Rep. 155.

Lease at Undervalue.]—M. being in embarrassed circumstances, in consideration of a loan of 900*l*. makes a lease to D., with covenant for perpetual renewal of lands of yearly value of 450*l*., at rent of 150*l*., subject to private parol agreement, that M. might redeem within two years, on payment of 1,300*l*. S. knowing circumstances, with consent of M. purchases from D. his interest, to whom S. pays the 1,300*l*. S. afterwards purchases the whole interest of this and other lands of M., for additional sum of 3,706*l*. The clear profit rent at which the lands were let the year following being 600*l*. a year and other advantages:—Held, binding on M. *Meredith* v. *Saunders*, 2 Dow, 515; 14 R. R. 201.

Contract with Solicitor—Oppression.]—A. B., being desirous of raising money to enable him to prosecute his claim to a fund in court, applied to a solicitor for that purpose. An agreement was executed, by which the solicitor agreed to

lend 1,000*l.*, and A. B. agreed to purchase from him some land for 6,000*l.* (ten times its value). The land was conveyed, and the funds in court mortgaged by A. B. for the 6,000*l.*; but the 1,000*l.* was not advanced at the time. The court, on the ground of the gross inadequacy of value, coupled with the other circumstances of the case, set aside the whole transaction with costs. *Cockell* v. *Taylor*, 15 Beav. 103; 21 L. J., Ch. 545.

Inadequacy of value, though it is not by itself a sufficient ground for avoiding a sale, is yet of great weight when coupled with circumstances of oppression. *Ib.*

The court looks with suspicion at the evidence of value derived from the mere opinion given by surveyors, unsupported by any other circumstances. *Ib.*

Agreement for Annuity — Completion when Annuitant was Dying.]—A purchase upheld which was agreed to on the vendor's death-bed, and in consideration of an annuity for his life, the vendee having afterwards acquired the legal estate, and the agreement having been in pursuance of a contract made out by letters written some months previous to the final agreement. *Barry* v. *O'Grady*, 9 Ir. Eq. R. 550.

Value of Property Not Known.]—A wife became entitled to a share of an intestate's property amounting to 3,609*l.* The husband, whilst he was ignorant of the amount of the share, assigned it in trust for his wife and children, subject to the payment of 10*s.* a week to himself for his life. Although the deed recited that the intestate's estate was very considerable, yet as the administrators, parties to the transaction, did not disclose to the husband the amount of the share, the deed was set aside. *Groves* v. *Perkins*, 6 Sim. 576.

Trustees.]—Trustees not to be compelled to perform an agreement entered into under mistake, to sell for an inadequate consideration. *Bridge* v. *Rice*, 1 J. & W. 74.

Specific Performance Refused.]—Mere inadequacy of price is a sufficient reason to refuse specific performance of a contract. *Flacke* v. *Gray*, 4 Drew. 651; 29 L. J., Ch. 28; 5 Jur. (N.S.) 645.

Specific performance of agreement refused under circumstances of inadequate consideration. *Underwood* v. *Hitchcock*, 1 Ves. Sen. 279.

Price to be Fixed.]—Specific performance will not be decreed of an agreement to sell certain property at a price to be settled by two persons who are named, if the court sees reason to believe that the price subsequently fixed by these persons is considerably below the real value of the property. *Parken* v. *Whitby*, Turn. & R. 366; 24 R. R. 74.

Specific performance of an agreement to purchase at a price to be fixed by third persons named in the contract, decreed, though price thus fixed was inadequate, there being no evidence that the valuation was unfair. *Weeks* v. *Gallard*, 21 L. T. 655; 18 W. R. 331.

Death of Vendor.]—If a vendor of real estate dies before conveyance, intestate, and his heir-at-law contests the sufficiency of the consideration for the purchase, he ought to file a bill to have the agreement set aside, and not rest upon inadequacy of consideration as a defence to a bill for specific performance. *Hoddel* v. *Pugh*, 33 Beav. 489; 10 Jur. (N.S.) 534; 10 L. T. 446; 12 W. R. 782.

And see cases supra, col. 1778.

2. ILLEGALITY.

Contrary to Statute.]—When the plain intent of an agreement is unobjectionable, this court will decree specific performance of it according to such intent, though in its terms the agreement was contrary to a statute. *Daly* v. *Duggan*, 1 Ir. Eq. R. 311.

Where an equal agreement cannot, by reason of a subsequent act of parliament, or some other lawful impediment, be performed in the whole, yet the same shall be specifically executed in such part of it as remains lawful. *Betteswortb* v. *St. Paul's* (*Dean*), 1 Bro. P. C. 240.

Agreement partly Illegal.]—If an instrument contains distinct engagements to do certain acts, some of which are legal and some illegal at common law, the performance of those which are legal may be enforced, though those which are illegal cannot. *Bank of Australasia* v. *Breillat*, 6 Moore, P. C. 152; 12 Jur. 189.

Threat to Prosecute.]—A court of equity will not enforce an agreement against a party, who was induced to enter into it, in order to save his sons from a threatened prosecution for felony. *Dewar* v. *Elliott*, 2 L. J. (O.S.) Ch. 178.

Evasion of Stamp Act.]—A clause in an agreement, providing that, if it should become necessary to stamp it and to pay any penalty for that purpose, the creditor may charge it against the debtor, is an evasion of the Stamp Acts, and the court will not enforce it. *Abbott* v. *Stratten*, 3 Jo. & Lat. 603; 9 Ir. Eq. R. 233.

Fraud on the Public.]—The plaintiffs proposed to publish a book with a title-page, stating that it was edited by K. (assisted by M., the defendant). K. was known as having published other books of a similar description, and had allowed the plaintiffs to make use of his name, but he had taken no part whatever in the compilation, which was the work of M.:—Held, that the proposed title-page would be a fraud on the public, and that on this ground the plaintiffs were disentitled to relief. *Post* v. *Marsh*, 50 L. J., Ch. 287; 16 Ch. D. 395; 43 L. T. 628; 29 W. R. 198.

Champerty.]—The purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud, partakes of the nature of champerty, and will not be enforced in equity. *De Hoghton* v. *Money*, L. R. 2 Ch. 164.

Compromise of Divorce Proceedings.]—Where an agreement for the compromise of a suit for a divorce, provided that the wife should have the custody of two of the children, and should educate them in a particular manner, the first part of such provision being contrary to public policy, and the latter incapable of being enforced against the wife, a demurrer to a bill filed by her for specific performance was allowed. *Vansittart* v. *Vansittart*, 4 K. & J. 63. Affirmed 2 De G. & J. 249; 27 L. J., Ch. 289; 4 Jur. (N.S.) 519; 6 W. R. 386.

And see COMPROMISE.

Illegal Association.]—A member of an association, which is an illegal association within s. 4 of the Companies Act, 1862, and which is regulated by a trust deed, cannot bring an action for the administration of the trust, as the trust deed is an illegal contract, which the court will not enforce. *Sykes* v. *Beadon*, 48 L. J., Ch. 522; 11 Ch. D. 170; 40 L. T. 243; 27 W. R. 464.

3. Ultra Vires.

Contract by Directors.] — Directors having entered into a contract, ultra vires:—Held, that it could not be specifically performed. *Ellis* v. *Colman*, 25 Beav. 662; 27 L. J., Ch. 611; 4 Jur. (N.S.) 350; 6 W. R. 360.

Assignees of an agreement between A. and a company sued for specific performance:—Held, that they could sustain the action, but specific performance refused, as the agreement contained clauses ultra vires the power of the directors of the company. *Browne* v. *London Necropolis and National Mausoleum Co.*, 6 W. R. 188.

Agreement not to Oppose Bill in Parliament.]—An agreement between railway companies not to oppose a bill in parliament, promoted by one of the railways:—Held, that the agreement was ultra vires, and ought not to be decreed to be specifically performed. *Shrewsbury and Birmingham Ry.* v. *L. & N. W. Ry.*, 4 De G. M. & G. 115; 6 H. L. Cas. 113; 22 L. J., Ch. 682; 17 Jur. 845; 1 W. R. 172.

Contract by Trustees.]—Bill for the execution of a covenant contained in a renewed lease granted by trustees dismissed, the covenant being ultra vires of the trustees. *Bellringer* v. *Blagrave*, 1 De G. & Sm. 63; 11 Jur. 407.

Contract by Executor.]—One of two executors erroneously believing that he was acting with the authority of the other, contracted to sell a house, part of the testator's estate:—Held, that the purchaser could not enforce a specific performance of the contract. *Sneesby* v. *Thorne*, 7 De G. M. & G. 399; 1 Jur. (N.S.) 1058; 3 W. R. 605.

Quære, whether he could have done so if the executor had been under no misapprehension. *Ib.*

And see *Avery* v. *Griffin*, infra, col. 1853.

4. Uncertainty.

General Principle.]—In a suit for specific performance of a contract vague in its language, a court of equity, having regard to the terms of the agreement, will consider the surrounding circumstances and conduct of the parties in dealing with the property comprised in it, in the interval between the making of the agreement and the commencement of the suit for its enforcement. *Oxford* v. *Provand*, 5 Moore, P. C. (N.S.) 150; L. R. 2 P. C. 135.

Courts of equity will not decree specific performance of an agreement, the object of which is uncertain. *Callaghan* v. *Callaghan*, 8 Cl. & F. 374. And see *S. C.*, 4 Ir. Eq. R. 441.

Ambiguous Document.]—Where an agreement is in writing, and is unambiguous, it is the duty of the court to construe it quite independently of the ideas of the parties as to what it means; but where an agreement is ambiguous or capable of two constructions, I think it would be very strange indeed if a plaintiff, who had always acted on the one construction, should succeed in persuading the court to grant specific performance on the footing that it ought to bear the opposite construction—per Jessel, M.R. *Marshall* v. *Berridge*, 51 L. J., Ch. 329; 19 Ch. D. 241; 45 L. T. 599. And see *Bromley* v. *Jefferies*, infra, col. 1853.

What is.]—An agreement to give so much of a thing as may be necessary for a specified purpose confers a right of a nature known to the law, and is not open to the objection of uncertainty. Under an agreement to give so much of a specified piece of land as may be necessary for a specified purpose, when the quantity has been determined, the right of selecting the position of the piece to be given belongs to the promisee. If the promisor, however, had any objection to the promisee's selection, and made a reasonable offer in lieu thereof, the court might listen to it. *Rumble* v. *Heygate*, 18 W. R. 749.

Specific performance of an agreement, "subject to a contract to be settled," will not be enforced. *Harvey* v. *Barnard's Inn* (*Principal*), 50 L. J., Ch. 750; 45 L. T. 280; 29 W. R 922.

Executory Contract to pull down and Build—Indefiniteness.]—By two letters of the 10th and 13th May, 1892, to the corporation of Oxford, C. offered to surrender his existing lease, to pull down an old building and erect a new building on the site of a line marked out by a specified surveyor, at a cost of 4,000*l.*, and to carry out the work within twelve months, provided that the city would grant him a new lease for seventy-five years, at a ground-rent of 100*l.* per annum; and he would agree to a line being drawn in the rear, giving up part of his cellar for the purpose of straightening the dividing line between the properties; this proposal to include all claims he might have for compensation for the loss of business and other things incidental to the taking down and rebuilding:—Held, that specific performance would be withheld, on the ground that no date was fixed for the surrender of the old lease and the commencement of the new term, and there was a want of definiteness in the provisions of the contract. *Oxford Corporation* v. *Crow*, [1893] 3 Ch. 535; 69 L. T. 228.

5. Want of Mutuality.

General Principle.]—Where nothing has been done under an agreement, the court ought not to decree a specific performance, except when the right to compel it exists both in plaintiff and defendant. *Lawrenson* v. *Butler*, 1 Sch. & Lef. 13.

The written undertaking of any party will be enforced, although the other party is not mutually bound by writing. *Palmer* v. *Scott*, 1 Russ. & M. 391; Tam. 488; 8 L. J. (O.S.) Ch. 127.

Where damages in action for breach of contract to sell chattel would be insufficient remedy for purchaser, though sufficient for vendor, specific performance decreed, as remedy must be mutual. *Withy* v. *Cottle*, 1 Sim. & S. 174; Turn. & R. 78; 1 L. J. (O.S.) Ch. 117; 23 R. R. 187.

Specific performance refused because lien of remedy was not mutual. *Armiger* v. *Clarke*, Bunb. 111.

The court will not interfere by injunction to prevent the violation of an agreement of which, from the nature of the subject, there could be no decree for a specific performance, as, for instance, to restrain the defendant from imparting the secret of an invention which had been the subject of a patent long since expired. *Newbury* v. *James*, 2 Mer. 446.

Specific performance refused on the ground of want of specific mutuality and other circumstances. *Hamilton* v. *Grant*, 3 Dow, 33; 1 Bligh (N.S.) 594; 15 R. R. 5.

Motion to restrain a defendant from violating his part of an agreement refused, on the ground of the agreement being such that the court could not compel a specific performance by the plaintiff of his part of it. *Hills* v. *Croll*, 1 Coop. t. Cott. 84, n.; 2 Ph. 60; 14 L. J., Ch. 444; 9 Jur. 645.

The rights of parties to agreements to enforce a specific performance in equity are not co-extensive, for their respective rights depend upon their conduct; and the conduct of one may give him the right to apply to the court, where the conduct of the other may debar him from that right. *S. E. Ry.* v. *Knott*, 10 Hare, 122.

Custody of Children.]—An agreement by a father, that the mother of his deceased wife should have the custody of the infant children during three months of every year, is bad for want of mutuality, and cannot be enforced against the deceased wife's mother. *Kennedy* v. *May*, 7 L. T. 819; 11 W. R. 358. And see *Vansittart* v. *Vansittart*, supra, col. 1848.

Infant.]—An infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual. *Flight* v. *Bolland*, 4 Russ. 298; 28 R. R. 101.

Contract Enforceable on Event Happening.]—The doctrine of non-mutuality being a bar to specific performance, does not apply to a contract which, to the knowledge of both parties, cannot be enforced by either until the occurrence of a contingent event. *Wylson* v. *Dunn*, 56 L. J., Ch. 855; 34 Ch. D. 569; 56 L. T. 192; 35 W. R. 405; 51 J. P. 452.

In a contract for sale of land, the vendor, tenant for life, with a proviso against alienation, agreed to apply for an act of parliament to enable him to convey; the court refused to stop a suit for specific performance on the ground that the act of parliament had not been yet obtained. *Devenish* v. *Brown*, 26 L. J., Ch. 23; 2 Jur. (N.S.) 1043; 4 W. R. 783.

Where a contract is made which both parties to it know at the time cannot be carried out without the act or consent of a third party, and that act or consent is done or given by the third party within a reasonable time, want of mutuality at the time of contract is no bar to its performance. *Blackburn Union* v. *Brooks*, 26 W. R. 57.

Contract Court cannot enforce.]—When the terms of a contract are such that the court cannot superintend so as to secure the performance by a plaintiff on his part, it will not decree specific performance. *Peto* v. *Brighton, Uckfield and Tunbridge Wells Ry.*, 1 H. & M. 468; 9 L. T. 227; 11 W. R. 874.

If, on nonperformance by a plaintiff, both parties cannot have equal justice, it will not, in the absence of an express negative covenant, grant an injunction to restrain acts, the doing of which is inconsistent with the maintenance of the contract. *Ib.*

The court will not entertain a bill for specific performance of an agreement, which contains terms that cannot be enforced against the plaintiff, where the effect of a decree would be that, on the plaintiff refusing to perform his part of the contract, the defendant could not be restored to his former position. *Stocker* v. *Wedderburn*, 3 K. & J. 393; 26 L. J., Ch. 713; 5 W. R. 671.

The circumstance that an agreement, of which specific performance is sought in equity, contains stipulations on the part of a plaintiff which could not themselves be specifically enforced, affords no valid objection to making a decree in favour of the plaintiff, if the intention of the parties was that the performance of those stipulations should be secured by covenant only. *Wilson* v. *West Hartlepool Harbour and Ry.*, 5 H. L. Cas. 40; 5 N. R. 289; 2 De G. J. & S. 475; 34 L. J., Ch. 241; 11 Jur. (N.S.) 124; 11 L. T. 692; 13 W. R. 361.

—— **Compromise of Actions.**]—An agreement was signed between the plaintiff and the defendant, that a patent, standing in the name of the plaintiff, but which was claimed by the defendant, should be held for their mutual benefit, the defendant to pay 100*l.* towards the expenses of taking out the patent. The plaintiff agreed to "rase" all proceedings, each party paying his own costs, "it being agreed that all claims between the defendant and the plaintiff are settled up to this date." The plaintiff filed a bill for specific performance of the agreement:—Held, that the agreement was such an one as the court would decree the performance of; and that it was not bad for want of mutuality. *Marsh* v. *Milligan*, 3 Jur. (N.S.) 979.

—— **Personal Service.**]—By a grant, dated in 1801, the then Bishop of Ely granted to P., a solicitor, "the office of receiver of all issues, profits, sum and sums of money, arising and issuing" from the possessions of the see, for his life. P. held the office under three successive bishops and attended all searches for records in the bishop's muniment room, of which he kept a key, for the performance of which acts he received fees and emoluments. Upon the accession of A. to the bishopric in 1836, he refused to admit P.'s claim of right to perform these acts; upon which P. filed his bill against the bishop:—Held, first, that the plaintiff's claim was not of such a nature as to induce this court to interfere to protect him; and, secondly, that the relief sought being analogous to the specific performance of an agreement, the bill must fail on the ground of want of mutuality. *Pickering* v. *Ely (Bishop)*, 2 Y. & C. C. C. 249; 12 L. J., Ch. 271; 7 Jur. 479.

By an agreement between the plaintiffs and the defendants, the former were to have the exclusive right of engraving and publishing a series of maps, from drawings to be furnished to them by the defendants. The court refused to restrain the defendants from acting in violation of the agreement, as it could not compel the defendants to furnish the drawings, and therefore could not decree a specific performance of the agreement. *Baldwin* v. *Society for the Diffusion of Useful Knowledge*, 9 Sim. 393; 2 Jur. 161.

Price not Fixed.]—The plaintiffs had entered into an agreement with the defendant's vendor to become lessees of premises, with the option of

purchasing within a given period at a sum fixed. A second memorandum was afterwards signed by the lessor alone, prolonging the term, and giving the plaintiffs the chance of purchasing during the enlarged term, but not fixing any price:—Held, that the agreement was not void for want of mutuality, but was in all respects good and valid. *Heys* v. *Astley*, 4 De G. J. & S. 34; 3 N. R. 19; 9 L. T. 356; 12 W. R. 64.

Where the plaintiff has acted upon an agreement, want of mutuality is not a sufficient ground for refusing specific performance. *Ib.*

Sale of Patents.]—An agreement was entered into by which the owners of an English and certain foreign patents agreed to transfer to A. shares in a proposed company to be formed to purchase their patents. The scheme of the company, as first proposed, was abandoned, and a company under a different name, with a different capital, was brought out to purchase the English patent only:—Held, that the second company comprehended, in effect, the substance of the contract which existed between the parties, and that an objection for want of mutuality in the contract could not be sustained. *Turner* v. *Moy*, 32 L. T. 56.

Covenant to Sell Lands.]—A., on the marriage of his daughter to B., covenants that B. should have his land for 1,500*l.* less than any other would give for it, and afterwards devises the premises and dies. Court refused to decree a specific performance of this agreement, by reason of the uncertainty and want of mutuality in it. *Bromley* v. *Jefferies*, 2 Vern. 415; Pre. Ch. 138.

Invalid Lease by Tenant for Life.]—Where a tenant for life agreed to grant a mining lease containing a clause not within his powers of leasing:—Held, that the tenant for life not having a power to grant such a lease, the reversioner, although able to do so, was not entitled to enforce a specific performance of it. *Ricketts* v. *Bell*, 1 De G. & Sm. 355; 11 Jur. 918.

Contract Invalid, not being under Seal.]—Where a contract between an individual and a corporation to grant a lease was invalid, as not being under the seal of the corporation, and therefore not enforceable by the corporation, specific performance was refused. *Oxford Corporation* v. *Crow*, [1893] 3 Ch. 535; 8 R. 279; 69 L. T. 228; 42 W. R. 279. *And see cases* supra, col. 1765.

Sale by one Devisee in Trust.]—A feme covert, one of several devisees in trust for sale, cannot bind herself to convey the estate, and a bill by the purchaser to enforce specific performance of a contract by such trustees was dismissed. *Avery* v. *Griffin*, L. R. 6 Eq. 606. And see *Sneesby* v. *Thorne*, supra, col. 1849.

Joint Tenants—Contract for Lease of Entirety—One Joint Tenant only bound—Moiety.]—A contract entered into by an agent of two joint tenants, one of whom is an infant, for a lease of the entirety of the subject-matter of the tenancy, which is not enforceable against the two joint tenants as to the entirety, will not be enforced by specific performance against the adult joint tenant as to his moiety where there has been no misrepresentation on his part. *Lumley* v. *Ravenscroft*, 64 L. J., Q. B. 441; [1895] 1 Q. B. 683; 14 R. 347; 72 L. T. 382; 43 W. R. 584; 59 J. P. 277—C. A. *And see cases* infra, col. 1856.

6. Breach of Trust or Forfeiture.

Breach of Trust.]—The court will not decree a specific performance which involves a breach of trust. *Maw* v. *Topham*, 19 Beav. 576. S. P., *Wood* v. *Richardson*, 4 Beav. 174; 5 Jur. 623.

The court refuses to enforce specific performance of a contract which is a breach of trust, equally at the suit of the vendors as of the purchasers. *Dunn* v. *Flood*, 54 L. J., Ch. 370; 28 Ch. D. 586; 52 L. T. 699; 33 W. R. 315—C. A.

Sale by Trustees.]—Where act of sale by trustees takes place, under circumstances of breach of trust, court will not decree specific performance in favour of bonâ fide or innocent purchaser. *Ord* v. *Noel*, 5 Madd. 438; 21 R. R. 328.

An agreement by trustees of two properties held on different trusts for a mining lease of both at a rent of so much per acre worked:—Held, a breach of trust, and specific performance at the suit of the trustees refused. *Tolson* v. *Sheard*, 46 L. J., Ch. 815; 5 Ch. D. 19; 36 L. T. 756; 25 W. R. 667.

Contract by trustees for sale of trust property, conjointly with property not subject to the trusts, will be specifically performed only where the terms of the contract furnish means of ascertaining clearly the proportion of the proceeds of the sale to be attributed to the trust premises. *Rede* v. *Oakes*, 4 De G. J. & S. 505; 34 L. J., Ch. 145; 11 L. T. 549; 13 W. R. 303.

A trustee, with the authority of his co-trustees, signed an agreement for the sale of trust property. In an action for specific performance, to which the co-trustees were not parties:—Held, that specific performance could not be ordered either as to the whole or as to the part in which the contracting trustee had a beneficial interest. *Naylor* v. *Goodall*, 47 L. J., Ch. 53; 37 L. T. 422; 26 W. R. 162.

A trustee entered into a contract for the sale of trust property, and it was agreed that the purchaser should, out of the purchase-money, retain a private debt due to him from the trustee. On a bill by the trustee:—Held, that this court would not decree the specific performance of such a contract. *Thompson* v. *Blackstone*, 6 Beav. 470.

Sale for Agreed Purpose.]—A contract in writing entered into for sale of land by trustees on the parol understanding that a church should be built. Purchaser before completion agreed to sell to a third party, who intended to erect a manufactory on it, and the trustees then refused to complete:—Held, that the court would not compel them to complete. *Trappes* v. *Cobb*, 16 W. R. 117.

Property liable to Pre-emption.]—It is no defence to a suit for specific performance against trustees of a turnpike road, that the land they have contracted to sell is liable to pre-emption by the owner of the adjoining land under the General Turnpike Act, 3 Geo. 4, c. 126, s. 39, even where the offer required has not, through inadvertence, been made to such owner, and it is in evidence that the owner insists on his right, the purchaser making no objection to the title, and being content to take such estate as the trustees could convey. *Barrett* v. *Ring*, 2 Sm. & G. 43.

Purchase of Sub-Lease instead of Lease.]—Where a town council is empowered to purchase

or rent lands for the purposes of baths and wash-houses, the purchase of lands held under a sub-lease, the interest in which might be lost by the default of the lessees, is a breach of trust, and specific performance will not be decreed. *Mulholland* v. *Belfast Corporation*, 9 Ir. Ch. R. 292.

Sale of Bankrupt's Estate.]—The provision in a contract for the sale of the property of a bankrupt, entered into by the creditor's assignees, that the purchase-money is to be received by the solicitor of the assignees, is not a breach of trust which would induce the court to refuse specific performance of the contract. *Hughes* v. *Morris*, 9 Hare, 636; 21 L. J., Ch. 761; 16 Jur. 603.

Breach of Trust by Directors.]—The directors of a railway company are trustees (in an important sense of the word) of their statutory powers, and an agreement entered into by the company amounting to a breach of trust will not be enforced. *Shrewsbury and Birmingham Ry.* v. *L. & N. W. Ry.*, 4 De G. M. & G. 115; 6 H. L. Cas. 113; 22 L. J., Ch. 682; 17 Jur. 845; 1 W. R. 172.

Prior Inconsistent Agreement.]—The court will not compel a defendant specifically to perform an agreement when the result would be to compel him to commit a breach of a prior agreement with another person. *Willmott* v. *Barber*, 15 Ch. D. 96; 43 L. T. 95; 28 W. R. 911.

Forfeiture.]—Although a court of equity will not in general decree specific performance of an agreement, of which the forfeiture of a lease will be the consequence, it will not allow a person to set that consequence up as a defence to a decree for specific performance, where the act creating the forfeiture is one which he might himself have guarded against. *Helling* v. *Lumley*, 3 De G. & J. 493; 28 L. J., Ch. 249; 5 Jur. (N.S.) 301; 7 W. R. 152.

Where the acts of the party to a contract are such as would have worked a forfeiture of all benefit of the contract if it had been executed, the court will not decree a specific performance. But when there is a doubt as to whether there has been any breach of the contract, and the evidence is conflicting, or the breaches of the agreement are nominal, the court may make a decree, leaving the plaintiff to his remedy at law. *Cartan* v. *Bury*, 10 Ir. Ch. R. 387.

Forfeiture not Probable.]—Agreement to grant a lease of copyhold premises for twenty-one years, and to put the same in repair, there being no evidence that to grant such lease would work a forfeiture, or that the licence of the lord could not be obtained:—Decreed, to be specifically performed. *Paxton* v. *Newton*, 2 Sm. & G. 437.

—— **Agreement for Underlease—Covenant not to Underlet without Licence—Unreasonable Refusal.**]—The plaintiff and defendant signed a memorandum of agreement, by which the defendant was to take an underlease of a house on certain terms. By the lease under which the plaintiff held, there was a covenant that the lessee would not assign or underlet without the licence in writing of the lessor, but the licence was not to be withheld in the case of the lessee obtaining a respectable and responsible person as tenant. The defendant was a respectable and responsible tenant, but the lessor declined to consent to the underlease, unless a certain undertaking was given by the defendant:—Held, that the defendant would get a good title and run no substantial risk of having it impeached on the ground of any breach of covenant by the granting of the underlease. He was therefore ordered to specifically perform the contract. *White* v. *Hay*, 72 L. T. 281.

7. Where Court cannot carry out its Order.

Work of Unspecified Character.]—Where there is an agreement to do certain works to the satisfaction of a referee named, without specifying the nature, materials, or extent of such works, no decree for specific performance can be made. Semble, a court of equity makes a decree in the sense that a court of law awards damages, and will not make a decree which it cannot enforce. *L. & S. W. Ry.* v. *Humphrey*, 6 W. R. 784.

Definite Work.]—A court of equity has jurisdiction to enforce the specific performance of a contract by a defendant to do defined work upon his property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages. *Storer* v. *G. W. Ry.*, 2 Y. & C. C. C. 48; 3 Railw. Cas. 106; 12 L. J., Ch. 65. *And see cases* supra, col. 1789.

Employment of Person to Construct Works.]—The court has not jurisdiction to decree the specific performance of a contract for which the consideration on the part of the plaintiff is the execution of certain works which the court is unable to superintend. *Peto* v. *Brighton, Uckfield and Tunbridge Wells Ry.*, 1 H. & M. 468; 9 L. T. 227; 11 W. R. 874.

Therefore, where a bill stated an agreement to employ the plaintiffs as contractors for making a railway, a motion for an injunction was refused. *Ib.*

Specific performance will not be decreed of a contract to employ a person to construct works which the court is unable to superintend. *Greenhill* v. *Isle of Wight (Newport Junction) Ry.*, 23 L. T. 885; 19 W. R. 345.

Therefore, where directors of a railway company entered into a written agreement to give G. "a contract for the construction of the line for 55,000*l.*, subject to a specification of the works to be agreed upon between G. and the engineer of the company":—Held, that the agreement was of such a nature that specific performance could not have been decreed. *Ib.*

The defendants agreed with the plaintiffs to undertake to execute a branch railway according to the terms of a specification to be prepared by the plaintiffs' engineer for the performance of their contract. The specification was prepared by the company's engineer, but, prices having risen, the defendants repudiated their agreement:—Held, first, that the agreement could not be enforced as regards the construction of the railway, because, from the nature of the works the subject of the agreement, it was an agreement the execution of which the court could not superintend consistently with public convenience, inasmuch as the motions would be incessant for committal or otherwise for nonperformance of orders with regard to the making of particular works. *South Wales Ry.* v. *Wythes*, 1 K. & J. 186. Affirmed 3 Eq. R. 153; 5 De G. M. & G. 731; 24 L. J., Ch. 87; 3 W. R. 133.

To work Line and repair Rolling Stock.]—A company agreed with contractors that the contractors should work the line and keep the engines and rolling plant in repair at a specified remuneration, and that the contract should be in force for seven years, but with a proviso for its determination if the contractors did not, within forty-eight hours after notice given by the company, obey the instructions contained in such notice:—Held, that the agreement was not of such a kind as to be enforceable by injunction restraining the company from determining the contract. *Johnson* v. *Shrewsbury and Birmingham Ry.*, 3 De G. M. & G. 914; 22 L. J., Ch. 921; 17 Jur. 1015.

And see *Cook* v. *Chilcott*, supra, col. 1791.

To make Siding.]—A railway company, requiring some of the plaintiff's land, entered into a contract for the purchase, by which the company agreed to make and maintain, so long as it should be a convenience, a siding, with all necessary approaches, at B., for public use, for the reception and delivery of goods:—Held, that the court will not dismiss the bill, on the ground that the agreement was not such as could be carried out under the superintendence of the court. *Lytton* v. *G. N. Ry.* 2 K. & J. 394; 2 Jur. (N.S.) 436; 4 W. R. 441.

And see cases sub head PERSONAL SERVICE, supra, col. 1797.

III. PRACTICE.

A. IN GENERAL.

Questions at Hearing.]—In suits for specific performance, all questions as to the validity of the contract, and whether it is such as ought to be specifically enforced, must be raised upon the hearing. *Hood* v. *Oglander*, 34 Beav. 513; 6 N. R. 245; 34 L. J., Ch. 528; 11 Jur. (N.S.) 498; 12 L. T. 627; 13 W. R. 705.

It is the duty of the court, in a bill for specific performance arising out of a doubtful point of law, to settle the law on the subject. *Bell* v. *Holtby*, 42 L. J., Ch. 266; L. R. 15 Eq. 178; 28 L. T. 9; 21 W. R. 321.

On a bill for specific performance, the questions whether time was originally of the essence of the contract, and whether the defendant has waived it are questions depending on evidence, and to be decided upon the hearing. *Levy* v. *Lindo*, 3 Mer. 81.

Defective Title.]—Where answer to bill for specific performance raises other objections to performance besides defect of title court will not, on motion by plaintiff for reference of title after answer, decide whether other objections are frivolous or not, semble. *Withy* v. *Cottle*, 1 Sim. & S. 174; Turn. & R. 78; 1 L. J. (O.S.) Ch. 117; 23 R. R. 187. S. P., *Gordon* v. *Ball*, 1 Sim. & S. 178.

If defence to bill for specific performance of agreement depends merely on want of title in vendor, defendant ought to rest on his answer, and not file a cross-bill. *Hilton* v. *Barrow*, 1 Ves. J. 284.

Issue Tried.]—Bill for specific performance dismissed, although an issue had been tried and had resulted in a verdict for the plaintiff, the court being of opinion that the agreement was one of which specific performance could not be decreed, and that the issue ought not to have been directed. *Morrison* v. *Barrow*, 1 De G. F. & J. 633.

Bill Dismissed.]—Where a plaintiff has failed at the hearing to prove his title to a decree for a specific performance on a point not raised by the pleadings, the court dismissed the bill, without prejudice to any other bill that the plaintiff may be advised to file. *Clay* v. *Rufford*, 5 De G. & Sm. 768.

Different Agreement set up.]—Where a plaintiff sought the specific performance of an agreement, and the defendant set up by his answer a different agreement, the terms of which the plaintiff had always repudiated:—Held, that the plaintiff was not entitled, upon the hearing, to have the agreement set up by the defendant specifically performed. *Jeffery* v. *Stephens*, 6 Jur. (N.S.) 947; 8 W. R. 427.

In a suit for a specific performance of a contract for the sale to the plaintiff of certain bonds, the plaintiff cannot at the bar abandon his case as to the particular bonds, and ask specific relief by the delivery of other bonds of the same kind, admitted by the defendant to be in his hands. *Simpson* v. *Malherbe*, 6 N. R. 245: 13 L. T. 112; 13 W. R. 887. And see *Marshall* v. *Berridge*, supra, col. 1850.

Different Agreement Proved.]—Bill for specific performance of a parol agreement to renew, the only witness for the plaintiff proved an agreement different from that in the bill; two defendants by an answer stated an agreement different from both: in strictness the bill ought to be dismissed, but specific performance was decreed according to the answers, with costs against the plaintiff. *Mortimer* v. *Orchard*, 2 Ves. J. 242.

And see cases supra, col. 1774.

Compromise—Fresh Bill when Necessary.]—In a redemption suit against the mortgagee in possession a compromise was agreed upon, under which the mortgagor was to pay a fixed sum on a certain day and the mortgagee was to carry on the business and give up possession on payment, and all proceedings in the suit were to be stayed. The mortgagor failed to pay:—Held, that the agreement for compromise could not be enforced on motion in the suit, but a fresh bill must be filed for specific performance. *Pryer* v. *Gribble*, 44 L. J., Ch. 676; L. R. 10 Ch. 534; 32 L. T. 238; 23 W. R. 642.

Authority of Agent.]—The former practice, which, in a suit for specific performance, required the authority of an agent to enter into a binding contract on behalf of his principal to be specially pleaded, still prevails. *Vale of Neath Colliery Co.* v. *Furness*, 45 L. J., Ch. 276; 34 L. T. 231; 24 W. R. 631.

In an action for specific performance of an agreement made by an agent, the statement of defence, after alleging unsoundness of mind of the principal, denied that any agreement had been entered into by a person lawfully authorised:—Held, that the defendant had not put in issue the question of the authority of the agent, and was only entitled to adduce evidence with respect to the unsoundness of mind. *Byrd* v. *Nunn*, 47 L. J., Ch. 1; 7 Ch. D. 284; 37 L. T. 585; 26 W. R. 101.

Advancing Cause.]—In a suit for specific performance of an agreement to let a house for a short term, the plaintiff should apply to have

the cause advanced so that it may be heard before the term has expired. *De Brassac* v. *Martyn*, 9 L. T. 287; 11 W. R. 1020.

Mode of Trial.]—In an action for the specific performance of an agreement by the incumbent and patron of a church to give up a portion of his district to form a part of a district for another church, an application by the plaintiff, under r. 26, Ord. XXXVI., Rules of Supreme Court, 1876, that the action might be tried by a judge without a jury, was granted, although the defendant had given notice under r. 3 of the same order, for the trial of the issues of fact by a jury. *Usil* v. *Whelpton*, 50 L. J., Ch. 511; 45 L. T. 39; 29 W. R. 799.

Pleading.]—An allegation in a bill by a purchaser for specific performance, that he was informed by his agent that a written agreement was executed, followed by statements referring to the agreement as actually made, is a sufficient allegation of the execution of a written contract. *Heard* v. *Pilley*, 38 L. J., Ch. 718; L. R. 4 Ch. 548; 21 L. T. 68; 17 W. R. 750.

A bill by a vendor for specific performance of a contract to sell, stating or shewing by reasonable inference that the vendor cannot give a valid conveyance, is demurrable; otherwise, where the allegations only disclose difficulties in the mode of conveyance. *Beaufort* (*Duke*) v. *Glynn*, 3 Sm. & G. 213.

Bill by a vendee for specific performance, insisting that the vendors could not make a good title, dismissed with costs. *Nicolson* v. *Wordsworth*, 2 Swanst. 365; 19 R. R. 86.

Signature.]—If bill for specific performance of agreement state that agreement in writing, signature will be presumed. *Rist* v. *Hobson*, 1 Sim. & S. 543; 2 L. J. (o.s.) Ch. 86.

Where the want of signature to an agreement for the sale of lands clearly appears on the bill, the objection may be taken advantage of by general demurrer, but the statements of this bill not being inconsistent with a signature by the party to be charged, and containing allegations of part performance, a general demurrer thereto was overruled. *Field* v. *Hutchinson*, 1 Beav. 599; 3 Jur. 792.

Case Strictly Stated.]—The terms of an agreement sought to be specifically executed must be accurately stated, and the case must be proved as stated on the record. *Ormond* v. *Anderson*, 2 Ball & B. 270; 12 R. R. 103.

Agreement by Letters.]—Where letters are stated in bill as the agreement, no testimony aliunde is admissible; otherwise, where stated as evidence of the agreement only. *Bird* v. *Blotchley*, 6 Madd. 17.

Parol Agreement.]—Bill alleging a written agreement, may be sustained by evidence of a parol agreement. *Spurrier* v. *Fitzgerald*, 6 Ves. 548.

Joint Contract.]—Where a joint contract of sale is alleged, a joint contract must be proved. *Wollaston* v. *Osborn*, 1 W. R. 163.

Waiver of Title.]—In a suit for specific performance of an agreement to take a lease, it must be alleged and charged in the bill that the defendant has waived the production of the lessor's title, if such waiver is intended to be relied on. *Gaston* v. *Frankum*, 2 De G. & Sm. 561; 13 Jur. 739.

B. PARTIES.

1. Parties to Contract.

Parties in General.]—To a bill founded on a contract, the parties to the contract are in general the only necessary parties. *Humphreys* v. *Hollis*, Jacob. 75. S. P., *Wood* v. *White*, 4 Myl. & Cr. 460; 2 Keen, 664; 8 L. J., Ch. 209; 3 Jur. 117.

A person not a party to the contract, ought not to be made party to a suit for specific performance. *Peacock* v. *Penson*, 11 Beav. 355; 18 L. J., Ch. 57; 14 Jur. 518.

Entire strangers to an agreement, and claiming under an adverse title to it, cannot be parties to a suit for its specific performance. *De Houghton* v. *Money*, 15 L. T. 403; 15 W. R. 214.

It is a rule of equity that specific performance can only be decreed against parties to the original contract, or persons claiming under them. *Lumley* v. *Timms*, 28 L. T. 157; 21 W. R. 319.

Stranger to Contract.]—A purchaser may, under special circumstances, make other persons than the parties to the contract who are interested in the estate parties to a bill for specific performance. *Tasker* v. *Small*, 6 Sim. 633; 3 Myl. & Cr. 63; 5 L. J., Ch. 321.

If a person not originally a party to an agreement, acts under it, and professes to render accounts and make payments according to its provisions, a bill for the performance of it may be maintained against him, even though the original agreement stipulated that it was not to extend to create any demand against him. *Cockell* v. *Whiting*, 3 L. J. (o.s.) Ch. 6.

Specific performance decreed at the instance of a person entitled to the benefit of an agreement, though not a party to it. *Hook* v. *Kinnear*, 3 Swanst. 417; 19 R. R. 251.

Party to Antecedent Agreement.]—Although a person claiming land by title paramount is not a proper party to a suit for specific performance, a person who, by virtue of an antecedent agreement with the vendor, claims to be interested in the purchase-money, is a proper party to a suit by the purchaser to have the right to the purchase-money ascertained, and for specific performance against the vendor. *West Midland Ry.* v. *Nixon*, 1 H. & M. 176.

Where Sub-Contract.]—B. agreed to sell property to W., who, before the completion of the agreement, contracted to sell a portion of the property to F. Subsequently F. filed a bill against B. and W., praying for the specific performance of his agreement:—Held, that B. was a proper party to the suit. *Fenwick* v. *Bulman*, L. R. 9 Eq. 165; 21 L. T. 628; 18 W. R. 179.

A party claiming an interest in a purchase by virtue of a contract as having been entered into on his behalf, is a proper party to a suit by the vendor for the specific performance of the contract: *Chadwick* v. *Maden*, 9 Hare, 188; 21 L. J., Ch. 876.

Joint Purchasers.]—A bill was filed for the specific performance of a contract, by one of two joint purchasers, against the other purchaser and

the vendor. An objection taken by the vendor, on the ground that the plaintiff could not support his bill, unless the joint purchaser joined him as a co-plaintiff therein, was overruled. *Mackreth* v. *Dunn*, 10 L. J., Ch. 367. And see *Hornsby* v. *Bird*, infra, col. 1863.

Tenant.]—A. agreed to sell to B. a piece of land in the occupation of his tenant, and to buy up the tenant's interest. B. having entered on the land before payment of his purchase-money, A. and his tenant served him with notices not to trespass, and afterwards A. filed a bill against B. for a specific performance, and to restrain the trespass:—Held, that the tenant was not a necessary party to the suit. *Robertson* v. *G. W. Ry.*, 10 Sim. 314; 1 Railw. Cas. 459; 9 L. J., Ch. 17.

Owner of Inheritance.]—Whether the owner of the inheritance is a necessary party to a suit, against tenant for life, for specific performance of an agreement for a lease for lives renewable for ever, quære. *Lowry* v. *Dufferin*. 1 Ir. Eq. R. 281.

Claim for specific performance of an agreement by a railway company to purchase land from trustees:—Held, that persons beneficially interested in the land were not necessary parties to the suit. *Potts* v. *Thames Haven Dock & Ry.*, 15 Jur. 1004.

Corporation.]—Tenant for life, who is restricted by the instrument under which he holds from alienating his estate, or from agreeing or attempting so to do, contracts to sell a portion of the property to visitors of the county lunatic asylum. Upon a bill by the vendor for specific performance, the court refused to stop the suit by allowing a demurrer, although the title was not such as could be forced upon an unwilling purchaser, the plaintiff being entitled to fair opportunity for application to parliament to cure the defect. The clerk of the visitors of the county lunatic asylum is a sufficient party to a suit for specific performance of an agreement by them to purchase, without the treasurer of the county, he being a trustee of the money which has come to his hands, and bound to pay it over to the clerk. *Devenish* v. *Brown*, 4 W. R. 783.

Company.]—To enforce specific performance of an agreement entered into by the directors of a company, it is sufficient to make the company a defendant. *Scott* v. *Oakley*, 4 N. R. 258; 33 L. J., Ch. 612; 10 Jur. (N.S.) 648; 10 L. T. 801; 12 W. R. 897.

—— **Shareholders.**]—To a suit by the directors of a joint-stock company on behalf of themselves and all other the shareholders, seeking to have the benefit of an agreement entered into by an agent of the company, it is not necessary that all the shareholders should be made parties. *Taylor* v. *Salmon*, 4 Myl. & Cr. 134.

A person who sets up a title adverse to the company, may be properly made a defendant in such a suit, although he also sustains the character of a shareholder. *Ib.*

Apportionment of Rent—Landlord.]—A company arranged by private contract the price of the interest of a tenant in lands they required, there being a covenant in his lease not to assign without the consent of his landlord. The contract provided an apportionment of rent:—Held, that the company could not resist specific performance, because the lessor was not a party to such apportionment. *Slipper* v. *Tottenham and Hampstead Junction Ry.*, 36 L. J., Ch. 841; L. R. 4 Eq. 112.

Beneficiary.]—Upon a bill for the specific performance of a covenant with A. for the benefit of B., A. must be a party. *Cooke* v. *Cooke*, 2 Vern. 36.

Trustees.]—In a bill to compel performance of covenant to surrender copyhold estate to A. in trust for others, A. must be a party. *Cope* v. *Parry*, 2 J. & W. 538.

Where trustees sell property with depreciatory conditions which render the sale liable to be impeached by the cestuis que trustent, the trustees cannot maintain an action for specific performance against the purchasers. *Dunn* v. *Flood*, 49 L. T. 670; 32 W. R. 197.

—— **Breach of Trust.**]—An agreement by trustees of a will to grant an underlease of their testator's property, is primâ facie inconsistent with a trust for sale of it. There may be circumstances to justify the agreement, but the court cannot enter into the consideration of those circumstances in a suit for specific performance between the trustees and the underlessee, the cestuis que trustent not being parties to it. *Evans* v. *Jackson*, 8 Sim. 217; 6 L. J., Ch. 8.

—— **Purchase on behalf of.**]—A party purchased land, and signified at the time that he made the purchase on behalf of the trustee in his marriage settlement, who had money vested in him to be laid out in land, and a bill being filed against him for specific performance, the court would not allow the case to proceed until the trustee was made a party. *Wynniat* v. *Lindo*, Tam. 512.

Remainderman.]—In a case resting simply upon covenant, if the party seeking specific performance be entitled in possession, he has a right to the enjoyment of the property, modo et formâ, according to his covenant; but if he be entitled in remainder only, he must shew that he has sustained some material damage by reason of the breach to entitle him to relief of this nature. *Johnstone* v. *Hall*, 2 K. & J. 414; 25 L. J., Ch. 462; 2 Jur. (N.S.) 780; 4 W. R. 417.

Auctioneer.]—The proper practice is not to make an auctioneer holding the deposit a defendant when the deposit is of small amount, unless he refuses to pay it into court when required; but where the deposit is of large amount, he may be properly made a defendant, unless he has paid it into court before action brought. *Egmont* (*Earl*) v. *Smith*, 46 L. J., Ch. 356; 6 Ch. D. 469.

Lease.]—Lease of lands is granted, reserving mines, &c., and a power of working them, lessor paying for damage done, which mines are leased to B. On a bill for performance of covenants against representatives of lessor, B. need not be a party. *Green* v. *Poole*, 5 Bro. P. C. 504.

—— **Mortgage.**]—A. agreed to grant B. a lease, but before he had done so he mortgaged the

property to C. with notice, who in no way contested A.'s right to the lease:—Held, that C. was not a proper party to a suit for specific performance. *Long* v. *Bowring*, 33 Beav. 585.

Sub-Lessee.]—A lessee of a house agreed to sub-let; he afterwards became bankrupt, and his trustee disclaimed the lease. The landlord commenced an action of ejectment against the sub-lessee. The sub-lessee filed his bill to restrain the action, and to compel the landlord to grant him a lease according to the terms of his agreement with the first lessee. The provisions of the agreement differed from those of the lease:—Held, that the sub-lessee had no equity to enforce the provisions of the agreement against the landlord. *Taylor* v. *Gillott*, 44 L. J., Ch. 740; L. R. 20 Eq. 682; 32 L. T. 795; 24 W. R. 65.

A lessee covenanted with his under-lessees, that in case he obtained an extension of the term he would give to the under-lessees a like extension of his under-term. A lease was subsequently taken from the ground landlord for an extended term in the name of a trustee for the separate use of the lessee's wife. The under-lessees filed a bill against the lessee, his wife, and her trustee, charging that the extended lease had been taken in a trustee's name, in order to defeat their rights under the lessee's covenant, and praying that the wife and her trustee might be decreed to grant an under-lease to the plaintiff for the extended term:—Held, that the action failed, as the suit was virtually one for specific performance against persons who were not parties to the original covenant or contract to renew the underlease. *Lumley* v. *Timms*, 28 L. T. 608; 21 W. R. 494—L.JJ.

Joint Vendors.]—Five persons contracted to sell an estate in land, and a formal agreement was prepared, but before execution it was discovered that the entirety belonged to four only; and accordingly it was verbally agreed that the fifth should not be required to execute. The agreement was executed by the four only as vendors and by the purchaser, but as no alteration was made in the body of the agreement it still purported to be an agreement by the five to sell and convey:—Held, that the four who executed could not maintain a bill for specific performance against the purchaser. *Hornsby* v. *Bird*, 38 L. J., Ch. 244; 17 W. R. 367.

Husband and wife may maintain a suit for specific performance of an agreement by them with a third party, for the sale to him of lands whereof the husband is seised in right of the wife. *Fennelly* v. *Anderson*, 1 Ir. Ch. R. 706.

Joint Lessees.]—Where three joint lessees of a manor agreed with M., upon the expiration of a subsisting grant, to make a fresh grant to him, and entered into a bond for performance of the agreement; one of the lessors afterwards conveyed his interest subject to the agreement, and afterwards died, leaving the plaintiff his executor, who, pending a suit against him, and the co-lessors, were unable to make the grant, upon which several actions on the bond were brought against the plaintiff and the other lessors, but a consolidation rule was obtained to abide the event of one of the actions:—Held, that M., being a party to the rule, and the question as against him being the same at law and in equity, he could not maintain a suit for specific performance of the agreement. *Hole* v. *Pearse*, 5 Hare, 408.

Creditors.]—Plaintiff, having become surety for the defendant for due payment of an annuity, the defendant who was tenant in tail in remainder, covenanted with the plaintiff, that he would suffer a recovery of the entailed premises for the benefit of the plaintiff. Upon a bill being filed for a specific performance of the contract, the defendant objected that certain creditors, upon judgments entered up against the defendant subsequently to the date of the indenture of indemnity, had, by the statute 1 & 2 Vict. c. 110, s. 13, acquired charges upon the entailed premises prior in point of date to the plaintiff's claim, and that such creditors were necessary parties to the suit:—Held, the objection went to the relief, and not to the want of parties. *Petre* v. *Duncombe*, 17 L. J., Ch. 370; 12 Jur. 261.

2. Real and Personal Representatives.

Death of Vendor.]—A vendor of a real estate died before completion, intestate as to his real estate:—Held, that the legal personal representatives of the vendor might maintain a bill against the vendor's heir and the purchaser for a specific performance *Hoddel* v. *Pugh*, 33 Beav. 489; 10 Jur. (N.S.) 534; 10 L. T. 446; 12 W. R. 782.

To a suit by the personal representative of a vendor of real estate for specific performance of the contract, the real representative of the vendor is a necessary party. *Roberts* v. *Marchant*, 1 Ph. 370; 1 Hare, 547; 13 L. J., Ch. 56.

Death of Purchaser.] — A bill for specific performance of a contract for the sale of real estate was brought against the heir of a purchaser, alleging that he in his ancestor's lifetime took upon himself the contract. To this suit the administratrix of the purchaser was made a defendant, and upon her death the suit was revived against the grantee of limited letters of administration, de bonis non of the purchaser, the plaintiff not seeking any general administration; quære, whether such grantee was a proper and sufficient party to the revived suit; or whether the general personal representative of the purchaser ought to have been made a party. *Care* v. *Cork*, 2 Y. & C. C. C. 130; 12 L. J., Ch. 156; 7 Jur. 461.

Where the purchaser dies before completion, his real and personal representatives are necessary parties, unless not interested in the subject-matter. *S. C.*, 6 Jur. 385.

—— **Infant Devisees.**]—Suit for specific performance of contract to purchase freehold; defendant had paid several large sums on account of the purchase-money, and a considerable portion was still due. He died when cause was at issue, leaving real and personal estate to infant children. Plaintiffs revived against executors only:—Held, that infant devisees were necessary parties. Suit ordered to stand over to amend, in that respect, by supplemental bill. *Townsend* v. *Champernowne*, 9 Price, 130.

Heir of Devisor.]—Bill by devisees in trust to sell for specific performance of an agreement to

purchase, that the heir of the devisor is not a party to the suit, is not matter of exception to the report in favour of the title. *Wakeman* v. *Rutland (Duke)*, 3 Ves. 234. *And see* VENDOR AND PURCHASER.

3. DERIVATIVE PURCHASERS.

In General.]—Quære, in what cases successive purchasers are properly made parties to a suit for specific performance. *Nelthorpe* v. *Holgate*, 1 Coll. C. C. 203; 8 Jur. 551. *See cases stated* 1 Coll. C. C. 223, n. et seq.

A party claiming an interest as a sub-purchaser is not a proper party to a suit by the vendor for specific performance, semble. *Chadwick* v. *Maden*, 9 Hare, 188; 21 L. J., Ch. 876.

H. contracted with J. for the purchase of a piece of land, and subsequently sold his bargain to M. The abstract of title was delivered. The draft conveyance was prepared and approved:—Held, that H. and M. were not improperly made co-plaintiffs. *Moxhay* v. *Inderwick*, 11 Jur. 837.

Purchaser of Part of Property.]—B. agreed to sell property to W., who before the completion of the agreement, contracted to sell a portion of the property to F. Subsequently F. filed a bill against B. and W., praying for the specific performance of his agreement, and of so much of the agreement between B. and W. as related to the property comprised in his agreement:—Held, that B. was a proper party to the suit. *Fenwick* v. *Bulman*, L. R. 9 Eq. 165; 21 L. T. 628; 18 W. R. 179.

Assignee of Purchaser.]—An original vendee of an estate is not a necessary party to a bill against his assignee for specific performance of an agreement to purchase. *Hall* v. *Laver*, 3 Y. & C. 191.

Bill for specific performance of an agreement to purchase against the original vendee and assignee of his contract, dismissed as against the former, the plaintiff being held to have accepted the latter as purchaser. Quære, if the bill had been filed against the original purchaser only. *Holden* v. *Hayn*, 1 Mer. 47; 15 R. R. 83.

Company—Transfer to New Company.]—The Mid-Kent Railway Company entered into a contract for the purchase of land, but did not pay the purchase-money, and subsequently thereto an act of parliament was passed, transferring all the property of that company to the South Eastern Railway Company. On bill against both companies for the specific performance of the contract:—Held, the South Eastern Railway was a proper party. *Hacker* v. *Mid-Kent Ry. and S. E. Ry.*, 11 Jur. (N.S.) 634; 12 L. T. 699.

Cross Bill by Sub-Purchaser.]—Vendors, to their bill against purchaser for specific performance of, or for rescinding the agreement, made a sub-purchaser a defendant; and the sub-purchaser afterwards filed a bill against his vendor for specific performance of his agreement, and made the original vendors defendants. A demurrer by the original vendors to the sub-purchaser's bill was overruled, on the ground that they had made him a defendant to their bill. *Fenwick* v. *Bulman*, supra.

4. SALE IN LOTS.

Two Houses under one Lease.]—Two houses, held under one lease, were sold in separate lots, and it was stipulated that the purchasers should be parties to each other's assignment:—Held, that the purchaser of lot 2 was not a necessary party to a suit for specific performance against the purchaser of lot 1. *Paterson* v. *Long*, 5 Beav. 186.

Sale to Building Society.]—The plaintiff sold some land to a building society, retaining an equitable mortgage on it for the purchase-money. The land was divided and sold in lots to the members:—Held, that the plaintiff could not maintain a suit against the purchasers of some of the lots to recover his debt, in the absence of the purchasers of the other lots. *Peto* v. *Hammond*, 29 Beav. 91.

Building Plots — Restrictive Covenants.]—Where an estate is vested in trustees who sell in plots for building subject to restrictive covenants, each purchaser has an equity against the others to compel the observance of the covenants. In a suit to enforce such an equity the trustees are necessary parties, and the remaining purchasers ought to be represented on the record. *Eastwood* v. *Levers*, 33 L. J., Ch. 355; 9 L. T. 615; 12 W. R. 195.

Joint Power of Appointment—Infant Beneficiary.]—Contracts for sale of different parts of an estate held under the same title had been entered into with different purchasers by a father and son who had a joint power of appointment under a settlement. The son died before the conveyances were executed. The legal estate under the settlement thereupon became vested in the father for life, with the remainder in tail to an infant. On a bill by one of the purchasers for the purpose of having the several contracts carried into effect, Turner, L. J., declined to make a decree against the infants in a suit of that form. The bill was amended by making all the purchasers co-plaintiffs, and the decree was then made against the infant and unborn persons claiming under the settlement. *Hargreaves* v. *Wright*, 1 W. R. 408.

Alteration of Particulars of Sale.]—A bill brought by a purchaser for the specific performance of an agreement to sell lot A. as described in the particulars of sale, was resisted on the ground that by an arrangement, to which the plaintiff was a party, part of lot A. as described, was deducted from that lot, and added to lot B.:—Held, that the plaintiff, on amending his bill, and puting in issue this averment, was bound to make the purchasers of lot B. defendants to the suit. *Mason* v. *Franklin*, 1 Y. & C. C. C. 239.

Mistake in Parcels.]—Where on a sale in lots, H., the purchaser of lot 6, obtained from the vendor a portion of the property comprised in lot 5, and the purchaser of lot 5 brought an action, and it was held that he was entitled to an assignment of that portion wrongly assigned to H.:—Held, also that the vendor was not a proper party to the suit. *Leuty* v. *Hillas*, 2 De G. & J. 110; 27 L. J., Ch. 534; 4 Jur. (N.S.) 1166; 6 W. R. 217.

C. INQUIRIES AND ACCOUNTS.

Account.]—Bill for specific performance against vendor in possession, and an account being necessary of the vendee's personal estate, referred to the master to fix a short day for the payment of the purchase-money, otherwise the bill to be dismissed as against those defendants, with costs. *Lowther* v. *Andover*, 1 Bro. C. C. 396.

Fact not in Issue.]—If, in the course of proceedings for specific performance, there comes out a fact, not put in issue by either party, which affects the legality of the contract, or tends to shew that the contract is not fully stated in the bill, the court will direct an inquiry into the fact so disclosed. *Parken* v. *Whitby*, Turn. & R. 366; 24 R. R. 74.

Parol Variation.]—Semble, in a suit for specific performance of a written agreement, a parol variation, not set up by the answer, but coming out on the cross-examination of the defendant's agent, who was one of the plaintiff's witnesses, is a proper subject for inquiry before the court finally disposes of the case. *London and Birmingham Ry.* v. *Winter*, Cr. & Ph. 57.

Where a parol agreement, varying the terms of the written agreement, is set up by the defendants in a suit for specific performance, and supported by evidence affording presumption or suspicion of its existence, an inquiry will be directed. *Van* v. *Corpe*, 3 Myl. & K. 269; 6 L. J., Ch. 208; 1 Jur. 149. *And see cases* supra, col. 1775.

Inquiry as to Title.]—If the common decree for specific performance and for inquiry as to title be made, and no special directions, the purchaser may under it raise objections which he had abandoned before suit. *Curling* v. *Austin*, 2 Dr. & Sm. 129; 10 W. R. 682.

The court will not add any special inquiry on the subject to the decree, or direct the chief clerk to state special circumstances. *Ib.*

Inquiry as to Terms of Contract.]—Where contract for the purchase of an estate is not complete in the lifetime of the ancestor, the terms of it not being ascertained, heir is not entitled to have the personal estate applied in payment of the purchase money. A reference or issue will not be granted to ascertain the terms of the contract. *Savage* v. *Carroll*, 1 Ball & B. 265. *See* 12 R. R. 32.

Agreement for Lease.]—Decree for specific performance of an agreement to grant a lease, rejecting one item for such conditions, &c., as shall be judged proper by J., and substituting reference to the master, the agency of J. not being of the essence of the contract. *Gourlay* v. *Somerset* (*Duke*), 19 Ves. 429; 13 R. R. 234.

Mixed Fund.]—When estates and other property forming a mixed fund are settled, the court, where the parties entitled to this mixed fund are numerous, will not, as against a purchaser of part of the mixed fund in which purchase one of its objects acquiesced, act as against that purchaser without knowing all the dispositions of that mixed fund, and will direct inquiries accordingly. *Thompson* v *Simpson*, 1 Dr. & War. 459.

Share in Partnership.]—The vendor of a share in a co-partnership business filed a bill against the purchaser, who had taken possession, charging that he had grossly mismanaged the property and destroyed its value, and praying that he might be declared to have accepted the title, and might be decreed to perform the contract specifically. The court was of opinion that the title had not been accepted, and as a good title was not shewn, a specific performance could not be decreed:—Held, that upon a record so framed, no accounts or inquiries could be directed. *Stevens* v. *Guppy*, 3 Russ. 171; 6 L. J. (o.s.) Ch. 164.

D. COSTS.

General Rule.]—The rule, that the costs of a suit for specific performance depend upon when the title was first shewn, is to be strictly adhered to. *Wilkinson* v. *Hartley*, 15 Beav. 183.

The costs of a suit for specific performance do not depend upon when a good title was first shewn, but upon the conduct of each party in causing the litigation. *Parr* v. *Lovegrove*, 4 Jur. (N.S.) 600; 6 W. R. 201.

The rule which makes the costs of a suit for specific performance depend upon when the title was first shewn relaxed; first, where the requisition was not made until after a bill was filed; and, secondly, where, although the requisition was made before the bill was filed, noncompliance was attributable to the purchaser having claimed compensation, in respect of which his bill had been dismissed with costs. *Lyle* v. *Yarborough* (*Earl*), 1 Johns. 70.

Title, when Proved.]—A vendor is entitled to costs of action, if he shewed and offered a good possessory title before action, though it is not proved till afterwards in chambers. *Games* v. *Bonnor*, 54 L. J., Ch. 517; 33 W. R. 64—C. A.

When a vendor succeeds in a suit for specific performance, he is entitled to costs, notwithstanding the title was first shewn in the master's office, if the suit was occasioned solely by the conduct of the defendant. *Peers* v. *Sneyd*, 17 Beav. 151.

The fact of a title having been perfected in the master's office does not determine the question of the costs, which depends upon whether the defects removed there were the occasion of the suit. *Scoones* v. *Morrell*, 1 Beav. 251.

Where a purchaser objects to specific performance upon other grounds than those of title, and fails, and the vendor does not make out his title until after decree, the purchaser is liable to the costs of the vendor's suit, except the costs of making out title. *Abbott* v. *Calton*, 22 L. J., Ch. 936.

Where the vendor does not shew a good title till after the commencement of the suit, he must pay the costs, though specific performance be decreed. *Townsend* v. *Champernowne*, 3 Y. & C. 505.

If vendor can make a good title at hearing, on further directions, it is sufficient for specific performance, vendor paying costs. *Paton* v. *Rogers*, 6 Madd. 256.

Vendor not making good title when bill filed, pays costs till report of good title. *Harford* v. *Purrier*, 1 Madd. 532; 16 R. R. 260.

Abstract Imperfect.]—A vendor seeking a specific performance should have his title prepared, and therefore, where the abstract delivered is imperfect, he pays the costs of the suit up to the time of the defects being supplied. *Wilson* v. *Allen*, 1 J. & W. 623; 21 R. R. 255. S. P., —— v. *Collinge*, cited, 3 V. & B. 143, n.

Specific performance decreed without costs, the abstract delivered not containing a satisfactory title. *Wilson* v. *Clapham*, 1 J. & W. 36; 20 R. R. 213.

Costs to a purchaser; the vendor having established his title before the master, after contest, upon a different ground from that in the abstract delivered. *Fielder* v. *Higginson*, 3 V. & B. 142; 13 R. R. 167.

Vendor alleged acceptance of title, purchaser asserted title defective. On suit by vendor neither

allegation turned out correct, and, though a good title was first shewn in the master's office, the decree was made without costs. *Sidebotham* v. *Barrington*, 5 Beav. 261.

Production of Documents.]—Specific performance without costs, the suit being occasioned by the refusal of the vendor to produce documents insisted on by the purchaser, some of which were necessary and others not. *Newall* v. *Smith*, 1 J. & W. 263; 21 R. R. 164.

Unnecessary Expenses.]—Where the plaintiff (vendor) has shewn a good title, but has been the means of great expense being incurred at chambers, the court will give him his costs up to the hearing only. *Goold* v. *White*, 2 Eq. R. 1100.

Vendor's Error.]—No costs given against the purchaser who had failed in his objections, the error having occurred in the vendor's deed. *Lecoy* v. *Mogford*, 2 Jur. (N.S.) 1084; 4 W. R. 805.

Title how shewn.]—A purchaser was ordered to pay all the costs, though a good title was not shewn until after the institution of the suit by the production of a declaration which was not the cause of dispute, and had not been previously required. *Bridges* v. *Longman*, 24 Beav. 27.

Where the plaintiff, the vendor, shewed a good title from the time of producing certain evidence of which the defendant knew, but it had formed the subject of dispute between him and the vendor:—Held, that the plaintiff was entitled to the costs of the suit. *Monro* v. *Taylor*, 3 Mac. & G. 713; 21 L. J., Ch. 525. Affirming 8 Hare, 51.

In a suit by a vendor, the costs will be thrown upon the purchaser, though the master reports that a good title was not shewn till after the filing of the bill, on the ground that certain evidence had not been previously furnished, which the vendor had offered to produce, but which had not been actually produced, before the institution of the suit, in consequence of the purchaser insisting upon other unsubstantial objections. *Long* v. *Collier*, 4 Russ. 269.

Specific performance decreed with costs in a case when the defendant, objecting to title, had been served with notice of a prior decision in a different cause in favour of the same title. *Biscoe* v. *Wilks*, 3 Mer. 456.

Unnecessary Objections.]—If purchaser makes frivolous objections to title, he pays costs, but not otherwise. *Thorpe* v. *Freer*, 4 Madd. 466. And see *Litchfield* v. *Brown*, 23 L. J., Ch. 176.

If a defendant questions the title of a plaintiff and fails, and by that course puts the plaintiff to any costs, such defendant should pay so much of the costs as has been occasioned by the objection. *Jones* v. *Morrall*, 2 Sim. (N.S.) 254; 21 L. J., Ch. 630.

On a sale by trustee of a will open to suspicion, the title was approved, but before completion the heir-at-law brought an action to upset the will. The purchaser refused to complete, and an action for specific performance was begun. The action by the heir failed, and thereupon a reference to title was directed, and the master having reported in favour of the title, a decree was made for specific performance. On appeal, however, the Lord Chancellor (Lord Cottenham) ordered the case to stand over generally, with liberty for the vendor to take such proceedings for establishing the will as he should be advised. The vendor then instituted a suit against the heir, which resulted in the will being established. The Lord Chancellor (Lord Truro) thereupon confirmed the decree for specific performance, and directed the purchaser to pay interest from the time when under the contract the sale ought to have been completed, and also to pay the costs of the suit subsequently to the hearing, when the reference as to title was directed. *Grove* v. *Bastard*, 1 De G. M. & G. 69.

The judgment of Lord Cottenham in this case (2 Ph. 619) observed upon. *Ib.*

In a suit for specific performance, a purchaser, who set up a defence which prevented the plaintiff obtaining, on motion, a reference as to title, and failed in establishing it, was ordered to pay the costs up to, and inclusive of the hearing. *Hyde* v. *Dallaway*, 4 Beav. 606; 6 Jur. 119.

In a suit for specific performance, where an objection to the contract had been overruled at the hearing, and the defendant had afterwards raised an objection to the title in the master's office, and that objection was cleared up, the court ordered that the costs after the decree should be paid by the defendant, but that up to the decree on the hearing there should be no costs on either side. *Woodward* v. *Miller*, 16 L. J., Ch. 16; 10 Jur. 1027. And see *Wright* v. *Howard*, infra, col. 1875.

No Title shewn.]—Where a master's report is against the title, a vendor's bill may now be dismissed with costs upon motion. *Bennett College* v. *Carey*, 3 Bro. C. C. 390. S. P., *Walters* v. *Pyman*, 19 Ves. 351.

Vendor not making a good title ordered to pay costs, though he was only a trustee to sell. *Edwards* v. *Harvey*, G. Cooper. 40.

A purchaser having unsuccessfully objected, no costs were given on either side on a bill for specific performance by vendor, who had not made out his title. *Weddall* v. *Nixon*, 17 Beav. 160; 22 L. J., Ch. 939; 17 Jur. 642; 1 W. R. 250.

Where it appears on the face of a bill for a specific performance, that the plaintiff could not convey, according to the agreement, without the direction of the court, he will not have the costs up to the hearing; but if the defendant insists on inquiries into the title, and fails in them, the plaintiff's costs incurred in these inquiries, and at the hearing on further directions, must be paid by the defendant. *Allen* v. *Currie*, 1 L. J. (O.S.) Ch. 135.

Title Doubtful.]—Where in a suit by a vendor the master reported in favour of the title, but the court, on an exception taken by the purchaser, deemed the title doubtful, an order was made, dismissing the bill without costs, but neither allowing nor disallowing the exception. *Willcox* v. *Bellaers*, Turn. & R. 491.

Purchaser brought into court on a doubtful title ought to be discharged with costs. *Blosse* v. *Clanmorris*, 3 Bligh, 62.

In a doubtful case of title, where the doubt is only removed at the hearing by an act of the plaintiffs, the plaintiffs must pay the defendant's costs. *Ashley* v. *Waugh*, 9 L. J., Ch. 31; 4 Jur. 572.

—— **Action by Purchaser.**]—Bill by purchaser for specific performance, insisting that the vendors could not make a good title, dismissed with costs. *Nicloson* v. *Wordsworth*, 2 Swanst. 365; 19 R. R. 86.

Where a bill for specific performance is filed

by a purchaser, and it turns out that the vendor cannot make a good title, the bill is dismissed, but without costs. *Malden* v. *Fyson*, 9 Beav. 347.

Plaintiffs in a suit for specific performance, in which the only question was one of title, which was decided against them, ordered to pay the costs, though a decree was made in their favour. *Hood* v. *Oglander*, 34 Beav. 513; 6 N. R. 57; 34 L. J., Ch. 528; 11 Jur. (N.S.) 498; 12 L. T. 627; 13 W. R. 705.

Negligence of Vendor.]—Where purchaser raised objections which were overruled, but before the certificate was signed discovered an objection on which it was held vendor (plaintiff) had no title:—Held, that the vendor was to blame, as he might, with reasonable diligence, have informed himself of this defect before selling, and that, therefore, although he had been right on all points which arose before the bill was filed, he ought not to receive costs. *Phillipson* v. *Gibbon*, 40 L. J., Ch. 406; L. R. 6 Ch. 428; 24 L. T. 602; 19 W. R. 661.

Time of the Essence of Contract—Notice to complete.]—Although time is not of the essence of the contract, yet, where there is unnecessary delay, the purchaser has a right to limit by notice the time for completing it, or to abandon the contract; where the purchaser failed in this defence:—Held, liable to costs up to the hearing, and the usual reference ordered. *Taylor* v. *Brown*, 2 Beav. 180; 9 L. J., Ch. 14.

In a suit by a vendor for specific performance, if the contract stipulated that the possession should be given at a specified day, it is competent for the purchaser to insist that both time and a vacant possession are the essence of the contract. Where a purchaser has consented to enlarge the time for completion, and where a vacant possession was of the essence of the contract, it is competent for him to object to complete at the expiration of such enlarged time, if the possession is not then vacant, and if he has done no act towards completion of the contract after he had notice that vacant possession could not be given at the day. But where a purchaser had by his acts waived the time for completion in the first instance, and had gone on for some time inducing the vendor to incur expenses to perfect his title, and suddenly, upon the discovery that vacant possession could not be given, declined to complete, the court dismissed a bill filed against such a purchaser, without costs. *Nokes* v. *Kilmorey*, 1 De G. & Sm. 444.

When, after a contract for the sale of land has been entered into, a notice is given to make time of the essence of the contract, the question whether the notice is reasonable or not must be judged of as at the date when it is given. The plaintiff held a lease from the defendant with an option to purchase, on giving three months' previous notice in writing. On the 24th March, 1877, the plaintiff gave the defendant notice of his intention to exercise the option. On the 24th September, 1878, the defendant gave the plaintiff a notice in writing, requiring him to complete the purchase, and stating that, unless he completed it on or before the 31st October, 1878, the defendant would treat the contract as rescinded, and that in that respect time should be deemed of the essence of the contract. On the 1st November, 1878, the defendant's solicitors wrote to the plaintiff that the defendant, in pursuance of his notice, declared the contract at an end; and they requested the return of the abstract, and demanded payment of rent for the property:—Held, that the notice of the 24th September fixed an unreasonably short time for the completion of the purchase, and was therefore invalid. Specific performance was decreed, and the defendant was ordered to pay the costs of the action up to and including the trial. *Crawford* v. *Toogood*, 49 L. J., Ch. 108; 13 Ch. D. 153; 41 L. T. 549; 28 W. R. 248.

Death of Vendor.]—Where, after contracting to sell land, the vendor devises to parties, some of whom are infants at his decease, his estate must bear the costs of the suit which he has thus voluntarily rendered necessary to a completion of the contract, and a mere devise of trust estates does not in such a case avoid the necessity of a suit. *Purser* v. *Darby*, 4 K. & J. 41.

Secus, if he dies intestate. *Sanderson* v. *Chadwick*, 2 N. R. 414. S. P., *Williams* v. *Glenton*, 35 L. J., Ch. 284; 12 Jur. (N.S.) 175; 13 L. T. 727; 14 W. R. 294. Affirming 34 Beav. 528; *L. & S. W. Ry.* v. *Bridger*, 4 N. R. 261; 12 W. R. 948.

A vendor, after the contract, and before the conveyance to the purchaser, died, without having devised the legal estate in the premises in trust to complete the purchase, and a suit for a specific performance against the trustees and the infant devisees of interests in his estate having become necessary, the court made the decree without costs, there having been no default on either side. *Hinder* v. *Streeten*, 10 Hare, 18; 16 Jur. 650.

A., having devised his real estate to B., contracted to sell a portion to the plaintiffs, and died before the contract was completed, leaving B. his infant heir and devisee:—Held, on the authority of *Hinder* v. *Streeten* (supra), that the heir was entitled to his costs up to the hearing of a suit by the plaintiffs for specific performance. *Midland Counties Ry.* v. *Rice*, 2 Eq. R. 1109. S. P., *Heard* v. *Cuthbert*, 1 Ir. Ch. R. 369. *Mudin* v. *Patey*, 1 N. R. 566; *White* v. *Beck*, Ir. R. 6 Eq. 63; 20 W. R. 275; *Hale* v. *Bushill*, 35 Beav. 343; 35 L. J., Ch. 381; 12 Jur. (N.S.) 243; 14 L. T. 246; 14 W. R. 495.

—— **Equitable Estate.**]—When, in order to give the purchaser an immediate estate in fee, both legal and equitable, a decree for specific performance of the contract, under the statute 11 Geo. 4, and 1 Will. 4, c. 60, s. 17, was necessary:—Held, that as this was a question of title, and the vendor had contracted to deduce a good title at her own expense, and there were no laches on either side, the costs of the suit must be paid out of the vendor's estate. *Farrar* v. *Winterton* (*Earl*), 4 Y. & C. 472.

—— **Intestacy.**]—A contract for the sale of real estate had been entered into, but before completion, the vendor died intestate, leaving an infant heir-at-law:—Held, that in a suit instituted by the purchaser for specific performance, no costs of suit would be given on either side, otherwise if the estate had been devised by the vendor. *Hodson* v. *Carter*, 1 N. R. 179; 7 L. T. 504. S. P., *Hanson* v. *Lake*, 2 Y. & C. C. C. 328. And see *Bannerman* v. *Clarke*, 3 Drew. 632; 26 L. J., Ch. 77; 5 W. R. 37; *Longinotto* v. *Morss*, 26 L. T. 828.

If a vendor dies before completion, his infant heir, not disputing the contract, is entitled to be paid out of the purchase-money his costs and

expenses of a suit to carry the contract into effect. *Barker* v. *Venables*, 34 L. J., Ch. 420; 11 Jur. (N.S.) 480; 12 L. T. 796; 13 W. R. 803.

A vendor died intestate, and it became necessary to file a bill to make his infant heir a trustee:—Held, that each party must bear his own costs. *Scott* v. *Scott*, 8 L. T. 450; 11 W. R. 766.

Distinction in this respect between suits rendered necessary by the voluntary act of the deceased, and those caused by the mere act of God, as where the deceased has died intestate, leaving an infant heir. *Ib.*

The heir-at-law of a vendor, who refused to convey to the purchaser an estate sold by his ancestor, was ordered to pay costs of a suit to compel him. *Hoddel* v. *Pugh*, 33 Beav. 489; 10 Jur. (N.S.) 534; 10 L. T. 446; 12 W. R. 782.

After decree in a suit for specific performance against the infant heir of the vendor, a petition must be presented under 11 Geo. 4 & 1 Will. 4, c. 60, for an order that the infant may convey to the purchaser. The costs of the suit were ordered to be paid out of the purchase-money. *Prytharch* v. *Havard*, 6 Sim. 9.

Insanity of Vendor.]—Where, by reason of one of several vendors becoming of unsound mind before the purchase-money is paid, a suit for specific performances becomes necessary, no costs of the suit will be given on either side. *Cresswell* v. *Haines*, 31 L. J., Ch. 237; 8 Jur. (N.S.) 208; 10 W. R. 121.

On a claim by vendor for specific performance by purchaser found by inquisition to have been lunatic at the time of the contract, the court declared the contract to have been null and void, and ordered the residue of the deposit, after deducting the vendor's costs, charges, and expenses, to be repaid to the committee of the lunatic's estate. *Frost* v. *Beavan*, 22 L. J., Ch. 638; 17 Jur. 369.

Offer by Party.]—Interpretation of a subsequent correspondence, in reference to the original contract. The agreement is not impaired nor altered by proposals which the purchaser makes subsequently, with a view to an amicable arrangement. Such proposals may have an influence on costs. *Bunning* v. *Bunning*, 1 L. J. (O.S.) Ch. 56.

Where the court has declared, in a suit by a vendor, against his contention on a matter of conveyance, that being the substantial ground of the litigation, the vendor must pay the costs. It is the duty of the vendor plaintiff who has a defective title, when the objection is removed, to offer the purchaser the costs up to that time, and to give him a conveyance. *Freer* v. *Hesse*, 2 Eq. R. 13; 23 L. J., Ch. 338—L.JJ.

Property was put up for sale, and in the particulars advertised was described as being an absolute reversion in a freehold estate, falling into possession on the death of a lady in her seventieth year; and by the conditions of sale, which were read for the first time at the auction previously to the commencement of the biddings, the property was stated to be sold subject to two mortgages, and the purchaser's solicitor paid the deposit on his behalf after having read the conditions. The purchaser was deaf, and did not understand that he was buying only an equity of redemption in the property:—Held, that though in an ordinary case, as the purchaser's carelessness had contributed to the mistake, he would not have been entitled to the costs of the suit, he might have them, having, previously to the commencement of the suit, offered, on condition of having the contract rescinded and the deposit returned, to pay the costs of the sale. *Torrance* v. *Bolton*, 42 L. J., Ch. 177; L. R. 8 Ch. 118; 27 L. T. 738; 21 W. R. 134.

—— **Lis Pendens.**]—A purchaser refused to complete, on the grounds that the original title was at least doubtful, and that lis pendens was a charge on the property. The lis pendens was afterwards decided to form no charge on the property; after which the vendor offered to stay all further proceedings if the purchaser would complete his contract and pay the costs up to the time of the offer:—Held, that the vendor was entitled to a decree for specific performance, and costs up to and inclusive of the hearing. *Bull* v. *Hutchons*, 9 Jur. (N.S.) 954; 8 L. T. 716; 11 W. R. 866.

Supplemental Bill filed Pendente Lite.]—Purchaser pendente lite, on filing supplemental bill, is liable to all costs from beginning of suit. *Anon.*, 1 Atk. 89.

Sale by Trustees.]—A trust to sell with all convenient expedition, and within five years:—Held, to authorise a sale after the five years. Costs of specific performance not given. *Pearce* v. *Gardner*, 10 Hare, 287; 1 W. R. 98.

Devisees in trust for sale contract to sell in the ordinary form; an abstract of title is delivered, when the counsel for the purchaser advises him to claim indemnity against covenants not to build, &c., not set out in the contract but contained in the testator's purchase deed. A draft conveyance tendered, when the vendors insert a proviso embodying the covenants in the conveyance, and the purchaser objects to execute it in that form:—Held, that the disclosure of the covenants on the draft conveyance brought the contract down to that date, and the purchaser had the option to rescind or give the covenants. Claim dismissed without costs. *Lukey* v. *Higgs*, 3 Eq. R. 510; 24 L. J., Ch. 495; 1 Jur. (N.S.) 200; 3 W. R. 306.

A trustee having power to sell land in order to raise 600*l.* and the expenses, put it up to sale in two lots, and sold the first for 600*l.*, and the second for 510*l.*:—Held, that the sale of the second lot was not improper, and that the purchasers must pay the costs of a suit for specific performance brought against them by the trustee. *Thomas* v. *Townsend*, 16 Jur. 736.

Upon a bill for specific performance, the court thought that it would press too severely on the defendants, who were mere trustees, to make a decree. The court held that, in dismissing the bill, it had no authority to give the plaintiff his costs. *Wedgwood* v. *Adams*, 8 Beav. 103.

Bill being dismissed without costs as a hard case, parties made trustees without their knowledge, and as such being necessary parties to the bill, cannot have costs against plaintiff, but left to their remedy against their principal. *Brodie* v. *St. Paul*, 1 Ves. J. 326.

Parties refusing to Convey.]—A bill for a specific performance of an agreement was made necessary by trustee refusing to join in the conveyance. The court being of opinion that the trustees ought to pay all the costs of the suit, the decree was, that the plaintiff should pay the costs of all the other defendants (although he

had a decree against them), and recover over the whole costs from the defendant, the trustee. *Jones* v. *Lewis*, 1 Cox. 199.

Bill by purchaser for specific performance ordered to be dismissed for defect of title, a necessary party not choosing to concur in conveying; order to dismiss without costs, it being against the principles of the court to order the defendant to pay the plaintiff his costs in such case. *Lewis* v. *Loxham*, 3 Mer. 429.

A contract was entered into for the purchase of property as to which the vendor, whose interest was subject to his wife's dower, stated that she would release her dower. The wife refused to join:—Held, that the purchaser was entitled to specific performance with compensation, and that there was nothing to deprive the purchaser of his costs upon further consideration. *Wilson* v. *Williams*, 3 Jur. (N.S.) 810.

Unsuccessful Defence.]—In a suit for specific performance, where the purchaser insisted that the contract was abandoned and he was decreed to complete the contract on a good title being shewn, he must pay the costs of the suit up to the hearing. *Taylor* v. *Brown*, 2 Beav. 180; 9 L. J., Ch. 14.

A purchaser, who had altogether denied the vendor's right to a specific performance, ordered to pay the costs of a suit, instituted by the vendor for that purpose, down to the hearing, although the title was not finally completed until after the decree, but where since that time both parties claimed what they were not entitled to, no costs on either side were given. *Carradus* v. *Sharp*, 20 Beav. 56.

To a bill by a vendor for the specific performance of a contract for the sale of property, the defendant raised three objections, and at the hearing failed in two:—Held, that the defendant ought to pay so much of the costs of the suit as had been occasioned by his unsuccessful objections. *Smallwood* v. *Cotty*, 6 L. J., Ch. 265.

If the purchaser, in his answer, besides insisting on the want of title in the vendor, sets up a defence that he was seduced into the contract by fraud and misrepresentation, and that defence is not supported by evidence, he will be loaded with so much of the expense of the suit as was occasioned by those improper allegations. *Wright* v. *Howard*, 1 L. J. (O.S.) Ch. 94. And see *Woodward* v. *Miller*, supra, col. 1870.

Compensation.] — A claim of compensation being the sole cause of suit, plaintiff to pay the costs; bill dismissed without costs against subsequent purchaser, with notice of plaintiff's contract, who had formally abandoned, but given plaintiff no notice thereof. *Feuster* v. *Turner*, 11 L. J., Ch. 161; 6 Jur. 144.

Claim for Damages.]—In a suit for specific performance and damages, an issue was directed to be tried at common law to ascertain the amount of damages. The plaintiff set up a very large claim based on special user, but this claim was disallowed, and only a much smaller claim for common user allowed. On the cause being brought back into chancery the plaintiff was disallowed the extra costs occasioned by the excessive claim. *Cory* v. *Thames Iron Works and Shipbuilding Co.*, 16 W. R. 475.

Sale of Leaseholds.]—In conditions of sale of leaseholds it was stated, that the purchaser should have possession on a certain day; "all outgoings" up to that day being cleared by the vendors. The vendors refused to pay half a quarter's rent which had accrued due between the last quarter day and the date fixed for completion:—Held that the vendors were entitled to specific performance, subject to paying the half-quarter's rent; but that, as the purchaser had refused to accede to inexpensive modes which had been proposed for adjusting the dispute, there should be no order as to costs. *Lawes* v. *Gibson*, 11 Jur. (N.S.) 873; 13 L. T. 316; 14 W. R. 25.

Terms not expressed in Contract.]—W. let premises to V. upon a contract written in pencil by V., and signed by him in a notebook belonging to W.; both act under the contract, but V. ultimately alleges non-performance by W. of certain things not contained in it, and W. makes like charges. On a claim for specific performance, decree for specific performance made without costs. *Waller* v. *Vigurs*, 2 W. R. 51.

Plea of Statute of Frauds.]—Specific performance of an agreement refused, under the circumstances, but the costs occasioned by the defendant setting up the Statute of Frauds were disallowed. *Cowell* v. *Watts*, 2 Hall & Tw. 224.

Purchase of Advowson.]—Party who had contracted with person, since dead, for the purchase of advowson, but had taken no steps during the life of vendor to enforce contract, and for a considerable time after his death:— Held, not entitled as against devisee to present, if a vacancy occur in the meanwhile, though he insists on completion of contract; but entitled to costs as far as his claim comes in question. *Wyrill* v. *Exeter* (*Bishop*), 1 Price, 292; 16 R. R. 727.

Sale of Copyholds.]—Bill to have execution of articles for the sale of some copyhold lands to plaintiff, and to compel the lord of the manor to admit plaintiff in fee, according to the agreement, which was decreed; but there being no tender of a surrender to the lord, and consequently no refusal, he was to have his costs. *Sayle* v. *Reeves*, Gilb. Eq. Rep. 188.

Transfer of Shares.]—Where the registered holder of shares disputes the right of an applicant for a transfer under an agreement, the court has no jurisdiction to make the former pay the costs rendered necessary by his opposition. *Tahiti Cotton Co., In re, Sargent, Ex parte*, 43 L. J., Ch. 425; L. R. 17 Eq. 273; 22 W. R. 815.

Duty of Solicitor.]—A. verbally agreed with B., his solicitor, for the sale of land to B. This agreement, which was never reduced to writing, provided that possession should be at once given. B. entered into possession, but took no further steps in completion of the purchase, and, before the purchase-money became due died:—Held, that B., as A.'s solicitor, ought to have had an agreement in writing prepared, and that the executor was bound to complete the purchase and pay the costs of the suit. *Brafield* v. *Scriven*, 22 W. R. 202.

A lease contained a covenant by the lessor to grant a further lease, and a stipulation that the lease should be prepared by the lessor's solicitor:

—Held, that the lessor's solicitor was bound to prepare a proper lease, and the lessor was ordered to pay the costs of the suit, and of the dispute occasioned by him. *Mappin* v. *Savory*, 20 L. T. 777.

The defendants' solicitors, two days before a bill for specific performance was filed, but while the bill was in course of being printed, wrote to the plaintiff's solicitor, to propose an early day for completing the purchase, and the plaintiff's solicitor, on the very day on which the bill was filed, wrote to accept the appointment, but afterwards claimed the costs of the suit, which the defendants refused to pay:—Held, that the plaintiff must pay the costs of the suit. *Chester* v. *Metropolitan Ry.*, 11 L. T. 699; 13 W. R. 333.

Misrepresentation.]—The vendors having by their misrepresentations occasioned the suit, were ordered to pay all the costs. *Harrison* v. *Coppart*, 2 Cox, 319.

Fraud.] — A. and B. having entered into a verbal treaty for the purchase of certain premises belonging to A., and not being able to agree as to the amount of the purchase-money, A. agreed to take a certain sum from B. for the premises. During the period of this negotiation between A. and B., A. entered into a contract with D. for the sale of the same premises, and although notice of the agreement between A. and B. was given to D., actually conveyed the premises to D.:— Held, that D. having had notice of the agreement between A. and B., the conveyance to him must be considered fraudulent, and should be delivered up to be cancelled, and that the conduct of A. having been very fraudulent, the costs of B. should in the first place be paid out of the funds lodged by him in the hands of C. *Field* v. *Boland*, 1 Dr. & Wal. 37.

Costs of Appeal.]—A bill for specific performance was dismissed with costs in the court below. On appeal, the defendant, whose harsh and unreasonable conduct had made the suit necessary, was ordered to pay the whole costs, including the costs of the appeal. *Lillie* v. *Legh*, 3 De G. & J. 204.

In a suit by the purchasers of certain mines to set aside a sale, a decree with costs was made in favour of the plaintiffs. The House of Lords reversed the decree, and remitted the cause to the court below. The court directed the costs to be repaid to the defendants, but without interest. *Small* v. *Attwood*, 3 Y. & C. 105; 8 L. J., Ex. Eq. 67.

Costs at Law.]—A defendant demurred to a bill for specific performance, and his demurrer was overruled. He then asked for a case to be sent to a court of law, which was granted, and the opinion of the judges was against him. Ultimately, however, the bill was dismissed with costs:—Held, that the defendant was entitled to his costs at law as well as in equity. *Forbes* v. *Peacock*, 12 Sim. 528; 13 L. J., Ch. 46; 7 Jur. 688.

Third Party Claim.] — Where a third person not a party to a suit for specific performance for a contract of sale, made a claim independently of vendor and purchaser, the bill was dismissed without costs. *Heseltine* v. *Simmons*, 6 W. R. 268.

When in a suit against a vendor for specific performance of a contract the refusal to complete arose from a claim made by the defendant T. under a prior contract, but which claim T. was held to have abandoned in favour of the plaintiff, a decree was made with costs against both defendants, but with a declaration that as between the defendants the costs should be borne by T. *Wilson* v. *Thomson*, 44 L. J., Ch. 527; L. R. 20 Eq. 744; 23 W. R. 744.

Contract uncertain.] — In the absence of special circumstances, a court of equity will not enforce specific performance of a contract for the purchase of land which is silent as to the means of access to it, when it is reasonably uncertain whether any means of entering on the land at all times can be conferred on the purchaser. A bill for specific performance was dismissed with a fixed amount of costs. *Denne* v. *Light*, 8 De G. M. & G. 774; 26 L. J., Ch. 459; 3 Jur. (N.S.) 627; 5 W. R. 430.

By a contract T. agreed to sell an estate to a purchaser with the following reservation: T. "reserves the necessary land for making a railway through the estate to P." :—Held, on suit for specific performance by the purchaser, that the contract was too uncertain for the court to make a decree for specific performance of it, and the bill was dismissed with costs. *Pearce* v. *Watts*, 44 L. J., Ch. 492; L. R. 20 Eq. 492; 23 W. R. 771.

Where Specific Performance impossible.] — On a bill for a specific performance of an agreement for the sale of a house, the plaintiff made out his case; but it appeared that the defendant had actually sold the house to another person for a valuable consideration. The court directed the master to inquire what damages the plaintiff had sustained by the non-performance of the agreement, and that such damages, together with the costs of the suit, should be paid by defendant. *Denton* v. *Stewart*, 1 Cox, 258.

Semble, where a decree has been made for specific performance, and an objection is subsequently raised for the first time, which the court cannot get over, the proper course is to dismiss the bill without costs. *Jenkins* v. *Green*, 28 L. J., Ch. 820; 5 Jur. (N.S.) 304; 7 W. R. 304.

Bankruptcy of Vendor.]—Where there was a sufficient part performance to take a parol contract for sale out of the Statute of Frauds, and the purchaser became bankrupt:—Held, that the vendor, wishing to have effect given to his lien for unpaid purchase-money, was entitled to have his costs out of the estate sold. *Cooper, Ex parte, Taylor, In re*, 3 Mont. D. & D. 717.

A vendor resisted a bill for specific performance. He became bankrupt, and his assignee afterwards continued the resistance, but failed at the hearing:—Held, that the assignee must pay the plaintiff's costs of suit incurred subsequently to the bankruptcy. *Foxwell* v. *Greatorex*, 33 Beav. 345.

Covenant to Renew.]—A landlord who does not litigiously oppose a covenant for renewal shall be entitled to his costs. *Doneraile* v. *Chartres*, 1 Ridgw. 137; *Jones* v. *Lewis*, 1 Cox, 137.

A tenant having by his conduct made his title to a renewal doubtful, and thereby rendering a suit for it necessary, was, on obtaining a renewal, decreed to pay all the costs. *Barrett* v. *Pearson*, 2 Ball & B. 189.

Set-off.]—One of the terms of an agreement was, that the contract should be void if the purchaser's counsel should be of opinion that a marketable title could not be made good. The counsel being of that opinion, a bill by the purchaser for a specific performance, with a compensation, was dismissed with costs: and an application by the plaintiff that his deposit might be set off against the defendant's costs, was refused with costs. *Williams* v. *Edwards*, 2 Sim. 78; 29 R. R. 61. And see *Phipps* v. *Child*, 3 Drew. 709.

Priority of Purchaser's Costs over Mortgage after Contract.]—A vendor brought an action claiming a declaration that his contract for sale was at an end. The purchaser made a counter-claim for the specific performance of the contract. Judgment was given for the defendant, with costs, on both claim and counter-claim:—Held, that the defendant was entitled to deduct his costs from his purchase-money in priority to a mortgage of the plaintiff, whose mortgage had been created after the contract for sale, but before the commencement of the action. *Green* v. *Serin*, 13 Ch. D. 589.

Inquiry.]—By a decretal order specific performance was decreed against a vendor: an inquiry was directed what damage had been sustained by the plaintiff by reason of certain acts of the defendant. The inquiry found that plaintiff was entitled to damages for some acts and not for others:—Held, that the plaintiff was entitled to the costs of the inquiry so far as he had succeeded, but must pay all the other costs of the inquiry. *Krehl* v. *Park*, 44 L. J., Ch. 286; L. R. 10 Ch. 334; 33 L. T. 83; 23 W. R. 475.

E. E. H. B.

SPECIFICATION.

Of Patents.]—*See* PATENT.

Of Works.]—*See* WORK AND LABOUR.

SPECIFIC DELIVERY OF CHATTELS.

See DETINUE—SPECIFIC PERFORMANCE.

SPECIFIC LEGACY.

See WILL.

SPRING GUNS.

See NUISANCE.

STAGE-COACHES.

See CARRIERS—HACKNEY CARRIAGE.

STAGE PLAYS.

See COPYRIGHT—THEATRE.

STAKEHOLDER.

See GAMING—INTERPLEADER.

STAMPS.

See REVENUE.

STANNARIES.

See MINES AND MINERALS.

STATEMENT OF CLAIM.

See PRACTICE.

STATIONS.

See RAILWAY.

STATUTE.

Interpretation Act, 1889 (52 & 53 Vict. c. 63).
Short Titles Act, 1896 (59 & 60 Vict. c. 14).
Chitty's Statutes, tit. "Act of Parliament."

A. EFFECT OF FORMAL PARTS.
1. *Title*, 1881.
2. *Preamble*, 1882.
3. *Recitals*, 1884.
4. *Marginal Notes*, 1884.
5. *Headings*, 1885.
6. *Punctuation*, 1885.
7. *Interpretation Clauses*, 1885.

B. DISTINCTION BETWEEN PUBLIC AND LOCAL, 1886.

C. CONSTRUCTION GENERALLY.
1. *General Rules*, 1888.
2. *On whom Binding*, 1897.
3. *Prospective or Retrospective*, 1898.
4. *General Words*, 1905.
5. *Particular Words*, 1906.
6. *Technical Words*, 1908.
7. *Previous Decisions*, 1908.
8. *Imperative, Directory or Permissive*, 1910.
9. *Effect of one Part of Act on another*, 1913.
10. *Reference to Debate in Parliament*, 1916.
11. *Mistake or Casus Omissus*, 1917.

D. CONSTRUCTION SPECIALLY.
1. *Of Ancient Acts*, 1917.
2. *Of Remedial, Penal, or Prohibitory Acts*, 1918.
3. *Of Fiscal Acts*, 1920.
4. *Of Consolidating or Codifying Acts*, 1922.
5. *Of Local and Personal Acts*, 1922.
6. *Of Colonial Acts*, 1927.

E. CONSTRUCTION OF PARTICULAR PARTS.
1. *Exceptions and Provisoes*, 1928.
2. *Forms, Rules and Conveyances*, 1929.

F. EFFECT OF ONE ACT ON ANOTHER.
1. *Reading together*, 1932.
2. *Incorporation by Reference*, 1933.
3. *Repeal.*
a. General Rules, 1935.
b. Particular Cases, 1937.
c. Repeal of Special by General, 1939.
d. Repeal of General by Special, 1940.
e. Effect of Repeal, 1941.
4. *Continuance of Temporary Acts*, 1945.

G. EXERCISE OF STATUTORY POWERS.
1. *General Rules*, 1945.
2. *Authorisation of Nuisance*, 1950.

H. INTERFERENCE WITH CONTRACTS, 1952.

I. WAIVER OF STATUTORY RIGHTS, 1957.

J. ENFORCEMENT OF STATUTORY RIGHTS, 1957.

A. EFFECT OF FORMAL PARTS.

1. TITLE.

Full Title.]—The title of a statute is no part of the law. *Rex* v. *Williams*, 1 W. Bl. 95—per Lord Mansfield. S. P., *Att.-Gen.* v. *Lord Weymouth*, Ambl. 23—per Lord Hardwicke; *Salkeld* v. *Johnson*, 2 Ex. 283—per Pollock, C.B.

There is authority for saying that the title of a statute may be used where there is any ambiguity in the statute. *Coomber* v. *Berks JJ.*, 51 L. J., M. C. 297, 304; 9 Q. B. D. 33; 30 W. R. 785; 46 J. P. 629.

The title cannot be resorted to for the purpose of construing the provisions of the act. *Hunter* v. *Nockolds*, 1 Mac. & G. 640; 1 Hall & T. 644; 19 L. J., Ch. 177; 14 Jur. 256.

The title of a statute does not go for much in construing it, but I do not know that it is to be absolutely disregarded. The title of Lord Campbell's Act, 9 & 10 Vict. c. 93, was certainly referred to as not without significance in the court of queen's bench in *Blake* v. *Midland Ry. Co.*, 18 Q. B. 93. *Kenrick* v. *Lawrence*, 25 Q. B. D. 99; 38 W. R. 779—per Wills, J.

If there is in the provisions of an act anything admitting of a doubt, the title of the act is a matter proper to be considered in the interpretation of the act. *Shaw* v. *Ruddin*, 9 Ir. C. L. R. 214. S. P., *Reg.* v. *Mallow Union*, 12 Ir. C. L. R. 35.

The Sale of Farming Stock Act, 1816, 56 Geo. 3, c. 50, s. 11, which enacts that no assignee of any bankrupt or of any insolvent debtor's estate, nor any assignee under any bill of sale, nor any purchaser of the stock or crop of a tenant on lands let to farm, shall take, use or dispose of any hay or other produce, in any other manner than the tenant ought to do, applies to all sales, though the title, preamble and other sections of the act are confined to the sale of farming stock taken in execution. *Wilmot* v. *Rose*, 3 El. & Bl. 563; 2 C. L. R. 677; 23 L. J., Q. B. 281; 18 Jur. 518; 2 W. R. 378.

58 Geo. 3, c. 51 (repealed), described by their titles and dates several acts relating to persons employed in the woollen and other manufactures, which acts it in part repealed. Among these was an act stated to have been passed in 13 Geo. 3, but agreeing in title with 17 Geo. 3, c. 56, and with no act passed in 13 Geo. 3:—Held, that this act might be identified by the title with the act recited, and that the legislature must be deemed to have mistaken the date. *Reg.* v. *Wilcock*, 7 Q. B. 317. S. P., *Boothroyd, In re*, 13 M. & W. 1; 15 L. J., Ex. 170.

The enacting part of an act is not to be controlled by the title or recitals unless the enacting part is ambiguous, and then the title and recitals may be referred to for the purpose of ascertaining the intention of the legislature. *Bentley* v. *Rotherham Local Board*, 46 L. J., Ch. 284; 4 Ch. D. 588.

Short Title.]—Short title a good general description of all that was done by the Superannuation Act, 1859, in *Middlesex JJ.* v. *Reg.*, 53 L. J., Q. B. 505; 9 App. Cas. 757; 51 L. T. 513; 33 W. R. 49.

2. PREAMBLE.

General Rule.]—It is a general rule, in the construction of statutes, that the preamble may extend, but cannot restrain, the effect of an enacting clause. *Kearns* v. *Cordwainers' Company*, 6 C. B. (N.S.) 388; 28 L. J., C. P. 285; 5 Jur. (N.S.) 1216.

We ought not to restrict a section in an act of parliament by the preamble or general purview of the act where the section is not inconsistent with the spirit of the act. *Sutton* v. *Sutton*, 52 L. J., Ch. 333, 338; 22 Ch. D. 521; 48 L. T. 98; 31 W. R. 372—per Jessel, M.R., and Bowen, L.J.

We are to give effect to the preamble to this extent, namely, that it shews us what the legislature are intending; and if the words of enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case we prefer that meaning to one shewing an intention of the legislature which would not answer the purposes of the preamble or which would go beyond them. To that extent only is the preamble material. *West Ham Overseers* v. *Iles*, 52 L. J., Q. B. 650; 8 App. Cas. 387; 49 L. T. 205; 31 W. R. 923; 47 J. P. 708.

The preamble of an act of parliament is proper to explain the general body of it. *Copeman* v. *Gallant*, 1 P. Wms. 317.

Only to be resorted to in case of Ambiguity.]—If the enacting part of a statute will bear only one interpretation, the preamble shall not confine it; but if it is doubtful, the preamble may be applied to throw light upon it. *Mason* v. *Armitage*, 13 Ves. 36; 9 R. R. 131.

If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound these words in their natural and ordinary sense. But if any doubt

arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute and to have recourse to the preamble, which, according to Dyer, C.J., in *Stowell* v. *Lord Zouch* (Plow. at p. 369), is a key to open the minds of the makers of the act, and the mischiefs which they are intended to redress. *Sussex Peerage Case*, 11 Cl. & F. 143. S. P., *Income Tax Commissioners* v. *Pemsel*, 61 L. J., Q. B. 265; [1891] A. C. 532; 65 L. T. 621.

In construing an act of parliament, or any other instrument, the court is at liberty to regard the state of the law at the time, and the facts which the preamble or recitals of the act of instrument prove to have been the existing circumstances at the time of its preparation. *Att.-Gen.* v. *Powis* (*Earl*), 1 Kay, 186; 2 Eq. R. 566; 2 W. R. 140.

The preamble of an act of parliament, though it may assist ambiguous words, cannot control a clear and express enactment. *Lees* v. *Summersgill*, 17 Ves. 508.

But it may serve to give a definite and qualified meaning to indefinite and general terms. *Emanuel* v. *Constable*, 3 Russ. 436, overruling *Lees* v. *Summersgill*, supra.

A preamble, reciting the existence of outrages, and making provision against them, is admissible to prove an introductory averment in an information for a libel, that acts of outrage had been committed. *Rex* v. *Sutton*, 4 M. & S. 532.

Though the preamble of one act may seem directed against a particular evil, and though another act may be passed to aid its application, the enactments of the second act are not necessarily to be confined to the special purpose which seemed to be the particular object that the first had in view. Its own words must be considered as explaining and defining its objects and means. *Copland* v. *Davies*, L. R. 5 H. L. 358; 21 W. R. 1.

The preamble of an act cannot be resorted to in order to ascertain the intention of the act, unless there is an ambiguity in the enacting part. *Taylor* v. *Oldham Corporation*, 46 L. J., Ch. 105; 4 Ch. D. 395; 35 L. T. 696; 25 W. R. 178.

Although the preamble is generally the key to the construction, yet it does not always open all the parts of it, as sometimes the legislature, having a particular mischief in view, which was the primary object of the statute, merely states that in the preamble, and then goes on to provide a remedy for general mischiefs of the same nature, but of different species, neither expressed in the preamble, nor perhaps then in immediate contemplation. *Mann* v. *Cammel*, Lofft, 783.

To be considered as part of a whole.]—In construing acts, the court must take into consideration not only the language of the preamble, or any particular clause, but of the whole act; and if, in some of the enacting clauses, expressions are to be found of more extensive import than in others, or than in the preamble, the court will give effect to those more extensive expressions, if, upon a view of the whole act, it appears to have been the intention of the legislature that they should have effect. *Doe* d. *Bywater* v. *Brandling*, 7 B. & C. 643; 1 M. & Ry. 600; 6 L. J. (o.s.) K. B. 162.

Effect of Repeal by Statute Law Revision Act.]—The preamble of the Betting Act, 1853, has been repealed by the Statute Law Revision Act, 1892, by which it is provided that such preamble may be omitted from any revised edition of the statutes; but the same act provides (s. 1) that the repeal shall not affect the operation or construction of the statute; and it is therefore legitimately to be referred to as affording information of the circumstances under which the act came to be passed, and, in so far as it directly throws light upon the question, of the object which the legislature had in view. *Hawke* v. *Dunn*, 66 L. J., Q. B. 364; [1897] 1 Q. B. 579; 76 L. T. 355; 45 W. R. 359; 61 J. P. 292.

3. Recitals.

General Effect of Recitals.]—A clear and explicit enactment is not to be cut down by a more limited preamble or recital; but if the enactment is not explicit in itself, it may be explained and cut down by the preamble or recital. *Hughes* v. *Chester and Holyhead Ry.*, 1 Dr. & Sm. 524; 9 W. R. 760.

In construing an act, the court is at liberty to regard the state of the law at the time, and the facts which the preamble or recital of the act prove to have been the existing circumstances at the time of its preparation. *Att.-Gen.* v. *Powis* (*Earl*), 1 Kay, 186; 2 Eq. R. 566; 2 W. R. 140.

The object of the act is to abolish the distinction between specialty and simple contract debts, and the recital of the act is that that alone is the object. I must therefore read the enactment as corresponding with the express recital of its object; and if I find words that may be carried further, I must read them with reference to the mischief intended to be remedied, and to the express recital of the act. *Crowder* v. *Stewart*, 50 L. J., Ch. 136; 16 Ch. D. 370; 29 W. R. 331—per Malins, V.-C.

A mere recital in a statute, either of fact or of law, is not conclusive, and the court is at liberty to consider the fact of the law to be different from the statement in the recital. *Reg.* v. *Haughton*, 1 El. & Bl. 501; 22 L. J., M. C. 89; 17 Jur. 455; 1 W. R. 164.

A recital in an act will not bind those who are not within its enacting part. *Edinburgh and Glasgow Ry.* v. *Linlithgow* (*Magistrates*), 3 Macq. H. L. 704.

The recitals in the Disabling Statute do not limit the force of the subsequent enactment to cases in which the mischief by the alienation is done to the personal interest of the successor of the alienor; for it is evident from the enactment that the legislature intended to apply the prohibition to the case of persons who were seised either as mere trustees, or in a great measure in trustees, and among other persons to the master or guardian of an hospital. *York* (*Dean*) v. *Middleborough*, 2 Y. & J. 196; 31 R. R. 566.

Semble, that the recitals in private acts of parliament of recent date are not evidence of the facts stated in them, such recitals being no longer submitted to the previous approval of the judges. *Shrewsbury Peerage*, 7 H. L. Cas. 1.

The recitals in a private act do not bind third parties. *Taylor* v. *Parry*, 1 Macq. H. L. 604; 1 Sc. (N.R.) 576; 9 L. J., C. P. 298.

4. Marginal Notes.

The marginal note to a section in the copy printed by the Queen's printer, forms no part of the statute itself, and is not binding as an expla-

nation or as a construction of the section. *Claydon* v. *Green*, 37 L. J., C. P. 226; L. R. 3 C. P. 511; 18 L. T. 607; 16 W. R. 1126—per Willes, J. S. P., *Att.-Gen.* v. *G. E. Ry.*, 48 L. J., Ch. 429; 11 Ch. D. 449; 40 L. T. 265; 27 W. R. 759—C. A. —per Bramwell and Baggallay, L.JJ.

The dictum in *Venour's Settled Estates, In re* (2 Ch. D. 525), is not correct, and the marginal notes to the sections of an act of parliament are not to be taken as part of the act. *Sutton* v. *Sutton*, 52 L. J., Ch. 334; 22 Ch. D. 513; 48 L. T. 96; 31 W. R. 370—per Jessel, M.R.

5. HEADINGS.

Headings Grammatically Connected.]—The headings of different portions of a statute are to be referred to in order to determine the sense of any doubtful expression in a section ranged under any particular heading. *Hammersmith and City Ry.* v. *Brand*, 38 L. J., Q. B. 265; L. R. 4 H. L. 171; 21 L. T. 238; 18 W. R. 12. S. P., *Eastern Counties Co.* v. *Marriage*, 9 H. L. Cas. 41; *Bryan* v. *Child*, 5 Ex. 368.

Headings not Grammatically Connected.]—Remarks as to the effect upon interpretation of dividing an act of parliament into parts with appropriate headings. *Union Steamship Co. of New Zealand* v. *Melbourne Harbour Trust*, 53 L. J., P. C. 59; 9 App. Cas. 365; 50 L. T. 337—P. C.

Headings in Glasgow Police Act considered. *Long* v. *Kerr*, 3 App. Cas. 529.

Sub-headings in Public Health Act, 1875, considered. *Reg.* v. *Local Government Board*, 52 L. J., M. C. 4; 10 Q. B. D. 309; 49 L. T. 244; 31 W. R. 72—per Brett, L.J.

6. PUNCTUATION.

The words in 13 Geo. 3, c. 21, s. 3, are to be read, "aliens' duties, customs and impositions," and not "aliens, duties, customs and impositions"; and therefore the grandchild of a natural-born subject, born out of the Queen's allegiance, is entitled to the benefit of that statute in regard to holding lands as a natural-born subject, although he has not complied with the formalities specified in the third section. *Barrow* v. *Wadkin*, 24 Beav. 327.

7. INTERPRETATION CLAUSE.

Does not affect plain Meaning of Words in Themselves.]—But for the interpretation clause, no difficulty as to the construction would have arisen. But I think an interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain. *Reg.* v. *Pearce*, 49 L. J., M. C. 81; 5 Q. B. D. 386, 389; 28 W. R. 568; 44 J. P. 216—per Lush, J. S. P., *Robinson* v. *Barton-Eccles*, 52 L. J., Ch. 5; 8 App. Cas. 798; 47 L. T. 286; 32 W. R. 249 —per Lord Selborne.

An interpretation clause in an act should be understood to define the meaning of the word thereby interpreted, in cases as to which there is nothing else in the act opposed to or inconsistent with that interpretation. *Midland Ry.* v. *Ambergate, Nottingham and Boston and Eastern Junction Ry.*, 10 Hare, 359.

Part of, ex abundanti cautelâ, does not alter Law.]—The interpretation of "justice of the peace," in s. 3 of the Railways Clauses Consolidation Act, 1845, as meaning (inter alia) a justice not interested does not alter the law so as to prevent waiver of an objection to jurisdiction on the ground of interest. *Wakefield* v. *West Riding Ry.*, 6 B. & S. 801; 35 L. J., M. C. 69; L. R. 1 Q. B. 84.

Objections to Interpretation Clauses.]—An interpretation clause is a modern innovation, and frequently does a great deal of harm. *Lindsay* v. *Cundy*, 1 Q. B. D. 348—per Blackburn, J.. S. P., *Ely (Dean of)* v. *Bliss*, 2 De G. M. & G. at p. 471—per Lord St. Leonards; *Reg.* v. *Boilers Explosion Act Commissioners*, 60 L. J., Q. B. 544; [1891] 1 Q. B. 703; 64 L. T. 674; 39 W. R. 440.

B. DISTINCTION BETWEEN PUBLIC AND LOCAL ACTS.

How Distinguished.]—Whether an act is to be deemed a public act, binding on all the Queen's subjects, or merely a private act, depends upon the nature and substance of the case, and not upon the technical consideration whether the act does or does not contain a clause declaring that it shall be deemed to be a public act. *Dawson* v. *Paver*, 5 Hare, 415; 16 L. J., Ch. 274; 11 Jur. 766.

Acts of parliament relating to trade in general are public acts. *Kirk* v. *Nowill*, 1 Term Rep. 125; 1 R. R. 160.

The 23 Hen. 6, c. 10, is a public act; and therefore the courts will take judicial notice of it, although not pleaded. *Samuel* v. *Evans*, 2 Term Rep. 569. S. P., *Lovell* v. *London Corporation*, 15 East, 320.

An act for the formation of a railway, containing a declaration that it is to be judicially taken notice of as a public act, cannot be treated or construed as a private assurance. *Hargreaves* v. *Lancaster and Preston Ry.*, 1 Railw. Cas. 416.

A local act, though containing a clause making it a public act, is not public notice of its powers over land therein mentioned. *Ballard* v. *Way*, 2 Gale, 61; 1 M. & W. 520; 1 Tyr. & G. 851; 5 L. J., Ex. 207.

A canal act is not rendered a public act by containing provisions empowering the company to regulate and take tonnage rates and tolls from persons using the canal. *Brett* v. *Beales*, M. & M. 421; 31 R. R. 744.

Building Acts.]—The Building Act (14 Geo. 3, c. 78) was an act of a local and personal nature. *Richards* v. *Easto*, 15 M. & W. 244; 3 D. & L. 515; 15 L. J., Ex. 163; 10 Jur. 695.

7 & 8 Vict. c. 84 (repealed), for regulating the construction and the use of buildings in the metropolis and its neighbourhood, although printed among the public general statutes, was an act of a local and personal nature, and ought to have been so classed. *Ib.*

—— **Metropolitan Police.**]—The Metropolitan Police Acts (2 & 3 Vict. c. 47; 2 & 3 Vict. c. 71; and 3 & 4 Vict. c. 84) are not local and personal within s. 5 of the Limitation of Actions and Costs Act, 1842, 5 & 6 Vict. c. 97, s. 5, and therefore the times limited by the statutes respectively for the bringing of actions are not altered by that section. *Barnett* v. *Cox*, 9 Q. B. 617; 2 New Sess. Cas. 487; 16 L. J., M. C. 27; 11 Jur. 118.

Local and Personal Act Generally, what is, and what is not.]—The repealed 8 & 9 Vict. c. 21, gave power to the justices of the county of Lancaster to make rates on the division of Manchester for the purposes of the act, and provided that all existing powers and provisions relating to county rates should be taken to apply to rates made under the act. The County Rates Act (55 Geo. 3, c. 51) provided a limitation of three months as the period within which actions must be brought for anything done in pursuance of the act. The Limitation of Actions and Costs Act, 1842, 5 & 6 Vict. c. 97, s. 5, provides that actions for anything done in pursuance of local or personal acts shall be brought within two years:—Held, that the limitation in 55 Geo. 3, c. 51, was incorporated in 8 & 9 Vict. c. 21; and that even if the latter act is to be considered as a local one, it must be taken to have repealed the act of 1842, as far as regards the period of limitation; and, therefore, that an action brought for seizing the plaintiff's goods for a rate under 8 & 9 Vict. c. 21, was brought too late after the expiration of three months after the seizure. *Boden* v. *Smith*, 18 L. J., C. P. 121; 13 Jur. 428.

An act for establishing a court of requests, empowering commissioners to adjudicate on demands, not exceeding a certain amount, by any persons against defendants resident within certain limits, and having a clause making it a public act, is a public, local and personal act. *Cock* v. *Gent*, 1 D. & L. 413; 12 M. & W. 234; 13 L. J., Ex. 24.

11 Geo. 1, c. 30, s. 43, is not such a local and personal act as is contemplated and repealed by 5 & 6 Vict. c. 97, s. 3. *Carr* v. *Royal Exchange Insurance Co.*, 1 B. & S. 956; 31 L. J., Q. B. 93; 8 Jur. (N.S.) 384; 6 L. T. 105; 10 W. R. 352.

Statutes which, since the resolution of the House of Commons in 1801, have been printed by the king's printers, amongst the public, local and personal acts, are statutes commonly called public, local and personal, within 5 & 6 Vict. c. 97. *Shepherd* v. *Sharp*, 1 H. & N. 115; 25 L. J., Ex. 254; 2 Jur. (N.S.) 617; 4 W. R. 570—Ex. Ch.

An act for preventing nuisances in the parish of St. Mary, Islington, enacted that, "if any person put or caused to be put, or cast out of any waggon, &c., in or near any of the roads, within the parish of St. Mary, Islington, or should put or cast, within the parish, and in or within a quarter of a mile of any of the roads, any noisome or offensive matter, such person might be apprehended and carried before a magistrate":—Held, that the whole of the clause applied to such nuisances only when committed within the parish of St. Mary, Islington, and not when committed out of the parish, although within a quarter of a mile of a road within it. *Flight* v. *Clarke*, 13 M. & W. 155; 13 L. J., Ex. 309.

The statute 9 Anne, c. 22, created a tax upon coals coming into the port of London, and provided for the appointment of commissioners for the purpose of building fifty new churches in and about London and finishing Westminster Abbey and Greenwich Hospital. By 10 Anne, c. 11, the commissioners were empowered to purchase land for cemeteries to be used in connection with the new parish churches; and, by s. 4, it was provided that, wherever they should purchase for the cemetery of a new parish a piece of ground outside the bounds of the parish, the ground so purchased should thenceforth be deemed to be part of the parish:—Held, that whether the above statutes, regard being had to the whole scope of them, were "general" acts, or "local and personal" acts, s. 4 of the latter statute was a "local and personal" enactment within s. 59, sub-s. 6 of the Local Government Act, 1888, and that therefore a county council could, under s. 57, amend s. 4 of 10 Anne, c. 11, by ordering the re-transfer of a cemetery to the parish of which it originally formed a part. *Reg.* v. *London County Council*, 63 L. J., Q. B. 4; [1893] 2 Q. B. 454; 4 R. 529; 69 L. T. 580; 42 W. R. 1; 58 J. P. 21—C. A.

C. CONSTRUCTION GENERALLY.

1. General Rules.

Rules such as are Applicable to all Documents.]—It is safer to abstain from imposing with regard to acts of parliament, any further canons of construction than those applicable to all documents. *Lamplugh* v. *Norton*, 58 L. J., Q. B. 279; 22 Q. B. D. 452; 37 W. R. 422; 53 J. P. 389—Bowen, L.J.

Duty of Court.]—When a doubt arises upon the construction of the words of an act of parliament, it is the duty of the court to remove the doubt by deciding it; and when the court has given its decision, the point can no longer be considered doubtful. *Bell* v. *Holtby*, 42 L. J., Ch. 266; L. R. 15 Eq. 178; 28 L. T. 9; 21 W. R. 321.

According to Ordinary Sense of Language.]—An act is to be construed according to the ordinary and grammatical sense of its language, if there be no inconsistency apparent in its provisions; and a proviso, which, on the face of the act, is not inconsistent with the other enactments of it, is not to be limited in its effect by reason of local circumstances, not apparent on the face of the act causing such inconsistency. *Smith* v. *Bell*, 2 Railw. Cas. 877; 10 M. & W. 378.

Acts should be construed according to the intent of parliament. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves in such case, best declare the intention of the legislature. *Sussex Peerage*, 11 Cl. & F. 86; 8 Jur. 793.

The intention of the legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute. *Fordyce* v. *Bridges*, 1 H. L. Cas. 1; 11 Jur. 157.

The court knows nothing of the intention of an act, except from the words in which it is expressed, applied to the facts existing at the time. *Logan* v. *Courtown (Earl)*, 13 Beav. 22; 20 L. J., Ch. 347.

The court must read the words in their grammatical sense, unless they be in such a sense repugnant to the act. *Richards* v. *McBride*, 51 L. J., M. C. 15; 8 Q. B. D. 119; 45 L. T. 677; 30 W. R. 121; 46 J. P. 247.

The language of a statute taken in its plain ordinary sense, and not its policy or supposed intention, is the safer guide in construing its enactments. *Philpott* v. *St. George's Hospital*,

6 H. L. Cas. 338; 3 Jur. (N.S.) 1269; 5 W. R. 845.

I prefer to adhere to the golden rule of construction, that the words of a statute are to be read in their ordinary sense, unless the so construing them will lead to some incongruity or manifest absurdity. *Collins* v. *Welch*, 5 C. P. D. at p. 29—per Grove, J.

When Ordinary Signification should be Restricted.]—When from the provision contained in a statute it is clear that a restriction must be put upon the ordinary and literal signification of some word or expression, and it is uncertain from anything to be found in the act itself or in the circumstances judicially cognisable under which the provision was inserted, what the exact character and extent of that restriction is, it is the duty of the court to put no greater restriction than the nature of the provision and the subject-matter to which it relates necessarily impose. *Sullivan* v. *Mitcalfe*, 49 L. J., C. P. 815; 5 C. P. D. 459; 45 L. T. 8; 29 W. R. 181—per Thesiger, L.J.

Any one who contends that a section of an act of parliament is not to be read literally, must be able to shew one of two things, either that (1) there is some other section which cuts down its meaning, or else (2) that the section itself is repugnant to the general purview of the act. *Nuth* v. *Tamplin*, 51 L. J., Q. B. 177; 8 Q. B. D. 253; 30 W. R. 346; 46 J. P. 692; 1 Colt. 260.

A statute is not to be construed literally when a literal construction would end in an absurdity or inconsistency with the intention of the legislature, as evidenced by the provisions of the statute, but it is to be construed in harmony with common-sense and the intention of the legislature. *Walton, Ex parte, Levy, In re*, 50 L. J., Ch. 657, 662; 17 Ch. D. 756; 45 L. T. 1; 30 W. R. 395.

When two Constructions can be put upon Words.] — The more literal construction of a section of a statute ought not to prevail if it is opposed to the intentions of the legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated. *Caledonian Ry.* v. *North British Ry.*, 6 App. Cas. 122; 29 W. R. 685—per Lord Selborne, L.C., and Lord Blackburn.

No court is entitled to depart from the intention of the legislature as appearing from the words of the act because it is thought unreasonable. But when two constructions are open, the court may adopt the more reasonable of the two. *Rothes (Countess)* v. *Kirkcaldy Waterworks Commissioners*, 7 App. Cas. 702—per Lord Blackburn.

An act of parliament is to be construed according to the ordinary meaning of the words in the English language, as applied to the subject-matter, unless there is some very strong ground, derived from the context or reason, why it should not be so construed. *Hornsey Local Board* v. *Monarch Investment Building Society*, 59 L. J., Q. B. 105; 24 Q. B. D. 1; 61 L. T. 867; 38 W. R. 85; 54 J. P. 391—per Lord Esher, M.R.

Application to Subject-Matter.] — Whenever you have to construe a statute or a document you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used, unless there is something which obliges you to read them in a sense which is not their ordinary sense in the English language as so applied—per Brett, M.R. *Lion Insurance Association* v. *Tucker*, 53 L. J., Q. B. 185; 12 Q. B. D. 186; 49 L. T. 764; 32 W. R. 546.

In construing an act of parliament, the court is bound by the verbal construction of the section in question if plain and simple; but if there is doubt upon that, it is entitled to look, first, at the circumstances attending the passing of the act; next, to the preamble; and, lastly, to the whole purport and scope of the act, beyond the section immediately under consideration: primâ facie, the acts of an independent legislature must be supposed to deal with those matters only which are within its own jurisdiction. *Cope* v. *Doherty*, 2 De G. & J. 614; 27 L. J., Ch. 600; 4 Jur. (N.S.) 699; 6 W. R. 695.

Ambiguous words occurring in an act of parliament ought not to be extended to institutions which are well known to exist, but are not named in the act. *St. James's Club, In re*, 2 De G. M. & G. 383; 16 Jur. 1075.

Intention of Legislature.]—Where the main object and intention of a statute are clear it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law, except in the case of necessity or the absolute intractability of the language used. *Salmon* v. *Duncombe*, 55 L. J., P. C. 69; 11 App. Cas. 627; 55 L. T. 446—P. C.

The ordinary meaning of the words used in a statute must be adhered to unless that meaning is at variance with the intention of the legislature to be collected from the statute itself or leads to some absurdity or repugnance. *Pietermaritzburg Corporation* v. *Natal Land Co.*, 57 L. J., P. C. 82; 13 App. Cas. 478; 58 L. T. 895—P. C.

The more literal construction of a section of a statute ought not to prevail if it is opposed to the intentions of the legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated. Semble. *Caledonian Ry.* v. *North British Ry.*, 6 App. Cas. 122; 29 W. R. 685.

Unless the court is obliged to do so, it must not suppose that the legislature intended to do a palpable injustice. Semble. *Corbett, Ex parte, Shand, In re*, 14 Ch. D. 122.

You are not to attribute to general language used by the legislature a meaning that would not only carry out its object, but produce consequences which to the ordinary intelligence are absurd. You must give it such a meaning as will carry out its object. *The Duke of Buccleuch*, 15 P. D. 86; 62 L. T. 94; 6 Asp. M. C. 471—per Lindley, L.J.

Semble, a statute is not to be construed literally when a literal construction would end in an absurdity or inconsistency with the intention of the legislature, as evidenced by the provisions of the statute, but is to be construed in harmony with common-sense and the intention of the legislature. *Walton, Ex parte, Levy, In re*, 50 L. J., Ch. 657, 662; 17 Ch. D. 756; 45 L. T. 1; 30 W. R. 395.

Uniformity in the Law.]—If we can fairly construe an act so as to carry out what must obviously have been the intention of the legislature, although the words may be a little difficult to deal with, and although they may possibly

admit of more than one interpretation, we ought from those general considerations to adopt the interpretation which will make the law uniform, and will remedy the evil which prevailed in all the cases to which the law can be fairly applied —per Jessel, M.R. *Freme* v. *Clement*, 44 L. T. 399 ; 30 W. R. 3.

Beneficial rather than Injurious Meaning.]—The court should, in construing a statute, endeavour to attach a rational and beneficial meaning, if that is possible, rather than an irrational and an injurious meaning, to the statutes passed by the legislature. *Mersey Steel and Iron Co.* v. *Naylor*, 51 L. J., Q. B. 576, 584 ; 9 Q. B. D. 648 ; 47 L. T. 369 ; 31 W. R. 83.

Unless you are obliged to do so, you must not suppose that the legislature intended to do a palpable injustice. *Corbett, Ex parte, Shand, In re*, 14 Ch. D. 122, 129.

A very strong case of injustice arising from giving the language of an act of parliament its natural meaning must be made out before the court will construe a section in a way contrary to the natural meaning of the language used. *Hall, In re*, 57 L. J., Q. B. 494 ; 21 Q. B. D. 141 ; 59 L. T. 37 ; 36 W. R. 892.

If the words of an act of parliament, though capable of an interpretation which would work manifest injustice, can possibly within the bounds of grammatical construction and reasonable interpretation be otherwise construed, the court ought not to attribute to the legislature what is a clear, manifest, and gross injustice. *Plumstead Board of Works* v. *Spackman*, 53 L. J., M. C. 142 ; 13 Q. B. D. 878 ; 51 L. T. 760.

When the language of the legislature construed literally produces great injustice, the courts act upon the view that the legislature could not have intended to produce a result which would be palpably unjust, and would revolt the mind of any reasonable man, unless that intention has been manifested by express words—Esher (Lord), M.R. *Dunn, Ex parte, Brockelbank, In re*, 58 L. J., Q. B. 375 ; 23 Q. B. D. 461 ; 61 L. T. 543 ; 37 W. R. 537 ; 6 M. B. R. 138.

If the apparent logical construction of a statute leads to results which it is impossible to believe that those who framed or those who passed the statute contemplated, and from which one's own judgment recoils, there is good reason for believing that the construction which leads to such results cannot be the true construction—per Coleridge, C.J. *Reg.* v. *Clarence*, 58 L. J., M. C. 10 ; 22 Q. B. D. 65 ; 59 L. T. 780 ; 37 W. R. 166 ; 16 Cox, C. C. 511 ; 53 J. P. 149.

Collateral Effects—Injurious to third parties.]—Of two possible constructions the court prefers that which does not extend the operation of a statute to collateral effects and consequences beyond its general objects and policy and is not injurious to third parties. *Railton* v. *Wood*, 59 L. J., P. C. 84 ; 15 App. Cas. 363 ; 63 L. T. 13—P. C.

If it can be shewn that a particular interpretation of a taxing statute would operate unreasonably in the case of a foreigner sojourning in this country, it would afford a reason for adopting some other interpretation if it were possible consistently with the ordinary canons of construction —per Lord Herschell. *Colquhoun* v. *Brooks*, 59 L. J., Q. B. 53 ; 14 App. Cas. 493 ; 61 L. T. 518 ; 38 W. R. 289 ; 54 J. P. 277.

Act of God.]—An act which in general terms imposes a liability in a certain event is to be read subject to the implied qualification that the liability will not arise where the event happens through the act of God. *Wear River Commissioners* v. *Adamson*, 1 Q. B. D. 546 ; 35 L. T. 118 ; 24 W. R. 872—C. A.

Therefore the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), s. 74, imposes no liability on the owner of a vessel for damage to a pier occasioned by the vessel being driven against the pier by stress of weather after it has been wrecked and abandoned on the high seas. *Ib.*

Policy of a Statute.]—It is never very safe ground in the construction of a statute to give weight to views of its policy, which are themselves open to doubt and controversy—per Lord Selborne, L.C. *Municipal Building Society* v. *Kent*, 53 L. J., Q. B. 290 ; 9 App. Cas. 273 ; 51 L. T. 6 ; 32 W. R. 681.

Statutory Fiction.]—When a statute enacts that something should be deemed to have been done which in fact was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to—per James, L.J. *Walton, Ex parte, Levy, In re*, 50 L. J., Ch. 657, 662 ; 17 Ch. D. 756 ; 45 L. T. 1 ; 30 W. R. 395.

History of Statute—When Inquiry Relevant.]—In order to construe an act of parliament the court is entitled to consider the state of the law at the time it was enacted—per Lord Esher, M.R. *Philipps* v. *Rees*, 59 L. J., Q. B. 1 ; 24 Q. B. D. 17 ; 61 L. T. 713 ; 38 W. R. 53 ; 54 J. P. 293.

It is useless to enter into an inquiry with regard to the history of an enactment, and any supposed defect in former legislation on the subject which it was intended to cure, in cases where the words of the enactment are clear. It is only material to enter into such an inquiry where the words of an enactment are ambiguous and capable of two meanings, in order to determine which of the two meanings was intended—per Lord Esher, M.R. *Reg.* v. *London (Bishop)*, 59 L. J., Q. B. 169 ; 24 Q. B. D. 213 ; 62 L. T. 167 ; 38 W. R. 214 ; 54 J. P. 340.

If the words are really and fairly doubtful, then, according to well-known legal principles and principles of common-sense, historical investigation may be used for the purpose of clearing away the doubt which the phraseology of the statutes creates. *Reg.* v. *Most*, 50 L. J., M. C. 113, 116 ; 7 Q. B. D. 251 ; 44 L. T. 823 ; 29 W. R. 760 ; 14 Cox, C. C. 583 ; 45 J. P. 696—per Coleridge, C.J.

The court cannot impute to the legislature, in passing statutes, confirming titles created by means of parliamentary powers, ignorance of the transactions which had taken place in exercise of such powers. *Beadon* v. *King*, 9 Hare, 522 ; 22 L. J., Ch. 111.

When Common Law is affected.]—A statute which refers to the matter of a common-law liability and declares to whom it shall attach will not thereby create a new and extended application of that liability, unless it contains words expressly declaring such a purpose. *Wear River Commissioners* v. *Adamson*, supra, 47 L. J., Q. B. 193 ; 2 App. Cas. 743 ; 37 L. T. 543 ; 26 W. R. 217—H. L.

It is the most natural and genuine exposition of a statute to construe one part by another, for that best expresseth the meaning of the makers; and this exposition is ex visceribus actus. *Reg.* v. *Mallow Union*, 12 Ir. C. L. R. 35.

The common-law rights of the subject, in respect of the enjoyment of his property, are not to be trenched upon by a statute, unless such intention is shewn by clear words or necessary implication. *Ib.*

Statutes restrictive of the common law receive a restrictive construction. *Ash* v. *Abdy*, 3 Swans. 664.

In construing acts which infringe on the common law, the state of the law before the passing of the act must be ascertained to determine how far it is necessary to alter that law, in order to carry out the object of the act. *Swanton* v. *Gould*, 9 Ir. C. L. R. 234.

A right to demand a poll is a common law incident of all popular elections, and as such cannot be taken away by mere implication which is not necessary for the reasonable construction of a statute—per Brett, L.J. *Reg.* v. *Wimbledon Local Board*, 51 L. J., Q. B. 219; 8 Q. B. D. 459; 46 L. T. 47; 30 W. R. 400.

A married woman cannot vote at a municipal election, her existence for such a purpose being merged in that of her husband by the common law, which is not affected by the statutory enfranchisement of women for municipal elections. *Reg.* v. *Harrald*, 41 L. J., Q. B. 173; L. R. 7 Q. B. 361; 26 L. T. 616; 20 W. R. 328.

Interference with Common-law Rights.]—The fact that statutes interfere with a plaintiff's common-law rights is no reason why they should be construed differently from any other acts of parliament. *The Warkworth*, 53 L. J., P. 4; 9 P. D. 21; 49 L. T. 715; 32 W. R. 479; 5 Asp. M. C. 194—per Butt, J.

Injuring Persons without Compensation.]—It is a proper rule of construction not to construe an act of parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it. *Att.-Gen.* v. *Horner*, 54 L. J., Q. B. 227; 14 Q. B. D. 257; 33 W. R. 93—per Brett, M.R.

Common-law Rights presumed not to be affected.]—We ought not to assume without the clearest language that parliament intends to destroy common-law rights, though such legislation is possible. *Rendall* v. *Blair*, 59 L. J., Ch. 641; 45 Ch. D. 139; 63 L. T. 265; 38 W. R. 689—per Bowen, L.J.

A statute which refers to the matter of a common-law liability and declares to whom it shall attach will not thereby create a new and extended application of that liability, unless it contains words expressly declaring such a purpose. *Wear River Commissioners* v. *Adamson*, supra, col. 1892.

Affecting General Law of Country.] — The general law of the country is not altered or controlled by partial legislation, made without any special reference to it. *Denton* v. *Manners* (*Lord*), 27 L. J., Ch. 199; 4 Jur. (N.S.) 151; 6 W. R. 238. Affirmed 27 L. J., Ch. 623; 4 Jur. (N.S.) 714; 6 W. R. 742.

The general words of a statute are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be put upon those words consistently with the intention of preserving the existing policy untouched; but the title and preamble of the General Inclosure Act, 8 & 9 Vict. c. 118, being quite general, the words of the 147th section appear to be so general as to make it impossible to limit them to exchanges of freeholds of the same species, notwithstanding inconveniences and seeming injustice to parties. *Minet* v. *Leman*, 20 Beav. 269; 24 L. J., Ch. 545; 1 Jur. (N.S.) 410; 3 Eq. R. 501; 3 W. R. 359.

Remedy by Summary Jurisdiction—Jurisdiction of High Court.]—Where by an act of parliament a claim thereunder is made enforceable by a court of summary jurisdiction, it is not competent to enforce such claim by means other than those prescribed by the statute, or to have recourse to the high court in order to determine the right. *Barraclough* v. *Brown*, 66 L. J., Q. B. 672; [1897] A. C. 615; 76 L. T. 797—H. L. (E.)

Inconvenience.]—If upon ambiguous words or expressions the balance of hardship or inconvenience seems to be strongly against the public upon one construction, or strongly against a private person upon another construction, I think it is consistent with all sound principles to have regard to the balance of inconvenience in determining the question of construction. *Dixon* v. *Caledonian Ry.*, 5 App. Cas. 827; 43 L. T. 513; 29 W. R. 250—per Selborne, L.C.

With regard to inconvenience, I think that it is a most dangerous doctrine. I agree if the inconvenience is not only great, but what I may call an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if you read it in a manner in which it is capable of being read, though not its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning. *Reg.* v. *Tonbridge Overseers*, 13 Q. B. D. 342.

Affecting Custom.]—As a rule, existing customs or rights are not to be taken away by mere general words in an act. But, without words especially abrogating them, they may be abrogated by plain directions to do something which is wholly inconsistent with them. And this may be the case though the act is a private act, and though the particular custom may have been confirmed, years before, by a verdict in a court of law. *Green* v. *Reg.*, 1 App. Cas. 513; 35 L. T. 495.

The usage of a particular place cannot control the operation of a general statute. *Rex* v. *Hogg*, 1 T. R. 721; Cald. 266; 1 R. R. 375.

Long usage is of no avail against plain statutory enactments, and it can be binding on parties only as the interpreter of a doubtful law, and as affording a contemporaneous exposition. Where a statute, expressive as to some points, is silent as to others, usage may well supply the defect, if not inconsistent with express directions of the statute. *Dunbar Magistrates* v. *Roxburghe* (*Duchess*), 3 Cl. & F. 335.

Neither usage nor long-continued practice can have any effect upon acts of parliament relating to tolls. *Northern Bridge Co.* v. *Reg.*, 55 L. T. 759.

Jurisdiction taken away by.]—An existing jurisdiction cannot be taken away by an act of parliament, except by precise and distinct words. *Galsworthy* v. *Durrant*, 6 Jur. (N.S.) 743; 8 W. R. 594.

Dealing primâ facie with things within the Jurisdiction.]—It seems to me that unless parliament expressly declares otherwise the proper construction to be put on general words used in an English act of parliament is, that parliament was dealing only with such persons or things as are within the general words and also within the proper jurisdiction, and that we ought to assume that parliament (unless it expressly declares otherwise) when it uses general words is only dealing with persons or things over which it has properly jurisdiction. *Colquhoun* v. *Heddon*, 59 L. J., Q. B. 465; 25 Q. B. D. 129; 62 L. T. 853; 38 W. R. 545—per Lord Esher, M.R.

Contemporanea Expositio.]—When there are ambiguous expressions in an act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the legislature at that remote period. But I feel bound to construe a recent statute according to its own terms, when these are brought into controversy, and not according to the views which interested parties may have hitherto taken. *Clyde Navigation Trustees* v. *Laird*, 8 App. Cas. 673—per Lord Watson.

Ut res magis valeat quam pereat.]—The words of a statute must be construed so as to give a sensible meaning to them if possible. The words ought to be construed ut res magis valeat quam pereat. *Curtis* v. *Stovin*, 58 L. J., Q. B. 174; 22 Q. B. D. 513; 60 L. T. 772; 37 W. R. 315—Bowen, L.J.

Wresting Words when superfluous.]—Nothing can be more mischievous than the attempt to wrest words from their proper and legal meaning, only because they are superfluous. *Hough* v. *Windus*, 53 L. J., Q. B. 165; 12 Q. B. D. 229; 50 L. T. 312; 32 W. R. 452; 1 Morrell, 1—per Selborne, L.C.

As to Service.]—Where personal service is not required by a statute, service at the dwelling-house is sufficient. *Lowe, Ex parte*, 2 New Sess. Cas. 331; 3 D. & L. 737; 15 L. J., M. C. 99; 10 Jur. 595.

Consideration of Practice under Statute.]—Whilst it is true that we ought not to construe an act itself by looking at the practice which has taken place in carrying the act out, it is equally true that we are entitled to construe a subsequent act not only with regard to the actual words used, but also to the practice which had grown up and existed at the time the subsequent act was passed. *Yewens* v. *Noakes*, 50 L. J., Q. B. 132, 135; 6 Q. B. D. 535; 44 L. T. 128; 28 W. R. 562; 45 J. P. 8—per Thesiger, L.J.

Parol Evidence to Explain.]—Upon the trial of an information at the suit of the attorney-general against a member of the house of commons for voting without having taken the oath of allegiance within the meaning of the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Acts, 1868, evidence of the practice observed in the house of commons as to taking the oath of allegiance is admissible for the purpose of explaining the construction of those statutes. *Att.-Gen.* v. *Bradlaugh*, 54 L. J., Q. B. 205; 14 Q. B. D. 667; 52 L. T. 589; 33 W. R. 673—C. A.

Interference with Private Rights, Construction against.]—A statute must not be deemed to take away or extinguish the right of a subject, unless it appear by express words or by plain implication, that it was the intention of the legislature so to do. *Western Counties Ry.* v. *Windsor and Annapolis Ry.*, 51 L. J., P. C. 43; 7 App. Cas. 188; 46 L. T. 351.

On those who seek to establish that the legislature intended to take away the private rights of individuals lies the burden of shewing that such an intention appears by express words or necessary implication. Semble. *Metropolitan Asylum District* v. *Hill*, 50 L. J., Q. B. 353; 6 App. Cas. 208; 44 L. T. 653; 29 W. R. 617.

Where the terms of a statute are not imperative, but permissive, the fair inference is that the legislature intended that the discretion, as to the use of the general powers thereby conferred, should be exercised in strict conformity with private rights. Semble. *Ib.*

No inference from a statute designed in favour of the liberty of the subject to the prejudice of that liberty. *Crowley's Case*, 2 Swan. 68; Buck, 264.

Where an equal agreement cannot, by reason of a subsequent act of parliament, or some other lawful impediment, be performed in the whole, yet the same shall be specifically executed in such part of it as remains lawful. *Bettesworth* v. *St. Paul's (Dean)*, 1 Bro. P. C. 240.

An affirmative statute, giving a new right, does not of itself and necessarily destroy a previously existing right, created by another statute to which it does not refer; but will do so if it appears to have been the intention of the legislature that the two rights should not exist together. *O'Flaherty* v. *M'Dowell*, 6 H. L. Cas. 142.

A party interested in the subject-matter of a private act of parliament will have his rights affected by its provisions, though it may have been introduced and passed without notice duly given to him. *Edinburgh Ry.* v. *Wauchope*, 8 Cl. & F. 710; 3 Railw. Cas. 233.

An enacting clause which interferes with private rights must be construed strictly; but the largest and most liberal construction will be given to an exception which protects those rights. *Finch* v. *Birmingham Canal Proprietors*, 5 L. J. (o.s.) K. B. 17.

When an act confers upon a landowner a private right creating a burden upon a railway and restraining the directors from regulating the traffic so as best to accommodate the public it must be construed strictly. *Turner* v. *L. & S. W. Ry.*, 43 L. J., Ch. 430; L. R. 17 Eq. 561.

A statute relating to the corporate property of a city, with the usual clause declaring that it shall be deemed a public act, does not bind strangers with notice; and the mere probability of a purchaser knowing it, or precautions taken by him in a purchase of corporate property, will not fix him with constructive notice. *Att.-Gen.* v. *Marrett*, 10 Ir. Eq. R. 167.

When persons having, as a class, certain privileges, are by statute subjected to certain liabilities, their privileges being expressly reserved to them, and other persons having the same privileges are afterwards, as a class, subjected to the same liabilities, but nothing is said of their privileges, these privileges still continue to exist. *Newcastle (Duke)* v. *Morris*, L. R. 4 H. L. 661; 19 W. R. 26.

Where an act of parliament interferes with private rights and private interests, it ought to receive a strict construction, so far as those rights and interests are concerned. *Hughes* v. *Chester and Holyhead Ry.*, 31 L. J., Ch. 97; 8 Jur. (N.S.) 821; 7 L. T. 197; 10 W. R. 219.

Privilege, Act giving, Construction of.]—56 Geo. 3, c. 67 (repealed), allowing children of soldiers, and others employed since 1802, to set up any trade, any statute to the contrary notwithstanding, does not exempt such persons from the general provisions of the licensing and other acts. *Killin* v. *Swatton*, 76 L. T. 55; 45 W. R. 235; 61 J. P. 150.

2. On whom Binding.

Generally.]—Primâ facie an English statute affects only English subjects or foreigners who come, either permanently or temporarily, within the allegiance of the English Crown. *Blain, Ex parte, Sawers, In re*, 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334—C. A.

Whether to be confined to United Kingdom.]—A statute, if there be nothing pointing to the contrary intention, will primâ facie be taken to apply only to the United Kingdom; but where it is applicable to the Queen's dominions, it will be taken to apply to all persons in the Queen's dominions, including those who owe temporary allegiance—such as foreigners during their residence in the country; and according to its context it may be taken to apply to the Queen's subjects anywhere. *Reg.* v. *Jameson*, 65 L. J., M.C. 218; [1896] 2 Q. B. 425; 75 L. T. 77; 60 J. P. 662; 18 Cox, C. C. 392—Trial at Bar.

A statute, if any other construction be possible, is not to be construed as applying to foreigners in respect of acts done by them outside the dominions of the enacting sovereign power. *Ib.*

The Crown.]—An enactment distinct, and without exception in itself, is not to be controlled or limited by a doubtful implication to be drawn from a previous section of the same statute, especially in respect of the prerogatives of the crown, which are not to be affected except by distinct enactment. *Exeter (Bishop), Ex parte, Gorham, In re*, 10 C. B. 102; 19 L. J., C. P. 200.

By 11 Geo. 4 & 1 Will. 4, c. 70, s. 8 (repealed), writs of error upon any judgments given by the Queen's Bench, Common Pleas or Exchequer, were returnable by the judges and barons, or judges only of the other two courts, in the Exchequer Chamber:—Held, that the Crown was bound by this enactment, and that therefore a writ of error lay upon a judgment for the Crown in a petition of right to the Exchequer Chamber. *De Bode (Baron)* v. *Reg.*, 13 Q. B. 364; 14 Jur. 970—Ex. Ch.

A defendant at the suit of the Crown is liable to arrest as if the Debtors Act had not passed, Crown debts not being either directly or by implication referred to in that act. *Att.-Gen.* v. *Edmunds*, 22 L. T. 667.

Ireland.]—Every act since the union embraces Ireland, unless Ireland is excluded from its operation in express terms, or by necessary implication to be gathered from the construction of the statute. *Reg.* v. *Mallow Union*, 12 Ir. C. L. R. 25.

Colonies.]—If the scope and object of an imperial statute leads to the conclusion that the legislature intended it to affect a colony, and the words used are calculated to have that effect, they must be so construed. *Callander* v. *Lagos (Colonial Secretary)*, 60 L. J., P. C. 33; [1891] A. C. 460; 65 L. T. 297—P. C.

There is a general rule of construction that English acts of parliament, when dealing with property in general, are not to be treated as applying to foreign or colonial property. *Colquhoun* v. *Brooks*, 57 L. J., Q. B. 70; 19 Q. B. D. 406; 57 L. T. 448; 36 W. R. 332—per Wills, J.

Foreigners.]—Part IX. of the Merchant Shipping Act, 1854, corresponding to Part VIII. of the Merchant Shipping Act, 1894, limiting the liability of shipowners, in case of loss or damage to any other ship, had no application where one of such ships was a foreign vessel, and, therefore, none where both were foreign, and the lex loci applied only to the form of procedure, and not to the substance of the proceeding itself; and excepting where foreign ships are expressly mentioned, Part IX. of the Act of 1854 applied only to British ships. *Cope* v. *Doherty*, 2 De G. & J. 614; 27 L. J., Ch. 600; 4 Jur. (N.S.) 699; 6 W. R. 695.

3. Prospective or Retrospective Effect.

Statutes generally not Retrospective.]—Primâ facie the general rule of construing acts of parliament is that they are prospective, and you are not to interfere with rights unless you find express words to that effect. *Allhusen* v. *Brooking*, 53 L. J., Ch. 520; 26 Ch. D. 564; 51 L. T. 57; 32 W. R. 657.

It certainly requires very clear and unmistakable language in a subsequent act of parliament to revive or re-create an expired right. It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless its language is such as to plainly require such a construction. And the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. *Lauri* v. *Renad*, 61 L. J., Ch. 580; [1892] 3 Ch. 402; 67 L. T. 275; 40 W. R. 679—C. A.

The International Copyright Act, 1886, must be construed according to these well settled rules. *Ib.*

The Gaming Act, 1892, provides that any promise to pay any person any sum under any wagering contract shall be null and void, and that no action shall be maintained to recover any such sum:—Held, that although the words barring an action might be redundant, yet that they could not be held retrospective, so as to bar a right of action commenced after the passing of the act to recover payments made before it to a betting agent for lost bets paid by the agent. *Knight* v. *Lee*, 62 L. J., Q. B. 28; [1893] 1 Q. B. 41; 5 R. 54; 67 L. T. 688; 41 W. R. 125.

Statutes are, primâ facie, deemed to be prospective only. *Pettumberdass* v. *Thackoorseydass*, 5 Moore, Ind. App. 109; 7 Moore, P. C. C. 239; 15 Jur. 257.

The general rule in construing recent statutes is "Nova constitutio futuris formam imponere debet, non præteritis," but the rule, which is one

of construction only, will yield to a sufficiently-expressed intention of the legislature, that the enactment should have a retrospective operation. *Moon* or *Moore* v. *Durden*, 2 Ex. 22; 12 Jur. 138. S. P., *Quilter* v. *Mapleson*, 52 L. J., Q. B. 44; 9 Q. B. D. 672; 31 W. R. 75—per Jessel, M.R.

A retrospective effect will not be given to a statute unless the statute by precise words clearly shews that such was the intention of the legislature. *Thompson* v. *Lack*, 3 C. B. 540; 16 L. J., C. P. 75.

As a general principle, acts of parliament, especially when they alter the rights of parties, are not to be construed retrospectively, unless otherwise provided. *Hickson* v. *Darlow*, 52 L. J., Ch. 453, 454; 31 W. R. 362—per Fry, J. Affirmed 23 Ch. D. 690; 48 L. T. 449; 31 W. R. 361.

An act is not to be construed as retrospective by inference, but only by express enactment. *Evans* v. *Williams*, 2 Dr. & Sm. 324.

Clear and unambiguous words are necessary to give a retrospective effect to an act, so as to deprive a party of a vested right of action. *Marsh* v. *Higgins*, 9 C. B. 551; 1 L. M. & P. 253; 19 L. J., C. P. 297.

General presumption that a statute is not intended to have retrospective operation may give way to contrary inference, from remedial nature of the particular enactment. *The Ironsides*, Lush. 458; 31 L. J., Adm. 129; 6 L. T. 59.

Criminal Offence.]—Unless the intention of the legislature is clearly expressed criminal offences are not to be created by giving a retrospective operation to acts of parliament. *Reg.* v. *Griffiths*, 60 L. J., M. C. 93; [1891] 2 Q. B. 145; 39 W. R. 719; 56 J. P. 87—C. C. R.

Sect. 11 of 7 Will. 4 & 1 Vict. c. 85 (repealed) (by which a party charged with felony may, notwithstanding acquittal, be found guilty of assault), ruled to apply to offences committed before it came into operation. *Reg.* v. *Hagan*, 8 Car. & P. 167—per Bolland, B., and Coltman, J.

When Words not Plain.]—The rule of construction, which is only available when the words of an act of parliament are not plain, is embodied in the well-known maxim "nova constitutio futuris temporibus formam imponere debet non præteritis," that you ought, except in special cases, to construe the new law so as to interfere as little as possible with vested rights or vested dispositions of property. It seems to me that even if an act is to a certain extent retrospective, and even if construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. *Reid* v. *Reid*, 55 L. J., Ch. 294; 31 Ch. D. 102; 54 L. T. 100; 34 W. R. 333—per Bowen, L.J.

When a statute renders necessary to the validity of a transaction a condition with which it is impossible that the parties to the transaction could comply at the time when the statute comes into operation, the statute cannot apply to antecedent transactions, unless the legislature have plainly expressed their intention that it is to apply to them. *Todd, Ex parte, Ashcroft, In re*, infra—per Fry, L.J.

Statute Repealing former Statute and in part Re-enacting it.]—In determining whether any provision of an act was intended to be retrospective or not, I think the consequences of holding that it is not retrospective must be looked at, and to my mind it is inconceivable that the legislature, when, in a new act which repeals a former act, they repeat in so many words certain provisions of the repealed act, should have intended that persons who, before the passing of the new act, had broken the provisions of the old act, should entirely escape the consequences of their wrong-doing by reason of the repeal of the old act. I think it is a wholesome doctrine to hold that the section is retrospective so far as it is a repetition of the former enactment, but that it is not retrospective so far as it is new. *Todd, Ex parte, Ashcroft, In re*, 56 L. J., Q. B. 431; 19 Q. B. D. 195; 57 L. T. 835; 35 W. R. 676; 4 Morrell, 209—per Lord Esher M.R.

Commencement with Commencement of Day of Royal Assent.]—The Bastardy Law Amendment Act, 1872, 35 & 36 Vict. c. 65, s. 3, provides for an application for an order of affiliation by any single woman who may be delivered of a bastard child "after the passing of this act." The act, which came into immediate operation, received the royal assent on the 10th August, 1872:—Held, that an order of affiliation might be made under the act in respect of a child born at any time of the day on the 10th August, 1872, inasmuch as the act, in contemplation of law for this purpose, came into effect from the commencement of the day on which it received the royal assent. *Tomlinson* v. *Bullock*, 48 L. J., M. C. 95; 4 Q. B. D. 230; 40 L. T. 459; 27 W. R. 552.

Although it is expressly enacted that an act shall commence and take effect from a day named, yet, if the royal assent is not obtained until a subsequent day, the provisions of a particular section in its terms prospective do not take effect until such subsequent day. *Burn* v. *Carvalho*, 4 N. & M. 893; 1 A. & E. 895.

Statutes as to Procedure retrospective.]—The rule that statutes ought not to be construed retrospectively, unless an intention in the legislature that they should be so construed distinctly appears, does not apply to statutes which only affect the procedure or practice of courts of justice. *Wright* v. *Hale*, 6 H. & N. 227; 30 L. J., Ex. 40; 6 Jur. (N.S.) 1212; 3 L. T. 444; 9 W. R. 157.

A statute relating to procedure is retrospective. *Curtis* v. *Stovin*, 58 L. J., Q. B. 174; 22 Q. B. D. 513; 60 L. T. 772; 37 W. R. 315.

Where an enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the act. *Singer* v. *Hasson*, 50 L. T. 326.

Where the law is altered by a statute pending an action, the law as it existed when the action was commenced must decide the rights of the parties, unless the legislature, by the language used, shews a clear intention to vary the mutual relation of the parties. *Hitchcock* v. *May*, 6 A. & E. 943; 2 N. & P. 72.

A party who mistakes his rights and sues in a wrong form is not entitled to an order that would deprive the defendants of the benefit of any alterations made in the law in the meantime. *Waterford (Marquis)* v. *Knight*, 11 Cl. & F. 653. Reversing 4 Y. & Coll. 283; 10 L. J., Ex. Eq. 57; 5 Jur. 818.

After a suit was instituted by a railway company for specific performance, the company obtained legislative powers to retain possession

of the land in question:—Held, that the cause must be decided as if the act had not passed. *Ib.*

—— **Issue of an Alias.**]—A writ of summons issued under the Uniformity of Process Act expired before the 24th of October, 1852, when the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, came into operation:—Held, that an alias to save the statute must issue pursuant to the former act. *Gapp* v. *Robinson*, 12 C. B. 828; 22 L. J., C. P. 5; 16 Jur. 977; 1 W. R. 21.

Retrospective effect on Action Commenced.]—It has been considered in many cases that where a person has commenced an action he had a vested right, and that any subsequent statute ought not to be construed as retroactive so as to alter that right. This is not an invariable rule, and does not apply if the language of the statute is clear and express. *Att.-Gen.* v. *Theobald*, 24 Q. B. D. 557; 62 L. T. 768; 38 W. R. 527—per Pollock, B.

Vexatious Actions Act, 1896—Retrospective Operation.]—The Vexatious Actions Act, 1896, has a retrospective operation, and applies equally whether the vexatious legal proceedings complained of have taken place before or after the passing of the act. *Chaffers, In re, Att.-Gen., Ex parte*, 76 L. T. 351; 45 W. R. 365.

Declaratory Act retrospective.]—A declaratory act is, as a general rule, retrospective. *Jones* v. *Bennett*, 63 L. T. 705; 6 Asp. M. C. 596.

Retrospective where New Remedy.]—A statute is retrospective without express words, where it is intended to remedy an existing evil, and in order to do so gives to the parties injured a new remedy. *Reg.* v. *Birwistle*, 58 L. J., M. C. 158, 159.

Retrospective Effect of Repealing Statute.]—In August, 1887, the appellants obtained a licence to work a coal area for two years under a statute which provided that the licence "shall be extended to three years" upon an additional payment. Before the two years had expired this enactment was repealed, and other statutory rights were given in substitution for those which were abolished. Of these rights the appellants had an opportunity of availing themselves. They did not, however, apply for the substituted rights, but for a renewed licence under the provisions of the repealed statute:—Held, that when the amended statute was passed, the appellants had no accrued right under the repealed statute to obtain an extension of their licence, and therefore could not avail themselves of an enactment which was no longer in force. *Reynolds* v. *Att.-Gen. for Nova Scotia*, 65 L. J., P. C. 16; [1896] A. C. 240; 74 L. T. 108—P. C.

Non-Retrospective Operation of Amending Statute.]—Sect. 4 of the Trustee Act, 1893, Amendment Act, 1894, is not retrospective, and will not therefore have the effect of relieving trustees from a breach of trust committed before the passing of the act by the retention of an investment which has ceased to be an investment authorised by the instrument of trust or by the general law. *Chapman, In re, Cocks* v. *Chapman*, 65 L. J., Ch. 170; [1896] 1 Ch. 323; 73 L. T. 658; 44 W. R. 311.

Mercantile Law Amendment Act.]—The Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 1, does not operate retrospectively, so as to prevent the goods of an execution debtor being bound by fieri facias lodged with the sheriff before the act came into operation. *Williams* v. *Smith*, 4 H. & N. 559; 28 L. J., Ex. 286; 5 Jur. (N.S.) 1107; 7 W. R. 503—Ex. Ch.

Where a payment has been made (of interest or principal) on a promissory note by one of the co-contractors, before the passing of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), an action might be maintained by the holder of the note against any other of the co-contractors within six years after such payment, notwithstanding s. 14, as that section has no retrospective effect. *Jackson* v. *Woolley*, 8 El. & Bl. 771; 27 L. J., Q. B. 448; 4 Jur. (N.S.) 656; 6 W. R. 686—Ex. Ch.

Disqualification by Conviction.]—Sect. 14 of the Wine and Beerhouse Act Amendment Act, 1870 (33 & 34 Vict. c. 29), provides that "every person convicted of felony" shall be disqualified from selling spirits by retail, and makes any licence held by such person void:—Held, that the section had a retrospective operation, and applied to a person convicted before the passing of the act, so as to make a licence held by him void. *Reg.* v. *Vine*, 44 L. J., M. C. 60; L. R. 10 Q. B. 195; 31 L. T. 842; 23 W. R. 649; 13 Cox, C. C. 43.

Poor Law Settlements.]—The first paragraph of s. 35 of the Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), which abolishes derivative settlements, except in the case of a wife from her husband, and of a child under the age of sixteen from its parent, is to be read retrospectively as well as prospectively, both in the enacting part and in the exception. *Westbury-on-Severn Union* v. *Barrow-in-Furness Overseers*, 47 L. J., M. C. 79; 3 Ex. D. 88; 38 L. T. 315; 26 W. R. 372.

Sect. 35 of the Poor Law Amendment Act, 1876, so far as it provides that an illegitimate child shall retain the settlement of its mother until it acquires another settlement, is not retrospective so as to affect a pauper who has acquired a birth settlement by attaining the age of sixteen before its passing. *Tenterden Union* v. *St. Mary, Islington*, 47 L. J., M. C. 81; 38 L. T. 485.

Bankruptcy Acts.]—The Bankruptcy Act, 1849 (12 & 13 Vict. c. 106, s. 224), enacted that every deed of arrangement "now or hereafter entered into between any such trader and his creditors, and signed by six-sevenths of them in number and value, whose debts amount to 10*l.*, shall be obligatory upon all the creditors who shall not have signed the deed, as if they had signed it":—Held, that the section was not retrospective in its operation, and that a creditor was not barred by a deed of arrangement entered into by six-sevenths of the creditors of a debtor before the act came into operation, to which he was not a party. *Waugh* v. *Middleton*, 8 Ex. 352; 22 L. J., Ex. 109.

Where a debtor has been adjudged bankrupt prior to January 1, 1884, he is not subject to the disqualifications mentioned in s. 32 of the Bankruptcy Act, 1883, and may therefore be elected and act as a member of a school board after that date (Lord Esher, M.R., dissenting). *Pulborough School Board Election, In re, Bourke* v. *Nutt*, 63 L. J., Q. B. 497; [1894] 1 Q. B. 725; 9 R. 395; 70 L. T. 639; 42 W. R. 388; 58 J. P. 572; 1 Manson, 172—C. A.

Under s. 25, sub-s. 2 (*b*), of the Bankruptcy Act, 1890, which came into force on January 1st, 1891, a trustee under any deed of arrangement, as defined by s. 4 of the Deeds of Arrangement Act, 1887, is not required to furnish accounts of receipts and payments which took place prior to January 1, 1891. *Norman, In re, Board of Trade, Ex parte*, 63 L. J., Q. B. 34; [1893] 2 Q. B. 369; 4 R. 584; 69 L. T. 675—C. A.

Semble, that enactment is not retrospective, and does not apply to deeds of arrangement executed before that date. *Ib.*

Building Societies Act.]—Semble, the court of appeal must give effect to s. 10 of the Building Societies Act, 1894 (providing that advanced members, on the dissolution of a building society, are only liable to pay in accordance with the terms of their contracts), though the act was passed after the decision given in the court below. *Kemp* v. *Wright*, 64 L. J., Ch. 59; [1895] 1 Ch. 121; 6 R. 631; 71 L. T. 650; 43 W. R. 213—C. A.

Judicature Act, s. 22.]—A bill, which the court held to be a mere ejectment bill, was filed shortly before 2nd of November, 1874, when the Judicature Act came into operation: — Held, that although the bill could not have been sustained before the Judicature Acts, the objection to the jurisdiction was removed by s. 22 of the Judicature Act, 1873. *Hurst* v. *Hurst*, 51 L. J., Ch. 729; 21 Ch. D. 278; 46 L. T. 899—C. A.

Sect. 25, sub-s. 6, of the Judicature Act, 1873, is retrospective, and applies to assignments of choses in action made before that act came into operation. *Dibb* v. *Walker*, 62 L. J., Ch. 536; [1893] 2 Ch. 429; 3 R. 474; 68 L. T. 610; 41 W. R. 427.

Solicitors Act, 1843.]—Retrospective operation of the Solicitors Act, 5 & 6 Vict. c. 73, to make taxable bills not previously liable to taxation incurred before, but remaining unsettled at, the time of the passing of the act. *Rhodes, In re*, 8 Beav. 224; 14 L. J., Ch. 97.

The act applies to bills of costs, although incurred prior to the act, and although no part would have been before the act taxable; where a special agreement covers only part of the bill, it is competent to the master to proceed with the taxation, and without a special order; if the agreement is valid, and goes to the whole, as it would preclude taxation, the validity must first be decided, and quære, if the master is authorised to decide as to the validity, and whether, if to be brought before the court, upon petition or by bill. *Eyre, In re*, 2 Ph. 367; 17 L. J., Ch. 277.

Payment, before the act came into operation, of a previously taxable bill would not preclude taxation under the act upon a proper application made in due time. But payment before the act came into operation of a bill not previously taxable precludes taxation. *Ib.*

The act, as regards taxation, is retrospective with respect to bill previously taxable, and also as to bills thereby made taxable, provided the latter remained unpaid at the passing of the act. *Lees, In re*, 5 Beav. 410; 13 L. J., Ch. 151.

County Courts Act, 1867.]—The 10th section of the repealed County Courts Act, 1867, 30 & 31 Vict. c. 142, as to security for costs by plaintiff in tort, was retrospective, and applied to an action commenced before the passing of the statute. *Kimbray* v. *Draper*, 37 L. J., Q. B. 80; L. R. 3 Q. B. 160; 18 L. T. 540; 16 W. R. 539.

—— **Statute of Gloucester.**]—A writ of summons was issued in 1866, a verdict was taken, subject to a reference, the order of reference being made on the 7th of August, 1867; the award was made on the 29th of February, 1868, ordering a verdict of 5*l.* to be entered for the plaintiff, but giving no certificate; and a judge's order for costs, on the ground that title came in question, was obtained:—Held, that the County Courts Act, 1867, only repealed the Statute of Gloucester in cases where absolutely and at all events the plaintiff's right to costs was taken away; that in other cases they only added certain conditions to the right given by the Statute of Gloucester; that, on the repeal of such statutes by the County Courts Act, 1867, the Statute of Gloucester in such other cases stood freed from the conditions as respects actions previously commenced (special provision being made as to actions commenced afterwards), and that therefore the plaintiff was entitled to his costs. *Mount* v. *Taylor*, 37 L. J., C. P. 325; L. R. 3 C. P. 645; 18 L. T. 476; 16 W. R. 866.

Before the passing of the County Courts Act, 1867, a plaintiff brought an action for goods sold; and upon the trial, which took place after the act came into operation, he recovered a verdict for 13*l.* It was not a case of conclusive or concurrent jurisdiction, nor was there any certificate or order entitling the plaintiff to his costs:—Held, that the plaintiff was not entitled to his costs. *Mirfin* v. *Attwood*, 9 B. & S. 414; 38 L. J., Q. B. 181; L. R. 4 Q. B. 330; 20 L. T. 778; 17 W. R. 820.

An action in a case where there would have been concurrent jurisdiction under County Courts Act, 1846, s. 128, having been commenced before the passing of the County Courts Act, 1867, was tried by order, after the passing of the act, before a county court judge, and a verdict obtained for 5*l.* only:—Held, that the plaintiff was entitled to his costs, as the right to judgment did not accrue until after the passing of the County Courts Act, 1867, and in cases of conclusive or concurrent jurisdiction, the right to costs was substantially preserved by the former county courts acts; so that the Statute of Gloucester could not be considered as repealed with regard to such cases. *Levi* v. *Sanderson*, 9 B. & S. 410; 38 L. J., Q. B. 135; L. R. 4 Q. B. 330; 17 W. R. 443.

Where, in an action of contract referred at the trial, an award was made in the plaintiff's favour for less than 20*l.* before the passing of the County Courts Act, 1867:—Held, that the coming into operation of that act did not entitle the plaintiff to costs under the Statute of Gloucester. *Oldcrire* v. *Puckeridge*, 37 L. J., Ex. 90; L. R. 3 Ex. 145; 18 L. T. 333; 16 W. R. 872.

A plaintiff commenced an action of trespass before the 20th August, 1867, on which day the County Courts Act, 1867, received the royal assent, and recovered at the summer assizes a verdict for less than 5*l.*; but title to land came in question. The judge, before whom the cause was tried, did not certify on the record for costs, nor did the plaintiff obtain an order from a judge for that purpose before the 1st January, 1868:—Held, first, that the plaintiff having, under 13 & 14 Vict. c. 61, ss. 11, 12, become entitled to judgment for the amount of the verdict and no costs, unless he obtained an order under 15 & 16 Vict. c. 54, s. 4, the repeal of these statutes did not

enable him to sign judgment for costs under the Statute of Gloucester. *Butcher* v. *Henderson*, 9 B. & S. 403; 37 L. J., Q. B. 133, 139; L. R. 3 Q. B. 335; 16 W. R. 855.

Held, secondly, that 15 & 16 Vict. c. 54, s. 4, being repealed, the court had no power to make an order for costs. *Ib.*

—— **Not Entitled to Sign Judgment until after Commencement.**]—On the 5th of October, 1867, an action of tort was commenced; on the 29th of November a verdict was found for 5*l.* (no certificate), with leave to the defendant to move: in Hilary term, 1868, the defendant moved, but eventually abandoned the matter; in May, 1868, the plaintiff applied to be allowed to tax his costs. But for the County Courts Act, 1867, he would have been entitled to his costs, on the ground of concurrent jurisdiction:—Held, that the case fell within the County Courts Act, 1867, s. 5, and the plaintiff was not entitled to costs. *Ings* v. *L. & S. W. Ry.*, 38 L. J., C. P. 8; L. R. 4 C. P. 17; 17 W. R. 120.

A plaintiff who recovers less than 20*l.* in an action of contract commenced after the 20th of August, 1867, though before the 1st of January, 1868, is deprived of his costs by the County Courts Act, 1867, though he dwelt more than twenty miles from the defendant. *Wood* v. *Hunt*, L. R. 4 C. P. 18, n.; 16 W. R. 678.

When prior Act took Effect — Action after Passing—Judgment before Commencement.]—A plaintiff having recovered less than 20*l.* in an action founded on contract, and commenced in a superior court after the passing of the County Courts Act, 1867, but before the time fixed for it to come into operation:—Held, that the act had no operation till the 1st January next after it was passed, notwithstanding that the words used in s. 5 were "after the passing of this act"; and that the plaintiff was, therefore, entitled to his costs, although a judge had not certified, and they had not been allowed by a court or a judge. *Wood* v. *Riley*, 37 L. J., C. P. 24; L. R. 3 C. P. 26; 17 L. T. 216; 16 W. R. 146.

—— **Certificate not obtained before Commencement.**]—A plaintiff, before the 1st of January, 1868, recovered 5*l.* in an action of contract. After the 1st of January, 1868, he applied to a judge for an order for his costs under 15 & 16 Vict. c. 54, s. 4, on the ground that there was concurrent jurisdiction:—Held, that the judge's power to make such order was not taken away by the County Courts Act, 1867, s. 5, that section not applying to actions in which a verdict had been obtained before the act came into operation. *Restall* v. *L. & S. W. Ry.*, 37 L. J., Ex. 89; L. R. 3 Ex. 141; 18 L. T. 331; 16 W. R. 872.

4. General Words.

Construction of General Words.]—One of the safest guides to the construction of sweeping general words it is difficult to apply in their full literal sense is to examine other words of like import in the same instrument, and to see what limitations must be imposed on them. If it is found that a number of such expressions have to be subjected to limitations or qualifications, and that such limitations or qualifications are of the same nature, that forms a strong argument for subjecting the expression in dispute to a like limitation or qualification. *Blackwood* v. *Reg.*, 52 L. J., P. C. 10, 14; 8 App. Cas. 94; 48 L. T. 441; 31 W. R. 645—P. C.

The general words of a statute are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be put upon those words consistently with the intention of preserving the existing policy untouched; but the title and preamble of the Inclosure Act (8 & 9 Vict. c. 118) being quite general, the words of s. 147 appear to be so general as to make it impossible to limit them to exchanges of freeholds of the same species, notwithstanding inconveniences and seeming injustice to parties. *Minen* v. *Leman*, 20 Beav. 269.

General words in an act do not always extend to every case which falls literally within them. *Cope* v. *Doherty*, 2 De G. & J. 614; 27 L. J., Ch. 600; 4 Jur. (N.S.) 699; 6 W. R. 695.

Semble, as a matter of ordinary construction, where several words are followed by a general expression which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all. *G. W. Ry.* v. *Swindon and Cheltenham Ry.*, 53 L. J., Ch. 1075; 9 App. Cas. 787; 32 W. R. 957.

If an act of parliament, by general words, purports to confer a power upon several donees, one of whom possesses the same power more amply at common law as incident to his estate, the statute shall not be intended to apply to him, so as by implication to abridge his power; and acts of his, therefore, which the statute would have authorised, will be referred to his common-law right. *Clayton, Ex parte*, 1 Russ. & M. 369.

General Words in Special Section.]—Where there are general words in one section of an act and a subsequent special section limits the general words, the latter is the governing section. *Johnson, Ex parte, Watson, In re*, [1893] 1 Q. B. 21; 4 R. 90; 67 L. T. 519; 41 W. R. 34—C. A.

5. Particular Words.

Generally.]—The meaning of particular words in a statute, in the absence of express definition, "is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained."—Per Abbott, C.J., in *Rex* v. *Hall*, 1 B. & C. 136; 25 R. R. 332, approved of in the case of *The Lion*, 6 Moore, P. C. (N.S.) 163, 171; 38 L. J., Adm. 51; L. R. 2 P. C. 525; 21 L. T. 41; 17 W. R. 993.

"And," "Or."]—The question is whether the word "or" is used in the disjunctive or conjunctive. We think in construing "or" as conjunctive, we are construing the act according to an ordinary use of language, though it may not be strictly grammatical. *Metropolitan Board of Works* v. *Steed*, 51 L. J., M. C. 21, 24; 8 Q. B. D. 447; 45 L. T. 612; 30 W. R. 891—per Grove, J.

"Or" read as "And."]—I know no authority for reading "or" as "and" unless the context makes the necessary meaning of "or" "and," as in some instances it does; but I believe it is wholly unexampled so to read it when doing so will upon one construction entirely alter the meaning of the sentence, unless some other part

of the same statute or the clear intention of it requires that to be done. It may indeed be doubted whether some of the cases of turning "or" into "and" and vice versâ have not gone to the extreme limit of interpretation. *Mersey Docks* v. *Henderson*, 58 L. J., Q. B. 152; 13 App. Cas. 603; 59 L. T. 697; 37 W. R. 449—Halsbury, L.C.

"Now."]—"Now" to be construed retrospectively or prospectively in an act of parliament. See *Larpent* v. *Bibby*, 5 H. L. Cas. 481; 24 L. J., Q. B. 301; *Noble* v. *Gadban*, 5 H. L. Cas. 504.

"On."]—Whatever meaning may be given to the word "on" in an act of parliament, it is very difficult to extend it to above a year. It is not necessary to express an opinion as to what time should be allowed, but it is not to be conceived that a period of more than a year can be included in the word "on." "On," if not confined to the time of making the decree, must mean shortly after. *Robertson* v. *Robertson*, 8 P. D. 96; 48 L. T. 591; 31 W. R. 652.

Whether "Person" includes Corporation.]—If a statute provides that no person shall do a particular act except on a particular condition, it is, primâ facie, natural and reasonable to understand the legislature as intending such a person as by the proper means may be able to fulfil the condition; and not those who, though called "persons" in law, have no capacity to do so at any time, by any means or under any circumstances whatever; and therefore a penalty for selling poison cannot be recovered from an incorporated company, though the actual seller must be a qualified person. *Pharmaceutical Society* v. *London and Provincial Supply Assn.*, 49 L. J., Q. B. 736; 5 App. Cas. 862; 43 L. T. 389; 28 W. R. 957; 45 J. P. 20.

Trustees of a will had power to grant leases to any "person or persons" they should think fit:—Held, that this authorised them to grant a lease to a limited company. *Jeffcock's Trusts, In re*, 51 L. J., Ch. 507.

A municipal corporation is included in the words "all and every person and persons" in 39 Eliz. c. 5, enabling the foundation of hospitals. *Newcastle Corporation* v. *Att.-Gen.*, 12 Cl. & F. 402.

An action against the Melbourne harbour trust commissioners is an action brought against a "person" within the meaning of s. 46 of the Melbourne Harbour Trust Act. *Union Steamship Co. of New Zealand* v. *Melbourne Harbour Trust*, 53 L. J., P. C. 59; 9 App. Cas. 365; 50 L. T. 337—P. C.

A corporation, such as a board of guardians, is included in the word "person," so as to be within the protection of the Sale of Food and Drugs Act, 1875. *Enniskillen Union* v. *Hilliard*, 14 L. R., Ir. 214.

"Person"—Tramway Company.]—A local tramway act authorised the Board of Trade to make by-laws providing that engines should be brought to a stand at cross streets, and a penalty was imposed on any person offending:—Held, that the word "person" included the company. *St. Helens Tramway Co.* v. *Wood*, 56 J. P. 71.

"Person" not limited to Adults.]—The Crown Lands Alienation Act, 1861, of New South Wales, by s. 13, provides that, on and after the 1st day of June, 1861, crown lands, with certain exceptions, shall be opened for conditional sale by selection in manner following, viz.: "Any person may, upon any land office day, tender to the land agent for the district a written application for the conditional purchase of any such lands":—Held, that the word "person" in the above section is not limited to persons of the age of twenty-one years. *O'Shanassy* v. *Joachim*, 45 L. J., P. C. 43; 1 App. Cas. 82; 34 L. T. 265; 24 W. R. 792.

6. Technical Words.

Particular Trade.]—If an act deals with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If an act is passed with reference to a particular trade, business or transaction, then the words used have the meaning that every one conversant with that trade, business or transaction would assign to them, though that meaning may differ from the common or ordinary meaning. *Unwin* v. *Hanson*, 60 L. J., Q. B. 531; [1891] 2 Q. B. 115; 65 L. T. 511; 39 W. R. 587; 55 J. P. 662—per Esher (Lord), M.R.

Applicable to particular Trade.]—An act of parliament which is made applicable to a large trade or business should be construed, if possible, not according to the strictest and nicest interpretation of language, but according to a reasonable and business interpretation of it with regard to the trade or business with which it is dealing. It seems to me impossible reasonably to hold that those who have to regulate a large trade or business should be supposed to have made an enactment which would prevent that trade or business from being carried on, unless you are forced to come to such a conclusion by the language. *The Dunelm*, 53 L. J., P. 81; 9 P. D. 171; 51 L. T. 214; 32 W. R. 970; 5 Asp. M. C. 304—per Brett, M.R.

Where words have been long used in a technical sense, and have been judicially construed to have a certain meaning, and have been adopted by the legislature as having a certain meaning prior to a particular statute in which they are used, the rule of construction requires that the words used in such statute should be construed according to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of the words. *Ruckmaboye* v. *Lalloobhoy Mottichund*, 8 Moore, P. C. 4; 5 Moore, Ind. App. 234.

7. Previous Decisions.

Legislature presumed to know State of Law.]—The legislature must be presumed to have known at the time of the passing of an act of parliament the state of the law, as laid down in decided cases. *Kent County Council, Ex parte*, 60 L. J., Q. B. 435; [1891] 1 Q. B. 725; 65 L. T. 213; 39 W. R. 465; 55 J. P. 647—C. A.

If an act of parliament uses the same language which was used in a former act of parliament referring to the same subject, and passed for the same purpose and for the same object, the safe and well-known rule of construction is to assume that the legislature, when using well-known words upon which there have been well-known decisions, uses those words in the sense which the decisions

have attached to them. *Greaves* v. *Tofield*, 50 L. J., Ch. 118; 14 Ch. D. 563, 571; 43 L. T. 100; 28 W. R. 840—per James, L.J. S. P., *Sample, Ex parte, Cathcart, In re*, L. R. 5 Ch. 703; 23 L. T. 289; 18 W. R. 1056.

Words in Later Act following those in Former Act.]—Where cases have been decided in courts of justice on particular forms of words, and acts of parliament use those forms of words which have received judicial construction, in the absence of anything in the acts shewing that the legislature did not mean to use the words in the sense attributed to them by the courts, the presumption is that parliament did so use them. *Barlow* v. *Teal*, 54 L. J., Q. B. 400; 15 Q. B. D. 403; 53 L. T. 52—per Coleridge, C.J.

When a clause in an act which has received a judicial interpretation is re-enacted in the same terms, the legislature is to be deemed to have adopted that interpretation. *Campbell, Ex parte, Cathcart, In re*, L. R. 5 Ch. 703; 23 L. T. 289; 18 W. R. 1056.

Where the legislature have reproduced words upon which a case has been decided, they must be taken to have known the interpretation that had been put upon them in that case. *Clark* v. *Wallond*, 52 L. J., Q. B. 321, 322—per Mathew, J.

Reference to Cases on former Acts.]—The proper course is to read a section of an act, and to ascertain its meaning, and not to trouble ourselves about decisions upon a former act. Any other course would be apt to lead us astray. If the later act can clearly have only one meaning, we ought to give effect to it accordingly. If instead of doing that we compare it with the former act, and say that it differs from it only to such and such an extent, and then consider the decisions upon the former act, we might in that way go back to half-a-dozen older acts, and, after considering the decisions on them, we might at last arrive at a conclusion exactly contrary to the later act. *Blaibery, Ex parte, Toomer, In re*, 52 L. J., Ch. 461, 463; 23 Ch. D. 258; 49 L. T. 16; 31 W. R. 906—per Jessel, M.R.

Semble, the court ought to find out the meaning of a word from the section itself, and if it can do that, it need not have recourse to the use of the same word in the other sections of the act. If it cannot find out the meaning of the word by reading the particular section, then it may look through the other sections to see in what sense the word is there used, for, as a general rule, a word is to be considered as used throughout an act of parliament in the same sense. *Spencer* v. *Metropolitan Board of Works*, 52 L. J., Ch. 249, 252; 22 Ch. D. 262; 47 L. T. 465; 31 W. R. 351.

Semble, the court construes a word in one statute by reference to its use in another, in which the context may be different; and that the Lord Chancellor in *Metropolitan District Ry.* v. *Sharpe* (5 App. Cas. 425) did not intend to lay down any general rule to the contrary. *Ib.*

Amending Act—Previous Decisions.]—Where a limited interpretation has been placed upon prior acts of parliament and the words of an amending act have been enlarged, the inference is that that enlargement must have been intentional on the part of the legislature. *Hurlbatt* v. *Barnett*, 62 L. J., Q. B. 1; [1893] 1 Q. B. 77; 4 R. 103; 67 L. T. 818; 41 W. R. 33—C. A.

Sect. 11 of the Mercantile Law Amendment (Scotland) Act, 1856, is in the same terms with s. 6 of the corresponding English act; and enacts that "no acceptance of any bill of exchange . . . shall be sufficient to bind or charge any person unless the same be in writing on such bill . . . and signed by the acceptor or some person duly authorised by him." On the 2nd March, 1878, in *Hindlaugh* v. *Blakey* (3 C. P. D. 136), it was held that an acceptance by the drawee was null by reason of there being no writing except the signature. On the 16th April, 1878, the Bills of Exchange Act was passed, which, after reciting the above-quoted section of the Mercantile Law Amendment Act, and that "it is expedient that the meaning of the said enactment should be further declared," provides "that an acceptance of a bill of exchange is not and shall not be deemed to be insufficient under the provisions of the said statutes by reason only that such acceptance consists merely of the signature of the drawee written on such bill":—Held, that the act of 1878 was in effect a declaration by the legislature, that the decision in the case of *Hindlaugh* v. *Blakey* was erroneous; and as no distinction whatever was made by the terms of the English enactment corresponding with the 11th section of the Scottish act between one kind of acceptance and another, the effect of that declaration, although in terms confined to an acceptance by the drawee of a bill, was necessary to displace the whole construction of the English statute on which that decision was founded. *Steele* v. *McKinlay*, 5 App. Cas. 754; 43 L. T. 358; 29 W. R. 17.

Binding Character of House of Lords' Decisions.]—Decisions of the House of Lords upon questions of law, as to the construction of statutes, and especially of fiscal acts, are binding on the house in subsequent cases. *Inland Revenue Commissioners* v. *Harrison*, 43 L. J., Ex. 138; L. R. 7 H. L. 1; 30 L. T. 274; 22 W. R. 559.

8. IMPERATIVE, DIRECTORY, OR PERMISSIVE.

Distinction between.]—Negative words will make a statute imperative; words in the affirmative are directory only. *Rex* v. *Leicester JJ.*, 9 D. & R. 772; 7 B. & C. 12; 5 L. J. (o.s.) M. C. 95; 31 R. R. 138.

Provisions as to Time imperative.]—Provisions which appear on the face of them obligatory cannot, without strong reasons given, be held only directory. The rule is, that provisions with respect to time are always obligatory, unless a power of extending the time is given to the court. *Barker* v. *Palmer*, 51 L. J., Q. B. 110; 8 Q. B. D. 10; 45 L. T. 480; 30 W. R. 59—per Grove, J. S. P., *Reg.* v. *Barclay*, 51 L. J., M. C. 47; 8 Q. B. D. 486; 46 L. T. 335; 30 W. R. 672; 46 J. P. 693—C. A.

Contract by Urban Authority under Public Health Act.]—Sub-sect. 1 of s. 174 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), by which every contract under that act by an urban authority "shall," if the value exceeds 50*l.*, be in writing and sealed, is imperative, so that although the other party may have executed the contract he cannot recover against the urban authority if the contract was not under seal. *Young* v. *Leamington Corporation*, 52 L. J., Q. B. 713; 8 App. Cas. 517; 49 L. T. 1; 30 W. R. 500. S. P., *Hunt* v. *Wimbledon Local Board*, 4 C. P. D. 48—C. A.; *Frend* v. *Dennett*, 27 L. J., C. P. 314.

A statute enacted, that certain persons should be a company, and that it should be lawful for the plaintiff to sell his letters-patent to them. It then made regulations for the company, and by a subsequent section recited that the letters-patent had become void from the non-inrolment of them within four months, and enacted, that the letters-patent should be as valid and effectual, to all intents and purposes, as if duly inrolled:—Held, that the last section was not conditional upon a compliance with the previous sections, and that, in an action by the patentee for an infringement of the patent, a plea shewing that the previous sections had not been complied with was no answer. *Stead* v. *Curey*, 1 C. B. 496; 14 L. J., C. P. 177; 9 Jur. 511.

By an act for paving and lighting a township, the commissioners for carrying the act into execution were empowered from time to time to enter into contract or contracts for the performance of the works, or for furnishing materials for the performance thereof, or for any other of the purposes of the act, with any persons who should be willing to undertake and engage in the same: provided always, that no such contract should be made for a longer term than three years, and before such contract should be entered into, ten days' public notice at the least should be given, in order that persons might make proposals to the commissioners at a time and place in such notice to be specified; and all such contracts should specify the several works to be done, and the prices to be paid for the same, and the times when the works were to be completed, together with the penalties to be incurred in the case of nonperformance; and the same should be signed by the commissioners, or by any three of them, or by their clerk, and by the person or persons contracting to perform such works; and copies of the contract should be entered in a book to be kept by the clerk to the commissioners:—Held, that the proviso in this clause applied to the duration of the contract only, and that the subsequent provisions were directory only, and not conditional, and that a contract, signed otherwise than in the manner therein pointed out, was not therefore void. *Cole* v. *Green*, 6 Man. & G. 872; 7 Scott (N.R.) 682; 13 L. J., C. P. 30.

By 43 Geo. 3, c. 59, s. 2, where any bridge or bridges, or roads at the end thereof, repaired at the expense of any county, shall be narrow and incommodious, it shall and may be lawful to and for the justices of the county, at any of their general quarter sessions, to order and direct such bridge or bridges, and roads, to be widened, improved and made commodious for the public, provided that no money shall be applied to the amendment or alteration of any such bridge or bridges, until presentment shall have been made of the insufficiency, inconveniency, or want of reparation of such bridge or bridges, in pursuance of some or one of the statutes made and now in force concerning public bridges:—Held, that the section is permissive, not imperative, and leaves the justices a discretion whether or not to order a bridge to be widened, though it is proved to them to be narrow and incommodious. *Newport Bridge, In re*, 2 El. & El. 377; 29 L. J., M. C. 52; 6 Jur. (N.S.) 97; 1 L. T. 131; 8 W. R. 62.

"Shall"—"May."]—When a statute declares that something "shall" be done, the language is considered imperative, and the thing must be done; where the word "may" is used, the language is, as a general rule, permissive. *Davies* v. *Evans*, 51 L. J., M. C. 132; 9 Q. B. D. 243; 46 L. T. 419; 30 W. R. 548; 46 J. P. 471. S. P., *Reg.* v. *Montgomeryshire JJ.*, 51 L. J., M. C. 95; 46 J. P. 517.

The words "shall and may" are only imperative where the clause in a statute is for the public benefit. *Rex* v. *Flockwold Inclosure Commissioners*, 2 Chit. 251.

The word "may," in 13 & 14 Vict. c. 61 (County Courts Extension Act), s. 13, which provides that, in certain cases, the court or a judge at chambers may, by rule or order, direct that the plaintiff shall recover his costs, is not used to give a discretion, but to confer a power upon the court or judge, and the exercise of such power depends not upon the discretion of the court or judge, but upon proof of the particular case out of which such power arises. *MacDougal* v. *Paterson*, 11 C. B. 755; 6 Ex. 337, n.; 21 L. J., C. P. 27. S. P., *Crake* v. *Powell*, 2 El. & Bl. 210; 21 L. J., Q. B. 183.

The words of s. 9, "shall and may," are obligatory and not merely permissive. *Chapman* v. *Milvain*, 5 Ex. 61; 1 L. M. & P. 209; 19 L. J., Ex. 228; 14 Jur. 251.

"It shall be Lawful"—Enabling or Compulsory.]—The words in a statute, "it shall be lawful," of themselves merely make that legal and possible which there would otherwise be no right or authority to do. Their natural meaning is permissive and enabling only. But there may be circumstances which may couple the power with a duty to exercise it. It lies upon those who call for the exercise of the power to shew that there is an obligation to exercise it. *Julius* v. *Oxford* (*Bishop*), 49 L. J., Q. B. 577; 5 App. Cas. 214; 42 L. T. 546; 28 W. R. 726; 44 J. P. 600.

In all cases where jurisdiction is given to a court of justice by act of parliament, by the words "it shall be lawful," those words, unless they are controlled by other parts of the act, give the court a discretion in the exercise of that jurisdiction. *Bridgman, In re*, 1 Dr. & Sm. 164; 2 L. T. 560; 8 W. R. 598.

Enabling Words when Compulsory.]—Enabling words are always compulsory where they are words to effectuate a legal right. *Julius* v. *Oxford* (*Bishop*), supra.

An act for making a railway recited that the formation of the railway would be beneficial to the public, and that the company was willing to execute it, and the power of compulsorily taking lands, with the then ordinary powers, was given to the company. A mandamus issued, commanding the company to complete the line:—Held, that the mandamus ought not to go, no duty being cast on the company to make the line; the words of the act being enabling, not obligatory, and there being nothing in the subject-matter or context to require that they should be construed as compulsory. *York and North Midland Ry.* v. *Reg.*, 1 El. & Bl. 858; 7 Railw. Cas. 459; 1 C. L. R. 119; 22 L. J., Q. B. 225; 17 Jur. 690; 1 W. R. 358—Ex. Ch.

When Construed apart from Practice under Previous Law.]—Where an act recites that the manner of proceeding in certain cases requires amendment, its provisions may be construed independently of the practice under the pre-

viously-existing law. Or at all events the previous practice is a matter of very slender and remote consideration. *Julius* v. *Oxford* (*Bishop*), supra—per Penzance (Lord).

Permissive Words give a Discretion.]—Where the terms of a statute are not imperative, but permissive, the fair inference is that the legislature intended that the discretion, as to the use of the general powers thereby conferred, should be exercised in strict conformity with private rights. *Metropolitan Asylum District Managers* v. *Hill*, 50 L. J., Q. B. 353; 6 App. Cas. 208; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664—per Watson (Lord).

Where an act directs that, under certain circumstances, one or other of two matters shall be done, the party to do the act has the option of doing which act he pleases. *Reg.* v. *S. E. Ry.*, 3 H. L. Cas. 471; 1 C. L. R. 932; 17 Jur. 901.

—— **Exemption from Rating.**]—Under the Sunday and Ragged Schools (Exemption from Rating) Act, 1869 (32 & 33 Vict. c. 40), s. 1. by which rating authorities may exempt from their rates buildings used as Sunday or ragged schools, the rating authority has a discretion, and is not bound to exempt any such school. *Bell* v. *Crane*, 42 L. J., M. C. 122; L. R. 8 Q. B. 481; 29 L. T. 217; 21 W. R. 911.

Where Observance Optional.]—Where an act directs that, under certain circumstances, one or other of two matters shall be done, the party to do the act has the option of doing which act he pleases. *Reg.* v. *S. E. Ry.*, 3 H. L. Cas. 471; 1 C. L. R. 932; 17 Jur. 901.

A railway company obtained an act for making a branch within seven years. They gave the usual notices. While their bill was before parliament, they agreed to purchase the land of a certain owner. It was a term of this contract that it should not be enforced against the company within the seven years, and the purchase-money was to be paid when the company, on obtaining their act, should have "begun to execute the branch." The company obtained their act, but never executed or began to execute the branch. The seven years expired:—Held, that permissive words in the act of parliament were not obligatory. *Edinburgh, Perth and Dundee Ry.* v. *Philip*, 2 Macq. H. L. 514; 3 Jur. (N.S.) 249; 5 W. R. 377.

9. Effect of One Part on Another.

One part of an Act may be explained by another.]—If any part of a statute is obscure, and other passages in the same act will elucidate that obscurity, recourse may be had to such context for that purpose. *Rex* v. *Palmer*, 1 Leach, C. C. 352, 355; 2 East, P. C. 898. S. P., *Reg.* v. *Mallow Union*, ante, col. 1893.

If it is doubtful whether a statute declaring an act, instrument or contract void, makes it voidable only, another clause in the same statute imposing a penalty on such act, instrument or contract, is a clear test that it is ipso facto void. *Gye* v. *Felton*, 4 Taunt. 876.

Where the words of a law in their ordinary signification are sufficient to include infants, the virtual exception must be drawn from the intention of the legislature manifested by other parts of the law, from the general purpose and design of the law, and the subject-matter of it. Thus, the Statute of Limitations and of Fines would have bound infants, &c., without any express exception. *Beckford* v. *Wade*, 17 Ves. 92; 11 R. R. 20.

Reference to other Sections in same Statute.]—We ought to find out the meaning of a word from the section itself, and if we can do that, we need not have recourse to the use of the same word in the other sections of the act. If we cannot find out the meaning of the word by reading the particular section then we may look through the other sections to see in what sense the word is there used, for, as a general rule, a word is to be considered as used throughout an act of parliament in the same sense. *Spencer* v. *Metropolitan Board of Works*, 52 L. J., Ch. 249, 252; 22 Ch. D. 162; 47 L. T. 465; 31 W. R. 351—per Jessel, M.R.

Where one section gives to A. the power which B. has, and a subsequent section gives B. new powers, A. does not acquire the new powers given to B. *Edwards* v. *Hodges*, 15 C. B. 477; 3 C. L. R. 472; 24 L. J., M. C. 81; 1 Jur. (N.S.) 12; 3 W. R. 167.

Right of Action given by Two Sections Conjointly.]—One section of an act for paving and improving a town empowered commissioners to pave the streets, and enacted that the expenses should be paid to them by the owners of the land adjoining, in equal shares; and that it should be lawful for such commissioners to recover such expenses by action. The following section, beginning with "provided always," enacted, that before the commissioners should pave the streets, they should give notice to the owner of land, adjoining the street, requiring him to pave the same; and, if the owner should neglect to pave for six months, it should be lawful for the commissioners to pave the same, and to recover the expenses from such owner in such manner as in the act was mentioned. A declaration by the commissioners, to recover from the defendant his share of the expenses of paving a street, stated that he was the owner of land within the street, that the commissioners paved the same, that his share of the expenses amounted to a certain sum of money, and alleged, as a breach, that he had not paid the same:—Held, that the giving a notice to the defendant to pave the street was a condition precedent to the plaintiff's right of action, and, therefore, that the declaration was bad for not containing such an averment. *Salford Corporation* v. *Ackers*, 16 M. & W. 85; 16 L. J., Ex. 6.

By one section of a local act it was enacted, that money allowed by commissioners of a navigation to their clerk, appointed by them, should be paid by the proprietors of the tolls on the navigation in certain proportions. A subsequent section enacted, that if any proprietor should neglect or refuse to pay on demand made, either of him or his agent, the money might be recovered by action, with double costs, in the clerk's name, against such proprietor, or, if he could not be found, against his agent; or otherwise the sum might be levied by distress upon the goods of the proprietor, or, if no such goods could be found, on the goods of his agent. The clerk obtained a verdict against a proprietor, but averred no demand in the declaration:—Held, that the right of action was given by the two sections conjointly; that the demand, if necessary to the

action, must be presumed after verdict; and therefore, that the declaration must be considered as framed, and the verdict recovered, under both sections, and that the plaintiff was entitled to double costs. *Tibbits* v. *Yorke*, 4 A. & E. 134; 5 N. & M. 609; 5 L. J., C. P. 54.

Two Sections of same Act Inconsistent.]—An act was passed on the 21st of July, 1851, called "The Governor and Company of Copper Miners Act, 1851," for arranging their affairs; and s. 22 provided, that after a reconveyance the company should hold their property discharged from all rights and claims of all creditors and claimants. The 12th section referred to another action previously brought by the plaintiff against the company on the same contract, and which had been referred to an arbitrator, and provided that the plaintiff should be considered as a creditor for a certain amount till the award was made:—Held, that s. 22 referred to debts or liquidated claims, and was not a bar to an action in respect of the damage which accrued after the passing of the act. *Wood* v. *Copper Miners' Co.*, 14 C. B. 428; 2 C. L. R. 1735; 23 L. J., C. P. 209; 1 Jur. (N.S.) 65.

Whether Schedule Restricts Enactment.]—It would be quite contrary to the recognised principles upon which courts of law construe acts of parliament to enlarge the conditions of the enactment and thereby restrain its operation by any reference to the words of a mere form given for the sake of convenience in a schedule, and still more so when that restricted operation is not favourable to the liberty of the subject, but the reverse. *Dean* v. *Green*, 8 P. D. 89—per Penzance (Lord).

Different Words in same Statute in relation to same Subject-matter.]—Where in the same statute, and in relation to the same subject-matter, different words are used, the court must see whether the legislature has not made the alteration intentionally and with some definite purpose; primâ facie such an alteration would be considered intentional. *Brighton Guardians* v. *Strand Union*, 60 L. J., M. C. 105; [1891] 2 Q. B. 156; 64 L. T. 722; 39 W. R. 581; 55 J. P. 743—per Esher (Lord), M.R.

Whole Statute must be Considered.]—In construing the terms of any provision found in a statute we are entitled and indeed bound to consider any other parts of the act which throw light upon the intention of the legislature. *Colquhoun* v. *Brooks*, 59 L. J., Q. B. 53; 14 App. Cas. 493; 61 L. T. 518; 38 W. R. 289; 54 J. P. 277—Herschell (Lord).

Rules of construing a statute where a general enactment in it would override a particular one, and where two parts of it are contradictory. *Pretty* v. *Solly*, 26 Beav. 606.

Where one clause of an act directs specific acts to be done, but such acts would be included in the general terms of a subsequent prohibitory clause, the former clause is not controlled by the latter. *De Winton* v. *Brecon Corporation*, 26 Beav. 533.

—— **General Provisions — Land Drainage Charge—Priority.**]—The General Land Drainage and Improvement Company's Act, 1849, and the Lands Improvement Company's Act, 1853, each contained a section which provided that upon the final order or certificate of the inclosure commissioners and the execution of the improvements the company should have a first charge upon the inheritance of the improved lands in priority over every other then existing or future charge. The company of 1853 having executed improvements of land already subject to a charge in favour of the company of 1849, contended that the latter charge was displaced by theirs:—Held, that the two sections were not irreconcilable, and that the charge which was first in order of time was entitled to priority. *Pollock* v. *Lands Improvement Co.*, 57 L. J., Ch. 853; 37 Ch. D. 661; 58 L. T. 374; 36 W. R. 617.

General provisions in an act do not override special provision; so that where an act contains special provisions as to particular property they must be read as exceptions from general provisions, whether contained in the same or any other act. *Taylor* v. *Oldham Corporation*, 46 L. J., Ch. 105; 4 Ch. D. 395; 35 L. T. 696; 25 W. R. 178.

Ordinary or Extended Meaning.]—Although the court are primâ facie bound to read the words of an act according to their ordinary meaning in the language, if there are other circumstances which shew that the words must have been used by the legislature in a sense larger than their ordinary meaning, the court is bound to read them in that sense. The rest of an act must therefore be considered to see whether there is any reason for reading the words in a sense larger than their ordinary meaning. *Barlow* v. *Ross*, 59 L. J., Q. B. 183; 24 Q. B. D. 381; 62 L. T. 552; 38 W. R. 372—per Esher (Lord), M.R.

10. REFERENCE TO DEBATE IN PARLIAMENT.

Opinion of Lord Chancellor expressed in Speech in House of Lords as to Construction.]—During the argument of a case counsel proposed to cite as an authority for the interpretation of the Church Discipline Act, s. 3, the opinion of the Lord Chancellor as to its construction, contained in a speech delivered by him during a debate in the House of Lords upon the third reading of the bill:—Held, by Bramwell and Baggallay, L.JJ. (Thesiger, L.J., dubitante), that the speech of the Lord Chancellor might be lawfully read for that purpose by counsel during his argument. *Reg.* v. *Oxford (Bishop)*, 48 L. J., Q. B. 609; 4 Q. B. D. 525; 41 L. T. 122—C. A. *See next case.*

Reference to Debate in Parliament.]—An act cannot be construed by reference to a debate in parliament. It has been regretted in the House of Lords that the court of appeal had allowed such a reference to be made in *Reg.* v. *Oxford (Bishop)*, supra. *S. E. Ry.* v. *Railway Commissioners*, 50 L. J., Q. B. 201, 203—per Selborne, L.C.

When Founded on Report of Commissioners.]—Where a statute is supposed to have been founded on a report of commissioners appointed by the crown, that report ought not to be referred to in a court of justice as a guide in construing the statute. *Martin* v. *Hemming*, 18 Jur. 1002. S. P., *Ewart* v. *Williams*, 3 Drew. 21, 24; *Arding* v. *Bonner*, 2 Jur. (N.S.) 763.

11. Mistake or Casus Omissus.

Mistake in Act not Assumed.]—We cannot assume a mistake in an act of parliament. The draftsman may have made a mistake, but if so, the legislature must amend it. *Richards* v. *McBride*, 51 L. J., M. C. 15; 8 Q. B. D. 119; 45 L. T. 677; 30 W. R. 121; 46 J. P. 247.

Elimination of Word.]—Where a word in a statute would make the clause in which it occurs unintelligible, the word may be eliminated, and the clause read without it. *Stone* v. *Yeovil Corporation*, 46 L. J., C. P. 137; 2 C. P. D. 99; 36 L. T. 279; 25 W. R. 240—C. A.

The Lands Clauses Act, 1845. 8 & 9 Vict. c. 18, s. 9, provides for assessment of purchase-money for lands taken from parties under disability and compensation for injury "to any such lands": —Held, that the section may be read as if the word "such" were not in it, and therefore a party under disability is entitled to compensation for injury to lands not taken. *Ib.*

Alteration of Word.]—When the intention of the legislature can be collected from the statute itself, words may be modified, altered, or supplied in the statute, so as to obviate any repugnancy to, or inconsistency with, such intention. *Quin* v. *O'Keeffe*, 10 Ir. C. L. R. 393.

There is a very serious consideration whether we can alter the word "convenient" in the 8th section of the Prescription Act by putting the word "easement" instead. That is a question which appears to me to be one of very considerable difficulty. A judge may take the view that the 8th section as it stands is so absurd that the word "convenient" cannot stand there, but that does not quite conclude the question as to whether you can insert another word. *Laird* v. *Briggs*, 19 Ch. D. 33; 45 L. T. 238—per Jessel, M.R.

Alterations permissible to complete sense of s. 6 of the Statute of Frauds Amendment Act, 1828, 9 Geo. 4, c. 14 (Lord Tenterden's Act). *Lyde* v. *Barnard*, 1 M. & W. 101; 1 Tyr. & G. 250; 5 L. J., Ex. 117.

Alterations refused to complete sense of s. 2 of Warrants of Attorney Act, 1822, 3 Geo. 4, c. 39. *Green* v. *Wood*, 7 Q. B. 178.

Casus Omissus.]—We ought not to create a casus omissus by interpretation save in some case of strong necessity. *Mersey Docks* v. *Henderson*, 58 L. J., Q. B. 152; 13 App. Cas. 595; 59 L. T. 697; 37 W. R. 449; 6 Asp. M. C. 338—per Lord Fitzgerald.

D. CONSTRUCTION SPECIALLY.

1. Of Ancient Acts.

Construction by reference to Date.]—Ancient statutes are to be construed with reference to the state of things at the time of their passing, *M'Williams* v. *Adams*, 1 Macq. H. L. 120.

The construction of an old act may be cleared by contemporanea expositio, shewing the conduct and understanding of parties at the time of its passing, and subsequently; and for this purpose the annals or histories of the period, and antiquarian researches, may be referred to. *Montrose Peerage*, 1 Macq. H. L. 401.

Semble, when there are ambiguous expressions in an act passed one or two centuries ago, it may be legitimate to refer to the construction put upon those expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the legislature at that remote period. A recent statute should be construed according to its own terms, when these are brought into controversy, and not according to the views which interested parties may have hitherto taken. *Clyde Navigation Trustees* v. *Laird*, 8 App. Cas. 673.

2. Remedial, Penal, or Prohibitory.

Remedial—Construed liberally.]—In the case of a remedial statute, everything is to be done in advancement of the remedy that can be done consistently with any construction that can be put upon it. *Johnes* v. *Johnes*, 3 Dow, 15. S. P., *Atcheson* v. *Everitt*, Cowp. 391.

It is by no means unusual, in construing a remedial statute, to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief. *St. Peter's, York (Dean and Chapter)* v. *Middleborough*, 2 Y. & J. 196.

Statutes intended to remedy a grievance ought to be construed liberally, so as to afford the utmost relief which the fair meaning of their language will allow. *Dapuoto* v. *Wyllie, The Pieve Superiore*, 43 L. J., Adm. 20; L. R. 5 P. C. 482; 30 L. T. 887; 22 W. R. 777.

Penal—To be Construed Strictly.]—When the words of a statute are equally applicable to penal or to civil consequences, the court will construe the statute in favour of the latter. *Dickinson* v. *Fletcher*, 43 L. J., M. C. 25; L. R. 9 C. P. 1; 29 L. T. 540.

Every statute which introduces a capital punishment must be construed strictly. *Rex* v. *Harvey*, 1 Wils. 164.

As a general rule, where a penalty is affixed by an act of parliament to an act or omission, such penalty is the only punishment or loss incurred by the party guilty of such act or omission. *International Patent Pulp and Paper Co., In re*, 46 L. J., Ch. 625; 37 L. T. 351; 25 W. R. 822.

A statute which is penal must be construed strictly. *Lloyd* v. *Rosbee*, 2 Camp. 453; 11 R. R. 764. S. P., *Stephenson* v. *Higginson*, 3 H. L. Cas. 638.

In construing a statute by which a penalty is imposed, we must look strictly at the language in order to see whether the person against whom the penalty is sought to be enforced has committed an offence within the section. *Graff* v. *Evans*, 51 L. J., M. C. 25; 8 Q. B. D. 377; 46 L. T. 347; 30 W. R. 381; 46 J. P. 262.

A person who seeks to recover a penalty imposed by a statute must pursue the method pointed out by statute with all possible strictness. *Smith* v. *Wood*, 59 L. J., Q. B. 5; 24 Q. B. D. 23; 61 L. T. 870; 38 W. R. 138; 54 J. P. 324—C. A. S. P., *Crane* v. *Lawrence*, 59 L. J., M. C. 110; 25 Q. B. D. 152; 63 L. T. 197; 38 W. R. 620; 54 J. P. 471—per Cave, J.

Penal laws are not to be construed according to rules of equity. *Harrison* v. *Southcote*, 1 Atk. 537.

Effect of Penal Statute.]—Subsequent statutes in the affirmative giving new penalties do not

repeal former methods of proceeding ordained by previous acts without negative words. *Middleton* v. *Crofts*, 2 Atk. 265 (Appendix).

When a statute inflicts a penalty for not doing an act provided for, the penalty enacted implies that there is a legal compulsion to do the act in question, and this principle is not affected by the fact that the penalty has a particular destination. *Redpath* v. *Allan*, 9 Moore, P. C. (N.S.) 340; 42 L. J., Adm. 8; L. R. 4 P. C. 511; 27 L. T. 725; 21 W. R. 276.

Forbidding a thing under a penalty, to protect the revenue, does not make void the thing if done, nor prevent an action thereon. If a thing is prohibited for other than revenue purposes, no action lies thereon. *Swan* v. *Bank of Scotland*, 2 Mont. & Ayr. 661.

Where a penalty is imposed by an act of parliament upon any transaction, the transaction will be illegal, though it is not expressly prohibited by the act. *Cork and Youghal Ry., In re*, L. R. 4 Ch. 748.

Recovery under, when by Crown exclusively.]—Where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party aggrieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it. *Bradlaugh* v. *Clarke*, 52 L. J., Q. B. 505; 8 App. Cas. 354; 48 L. T. 681; 31 W. R. 677—H. L. (E.)

Prohibitory, what are.]—The 9 Geo. 2, c. 36 (Mortmain Act), is a prohibitory, not a penal, statute. *Philpot* v. *St. George's Hospital*, 6 H. L. Cas. 338; 3 Jur. (N.S.) 1269; 5 W. R. 845.

Prohibitory statutes must not be interpreted on a principle of tendency; if anything done is substantially that which is prohibited, the thing is void, not because of its tendency, but because it is, within the true construction of the statute, the thing prohibited. *Ib.*

Where a statute, with the view of affording protection to the public, imposes a penalty for doing an act, it thereby prohibits the act itself, and renders it illegal. *D'Allax* v. *Jones*, 26 L. J., Ex. 79; 2 Jur. (N.S.) 979.

The 3 Hen. 8, c. 11, which imposes a penalty on a person exercising or occupying himself as a surgeon without being duly admitted, is a prohibition of his practising as a surgeon, and disables him from recovering for work and labour as such. *Ib.*

The 44 Geo. 3, c. 98, s. 14, which imposes a penalty on any unqualified person who acts as a conveyancer, is a prohibitory act, and therefore such person cannot recover the fees for conveyances drawn by him. *Taylor* v. *Crowland Gas and Coke Co.*, 2 C. L. R. 1247; 10 Ex. 293; 23 L. J., Ex. 254; 18 Jur. 913; 2 W. R. 563.

—— **Effect of.**]—When a statute prohibits, under a penalty, any person from agreeing to pay certain expenses, an agreement to pay such expenses is invalid, and no action is maintainable upon it, although the statute does not expressly prohibit the other party to the agreement from receiving such expenses, or impose a penalty upon him for so doing. *O'Brien* v. *Dillon*, 9 Ir. C. L. R. 318.

Prohibitory statutes must not be interpreted on a principle of tendency; if anything done is substantially that which is prohibited, the thing is void, not because of its tendency, but because it is, within the true construction of the statute, the thing prohibited. *Philpot* v. *St. George's Hospital*, supra.

A contract entered into in contravention of a statutory provision, whether the provision is express or implied, from the imposition of a penalty, will not support an action. *Cundell* v. *Dawson*, 4 C. B. 376; 17 L. J., C. P. 311.

Where a penalty is imposed by an act of parliament upon any transaction, the transaction will be illegal, though it is not expressly prohibited by the act. *Cork and Youghal Ry. Co., In re*, 39 L. J., Ch. 277; L. R. 4 Ch. 748; 21 L. T. 735; 18 W. R. 26.

In a statute respecting marriage, prohibitory and negative words do not create a nullity, unless such nullity is expressly declared in the statute. *Catterall* v. *Sweetman* or *Catterall*, 1 Rob. Ecc. Rep. 580; 9 Jur. 951.

3. Fiscal.

Strict Construction of Fiscal Statutes.]—Fiscal statutes must be construed strictly. *Partington* v. *Att.-Gen.*, 38 L. J., Ex. 205; L. R. 4 H. L. 100; 21 L. T. 370.

The principle of all fiscal legislation is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case may otherwise appear to be. In other words, if there is admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute. *Partington* v. *Att.-Gen.*, L. R. 4 H. L. 122—per Cairns (Lord).

A statute which imposes a tax or duty must be construed strictly; and any ambiguity will entitle the subject to be exempt from the tax or duty. *Hull Dock Co.* v. *La Marche*, 8 B. & C. 42; 2 M. & Ry. 107; 6 L. J. (O.S.) K. B. 216.

A taxing act is to be construed upon the same principle and by the same rules as any other act. *Mersey Docks and Harbour Board* v. *Lucas*, 51 L. J., Q. B. 114; 46 J. P. 388—per Brett, L.J.

Taxing acts must be construed strictly. And where therefore land which, in 4 Will. & M., being employed for charitable purposes, as the site for an almshouse or hospital, was on that account declared by a statute then passed (4 Will. & M. c. 1) to be exempt from the land tax at that time imposed, and the like words of exemption were used in 38 Geo. 3, c. 5, the fact that other land had since been applied to the same charitable purposes, and the original land had been, by order of the court of chancery, directed to be held by the trustees of the charity to their own use, freed from its charitable trust, did not, without more, render it liable, even in the hands of a tenant, to the taxation from which it had previously been exempt. *Cox* v. *Rabbits*, 47 L. J., Q. B. 385; 3 App. Cas. 473; 38 L. T. 430; 26 W. R. 483.

Taxing acts must be construed strictly, that is to say, that they are not to be extended so as to have the effect of imposing on the subject a tax which parliament has not clearly made him pay

Thorley, In re, Thorley v. *Massam*, 60 L. J., Ch. 537; [1891] 2 Ch. 613; 64 L. T. 515; 39 W. R. 565.

Decisions of the House of Lords upon questions of law, as to the construction of statutes, and especially of fiscal acts, are binding on the house in subsequent cases. *Inland Revenue Commissioners* v. *Harrison*, 43 L. J., Ex. 138; L. R. 7 H. L. 1; 30 L. T. 274; 22 W. R. 559.

Intention to Tax must be Clearly Shewn.]—Acts, in order to infringe upon the legal rights of the subject, and especially to impose a tax, must be expressed in language clear beyond all reasonable doubt. *Shaw* v. *Ruddin*, 9 Ir. C. L. R. 214. S. P., *Reg.* v. *Mallow Union*, 12 Ir. C. L. R. 35.

An intention to impose a charge on the subject must be shewn by clear and unambiguous language. *Oriental Bank* v. *Wright*, 50 L. J., P. C. 1; 5 App. Cas. 842, 856; 43 L. T. 177—P. C. S. P., *Ingram* v. *Drinkwater*, 44 L. J., P. C. 83; 32 L. T. 746.

Where such intention is doubtful, that meaning must be adopted which is most beneficial to the public. *Pryce* v. *Monmouthshire Canal and Ry. Co.*, 49 L. J., Ex. 130; 4 App. Cas. 187; 40 L. T. 630; 27 W. R. 666.

Ambiguity—Imposition of Rate.]—Where an act gives power to a company to impose a toll or rate upon the public, and it is left ambiguous which of two tolls they have a right to impose, the court must decide in favour of that which is least onerous or burdensome to the public. *South Staffordshire Waterworks Co.* v. *Barrow*, 61 J. P. 661—C. A.

—— **Exception or Modification.**]—The cases which have decided that taxing acts are to be construed strictly probably meant little more than this—that, inasmuch as there was not any a priori liability in any subject to pay any particular tax, or any antecedent relationship between the taxpayer and the taxing authority, no reason founded on any supposed relationship of the taxpayer and the taxing authority could be brought to bear upon the construction of the act, and therefore the taxpayer had a right to stand upon a literal construction of the words used, whatever might be the consequences. I cannot think this principle applies to any considerable extent where the payment spoken of in the act is a payment to be made in return for services rendered, and above all in a case where parliament does not step in to give the right to payment, but rather to moderate and limit a right to payment which otherwise might exist without limit, or, at all events, with only such limits as would be placed upon it by a quantum meruit assessment—per Lord Cairns, L.C. *Ib.*

Doctrine that Money to be Laid out in Land is Land.]—The doctrine of the court of equity, that money directed to be laid out in land is land, does not extend to the interpretation of statutes imposing duties on personal estate. *De Lancey* v. *Inland Revenue Commissioners*, 38 L. J., Ex. 193; L. R. 4 Ex. 345. Affirmed in Ex. Ch. 39 L. J., Ex. 76; L. R. 5 Ex. 102; 22 L. T. 239; 18 W. R. 468.

Retrospective Operation.]—Where a duty is imposed, with a retrospective date depending on a fact which has taken place, and which is provided for by the alternative expressions "shall be," or "shall have been found," it seems that the duty attaches from such retrospective date. *Hume* v. *Haig*, 8 Bro. P. C. 198.

Accommodation for Toll.]—When an act authorises the exaction of a toll, the accommodation for which the toll is authorised must be provided. *Aiton* v. *Stephen*, 1 App. Cas. 456.

4. Consolidating or Codifying.

Consolidation Statute—Alteration of Law.]—In construing a consolidation statute, the court refused to put upon certain words a construction which they did not otherwise properly bear, although by reason of alterations in the law between the dates of the original and the consolidation statutes it was difficult in any other way to give effect at the time to those words. *Mitchell* v. *Simpson*, 58 L. J., Q. B. 425; 23 Q. B. D. 373; 61 L. T. 248; 37 W. R. 798; 53 J. P. 694.

In construing an act of parliament which is a consolidating act and does not profess to amend or alter the provisions of the acts consolidated, primâ facie the same effect ought to be given to its provisions as was given to those of the acts for which it was substituted. *Mitchell* v. *Simpson*, 59 L. J., Q. B. 355; 25 Q. B. D. 183; 63 L. T. 405; 38 W. R. 565; 55 J. P. 36.

Consolidating and Amending Act.]—In construing a consolidating and amending act as distinguished from a codifying act, the court is entitled to have regard to previous decisions. *Budgett, In re, Cooper* v. *Adams*, [1894] 2 Ch. 557; 63 L. J., Ch. 847; 8 R. 424; 71 L. T. 72; 42 W. R. 551; 1 Manson, 230.

Codification Act.]—In construing a statute that expressly codifies the law the court cannot interpret it by the light of previous decisions except in the case of words of doubtful import or other exceptional circumstances. *Bank of England* v. *Vagliano*, 60 L. J., Q. B. 145; [1891] A. C. 107; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676—per Lord Halsbury, L.C., and Lord Herschell.

In the interpretation of a statutory code the earlier law and decisions can only be resorted to upon special grounds, as where the code contains provisions of doubtful import or uses language that previously had acquired a technical meaning. *Robinson* v. *Canadian Pacific Ry.*, 61 L. J., P. C. 79; [1892] A. C. 481; 67 L. T. 505—P. C.

5. Local and Personal.

General Construction of.]—Where an act interferes with private rights and private interests, it ought to receive a strict construction so far as those rights and interests are concerned. *Hughes* v. *Chester and Holyhead Ry.*, 31 L. J., Ch. 97; 8 Jur. (N.S.) 221; 7 L. T. 197; 10 W. R. 219.

An estate act is to be construed according to the intention of the legislature, clearly expressed therein; and its validity cannot be questioned on the suggested ground that all the parties who ought to have been were not before parliament during the discussion, or that parliament assented to it under a false impression, imposed upon

them by interested parties, in the absence of other parties equally interested. *Shrewsbury (Earl)* v. *Hope Scott*, 6 C. B. (N.S.) 1; 29 L. J., C. P. 34. Affirmed 6 C. B. (N.S.) 221; 29 L. J., C. P. 190; 6 Jur. (N.S.) 472—Ex. Ch.

An act empowering a company to contract, for purposes of public advantage, ought not to receive a narrow construction. *Dover Gas Light Co.* v. *Dover Corporation*, 7 De G. M. & G. 545; 1 Jur. (N.S.) 812.

Acts prepared by Company strictly construed against it.]—The respondents had the preparation of their own measure, and were bound to see that it fitly expressed the purposes of parliament. They were not forced to adopt the act if they had reason to complain of its harshness or injustice; and it behoved them to have any terms favourable to themselves and involving burthens on the public explicitly and unequivocally stated. If they have not done so, the fault is theirs, and they must take the consequences. *Pryce* v. *Monmouthshire Ry. and Canal Co.*, 49 L. J., Ex. 130; 4 App. Cas. 197; 40 L. T. 630; 27 W. R. 666—H. L. (E.)

Representations made on plans deposited by the promoters of an intended railway in pursuance of the standing orders of the houses of parliament previously to an application for an act, do not bind the railway company after the act is obtained nor give other persons any equity against the company, except so far as they are incorporated with the act. *Att.-Gen.* v. *G. E. Ry.*, L. R. 6 H. L. 367. Affirming 41 L. J., Ch. 505; L. R. 7 Ch. 475; 26 L. T. 749; 20 W. R. 599.

Construed in Favour of Person sought to be Charged.] — Clauses in acts empowering companies to levy a charge upon the public, as in railway acts, for example, must, where the meaning is doubtful, be construed favourably for the public. *Stockton and Darlington Ry.* v. *Barrett*, 11 Cl. & F. 598; 8 Scott (N.R.) 641; 7 Man. & G. 870. S. P., *Scales* v. *Pickering*, 4 Bing. 448; 1 M. & P. 195; 6 L. J. (O.S.) C. P. 53.

Although when an act imposing a duty or a toll is equally capable of two constructions it is to be construed so as to relieve, and not to impose a burden upon, the subjects of the realm, yet if of the two constructions the one is reasonable, and will effect the object of the act, which the other construction will not, the former is to be adopted. *Hibernian Mine Co.* v. *Tuke*, 8 Ir. C. L. R. 321.

It is a very well established rule, that if a statute imposes a charge on the subject, it must be strictly construed as against the party in whose favour the charge is imposed. *Reg.* v. *Barclay*, 51 L. J., M. C. 27; 8 Q. B. D. 306; 46 L. T. 102; 30 W. R. 472; 46 J. P. 167.

When an act is obtained by a company incorporated for purposes of profit, to confer upon them rights and powers which they would not have at common law, the provisions of such a statute must be somewhat jealously scrutinised, and I think that they ought not to be held to possess any right unless it be given in plain terms, or arises as a necessary inference from the language used. *Scottish Drainage Co.* v. *Campbell*, 14 App. Cas. 142—per Lord Herschell.

I have always understood that if a charge is imposed by a private act upon the person of an individual, it must be so imposed in clear and express terms, and not left to implication. *Ib.*—per Lord Fitzgerald.

Rate—Burthen of Proof.] — Whenever it is sought to impose a rate, the burthen lies on those seeking to enforce it to shew that the words used by the legislature are clear and unambiguous in order to charge the subject. *Ingram* v. *Drinkwater*, 44 L. J., P. C. 83; 32 L. T. 746.

The construction of private acts is to be governed by the principles of common law, and applied to the subject in a manner analogous to the rules of interpretation in a private deed or conveyance. *Eton College* v. *Winchester (Bishop)*, Lofft, 401.

Where by a statute a special authority is delegated to particular persons, affecting the property of individuals, it must be strictly pursued, and appear to be so upon the face of their proceedings. *Rex* v. *Croker*, Cowp. 26.

A local act of parliament is not to be construed strictly as against the public, who were, in fact, no parties to the passing of the act. *Campbell* v. *Lang*, 1 Eq. R. 98; 1 Macq. H. L. 451.

Where a public company is created by act of parliament, with liabilities and duties cast upon it, and privileges and rights are granted to the persons dealing with it, the party imposing duties on the company must be taken to know the provisions of the statute, although it is a private act. *Cahill* v. *L. & N. W. Ry.*, 10 C. B. (N.S.) 154; 30 L. J., C. P. 289; 7 Jur. (N.S.) 1164; 4 L. T. 246; 9 W. R. 653.

Observations as to the construction of doubtful passages of acts of parliament, as between a company and the public. *Eton College, Ex parte*, 20 L. J., Ch. 1; 15 Jur. 45.

The domestic statutes of a charitable foundation say, that the trustees "shall and may" turn out, &c. This shall be construed imperatively that they "must." *Att.-Gen.* v. *Lock*, 3 Atk. 164. S. P., *Stamper* v. *Miller*, 3 Atk. 212.

And the same words shall be construed imperatively in acts of parliament. *Ib.*

Construction of charitable bequests with reference to a local act of parliament, concerning charitable bequests to the parish, &c. *Att.-Gen.* v. *Freeman*, 5 Price, 425; Daniell, 117; 19 R. R. 641.

Construction of the Glamorganshire Canal Acts. Principles applicable to the construction of acts of parliament establishing public companies, with extraordinary powers, for the execution of works of local or general utility. *Blakemore* v. *Glamorganshire Canal Navigation*, 1 Myl. & K. 154; 2 L. J., Ch. 95.

Compensation for Damage.]—Statutory provisions as to compensation for damage, in a local and personal act, must be regarded as a contract between the parties, whether made by their mutual consent or forced on them by the legislature. *Rothes (Countess)* v. *Kirkcaldy Waterworks Commissioners*, 7 App. Cas. 707.

By the 43rd section of the Kirkcaldy and Dysart Waterworks Act, 1867, it was provided that the commissioners under the act "should be bound to make good to the Countess of Rothes and her heirs, &c., all damages which may be occasioned to her or them, by reason of or in consequence of any bursting, or flow, or escape of water from any reservoir, or aqueduct, or pipe, or other work connected therewith" which may be constructed by the commissioners. The countess is proprietress of land situated below the site of one of the reservoirs, and during an extraordinary rainfall a great quantity of water was continuously discharged from the reservoir, through a

waste weir, into the watercourse of a burn, and did much damage to the countess's lands. She claimed compensation. There was no failure or insufficiency of the works and no negligence: —Held, that on the construction of the above clause the countess was entitled to compensation for damage by flood waters from the reservoir, no matter how caused. *Ib.*

Effect of.]—A party interested in the subject-matter of a local act will have his rights affected by its provisions, though it may have been introduced and passed without notice duly given to him. *Edinburgh and Dalkeith Ry.* v. *Wauchope*, 8 Cl. & F. 710; 3 Railw. Cas. 233.

A local act must be judicially noticed, and must have all the operation of a public statute. *Aiton* v. *Stephen*, 1 App. Cas. 456.

Not affected by Public General Act.]—A partial exemption from the payment of rates for borough improvement purposes, conceded by a local act, is not taken away by the mere passing of public general acts for similar purposes. *Reg.* v. *L. & N. W. Ry.*, 35 L. T. 626; 25 W. R. 52. *S. C.*, in H. L., 48 L. J., M. C. 57; 4 App. Cas. 467; 41 L. T. 160; 28 W. R. 52.

As Evidence.]—A private act is not evidence in support of an ancient customary payment of toll within a manor. *Beaufort (Duke)* v. *Smith*, 4 Ex. 450; 19 L. J., Ex. 97.

Local Act excluding the Operation of the Statute of Limitations (37 & 38 Vict. c. 57).]—In the year 1850, an act (13 Vict. c. v.) was passed to enable commissioners (appointed by 6 Geo. 4, c. cxxix.) for managing the affairs of Brighton to purchase the Pavilion estate. By s. 19 of the act the commissioners were expressly prohibited from letting or selling any part of the property to be so acquired by them without the consent of the vestry. In 1854, the town of Brighton was incorporated, and in 1855 the powers and property of the commissioners under the act 6 Geo. 4 were transferred to the corporation. Down to the year 1853 the guardians of the poor of Brighton had had the use of offices in the town hall. On the 7th of March in that year they removed (by arrangement with the commissioners) to buildings which formed part of the Pavilion estate, in the adaptation of which to their purposes they expended a considerable sum of money; and they continued in the exclusive occupation of their new offices without payment of rent or any acknowledgment of title in the commissioners or the corporation, down to the 19th November, 1879, when an action was brought by the latter to recover possession:—Held, that, inasmuch as the guardians had had the exclusive possession of the offices for more than twelve years (assuming their relation to the corporation to have been that of tenants at will), the claim of the corporation was barred by the Statute of Limitations, notwithstanding the prohibition against letting or selling without the consent of the vestry, contained in the local act. *Brighton Corporation* v. *Brighton Union*, 49 L. J., C. P. 648; 5 C. P. D. 368; 44 J. P. 683.

Private Act—Right of Public to sue upon.]—A private act of parliament, authorising the construction of a railway, imposed upon another railway company, whose line was already in existence, an obligation to carry a particular class of traffic at rates not exceeding a fixed amount:—Held (Lord Morris dissenting), that the regulation was not a matter of contract between the two companies, but that it gave rights to the public upon which traders, who alleged that they had suffered injury owing to rates being charged in excess of the amount authorised, could sue. *Davis* v. *Taff Vale Ry.*, 64 L. J., Q. B. 488; [1895] A. C. 542; 11 R. 189; 72 L. T. 632; 44 W. R. 172—H. L. (E.)

Judicial Notice of.]—A local act must be judicially noticed, and must have all the operation of a public statute. *Aiton* v. *Stephen*, 1 App. Cas. 456—H. L. (Sc.)

Expenses of Obtaining.]—When commissioners appointed by a private act are authorised to do all things necessary for carrying out the object of the act, that will not give them authority to apply to parliament for a further act, so as to allow their applying funds raised for the purposes of the first act in discharging the expenses of obtaining the second act. *Att.-Gen.* v. *West Hartlepool Improvement Commissioners*, 39 L. J., Ch. 624; L. R. 10 Eq. 152; 22 L. T. 510; 18 W. R. 685.

Where the expenses of passing a public local act are directed to be defrayed out of certain tolls to be levied under the act, it is incumbent on the party who sues for the expense of soliciting the act to shew that tolls have been collected to cover his demand. *Andrews* v. *Dally*, 4 Bing. 566; 1 M. & P. 490; 6 L. J. (o.s.) C. P. 117.

Proof of Private Act.]—In ejectment for land, in order to shew that an act of Edw. 6 had passed for disgavelling the land, after evidence of a clerk in the parliament office, who had the custody of the records in the House of Lords, that no such act was to be found on the parliament roll, a calendar was put in, purporting to contain the titles of sixty acts passed in 2 & 3 Edw. 6, that numbered 40 being called "An act for disgavelling lands in Kent." The calendar so produced was made in 1640. Two calendars were kept in the office, one called the long calendar, the other the short calendar; and the practice had been to enter upon the long calendar such acts as passed as soon as they had received the royal assent, but not before, with their numbers: —Quære, whether this was sufficient evidence that such an act really did pass. *Doe* d. *Bacon* v. *Brydges*, 7 Scott (N.R.) 333; 6 Man. & G. 282; 13 L. J., C. P. 209.

An act for the regulation of the affairs of an insurance company containing a clause directing that it should be deemed and taken to be a public act, and should be judicially taken notice of as such by all judges, justices and others, without being specially pleaded, is sufficiently proved for all legal purposes by the production of a copy purchased at the office of the king's printer. *Beaumont* v. *Mountain*, 4 M. & Scott, 177; 10 Bing. 404; 3 L. J., C. P. 118.

Where copies of a private act, printed by the queen's printer, are made evidence, counsel cannot make an objection founded on that act a ground of an application for a nonsuit, if the act has not been given in evidence on the part of the plaintiff, because it is not an act to be judicially noticed, and is only before the court when given in evidence. *Greswolde* v. *Kemp*, Car. & M. 635.

An act, private in its nature, is not made admissible against strangers by a clause declaring

"that it shall be deemed and taken to be a public act, and shall be judicially taken notice of without being specially pleaded." *Brett* v. *Beales*, M. & M. 421; 31 R. R. 744.

Proof of Local Act.]—A local act, with a clause declaring it to be a public act, and that it shall be taken notice of as such without being specially pleaded, need not be proved either to have been examined with the parliament rolls, or to have been printed by the king's printer. *Woodward* v. *Cotton*, 1 C. M. & R. 44; 6 Car. & P. 457; 4 Tyr. 689; 3 L. J., Ex. 300.

Parliamentary Declaration.]—In the reign of Richard II., an earldom was created of an apparently nondescendible dignity. The earl was beheaded by Henry of Lancaster when he invaded England, and before he received or even claimed the crown. There was no evidence whether there had been any trial, or form of trial before the beheading. When Henry I. was declared king a proceeding took place in parliament in which the commons were represented to have prayed that all that was done in the pursuit, arrest and judgment of the earl might be declared good for the common profit of the realm. The king, with the assent of the lords temporal, declared that it was so. This proceeding was entered on the placita coronæ in parliament, but not on the rolls of parliament. Semble, that this was not an act of parliament. *Wiltes Peerage claim*, L. R. 4 H. L. 126.

But it was a solemn declaration pronounced by the king in open parliament at the prayer of the commons, and with the advice of the lords, and must be taken as a parliamentary declaration that, whatever had been the nature of the grant to the earl, it was wholly at an end. *Ib.*

6. Colonial.

Should be Construed in Accordance with English Decisions.]—An act of a colonial legislature, where English law prevails, is governed by the same rules of construction as prevail in England respecting statutes in pari materiâ; and English authorities upon an act are authorities for the interpretation of a colonial act in pari materiâ. *Catterall* v. *Catterall* or *Sweetman*, 1 Rob. Ecc. Rep. 580; 9 Jur. 951.

Where a colonial legislature has passed an act in the same terms as an imperial statute, and the latter has been authoritatively construed by a court of appeal in England, such construction should be adopted by the courts of the colony. *Trimble* v. *Hill*, 49 L. J., P. C. 49; 5 App. Cas. 342; 42 L. T. 103; 28 W. R. 479—P. C.

Authority of Colony to Pass.]—By an act of a colonial legislature it was provided that a banking company should sue and be sued in the name of its chairman, and that execution of any judgment against the company might be issued against the property of any member for the time being, in like manner as if such judgment had been obtained against such member personally. In an action against a member of the company on a judgment obtained in the colony against the chairman:—Held, that the colonial legislature had authority to pass the act, and that there was nothing repugnant to the law of England or to natural justice in enacting that actions on contracts made by the company in the colony, instead of being brought against the shareholders individually, should be brought against the chairman whom they had appointed to represent them. *Bank of Australasia* v. *Nias*, 16 Q. B. 717; 20 L. J., Q. B. 284.

Force of.]—An act of the local legislature lawfully constituted, whether in a settled or in a conquered colony, assented to by the crown, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the imperial parliament. *Phillips* v. *Eyre*, 10 B. & S. 1004; 40 L. J., Q. B. 28; L. R. 6 Q. B. 1; 22 L. T. 869—Ex. Ch. Affirming 17 W. R. 375.

E. Construction of Particular Parts.

1. Exceptions and Provisoes.

What is an Exception.] — Where a general intention is expressed, and the act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. *Churchill* v. *Crease*, 2 M. & P. 415; 5 Bing. 177, 180; 7 L. J. (o.s.) C. P. 63.

Where in a fiscal act of parliament (54 Geo. 3, c. 92. s. 6) there is a saving, co-extensive with and therefore repugnant to the enactment, the enactment must prevail. The rule of law, that an exception must be of part of the thing only, and not of all, applies as well to acts of parliament as to deeds. *Cleland* v. *Ker*, 6 Ir. Eq. R. 35. Affirmed, 1 Dr. 227.

In general a right cannot be raised out of a mere salvo or an exception in an act. *Lord Advocate* v. *Hamilton*, 1 Macq. H. L. 46.

Proviso — Enacting Part — Construction.]—If the language of the enacting part of a statute does not contain the provisions which are said to occur in it, those provisions cannot be imported by implication from a proviso—per Lord Watson. *West Derby Union* v. *Metropolitan Life Assurance Society*, 66 L. J., Ch. 726; [1897] A. C. 647; 77 L. T. 284; 61 J. P. 820—H. L. (E.)

Proviso in Section — Presumption as to.]—When one finds a proviso to a section, the natural presumption is, that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso. *Mullins* v. *Surrey (Treasurer)*, 5 Q. B. D. 170, 173.

Effect of Saving Clause.]—A local board of health, after having made a valuation as required by the Public Health Act, 1848, and other acts, duly gave a notice of their intention to make a rate under those acts. On the day when this notice expired, the acts under which it was made were repealed by the Public Health Act, 1875. The local board, not knowing this, proceeded to lay and collect the rate. The Public Health Act, 1875, is a consolidation act, and preserves the machinery and proceedings of the old acts. There is no difference in the kind or length of notice required, or in the estimate or the objects of the rate, but a slight alteration is made in the mode of valuing assessable property. The act contained a clause saving things duly done under the repealed acts. A question having arisen as to the validity of the rate:—Held, that the rate was valid, the valuation and notice being "things

duly done" under the saving clause, and the rate itself in all material points being a good rate under the new act. *Reg.* v. *Yorkshire, West Riding, JJ.*, 45 L. J., M. C. 97; 1 Q. B. D. 220; 35 L. T. 358.

Under the Nuisances Removal Acts (18 & 19 Vict. c. 121, ss. 12, 13, and 29 & 30 Vict. c. 90, s. 19), justices made an order on the 15th of May, 1875, for the abatement of a nuisance and prohibiting the recurrence of the same. On the 11th of August, 1875, the Public Health Act, 1875 (38 & 39 Vict. c. 55), came into operation, and repealed the above Nuisances Removal Acts, but with a saving clause in s. 343 that such repeal should not affect any right or liability acquired, accrued or incurred under any enactment thereby repealed. A complaint was made before the justices for disobedience of the order, by allowing a recurrence of the nuisance, on the 12th of August, 1875. The justices refused to convict on the ground that the order was gone by reason of the repealing statute:—Held, that the justices were wrong, on the ground that the defendant was liable to be convicted, as he had incurred a liability under the repealed enactment which was not affected by the repeal. *Barnes* v. *Edleston*, 1 Ex. D. 102; 45 L. J., M. C. 162; 33 L. T. 822.

Saving Rights of Crown.]—Semble, that a saving clause in an act of parliament in favour of the Crown refers to rights of property or rights in the nature of property which belong to the Crown as Crown property. *Yarmouth Corporation* v. *Simmons*, 47 L. J., Ch. 792; 10 Ch. D. 518; 38 L. T. 881; 26 W. R. 802.

Saving in Inclosure Act.]—In construing an inclosure act the reservation clause which is in derogation of the right of freehold given by the act to the allottees of the land inclosed must be construed most strictly against the lord of the manor. *Devonshire (Duke)* v. *O'Connor*, 59 L. J., Q. B. 206; 24 Q. B. D. 468; 62 L. T. 917; 38 W. R. 420; 54 J. P. 740—per Lord Esher, M.R.

2. Forms, Rules, and Conveyances.

Form of Notice.]—If a particular form of a notice or an order is prescribed by a private act, it must be fully set out and precisely pursued, and an allegation that due notice was given is not sufficient. *Rex* v. *Croker*, Cowp. 30.

And a defective notice under a private act is not cured by the appearance of the party. *Ib.*

If the legislature prescribes formalities to be observed by parties contracting inter se, and one of them endeavours to avail himself of the want of such forms to postpone or avoid the completion of a contract entered into, the court will itself ascertain whether the intentions of the legislature have, in substance, been complied with; and if they have it will carry the contract into effect. *Baker* v. *Metropolitan Ry.*, 31 Beav. 504; 32 L. J., Ch. 7; 9 Jur. (N.S.) 61; 7 L. T. 494; 11 W. R. 18.

Rules framed in pursuance of—Validity—Jurisdiction of Courts of Law—Fees.]—Where a statutory power is given to the board of trade to impose fees for a particular purpose, it is not within the province of courts of law to determine what is a reasonable amount at which the fees may be fixed. *Chartered Institute of Patent Agents* v. *Lockwood*, 63 L. J., P. C. 74; [1894] A. C. 347; 6 R. 219; 71 L. T. 205—H. L. (Sc.)

Where a statute is merely a skeleton piece of legislation, expressing a general object and providing a penalty, but leaving all material particulars to be filled up by rules which are to be framed by a public department, such as the board of trade, which rules are, subject to the fulfilment of certain conditions, to "be of the same effect as if they were contained in this act, and shall be judicially noticed," such rules—if in the opinion of the department they are requisite for giving effect to the object of the statute, and if the conditions imposed by the statute have been complied with—cannot be questioned in a court of law (Lord Morris dissenting). *Ib.*

A conveyance by the commissioners of the court for the sale of incumbered estates in Ireland is, under 12 & 13 Vict. c. 77, s. 27, "effectual to pass the fee simple discharged of all former estates," subject only to "such tenancies, leases, &c., as shall be expressed therein." Where such a conveyance is duly executed by the commissioners, it becomes under s. 49 conclusive evidence that everything required by the act to be done has been rightly done. *Rorke* v. *Errington*, 7 H. L. Cas. 617; 9 Ir. C. L. R. 357; 5 Jur. (N.S.) 1227.

A conveyance made under 21 & 22 Vict. c. 72, is, by s. 85, for all purposes conclusive evidence that all previous proceedings leading to such conveyance have been regularly taken. Where, therefore, proceedings had been taken for the sale of estates, and their sale and resale had been directed in a manner which was declared by the House of Lords to be marked with great irregularity, but the party complaining had not brought the matter before the court of appeal until after the conveyances had been executed:—Held, that the House was precluded by the provisions of the statute from affording the appellant relief against the consequences of such irregularities. *Power* v. *Reeves*, 10 H. L. Cas. 645.

Forms in Bastardy.]—The Bastardy Act, 1845, 8 & 9 Vict. c. 10, s. 1, reciting the Poor Law Amendment Act, 1844, 7 & 8 Vict. c. 101, declares that all proceedings in matters of bastardy, under the recited act, which shall have been set forth "according to the forms in the schedule hereunto annexed, or to the like tenor and effect, shall be taken to have been valid and sufficient in law." Where an order of two justices on a putative father of a bastard child was in substance in the form given in the schedule:—Held, that it was no objection to the order that it did not state the evidence to have been given on oath, as the court would not intend that the blank in the form given in the act, after the words "evidence of such woman," was to be filled up with the words "on oath" or "on affirmation." *Reg.* v. *Cheshire JJ.*, 2 New Sess. Cas. 161; 3 D. & L. 337; 15 L. J., M. C. 3; 10 Jur. 311.

An order in bastardy, under 7 & 8 Vict. c. 101, s. 3, stated, that application had been made and summons granted by a justice of the peace, usually acting in the division in which the mother resided:—Held, that, under 8 & 9 Vict. c. 10, the word "in" was to be taken to be synonymous with the word "for" contained in the forms given in the schedule, and that, consequently, the order shewed jurisdiction on the part of the magistrate granting the summons. *Reg.* v. *Milner*, 3 D. & L. 128; 14 L. J., M. C. 157; 10 Jur. 334.

Form of Affidavit.]—By 23 & 24 Geo. 3, c. 39 (Irish), for the encouragement of planting timber trees, tenants for lives by settlement, impeachable of waste, or tenants for years exceeding fourteen unexpired, who should plant or cause to be planted any timber trees, might fell and dispose of them at any time during the term. To secure the landlords, s. 2 enacted, that "any tenant so planting," &c., "should within twelve calendar months after such planting lodge with the clerk of the peace of the county" "an affidavit," &c., "reciting the number and kinds of trees, and the name of the lands, in form following :—I, A. B., do swear that I have planted," &c., "on the lands of ——, in the parish of ——, held by me from ——, the following trees [here reciting the number and kinds of trees]." The form throughout was couched in the first person, and, in fact, in its terms, was only applicable to a tenant for years. A lessee for three lives having planted many trees, his agent made the affidavit required, in his own name, as agent for the lessee :—Held, that as the form given in the statute could not possibly apply to the majority of the cases which its provisions sought to meet, it did not mean that no one but the tenants was to make the affidavit ; and that the form, if another person made the affidavit, might be varied. *Mountcashell (Earl)* v. *O'Neill (Viscount)*, 5 H. L. Cas. 937 ; 2 Jur. (N.S.) 1030 ; 4 W. R. 818.

Conveyances.]—Where a statute points out the manner in which a canal company shall convey lands, and enacts that "every such conveyance shall be valid," it does not cure any defect in the title of lands so conveyed. *Ward* v. *Scott*, 3 Camp. 284.

A conveyance by the commissioners of the court for the sale of incumbered estates in Ireland is, under 12 & 13 Vict. c. 77, s. 27, "effectual to pass the fee-simple discharged of all former estates," subject only to "such tenancies, leases, &c., as shall be expressed therein." Where such a conveyance is duly executed by the commissioners, it becomes under s. 49 conclusive evidence that everything required by the act to be done has been rightly done. *Rorke* v. *Errington*, 7 H. L. Cas. 617 ; 9 Ir. C. L. R. 357 ; 5 Jur. (N.S.) 1227.

A conveyance made under 21 & 22 Vict. c. 72 (Irish), is, by s. 85, for all purposes conclusive evidence that all previous proceedings leading to such conveyance have been regularly taken. Where, therefore, proceedings had been taken for the sale of estates, and their sale and resale had been directed in a manner which was declared by the House of Lords to be marked with great irregularity, but the party complaining had not brought the matter before the court of appeal until after the conveyances had been executed :—Held, that the House was precluded by the provisions of the statute from affording the appellant relief against the consequences of such irregularities. *Power* v. *Reeves*, 10 H. L. Cas. 645.

—— **Transfer of Debentures.**]—By a local and personal act, transfers of debentures were to be by indorsement by deed, and in a given form, and were to be entered in the books of the company, and "after such entry, but not till then, the assignee was to be entitled to the benefit" :—Held, that this did not apply to a transfer by act of law, as in the case of bankruptcy. *Lane* v. *Smith*, 14 Beav. 49 ; 15 Jur. 735.

F. EFFECT OF ONE ACT ON ANOTHER.

1. READING TOGETHER.

Of Statutes on same Subject.]—Statutes on the same subject must be construed together. *Anon.*, Lofft, 398.

If there are several acts upon the same subject, they are to be taken together as forming one system, and as interpreting and enforcing each other. *Rex* v. *Palmer*, 1 Leach, C. C. 352, 355 ; 2 East, P. C. 898.

It is a rule that several statutes on the same subject are to be read as one statute. *M'William* v. *Adams*, 1 Macq. H. L. 120.

The 32 Hen. 8, c. 28, and 13 Eliz. c. 10, are in pari materiâ, and must be taken together. *Doe* d. *Tennyson* v. *Yarborough (Lord)*, 7 Moore, 258 ; 1 Bing. 24 ; 25 R. R. 575.

By 19 & 20 Vict. c. 108, s. 3, that act and 9 & 10 Vict. c. 95 (County Courts Act), are to be read as one act. "That clause is frequently inserted in modern acts of parliament, but if the two acts be in pari materiâ, the construction would be the same without it." *Waterlow* v. *Dobson*, 8 El. & Bl. 585 ; 27 L. J., Q. B. 55—per Campbell (Lord), C.J.

A repealed statute in pari materiâ with an existing one may properly be referred to for the purpose of construing the latter. *Copeland, Ex parte*, 2 De G. M. & G. 914 ; 22 L. J., Bk. 17 ; 17 Jur. 121 ; 1 W. R. 9.

Operation inter se.]—An act repealed existing statutes and gave certain powers "in terms of the said recited acts," which were the repealed statutes :—Held, that this phrase incorporated the provisions of the repealed statutes and consolidated them. *Blantyre (Lord)* v. *Clyde Navigation Trustees*, 6 App. Cas. 273—H. L. (Sc.)

A prior statute may operate upon the provision of a subsequent one, without express words. *Perrin, In re*, 2 Dr. & War. 147 ; 1 Con. & L. 567 ; 4 Ir. Eq. R. 362.

Contradicting other Statutes.]—If it is found that, reading enactments in their ordinary sense, they would contradict some other enactments, but that, reading them in a sense in which, though not their ordinary sense, they were reasonably capable of being read, they would not contradict such other enactments, then I agree that they should be read so that all the enactments should be read together without contradicting each other. *Reg.* v. *Tonbridge Overseers*, 53 L. J., Q. B. 489 ; 13 Q. B. D. 342 ; 51 L. T. 199 ; 33 W. R. 24 ; 48 J. P. 740—per Brett, M.R.

If two statutes can be read together without contradiction, or repugnancy, or absurdity, or unreasonableness, they should be read together. *Reg.* v. *Oastler*, 50 L. J., M. C. 6 ; 43 L. T. 404 ; 45 J. P. 93—per Brett, L.J. And see *Fulham Union* v. *Isle of Thanet Union*, 50 L. J., M. C. 101 ; 7 Q. B. D. 539 ; 44 L. T. 678 ; 29 W. R. 723 ; 45 J. P. 552—C. A.

In adjusting the general provisions in a general act to the particular provisions of the special act, considerations of reason and justice, and the universal analogy of such provisions in similar acts of parliament, are proper to be borne in mind, and ought to have much weight and force. *Metropolitan District Ry.* v. *Sharpe*, 50 L. J.,

Q. B. 16; 5 App. Cas. 431; 43 L. T. 130; 28 W. R. 617; 44 J. P. 716—H. L. (E.)

—— **Burden of Proof as regards Reading together.**]—When a statute is not expressly repealed, the burden is on those who assert that there is an implied repeal to shew that the two statutes cannot stand consistently the one with the other. *Lybbe* v. *Hart*, 29 Ch. D. 15; 52 L. T. 636.

Reference to other Statute.]—I do not see how we can construe a word in one statute by reference to its use in another, in which the context may be different, and I do not think that Lord Selborne in *Metropolitan District Ry.* v. *Sharpe* (5 App. Cas. 425) intended to lay down any general rule to the contrary. *Spencer* v. *Metropolitan Board of Works*, 52 L. J., Ch. 251; 22 Ch. D. 157; 47 L. T. 464; 31 W. R. 350—per Jessel, M.R., and Cotton, L.J.

We cannot use the interpretation of one statute in construing another not made with the same intent. *Reg.* v. *Income Tax Commissioners*, 58 L. J., Q. B. 196; 22 Q. B. D. 296; 60 L. T. 446; 37 W. R. 294; 53 J. P. 198—per Lord Esher, M.R.

2. Incorporation by Reference.

Effect of, on Crown.]—Assuming that the Lands Clauses Act would have been read into the special act of 1855, in any ordinary case, can this be done in the case of these commissioners, who it is said represent the crown, and are in fact the crown, the crown not being mentioned in the Lands Clauses Act? The Lands Clauses Act is brought into the act of 1855 by reference, and the legal effect of its incorporation is this, that the moment the latter act is passed it must be considered that the legislature has written into it the provisions of the Lands Clauses Act, and if that be so, the act of 1855, in dealing with these commissioners, if they are to be taken to be the crown, is dealing with the crown itself. Therefore the objection that the crown is not mentioned in the Lands Clauses Act falls to the ground. *Wood's Estate, In re, Commissioners of Works and Buildings, Ex parte*, 55 L. J., Ch. 488; 31 Ch. D. 607; 54 L. T. 145; 34 W. R. 375—per Lord Esher, M.R.

Incorporation of Parts of other Statute—To what Extent.]—Where statute A. incorporates sections of statute B., and those sections in statute B. refer to a particular class of cases (e.g. settled estates), statute A. must not be construed as to these sections as only referring to the particular class of cases affected by statute B., but must be construed in a fair manner and not with any such restriction. *Barker, In re*, 50 L. J., Ch. 334; 17 Ch. D. 241; 44 L. T. 33; 29 W. R. 873.

Whether a special act only incorporates "such parts of a general act as are applicable to, and not inconsistent with, the special act," or "the whole act, except so far as its provisions are expressly varied by the special act," makes no difference in the application of the general to the special act. *Weld* v. *L. & S. W. Ry.*, 1 N. R. 415; 9 Jur. (N.S.) 510; 8 L. T. 13; 11 W. R. 448.

A clause of reference in an excise statute to a former law only extends to the general powers and provisions of that law, and not to every particular clause. *Rex* v. *Surrey JJ.*, 2 Term Rep. 504, 510.

An act empowered a canal company to construct canals and railroads, paying compensation to the owners of lands used; and also to make railroads to ironworks, within eight miles of the canals or railroads first mentioned: and it provided that, if the owners of certain species of property situate within eight miles from any part of the canals or railways before particularly described and authorised to be made should think it expedient that railways should be made through the lands of other persons, for the purpose of conveying goods from the canals or railways before particularly described, and if the company should refuse to make such railways, such owners might at their own cost make such railways, paying compensation to the proprietors of the lands over which they were to be made; and that the railways so made should be open to the public on payment of such tolls as the company could demand. A subsequent act incorporated a tramroad company, and gave them or the canal company power to make certain railways, and to take thereon the tolls authorised by the former act; and it provided that the companies should have the same powers for recovering the tolls as were given by the first act, and that the several clauses, privileges, penalties, and provisions therein contained, should, as far as the same would apply and the case would admit, extend to the works constructed under the new act, as if the clauses had been repeated, and the tramroad company had been therein named instead of the canal company:—Held, that this did not authorise owners of the specified kind of property within eight miles of the new works, unless authorised by the first act, to make railways from their property to the new works. *Sirhowy Tramroad Co.* v. *Jones*, 3 A. & E. 641, n.; 5 N. & M. 88.

Incorporation of General Statutes in Special Acts.]—The effect of the incorporation of a general act of parliament into the special act of any company is, that the general act must be looked at with reference to the powers conferred upon companies of dealing with the land when required; but it is to the special act that regard must be had for the purpose of ascertaining the contract between the landowner and the company, and the power which the company has of taking the land. *Simpson* v. *South Staffordshire Waterworks Co.*, 4 De G. J. & S. 679; 34 L. J., Ch. 380; 12 L. T. 360; 13 W. R. 729.

When a general act of parliament is incorporated with a special act, if there is any contradiction between them, the special act is to prevail. *Att.-Gen.* v. *G. E. Ry.*, 41 L. J., Ch. 505; L. R. 7 Ch. 475; 26 L. T. 749; 20 W. R. 599.

Effect of Subsequent General Act upon Prior Special Act Incorporating Prior General Act.]—In 1847 the Gasworks Clauses Act was passed; in 1853 a company obtained a special act which incorporated the act of 1847. In 1871 another Gasworks Clauses Act was passed, and in it was this provision: "The Gasworks Clauses Act, 1847, and this act shall be construed together as one act":—Held, that the act of 1871 was incorporated in the act of 1853. *Dudley Gas Co.* v. *Warmington*, 50 L. J., M. C. 69; 44 L. T. 475; 29 W. R. 680; 45 J. P. 649.

Repeal of Act Incorporated by Reference.]—Where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second, so that the first, so far as the second incorporated it, remains unrepealed. *Clarke* v. *Bradlaugh*, 51 L. J., Q. B. 7; 8 Q. B. D. 69; 46 L. T. 52: 30 W. R. 55—per Brett, L.J. S. P., *Reg.* v. *Smith*, 42 L. J., M. C. 46; L. R. 8 Q. B. 146; 28 L. T. 129; 21 W. R. 382.

3. Repeal.

a. General Rules.

No Repeal by Disuse.]—An act of parliament does not become inoperative by mere non-user, however long the time may have been since it was known to have been actually put in force; but the fact of non-user may be extremely important when the question is, whether there has been a repeal by implication. *The India*, 33 L. J., Adm. 193.

Test of Implied Repeal.]—The test of whether there has been a repeal by implication by subsequent legislation is this: Are the provisions of a later act so inconsistent with, or repugnant to, the provisions of an earlier act that the two cannot stand together? In which case "Leges posteriores contrarias abrogant." *West Ham* v. *Fourth City Mutual Building Society*, 61 L. J., M. C. 128; [1892] 1 Q. B. 654; 66 L. T. 350; 40 W. R. 446; 56 J. P. 438.

A repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim "Leges posteriores contrarias abrogant" applies. *Kutner* v. *Phillips*, 60 L. J., Q. B. 505; [1891] 2 Q. B. 267; 64 L. T. 628; 39 W. R. 526.

Implied Repeal not Favoured.]—Repeal by implication is never to be favoured; it is, no doubt, the necessary consequence of inconsistent legislation whenever it occurs, but which must not be imputed to the legislature unless absolutely necessary. *Dobbs* v. *Grand Junction Waterworks Co.*, 51 L. J., Q. B. 504; 9 Q. B. D. 158; 46 L. T. 820; 31 W. R. 15; 46 J. P. 756.

No statute can lose its force by non-user alone. Presumption is against the repeal of a statute by implication; but a subsequent statute, though not expressly referring to it, will be taken to have repealed a prior one, if the provisions of the two statutes are incompatible with each other or would lead to absurd consequences. *The India*, Br. & Lush. 221; 33 L. J., Adm. 193; 12 L. T. 316.

Inconsistent Affirmative Acts.]—No point is more clear, than that a subsequent affirmative statute may repeal a prior one, if the words are contrariant; but it is equally clear, that if there be two affirmative statutes made on the same subject, in all points in which they do not contradict each other, both shall stand. *Hayden* v. *Carroll*, 3 Ridgw. P. C. 592.

Where two inconsistent acts are passed at different times relative to the same subject-matter, the last is to be obeyed and take effect, although it may subvert the former. *Ely (Dean)* v. *Bliss*, 5 Beav. 582; 11 L. J., Ch. 351; 6 Jur. 496.

An affirmative statute is not repealed by a subsequent affirmative statute, unless the two cannot stand together. *Warrington, Ex parte*, 3 De G. M. & G. 159; 22 L. J., Bk. 33; 17 Jur. 430; 1 W. R. 261.

If there are two affirmative statutes inconsistent and incompatible with each other, the earlier statute is repealed by the later one. *O'Flaherty* v. *M'Dowell*, 6 H. L. Cas. 142; 4 Jur. (N.S.) 33.

Affirmative words in an act do not repeal the provisions of a former act, unless there is some obvious inconsistency between the enactments. *Pakins* v. *Seaman*, 9 M. & W. 777.

The mere recital in a subsequent statute of an intention to repeal a former specific statute will not operate by implication to repeal the former statute. In order to accomplish such a repeal, there must be a clause to that effect in the latter statute. *Mahony* v. *Wright*, 10 Ir. C. L. R. 420.

Mere general words in a subsequent affirmative statute, not referring expressly to a former specific statute, are not sufficient to effect a repeal of the former statute, if both statutes can stand together. *Ib.*

Penalties.]—Where a later statute describes an offence created by a former statute, and affixes a different punishment to it, varying the procedure, and giving an appeal when there was no appeal before, the offence must be prosecuted under the later statute. *Michell* v. *Brown*, 1 El. & El. 267; 28 L. J., M. C. 53; 5 Jur. (N.S.) 707; 7 W. R. 80.

When a statute prohibits a particular act, and imposes a penalty for doing it, and a subsequent statute imposes a different penalty for the same offence, the latter statute operates as a repeal of the former. *Robinson* v. *Emerson*, 4 H. & C. 352, 355; 12 Jur. (N.S.) 378; 14 L. T. 391; 14 W. R. 658.

The Crown.]—Clauses which limit in any way the right of the Crown must be considered as repealed by subsequent statutes, unless expressly re-enacted. *Att.-Gen.* v. *Newman*, 1 Price, 438.

When Two Acts repugnant to each other come into Operation on the same Day.]—Where two acts come into operation on the same day, and are repugnant, the one which last received the royal assent virtually repeals the other, although the former by reason of the classing of the different acts may be numbered as of a chapter later down in order than the latter. *Rex* v. *Middlesex JJ.*, 1 L. J., M. C. 5; 1 D. P. C. 117; 2 B. & Ad. 818.

Two Acts giving Inconsistent Powers to Different Public Bodies—Repeal of earlier one.]—Where two statutes give authority to two public bodies to exercise powers which cannot consistently with the object of the legislature co-exist, the earlier must necessarily be repealed by the later statute. *Daw* v. *Metropolitan Board of Works*, 12 C. B. (N.S.) 161; 31 L. J., C. P. 223; 8 Jur. (N.S.) 1040; 6 L. T. 353.

Re-enactment.]—A section of a statute, which merely re-enacts a provision in a previous statute, will not be construed as virtually repealing an inconsistent enactment in an act made subsequently to the first, but before the last act. *Morisse* v. *Royal British Bank*, 1 C. B. (N.S.) 67; 26 L. J., C. P. 62; 3 Jur. (N.S.) 137; 5 W. R. 138.

Repeal of Private Act by Private Act.]—A private act does not repeal a former private act

by implication. *Birkenhead Docks (Trustees)* v. *Laird*, 4 De G. M. & G. 732; 23 L. J., Ch. 457; 18 Jur. 883; 2 W. R. 7.

Where, therefore, a private act gave power to commissioners to construct a sea wall, the property in which was to be vested in them, with liberty to proprietors of adjoining lands to purchase portions of the wall, and to make openings in it, under the superintendence of the engineer of the commissioners:—Held, that under a subsequent act empowering a dock company to take some adjoining lands and to make such works for the purposes of their undertaking "as they might deem expedient," the power thus conferred was subject to the provisions of the former act. *Ib.*

b. Particular Cases.

Metropolitan Acts.]—Sect. 1 of the Street Music Act, 1864, does not by implication repeal s. 77 of the Metropolitan Police Act, 1839; and, therefore, a street musician who, under s. 1 of the Street Music Act, 1864, is convicted and fined forty shillings, may in default of payment of the fine be committed to prison for one month under s. 77 of the Metropolitan Police Act, 1839, although the punishment by imprisonment provided by s. 1 of the Street Music Act, 1864, cannot exceed three days. *Reg.* v. *Hopkins*, 62 L. J., M. C. 57; [1893] 1 Q. B. 621; 5 R. 315; 68 L. T. 292; 41 W. R. 431; 57 J. P. 152.

The provisions of s. 6 of the Metropolis Management Act, 1878, by which building within twenty feet of the centre of the highway is prohibited, are inconsistent with a special act empowering the London School Board to acquire compulsorily a particular site, defined by metes and bounds, for the purpose of providing school accommodation. Consequently the school board take such site, or so much of it as is necessary for school accommodation, free from the restriction imposed by the general act. *City and South London Ry.* v. *London County Council* ([1891] 2 Q. B. 513) followed. *London County Council* v. *London School Board*, 62 L. J., M. C. 30; [1892] 2 Q. B. 606; 5 R. 1; 40 W. R. 604; 56 J. P. 791.

Sect. 119 of the Metropolis Local Management Act, 1855, does not impliedly repeal the provisions contained in s. 65 of Michael Angelo Taylor's Act, which impose a penalty upon the hanging out of articles in front of any houses within the metropolis; such provisions are, therefore, still in force. *Wyatt* v. *Gems*, 62 L. J., M. C. 158; [1893] 2 Q. B. 225; 5 R. 507; 69 L. T. 456; 42 W. R. 28; 57 J. P. 665.

The powers given to the metropolitan local authorities by s. 65 of Michael Angelo Taylor's Act to order the removal of goods, barrows, &c., from carriage or footways are inconsistent with and therefore impliedly repealed as far as they affect costermongers by s. 6 of the Metropolitan Streets Act, 1867, and s. 1 of the Metropolitan Streets Act Amendment Act, 1868. *Summers* v. *Holborn Board of Works*, 62 L. J., M. C. 81; [1893] 1 Q. B. 612; 5 R. 284; 68 L. T. 226; 41 W. R. 445; 57 J. P. 326.

Amendment Act — Implied Re-enactment.]—In 1877 the Metropolitan Street Improvements Act was passed, authorising the Metropolitan Board of Works to execute certain street improvements and to take land for that purpose. It incorporated the Lands Clauses Consolidation Acts. Sect. 33 provided that accommodation should be furnished for such of the labouring classes as would be displaced by the proposed improvements, and authorised the board of works to acquire or appropriate certain lands, and sell or let the same for the purpose of providing such accommodation, and imposed certain restrictions on the board. An amending act was passed in 1882, which by s. 2 enacted that the board should, in exercise of the powers by the act of 1877 conferred upon them, appropriate lands, shewn on a certain plan, to the erection of artizans' dwellings in three pieces successively. Sect. 3 enacted that, in reference to the land shewn in the said plan, the act of 1877 should be read as though s. 33 were not contained therein:—Held, that s. 33 of the act of 1877 had not been repealed for all purposes, and that the board had by implication the powers of selling and letting conferred by that section for the purpose of carrying out the buildings referred to in s. 2 of the act of 1882. *Wigram* v. *Fryer*, 56 L. J., Ch. 1098; 36 Ch. D. 87; 57 L. T. 255; 36 W. R. 100.

Licensing Act—Betting.]—The provisions of s. 17 of the Licensing Act, 1872, whereby a licensed person is liable to a penalty of 10*l.* for using his premises for the purpose of betting, do not repeal the provisions of s. 3 of the Betting Houses Act, 1853, whereby such person is liable to a penalty of 100*l.* for the same offence. *Sims* v. *Pay*, 58 L. J., M. C. 39; 60 L. T. 602; 16 Cox, C. C. 609; 53 J. P. 420.

Implied Repeal.] — The applicant had been convicted of an offence against 7 & 8 Geo. 4, c. 53 (an act to consolidate and amend the law relating to the collection and management of the revenue of excise), by which act (s. 83) no appeal was allowed against a conviction, unless the appellant should, at and immediately upon the giving of the judgment appealed against, give notices in writing to the justices from whose judgment such appeal should be made, and also to the adverse party. The applicant gave notice of appeal within four days after his conviction. The justices in quarter sessions declined to hear the appeal, on the ground that the appellant had not given notice of appeal "at and immediately upon the giving of the judgment appealed against":—Held, that the effect of s. 6 of the Summary Jurisdiction Act, 1884, was to get rid of all procedure in appeals from courts of summary jurisdiction but that provided by the Summary Jurisdiction Acts, and that the notice of appeal was sufficient, as having been given within the time provided by the Summary Jurisdiction Act, 1884. *Reg.* v. *Glamorganshire JJ.*, 58 L. J., M. C. 93; 22 Q. B. D. 628; 60 L. T. 536; 37 W. R. 493; 16 Cox, C. C. 593; 53 J. P. 294.

Gas Act.]—By local act, a penalty of 200*l.* was imposed on any gas or other company for suffering any impure matter to flow into any stream, to be sued for by common informer. Afterwards, by s. 21 of the Gasworks Clauses Act (10 & 11 Vict. c. 15), a like penalty is imposed for the same offence, such penalty to be recovered by the person into whose water such substance shall be conveyed, or whose water shall be fouled by any such act:—Held, that the later provision was, pro tanto, a repeal of the former. *Parry* v. *Croydon Commercial Gas Co.*, 11 C. B. (N.S.) 579. Affirmed 15 C. B. (N.S.) 568; 10 Jur. (N.S.) 172; 9 L. T. 694; 12 W. R. 212—Ex. Ch.

Gaol Act.]—By a local act passed prior to 5 & 6 Vict. c. 98, in furtherance of arrangements made between the justices of a county and the council of a borough having a separate court of quarter sessions, it was provided that the prisoners of the borough should be maintained in the county gaol on certain terms:—Held, that this act was not a special contract within the meaning of the 5 & 6 Vict. c. 98, s. 18, and that the local act, being inconsistent with the general enactment, was repealed by it, though not expressly mentioned. *Bramston* v. *Colchester Corporation*, 6 El. & Bl. 246; 25 L. J., M. C. 73; 2 Jur. (N.S.) 809; 4 W. R. 401.

Harbours Act.]—The 19 Geo. 2, c. 22, s. 1, which imposed a penalty for the offence of throwing ballast into navigable rivers, is repealed impliedly by the Harbours Act, 1814 (54 Geo. 3, c. 159, s. 11), which provides a different punishment for the same offence, and prescribes a different mode of procedure. *Mitchell* v. *Brown*, 1 El. & El. 267; 28 L. J., M. C. 53; 5 Jur. (N.S.) 707; 7 W. R. 80.

c. Repeal of Special by General.

General Rule.]—Where an act of parliament dealing in a special way with a particular subject-matter is followed by a general act dealing in a general way with the subject of the previous legislation, general words in the general act are not to be held as repealing the prior special legislation, unless the general act contains some reference to the special legislation, or unless the general act cannot be given effect to without such a repeal. *Smith, In re, Clements* v. *Ward*, 56 L. J., Ch. 726; 35 Ch. D. 589; 56 L. T. 850; 35 W. R. 514; 51 J. P. 692.

It does not necessarily follow that a previous special act is to remain standing, notwithstanding the general provisions of a subsequent general act, if it is found on the consideration of the act or acts that such is not the intention of the legislature. *Williams, In re, Jones* v. *Williams*, 57 L. J., Ch. 264; 36 Ch. D. 573; 57 L. T. 756; 36 W. R. 34.

Where there are general words in a later act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation to be indirectly repealed, altered, or derogated from, merely by force of such general words, without any indication of a particular intention to do so. *Seward* v. *The Vera Cruz*, 54 L. J., P. 9; 10 App. Cas. 68; 52 L. T. 474; 33 W. R. 477; 5 Asp. M. C. 386—per Selborne, L.C.

The principle to be applied to the construction of acts is, that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless the two acts are necessarily inconsistent. *Thorpe* v. *Adams*, 40 L. J., M. C. 52; L. R. 6 C. P. 125; 23 L. T. 810; 19 W. R. 352. S. P., *Reg.* v. *Champneys*, 40 L. J., C. P. 95; L. R. 6 C. P. 384, 394; 24 L. T. 181; 19 W. R. 386.

If a statute professes merely to repeal a former statute of limited operation, and to re-enact its provisions in an amended form, an intention to extend the operation of its provisions to classes of persons not previously subject to them is not to be presumed as a necessary inference, unless the intention to the contrary is clearly shewn. *Brown* v. *McLachlan*, 9 Moore, P. C. (N.S.) 384; 42 L. J., P. C. 18; L. R. 4 P. C. 543; 21 W. R. 277.

A general enactment in a later statute does not repeal a particular enactment in an earlier statute, unless the intention to do so is manifest, or the implication is irresistible. *Thames Conservators* v. *Hall*, 37 L. J., C. P. 163; L. R. 3 C. P. 415; 18 L. T. 361; 16 W. R. 971.

It is now well settled, that a general enactment of a later act cannot repeal a specific enactment in an earlier act merely by implication. *Gard* v. *Commissioners of Sewers*, 49 L. T. 327.

Repeal of Private Act by Public Act.]—A local act is not, in the absence of any indication of intention to the contrary, repealed by a subsequent public general act. *Fitzgerald* v. *Champneys*, 2 Johns. & H. 31; 30 L. J., Ch. 777; 7 Jur. (N.S.) 1006; 9 W. R. 850. S. P., *Parnell* v. *Wolverhampton Waterworks Co.*, 10 C. B. (N.S.) 576; 4 L. T. 513.

The rule of construction, that a general act does not repeal or affect a prior special act without express words of reference, applies to church building acts. *Ib.*

The insertion in a general act of a saving clause, providing that the act shall not apply to a special case which had previously been regulated by a special act not otherwise referred to, will not prevent the application of the above rule of construction. *Ib.*

A clause in a private act which is quite inconsistent with a clause in a subsequent public act dealing with the same subject is thereby repealed. *Great Central Gas Consumers' Co.* v. *Clarke*, 13 C. B. (N.S.) 838; 32 L. J., C. P. 41; 11 W. R. 123—Ex. Ch.

A gas company was by its act of incorporation restricted to a charge of 4*s.* per 1,000 cubic feet. By a subsequent public act (23 & 24 Vict. c. 125) for the supply of gas to the metropolis, an increased standard of purity and illuminating power was required by the companies electing to adopt the provisions of that act as to force, purity and illuminating power, and an increased charge to be made by them:—Held, that the company was no longer subject to the restriction as to force contained in its private act. *Ib.*

Where a railway company has taken land under a private act passed before 1845, a subsequent act dealing with the same railway, and incorporating the Railways Clauses Consolidation Act, 1845, does not alter the contract entered into under the earlier act without express words to that effect in the later act. *G. W. Ry.* v. *Cefn Cribbwr Brick Co.*, 63 L. J., Ch. 500; [1894] 2 Ch. 157; 8 R. 178; 70 L. T. 279; 42 W. R. 493.

Where special legislation provides specific procedure it would seem that such special legislation would not be repealed by subsequent general legislation as to procedure. *East London Ry., In re, Oliver's Claim*, 24 Q. B. D. 507; 63 L. T. 147; 38 W. R. 312—per Fry, L.J.

d. Repeal of General by Special.

Inconsistency between General and Special Acts.]—If there is an inconsistency between the general act and a subsequent special act the latter must prevail. *Yarmouth Corporation* v. *Simmons*, 47 L. J., Ch. 792; 10 Ch. D. 518; 38 L. T. 881; 26 W. R. 802.

A later special act impliedly repeals a former general act when they cannot be read together so as to harmonise. *City and South London Ry.* v. *London County Council*, 60 L. J., M. C. 149; [1891] 2 Q. B. 513; 65 L. T. 362; 40 W. R. 166; 56 J. P. 6—C. A. S. P., *London County Council* v. *London School Board*, [1892] 2 Q. B. 606; 40 W. R. 604; 56 J. P. 791.

A section in a private act cannot by implication repeal a provision of the common law, or of a public statute. *The Clan Gordon*, 7 P. D. 190; 46 L. T. 490; 30 W. R. 691; 1 Asp. M. C. 513.

A public general statute held to have been impliedly repealed, pro tanto, by a subsequent affirmative, but inconsistent, local and personal act. *Kelly, Ex parte*, Ir. R. 9 C. L. 114.

By 3 & 4 Vict. c. 85, s. 6, all withs and partitions between any chimney or flue, which at any time after the passing of this act shall be built or re-built, shall be of brick or stone, and at least equal to half a brick in thickness. By the Huddersfield Improvement Act, 1871, Local and Personal, s. 111, the chimneys and flues of every new building shall be constructed in such a mode and of such materials and dimensions as shall from time to time be determined on and approved by the corporation. A master builder built a chimney having a partition of stone slate of less than half a brick in thickness, and was convicted of so doing contrary to the 3 & 4 Vict. c. 85, s. 6, but he had submitted a plan and detailed section of the building to the corporation, in accordance with which it was built, under s. 103 of the local act, and such plans had been approved by them:—Held, that there was not such a contrariety between the two acts as to make the subsequent local act repeal by implication the prior general statute so as to enable the corporation to dispense with the requirements of the former statute; and the conviction was held good. *Hill* v. *Hall*, 45 L. J., M. C. 153; 1 Ex. D. 411; 35 L. T. 860.

Where the legislature has vested special powers in a particular body for special purposes, a general act subsequently passed will not override those special powers. *London and Blackwall Ry.* v. *Limehouse District Board of Works*, 3 Kay & J. 123; 26 L. J., Ch. 164.

e. Effect of Repeal.

General Effect of Repeal.]—In order to ascertain the effect of a repealing statute the repealed words must be looked at. Where in any statute special words are followed by general words, any subject-matter which is aptly described by the special words comes within the purview of the statute by force of the special words, and not of the general words. If, therefore, the special words are repealed, the subject-matter ceases to be within the purview of the statute, though aptly described by the general words in the absence of the special words. *Att.-Gen.* v. *Lamplough*, 47 L. J., Ex. 555; 3 Ex. D. 214; 38 L. T. 87; 26 W. R. 323—C. A.

No proceedings can be pursued under a repealed statute, though commenced before the repeal, unless by special exception. *Miller's Case*, 3 Wils. 420; 1 W. Bl. 451.

An act from its passing repealed a former act which ousted clergy from a certain offence, and imposed a new punishment on the same offence from and after its passing:—Held, that an offence committed before the passing of the new act, but not tried till after, was not liable to be punished under either of these statutes. *Rex* v. *M'Kenzie*, R. & R. C. C. 429.

Where an act directs a mode of procedure to be adopted as contained in a former act, the repeal of such act does not operate to repeal the procedure directed, which is to be considered as incorporated in the latter act. *Reg.* v. *Stock*, 3 N. & P. 420; 8 A. & E. 405.

Effect of the repeal of a statute which modified a former statute considered. *Glaholm* v. *Barker*, 35 L. J., Ch. 259; L. R. 1 Ch. 223; 12 Jur. (N.S.) 82; 13 L. T. 653; 14 W. R. 296.

Observations upon the repealing effect of subsequent statutes. *London and Blackwall Ry.* v. *District Board of Works*, 3 Kay & J. 123; 26 L. J., Ch. 164; 5 W. R. 64.

Repealed Act to be considered as if never passed.]—Where an act or part of an act is repealed, it must, except as to transactions which are past and closed, be considered as if it had never existed. *Griswood, Ex parte*, 4 De G. & J. 544; 28 L. J., Ch. 769; 5 Jur. (N.S.) 1191.

After a statute has been repealed it cannot be acted upon in respect of a proceeding under it commenced before its repeal, and in this respect there is no valid distinction between matters of form and substance. Where, therefore, between the finding of an indictment for nonrepair of a road and plea pleaded, the statute alone upon which the indictment could be supported was repealed, and afterwards the indictment was proceeded with and a conviction obtained, the court arrested the judgment. *Reg.* v. *Denton*, 18 Q. B. 761; Dears. C. C. 3; 21 L. J., M. C. 207; 17 Jur. 453.

Costs of Action where Right already Vested.]—The repeal of a statute does not, without express words, take away the power of the courts to make an order for costs of an action to which a right has already vested under the repealed statute. *Restall* v. *L. & S. W. Ry.*, 37 L. J., Ex. 89; L. R. 3 Ex. 141; 18 L. T. 331; 16 W. R. 872.

Liability for Trespass for Acting under Jurisdiction given by Repealed Statute.]—A local act prohibited the exposing for sale of goods on the footway of a street, under a penalty of 10*s.*, and, by one of the sections, the justices had a summary jurisdiction to enforce the payment of the penalty. By a subsequent act, entitled "An act to amend and enlarge the former act," the section in the first act creating the offence was repealed and re-enacted, with this difference, that the penalty was made 20*s.* instead of 10*s.* There was no clause in the last act as to the mode in which the penalty should be enforced:—Held, that as the first act was repealed by the second, the justices, having granted a distress warrant for the purpose of enforcing payment of a penalty imposed by the latter act, were liable to an action of trespass. *Ward* v. *Stevenson*, 1 New Sess. Cas. 162.

Where a road had been presented by a magistrate, under 13 Geo. 3, c. 78, s. 24, and the presentment was removed by certiorari after trial, but before judgment, that statute was repealed by 5 & 6 Will. 4, c. 50, s. 1:—Held, that the court could not give judgment for the Crown, as the proceedings were founded on the presentment which was no longer valid. *Reg.* v. *Mawgan*, 3 N. & P. 502; 8 A. & E. 496; 7 L. J., M. C. 98.

12 & 13 Vict. c. 109, s. 44 (repealed), required the name and address of any person, party to an

action, suit or proceeding now pending on the common law side of the court of chancery, or their attorney, to be entered in a book kept in the petty bag office. This act repealed 11 & 12 Vict. c. 94, s. 39, which was similar to 12 & 13 Vict. c. 109, s. 44:—Held, that a compliance with the provision of the repealed act was a compliance with the new statute, and that a second entry of the name and address was not necessary. *Baddely* v. *Denton*, 1 L. M. & P. 172.

Not to affect Right acquired—Effect of s. 38 of Interpretation Act, 1889.]—Sect. 38 of the Interpretation Act, 1889, provides that unless the contrary intention appears the repeal of a statute shall not affect any right acquired:—Held, that the power of a bankrupt to apply for his discharge was a right acquired, and therefore a bankrupt adjudicated under the Bankruptcy Act, 1883, was entitled to his discharge under a repealed section in that act. *Raison, Ex parte, Raison, In re*, 60 L. J., Q. B. 206; 63 L. T. 709; 39 W. R. 271; 8 Morrell, 11.

When a repealing statute saves all rights accrued, the effect is not to leave it open to any one who could have taken advantage of any of the repealed enactments still to take advantage of them. *Abbott* v. *Minister for Lands*, 64 L. J., P. C. 167; [1895] A. C. 425; 11 R. 466; 72 L. T. 402—P. C.

Repeal "except as to acts done under them."]—A proviso in a repealing statute, that the repealed statutes shall be repealed, "except as to acts done under them," will operate to preserve to parties sued for acts alleged to have been done under colour of the powers of the repealed statutes a protection which those statutes conferred upon persons sued for such acts, at all events, if the action is brought before the repealing statute passes. *Foster* v. *Pritchard*, 2 H. & N. 151; 26 L. J., Ex. 215; 5 W. R. 610.

Qualified Repealing Section considered.]—It has been urged that the power to order service out of the jurisdiction which was conferred by the acts 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 84, is still subsisting, notwithstanding the repeal of those acts, and no doubt the act 46 & 47 Vict. c. 49, and each of the repealing acts, contain a saving clause, which provides that the repeal is not to affect any jurisdiction established by any enactment repealed by the act. But where, as here, we have a code of rules providing for service out of the jurisdiction, I think it would be wrong to hold that by virtue of this saving clause a further jurisdiction exists under a statute which has been repealed. *Busfield, In re, Whaley* v. *Busfield*, 55 L. J., Ch. 467; 32 Ch. D. 123; 54 L. T. 220; 34 W. R. 372—per Cotton, L.J.

Qualification of Statute Law Revision Act considered.]—I should like to refer to the great difficulty of interpreting what, if any, limitation can be put upon sub-s. (b) of s. 5 of the Statute Law Revision Act, 1883. I have never been able to attach any definite meaning to that section. It is almost wide enough to preserve everything intended to be swept away by the act. Its professed object is to pave the way to a revised edition of the statutes in force, and to eliminate obsolete statutes; yet, by this sub-section, jurisdiction, rights and liabilities are preserved for which reference must be made to numerous old statutes, while by ss. 7 and 8 powers are given and provisions enacted which are expressly stated to be interpreted according to the provisions in the sections of the three Common Law Procedure Acts, 1852, 1854, and 1860; yet these are professed to be specifically repealed in the schedule of the act. *Winfield* v. *Boothroyd*, 54 L. T. 574; 34 W. R. 501.

The preamble of the Betting Act, 1853, has been repealed by the Statute Law Revision Act, 1892, by which it is provided that such preamble may be omitted from any revised edition of the statutes; but the same act provides (s. 1) that the repeal shall not affect the operation or construction of the statute; and it is therefore legitimately to be referred to as affording information of the circumstances under which the act came to be passed, and in so far as it directly throws light upon the question of the object which the legislature had in view. *Hawke* v. *Dunn*, 66 L. J., Q. B. 364; [1897] Q. B. 579; 76 L. T. 355; 45 W. R. 359; 61 J. P. 292.

Consolidation of Repealed Statutes.]—An act repealed existing statutes and gave certain powers "in terms of the said recited acts," which were the repealed statutes:—Held, that this phrase incorporated the provisions of the repealed statutes and consolidated them. *Blantyre (Lord)* v. *Clyde Navigation Trustees*, 6 App. Cas. 273—H. L. (Sc.)

Repeal of Act—Revivor—Right of Way—Closure by Act of Parliament.]—When an act of parliament, originally passed for twenty-one years and subsequently extended, closes an old public bridle-road and vests the soil thereof in the owners, who have given land for making a new road, which the act authorises to be made, the repeal of this act does not revive any public right of way over the old bridle-road, inasmuch as the closing thereof is a matter passed and closed under the repealed act. *Gwynne* v. *Drewitt*, 63 L. J., Ch. 870; [1894] 2 Ch. 616; 8 R. 814; 71 L. T. 190; 43 W. R. 551.

Practice under Repealed Statutes.]—On a motion to strike out a plea to a return to a writ of mandamus it was contended that, because the statutes which allowed a plea in any case had been repealed, and because the rules of 1883 did not provide for the case of a plea to a return of the kind, therefore the practice which existed under those statutes was no longer in operation. By Ord. LXVIII. r. 1, and by Ord. LXXII. r. 2, nothing in these rules is to affect the procedure or practice in proceedings on the crown side of the Queen's Bench Division:—Held, that the practice prevailing at the time the rules came into operation still existed, and therefore the plea which was in accordance with the repealed statutes must stand. *Reg.* v. *Staffordshire JJ.*, or *Pirehill North JJ.*, 54 L. J., M. C. 17; 14 Q. B. D. 13; 51 L. T. 534; 33 W. R. 205—C. A.

Repeal — Unlawful Acts not conferring Rights.]—Though the general rule of law is that when a statute is absolutely repealed, it is to be treated as if it had not been passed, an act, or series of acts, done during its continuance, which were by it rendered unlawful, cannot confer rights as if they had not been thereby prohibited, and until a user becomes lawful it

remains inoperative, and the required period of enjoyment commences to run from the time the act is repealed. *Traill* v. *McAllister*, 25 L. R., Ir. 524.

4. CONTINUANCE OF TEMPORARY ACTS.

Effect of.]—A temporary act, when made perpetual by a subsequent act, is in effect perpetual ab initio. *Rex* v. *Swiney*, 1 Alc. & Nap. 139.

The legislature, in continuing a statute, is not bound to use any particular form of words. *Rex* v. *Longmead*, 2 Leach, C. C. 794.

A local act, entitled "An act for amending the roads and highways in the Isle of Wight," contained provisions other than related to turnpikes, but clauses, also, enabling the commissioners appointed under the act to raise money upon the security of tolls. The 4 & 5 Will. 4, c. 10, and other subsequent statutes, continued "all and every act for making, amending and repairing any turnpike roads in Great Britain, which will expire," &c.:—Held, that the local act was thereby continued. *Barnes* v. *White*, 1 C. B. 192; 14 L. J., M. C. 65; 9 Jur. 182.

39 Geo. 3, c. 79, s. 15, declared certain places to be disorderly places, within 36 Geo. 3, c. 8, and then enacted penalties with regard to them:—Held, that these penalties might be enforced, although the 36 Geo. 3, c. 8, which was to continue in force for a limited time, had expired. *Higginbotham, Ex parte*, 9 D. P. C. 200.

G. EXERCISE OF STATUTORY POWERS.

1. GENERAL RULES.

Limits of Special Powers.]—Where persons have special powers conferred on them by parliament for effecting a particular purpose, they cannot be allowed to exercise those powers for any purpose of a collateral kind. *Galloway* v. *London Corporation*, 35 L. J., Ch. 477; L. R. 1 H. L. 34; 12 Jur. (N.S.) 747; 14 L. T. 865.

When a statute prohibits, under a penalty, any person from agreeing to pay certain expenses, an agreement to pay such expenses is invalid, and no action is maintainable upon it, although the statute does not expressly prohibit the other party obtaining the funds to carry its declared objects into effect, and, in order to effect them, it must not exceed the limits of its powers. *Ib.*

A company authorised (making due compensation) to take compulsorily the lands of any person for a definite object may be restrained by injunction from any attempt to take them for another object. *Ib.*

Where the legislature has conceded power to a body of adventurers for a certain purpose (as, for example, the formation of a railway), such a body must shew some ground for the concession, and the legislature has no concern with its means for obtaining the funds to carry its declared objects into effect, and in order to effect them it must not exceed the limits of its powers. But the case is different where an existing public body, such as the corporation of a city, is entrusted by the legislature with the duty of making public improvements in its city, and the powers thus entrusted to it for such a purpose will not be subject, as in the other case, to a strict and restrictive construction. *Ib.*

Things not Authorised Prohibited.]—*Ashbury Ry.* v. *Riche* (L. R. 7 H. L. 653) appears to me to decide this, at all events, that where there is an act of parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorise is to be taken to be prohibited. *Att.-Gen.* v. *G. E. Ry.*, 5 App. Cas., at p. 481—per Lord Blackburn.

Effect of subsequent Act.]—Whenever the legislature has, by a special act, conferred powers upon a corporation or a body of commissioners for an object of public benefit, those powers are not affected by a subsequent statute giving to other persons, for another public purpose, inconsistent powers, in terms which, from their generality, would seem to overrule the powers given by the former act. *London and Blackwall Ry.* v. *Limehouse District Board of Works*, 3 Kay & J. 123; 26 L. J., Ch. 164; 5 W. R. 64.

Power to Public Body—Extent of.]—Where the legislature gives power to a public body to do anything of a public character, the legislature means also to give to the public body all rights without which the power would become wholly unavailable, although such a meaning cannot be implied in relation to circumstances arising accidentally only. *Dudley Corporation, In re*, 51 L. J., Q. B. 124; 8 Q. B. D. 93; 45 L. T. 734; 46 J. P. 340—per Brett, L.J.

If there are two possible constructions, we ought, I think, to adopt that construction which is based on the theory that the legislature only gave such powers as were necessary to enable the local authority to carry out the objects of the statute, and we ought not to presume that the legislature intended to confer upon the local authority any larger powers than were necessary. *Wandsworth Board of Works* v. *United Telephone Co.*, 53 L. J., Q. B. 457; 13 Q. B. D. 904; 51 L. T. 148; 32 W. R. 776; 48 J. P. 676—per Bowen, L.J.

A power to borrow money from the Public Works Loan Commissioners for the purpose of repairing churches must be exercised in exact accordance with the authority given, and the restrictions imposed, by the act itself. *Reg.* v. *All Saints', Wigan, Overseers*, 1 App. Cas. 611; 35 L. T. 381; 25 W. R. 128.

Ministerial or Judicial Act—Duty imposed by Statute.]—When a public duty is imposed by act of parliament upon a body of persons, which duty consists in the exercise of a discretion, it cannot be said that the exercise of that discretion is a merely ministerial act. If the act cannot be considered to be merely ministerial, it must be considered as judicial. *Partridge* v. *Medical Council*, 59 L. J., Q. B. 475; 25 Q. B. D. 90; 62 L. T. 787; 38 W. R. 729; 55 J. P. 4—per Esher (Lord), M.R.

Two Statutes—Acting under which presumed.]—Where a public body may have acted under two statutes, one of which increases its liability, and there is no evidence to shew under which statute it did act, the presumption is that it acted in pursuance of that statute under which its liability was not increased. *Burton* v. *Salford Corporation*, 52 L. J., Q. B. 668; 11 Q. B. D. 286; 49 L. T. 43; 31 W. R. 815.

Authority to Execute Works—Extent of.]—Where an act of parliament authorises the execu-

tion of certain works, that authority includes everything reasonably necessary for the execution of the works. *Harrison* v. *Southwark and Vauxhall Water Co.*, 60 L. J., Ch. 630; [1891] 2 Ch. 409; 64 L. T. 864.

In construing statutes creating bodies corporate the legislature must be considered, unless the contrary appears, to intend that the corporate body shall have the same duties and liabilities as are imposed by the general law upon private persons doing the same things. *Mersey Docks and Harbour Board* v. *Penhallow. Mersey Docks and Harbour Board* v. *Gibbs*, 11 H. L. Cas. 686; 35 L. J., Ex. 225; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.

Exercise of—Injunction.]—When the promoters of a public undertaking have authority from parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the enactment so far as it makes provision on his behalf. Nor can any court remodel arrangements sanctioned, or relax conditions imposed by act of parliament. *Herron* v. *Rathmines Commissioners*, [1892] A. C. 498; 67 L. T. 658—H. L. (Ir.)

Persons obtaining from the legislature power to interfere with the rights of property are bound strictly to adhere to the powers so conceded to them, to do no more than the legislature has sanctioned, and to proceed only in the mode which the legislature has pointed out; but (except in a proceeding at the instance of the attorney-general) any one seeking the assistance of a court of equity to restrain the violation of such a contract with the legislature is bound to shew that he has a private interest in the matter. *Liverpool Corporation* v. *Chorley Waterworks Co.*, 2 De G. M. & G. 852.

Does not necessarily affect previously existing Right.]—An affirmative statute, giving a new right, does not of itself and necessarily destroy a previously existing right, created by another statute to which it does not refer; but will do so, if it appears to have been the intention of the legislature that the two rights should not exist together. *O'Flaherty* v. *M'Dowell*, 6 H. L. Cas. 142; 4 Jur. (N.S.) 33.

—— **Or Rights of other Persons.**]—Where an act empowers persons to deal with their own property, or with property in a place or district or defined by a description, and does not by express words, or by necessary implication, import that the legislature intended to affect the rights of other persons in other property, courts of law do not construe mere general words in the act as affecting the rights of strangers as to property not within the description of that with which the act expressly purports to deal. *Dawson* v. *Paver*, 5 Hare, 415; 16 L. J., Ch. 274; 11 Jur. 766.

When persons having, as a class, certain privileges, are by statute subjected to certain liabilities their privileges being expressly reserved to them, and other persons having the same privileges are afterwards, as a class, subjected to the same liabilities, but nothing is said of their privileges, these privileges shall continue to exist. *Newcastle (Duke)* v. *Morris*, 40 L. J., Bk. 4; L. R. 4 H. L. 661; 23 L. T. 569; 19 W. R. 26.

When commissioners appointed by a private act are authorised to do all things necessary for carrying out the object of the act, that will not give them authority to apply to parliament for a further act, so as to allow their applying funds raised for the purposes of the first act in discharging the expenses of obtaining the second act. *Att.-Gen.* v. *West Hartlepool Improvement Commissioners*, 39 L. J., Ch. 624; L. R. 10 Eq. 152; 18 W. R. 685.

Heads of agreement for a lease were sanctioned by majorities of three-fifths at meetings of two companies without any certificate of the board of trade being obtained, and were acted upon for several years, but no formal lease, or agreement for a lease, was ever executed. The heads of agreement were also invalid as providing for payment of the rent out of profits not so applicable:—Held, that the arrangement was not ratified by reference to it in subsequent local and personal acts of parliament not expressing any direct intention to confirm it. *Kent Coast Ry.* v. *L., C., & D. Ry.*, L. R. 3 Ch. 656; 19 L. T. 174; 16 W. R. 1027.

Effect of the subsequent acts of parliament not being retrospective, and not altering the effect of a previous bargain and conveyance. *Caledonian Ry.* v. *Sprot*, 2 Macq. H. L. 449; 2 Jur. (N.S.) 623.

Persons authorised by act of parliament to cut a canal, and required to appropriate certain sums for the construction and maintenance of works to protect a harbour in which the canal was intended to terminate, not restrained from cutting through their own lands, at a distance from the harbour, in the event of a present insufficiency of funds for the completion of the undertaking, pending an application to parliament for further powers to levy money. *King's Lynn Corporation* v. *Pemberton*, 1 Swanst. 244; 18 R. R. 62.

But persons authorised by act of parliament to cut canal, if their funds are insufficient for completion of undertaking, may, on the prompt application of the owner of lands through which they are cutting, be restrained from proceeding. *Id.* 250.

Acts which might be carried out without Purchasing Lands—Onus of Proof as to Ownership of Lands.]—Provisions in different acts of parliament appointed conservators of a river navigation and gave them full powers to do what was necessary for carrying the object of the acts into effect, including powers to purchase land and levy tolls. The conservators executed the powers of the acts so far as related to the improvement of the river navigation, and the making of towing-paths, and they levied tolls. There was no evidence that they had actually purchased any of the land that lay along the course of the navigation, and had been used to form the towing-paths:—Held, that, as the acts might be carried into effect without purchasing, the burden of proof lay on the conservators to shew that they had purchased; and since they had failed to shew it, though they were entitled to an injunction to prevent any owner of adjoining land from so using the towing-paths as to obstruct in any way their free use for the purposes of the navigation, they were not entitled to be treated as owners of the soil of the towing-paths. *Lee Navigation Conservators* v. *Button*, 51 L. J., Ch. 17; 6 App. Cas. 685; 45 L. T. 385; 30 W. R. 233; 46 J. P. 164—H. L. (E.)

A railway company was empowered by its

special act to widen a branch of the railway passing through London, and to build additional stations. In conformity with the powers so given, the company proceeded to erect a station on its land by the side of a highway, within the distance required to be left between buildings and highways in London by the Metropolis Management Act, which had passed shortly after the special act of the company:—Held, that the powers conferred on the company by their special act were not controlled by the latter statute, and that the company was authorised so to build their station. *London and Blackwall Ry.* v. *Limehouse Board of Works*, 26 L. J., Ch. 166.

By a statute passed prior to the special act, the trustees of the particular highway had power to prevent any building being erected so near to the road as the station was being built. The Metropolis Management Act repealed this statute, and vested this authority in the managing body thereby constituted:—Held, that the trustees of the road must be taken to have been present at the passing of the special act, as well as of the Metropolis Act, and, therefore, the powers given by the Railway Act must prevail. *Ib.*

Giving Rights in alieno solo.]—The rights thus conferred are, as regards the landowner, of a very onerous nature, and being thus exercised in alieno solo, must, in my opinion, be construed strictly, and must be carried no further than the language of the act declaring the custom expressly warrants. *Wake* v. *Redfearn*, 43 L. T. 123, 126; 44 J. P. 681—per Cockburn, C.J.

When Power Exhausted or Extinguished.]—An agreement was entered into between two water companies, by which company A. should take over the works, provide for a mortgage debt, and pay interest upon the shares of company B. This agreement was sanctioned by act of parliament, and the transaction was carried into effect by a deed of January, 1857, which provided that if company A. (or their intended assignees, the corporation or local board of health), being desirous of becoming the absolute and unrestricted owners of the works of company B., subject only to the mortgage debt, should, "on or before any 25th December, after having given to company B. six months' previous notice of their desire to avail themselves of the option thereby given, pay unto the company B." 46,246*l.*, the amount of their share capital, the party so paying should become absolutely entitled to the works. In June, 1870, the corporation, who had acquired the interest of company A., gave notice to company B. of their intention to pay this sum on the 25th of December following, but they were unable for want of funds to carry out the purchase. In June, 1871, they again gave notice that they would pay the money on the 25th of December, 1871:—Held, that the corporation, by giving the first notice and failing to act upon it, had not lost the right given to them by the deed of January, 1857, of purchasing, after six months' notice, on or before any 25th day of December. *Ward* v. *Wolverhampton Waterworks Co.*, 41 L. J., Ch. 308; L. R. 13 Eq. 243; 25 L. T. 487; 20 W. R. 85.

When powers to make certain works are granted by act of parliament, they can only be exercised once and for all, and the grantees have no power afterwards to enlarge such works. *Taylor* v. *St. Helens (Corporation)*, 46 L. J., Ch. 857; 6 Ch. D. 264; 37 L. T. 253; 25 W. R. 885.

2. AUTHORISATION OF NUISANCE.

Statutory Powers when a Justification for a Nuisance.]—If the legislature prescribe that a public body shall provide hospital accommodation, no injunction could issue, provided it were proved that the directions of the act could not be complied with at all without creating a nuisance. And if a position has not been specified in the act for the hospital, the onus of proof that the creation of a nuisance will be the inevitable result lies on the persons seeking to justify the nuisance. The justification depends on their making good these two propositions, (1) that such are the imperative orders of the legislature, and (2) that they cannot possibly obey those orders without infringing private rights. *Metropolitan Asylum District Managers* v. *Hill*, 50 L. J., Q. B. 353; 6 App. Cas. 208; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664—H. L. (E.)—per Watson (Lord).

Primâ facie nobody is authorised to commit a nuisance under an act of parliament, unless it appears from express words or by necessary implication that the act was to be done or might be done notwithstanding its tending to the creation of a nuisance. *Vernon* v. *St. James (Vestry)*, 50 L. J., Ch. 81; 16 Ch. D. 466; 44 L. T. 229; 29 W. R. 222—C. A.

Statutory powers, although granted for the public benefit, are only co-extensive with the power to exercise them without an infringement of the general law. Where the exercise of such powers is not compulsory upon those to whom they were granted, and new and unforeseen circumstances subsequently arise which render the exercise of them a nuisance, an indictment lies in respect thereof. *Reg.* v. *Bradford Navigation Co.*, 6 B. & S. 631; 34 L. J., Q. B. 191; 11 Jur. (N.S.) 769; 13 W. R. 892.

Railways Station Yard for Cattle Traffic.]—A railway company were by their act authorised to carry cattle, and also to purchase by agreement (in addition to the lands which they were empowered to purchase compulsorily) any lands, not exceeding in the whole fifty acres, in such places as should be deemed eligible for the purpose of providing additional stations, yards, and other conveniences for receiving, loading, or keeping any cattle, goods, or things conveyed or intended to be conveyed by the railway, or for making convenient roads or ways thereto, or for any other purposes connected with the undertaking which the company should judge requisite. The company were also empowered to sell such additional lands, and to purchase in lieu thereof other lands which they should deem more eligible for the aforesaid purposes, and so on from time to time. The act contained no provision for compensation in respect of lands so purchased by agreement. Under this power the company, some years after the expiration of the compulsory powers, bought land adjoining one of their stations, and used it as a yard or dock for their cattle traffic. To the occupiers of houses near the station, the noise of the cattle and drovers was a nuisance which, but for the act, would have been actionable. There was no negligence in the mode in which the company conducted the business:—Held, that the purpose for which the land was acquired being expressly authorised by the act, and being incidental and necessary to the authorised use of the railway for the cattle traffic, the company were authorised to do what

they did, and were not bound to choose a site more convenient to other persons; and that the adjoining occupiers were not entitled to an injunction to restrain the company. *Metropolitan Asylum District* v. *Hill* (6 App. Cas. 193) distinguished. *L., B. & S. C. Ry.* v. *Truman*, 55 L. J., Ch. 354; 11 App. Cas. 45; 54 L. T. 250; 34 W. R. 657; 50 J. P. 388—H. L. (E.)

Tramway Company—Smell from Stables of.]—The defendants had statutory powers to lay down certain tramway lines, "with all proper works and conveniences connected therewith," but had no statutory power to purchase land or to construct stabling. The defendants bought some land near the plaintiff's premises, and erected thereon a large block of stables, which occasioned offensive smells and constituted a nuisance to the plaintiff:—Held, that the defendants had no statutory authority to commit the nuisance complained of, and the plaintiff was entitled to an injunction. The fact that the defendants had taken all reasonable care to prevent a nuisance was therefore no legal excuse. *Rapier* v. *London Tramways Co.*, 63 L. J., Ch. 36; [1893] 2 Ch. 588; 2 R. 448; 69 L. T. 361—C. A.

Electrical Current.] — Where a nuisance is created by a body acting under statutory powers it is protected from liability for damages so far as such powers extend. *National Telephone Co.* v. *Baker*, 62 L. J., Ch. 699; [1893] 2 Ch. 186; 3 R. 318; 68 L. T. 283; 57 J. P. 373.

There is no express or implied provision in the Electric Lighting Act, 1882, which relieves a company formed thereunder from liability to an action for a nuisance committed in the execution of the powers of the act. *National Telephone Co.* v. *Baker* (3 R. 318) supra, distinguished. *Mouse's Brewery Co.* v. *City of London Electric Lighting Co.*, 8 R. 823; 70 L. T. 762; 42 W. R. 644. Varied 12 R. 441; 43 W. R. 238—C. A.

Sewer.]—The town of H. having been drained for a long time into a river, the company obtained a local act to make a sewer and intercept the sewage and purify it and then discharge the effluent water into the river; all inhabitants of H. being at the same time prohibited from draining direct into the river. The act provided that the N. company should not discharge sewage water into the river until after being purified by the best known process:—Held, that the statutory provisions superseded all common law rights, that the N. company were entitled to discharge the effluent water after being purified by the best process, and that no action lay against the N. company for polluting the river, though the process was still imperfect. *Lea Conservancy Board* v. *Hertford Corporation*, 1 C. & E. 299; 48 J. P. 628.

Non-Liability for Damage where the Inevitable Result of Compliance with the Statute.]—The defendants, under the powers conferred upon them by the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 12), ss. 135, 136, constructed, and properly constructed, a sewer having its outfall at Deptford Creek, a little above the plaintiff's coal wharf, with water-gates, which it was the duty of the person in charge of them to open when the water within them became eight feet deep,—a depth which was reached only in heavy rainfalls. On the 29th of August, 1879, there was an exceptionally heavy rainfall, and it became necessary to open the water-gates to prevent a large district from being flooded. This having been done and the rain increasing in violence, the rush of water from the sewer carried away a portion of the plaintiff's wharf, with a barge moored thereto, and a quantity of coals deposited therein and thereon:—Held, that the injury complained of was occasioned by the opening of the water-gates, and not by the act of God, and therefore the defendants were primâ facie liable for the damage done, within the principle of *Rylands* v. *Fletcher* (L. R. 3 H. L. 330); but that, as they were a public body acting in the discharge of a public duty, and as that which happened was only the inevitable result of what parliament had authorised them to do, they were not liable. *Dixon* v. *Metropolitan Board of Works*, 50 L. J., Q. B. 772; 7 Q. B. D. 418; 45 L. T. 312; 30 W. R. 83; 46 J. P. 4—per Coleridge, C.J.

H. INTERFERENCE WITH CONTRACTS.

Different kinds of Acts.]—Distinctions between acts of parliament denying legal effect to instruments, as the Act for Inrolling Bargains and Sales, and the Registry Act, 7 Anne, c. 20, and acts declaring instruments void to all intents, as the Annuity and the Ship Registry acts; notwithstanding the former, the party is bound in equity by the contract. *Davis* v. *Strathmore* (*Earl*), 16 Ves. 428.

Part Interference.]—Where an equal agreement cannot, by reason of a subsequent act of parliament, or some other lawful impediment, be performed in the whole, yet the same shall be specifically executed in such part of it as remains lawful. *Bettesworth* v. *St. Paul's* (*Dean*), 1 Bro. P. C. 240.

Impairing Obligation of Person's Contract.]—It is a principle of law to avoid, if possible, a construction of a statute which would enable a person to defeat or impair the obligation of his own contract by his own act. *Gowan* v. *Wright*, 56 L. J., Q. B. 131; 18 Q. B. D. 201; 35 W. R. 297—C. A.

Purpose of Act must be considered.]—Clauses in statutes avoiding transactions or instruments are to be interpreted with reference to the purpose for which they are inserted, and, when open to question, are to receive a wide or a limited construction according as the one or the other will best effectuate the purpose of the statute. *Byrne, Ex parte, Burdett, In re*, 57 L. J., Q. B. 263; 20 Q. B. D. 314; 58 L. T. 708; 36 W. R. 345; 5 Morrell, 32—C. A.

Act in pursuance of Contract not made Actionable Wrong.]—A statute cannot make an act done in connection with a private contract an actionable wrong if it was not actionable independently of the statute. *Ward* v. *Hobbs*, 48 L. J., Q. B. 281; L. R. 4 App. Cas. 13; 40 L. T. 73; 27 W. R. 114.

Where a statute prohibited persons from sending animals affected with a contagious disease to market and inflicted penalties on any person so sending them, the act of sending them, if known to be so infected, was a public offence, but did

not amount by implication to a representation that they were sound, and did not of itself raise, as between the vendor of the animals and the purchaser of them, any right on the part of the purchaser to claim damages in respect of an injury he had suffered in consequence of their purchase. *Ib.*

Contract Illegal by Statute, not made good by Repeal of Statute.]—A contract declared by a statute to be illegal is not made good by a subsequent repeal of the statute. *Jacques* v. *Withey*, 1 H. Bl. 65.

Recognition by Subsequent Act of Contract held Invalid under prior Act.]—Where a corporation, previously to an act giving them compulsory powers of taking land, entered into an agreement for the re-sale of certain lands if the act should (as it did) authorise them to be taken, it had been held that such agreement was invalid, as being an abuse of the powers conferred by parliament, and as fettering the discretion of the corporation as to the quantity of land necessary for the purposes of the act. Subsequently an act was passed, by which it was enacted that nothing therein contained should prejudice the rights under the agreement of the party taking under it, but that all its covenants and provisions should be as applicable to a purchase under that act as to a purchase under the act in contemplation of the passing of which the agreement was entered into :—Held, that by this act the legislature had recognised the agreement, and had removed the former objection to its validity. *Galloway* v. *London Corporation*, 35 L. J., Ch. 477 ; L. R. 1 H. L. 34 ; 12 Jur. (N.S.) 747 ; 14 L. T. 865.

Discharge by Act from Obligations of Covenant.]—Land was demised to trustees for a parish, they covenanting to build a workhouse thereon, and to possess and enjoy the premises, for the sole use, maintenance, and support of the poor of the parish, and not to convert the building or the land to any other use or purpose whatsoever. Proviso for re-entry on breach of the covenant. The house was built, and together with the land used agreeably to the covenant. Afterwards, under the 4 & 5 Will. 4, c. 76 (Poor Law Amendment Act, 1834), the poor law commissioners incorporated the parish in a union, and removed all the paupers to the union. The workhouse became uninhabited, and was locked up, and the land was let at a rack-rent, which was applied in aid of the poor rates. On ejectment brought (three years afterwards) for breach of the covenant :—Held, that no breach of the covenant appeared ; but, semble, that a breach caused by the compulsory operation of the statute would have been thereby excused. *Doe* d. *Anglesea* (*Lord*) v. *Rugeley Overseers*, 6 Q. B. 107 ; 13 L. J., M. C. 137 ; 8 Jur. 615. S. P., *Wynn* v. *Shropshire Union Railways and Canal Co.*, 5 Ex. 420.

A landowner who has covenanted in the usual form that neither he nor his assigns shall build upon his land, is discharged from his covenant, after selling the premises to a railway company under its compulsory powers, as the company becomes an assignee of the land, not by the voluntary act of the former owner, but by compulsion of law. *Baily* v. *De Crespigny*, 38 L. J., Q. B. 98 ; L. R. 4 Q. B. 180 ; 19 L. T. 681 ; 17 W. R. 494.

The defendant let the basement of a store to the plaintiff, and covenanted to keep the premises in proper repair and condition, so that the same might be available for storing cartridges, and for quiet enjoyment by the plaintiff. Other parts of the store were let to other persons for the storage of gunpowder. Soon afterwards the Explosives Act, 1875, was passed, making it illegal to store cartridges and gunpowder in the same store without a licence, under pain of forfeiture. On the act coming into operation the defendant removed the cartridges which the plaintiff had deposited in the store, and gave notice that he would inform the authorities if the plaintiff stored any more :—Held, that there had been a trespass, but no eviction by the defendant, and that there had been no breach of covenant by the defendant, the covenant to keep the demised premises in proper condition for storing cartridges only referring to physical condition, and there being no obligation on the defendant to procure a licence to make the storage legal notwithstanding the act. *Newby* v. *Sharpe*, 47 L. J., Ch. 617 ; 8 Ch. D. 39 ; 38 L. T. 583 ; 26 W. R. 685—C. A.

Act passed subsequently.]—A building agreement provided that A. should build houses on land within a specified time, and that on their completion B. would grant to A. leases of them, A. agreed to pay a specified rent to B. from the date of the agreement to the expiration of the leases. The houses were not built by the specified time, and before they were built, an act of parliament rendered their erection illegal :—Held, that A. was not relieved from his liability to pay the rent under the agreement. *Gibbons* v. *Chambers*, 1 Cab. & E. 577.

By an agreement between the N. local board and the C. local board, it was agreed that the N. board should make a sewer and allow the sewers of the C. district to drain into it, but the sewage of any other districts or places was not to be permitted by the C. board to pass into their sewers so as to discharge into the sewer to be made by the N. board. Under acts of parliament then in existence, the owner of premises beyond the limits of a district had power to make a sewer to communicate with the sewers of the district, and by an act subsequently passed similar powers were given :—Held, that the provisions of the agreement were overruled by the subsequent act, and that the N. board could not restrain the C. board and the owners of premises beyond their district from making sewers which would discharge into the sewer of the N. district :—Held, also, that the agreement must be taken to have been made subject to the provisions of the law then existing, under which the owners of premises beyond the C. district had similar powers. *Newington Local Board* v. *Cottingham Local Board*, 48 L. J., Ch. 226 ; 2 Ch. D. 725 ; 40 L. T. 58.

Indemnity unaffected by Act.]—The plaintiff gave a bond to the crown conditioned to be void if a certain railway was completed within a given time, and the defendants undertook to indemnify the plaintiff against all liability which he might incur in giving such bond. The railway was not completed, and the plaintiff, under the Railway Companies Act, 1867, which was passed after the giving of the bond, applied to the board of trade to authorise the abandonment of the railway and to cancel the bond, which was ordered upon condition that the money secured by it should be

applied as assets of the company. The company was accordingly wound up, and the plaintiff paid, under an order of the court, a part of the money secured by the bond, which was then cancelled. The plaintiff brought an action to recover the amount so paid from the defendants on their undertaking to indemnify. On demurrer to the statement of claim :—Held, that the payment made by the plaintiff to obtain the cancelling of the bond was a liability incurred by him in giving the bond, for which the defendants were liable to indemnify him, although the Railway Companies Act, 1867, enabling the plaintiff to take proceedings to cancel the bond, was not passed when the indemnity was given. *Webster* v. *Petre*, 4 Ex. D. 127 ; 27 W. R. 662.

Generally, as to Infringement of Legal Rights.] —Where a person would have, at common law, a right of action grounded upon an interference with a given public right, when such interference had operated to his individual injury, if the public right is taken away by statute, and vested in a body of conservators to be exercised or controlled for a specified object, e.g. the benefit of trade and commerce, then, the right being thus resigned by the public, the individual right of action is lost also, and there can be no redress by action on account of any interference, duly authorised by such body, with private rights, of the nature of those to which the powers of the body relate. *Kearns* v. *Cordwainers' Co.*, 6 C. B. (N.S.) 388 ; 28 L. J., C. P. 285 ; 5 Jur. (N.S.) 1216.

By 6 & 7 Vict. c. 79, s. 1, articles of a convention between her majesty and the King of the French, for the guidance of the fishermen of the two countries in the seas between the British Islands and France, are to have the force of law. By the articles all transgressions of the regulations, and all disputes between the fishermen, are to be submitted to the exclusive jurisdiction of and settled by the tribunal or magistrates designated by law, which tribunal may summarily impose penalties for such transgressions, and award compensation to parties injured ; sect. 11 declares such tribunal in England to be any magistrate or justice of the peace having jurisdiction in the place in which, or in waters adjacent, to which the offence shall have been committed, or to which the offender shall be brought. Such magistrate may impose penalties, and award and enforce compensation to parties injured :—Held, that no action can be maintained for the breach of any article of the convention, or for damage caused by such breach, the remedy provided by the act being exclusive. *Marshall* v. *Nicholls*, 18 Q. B. 882 ; 21 L. J., Q. B. 343 ; 16 Jur. 1155.

An act of parliament empowered a company to make and maintain a canal, and provided that the owners of lands within the distance of twenty yards from the canal should make a communication by pipes, between the water therein and any steam-engine, and draw from the canal such quantities of water as should be sufficient to supply the engine with cold water, for the sole purpose of condensing the steam, and for working any such engine as aforesaid ; and for no other use or purpose ; and there was a proviso, that if any dispute should arise between the company and any person who should be desirous of taking water out of the canal for the purposes of any such engine, or who should be in the use of taking the same, such dispute should be finally settled by the commissioners appointed under the act. In an action the declaration alleged that the defendant, the owner of a steam-engine, who had laid down a pipe communicating with the canal, used the water which had been drawn off by means of the pipes, for other purposes than for condensing the steam, and more than was necessary for condensing :—Held, that the special power of adjudication conferred upon the commissioners did not take away the right of action. *Rochdale Canal Co.* v. *King*, 14 Q. B. 122 ; 18 L. J., Q. B. 293 ; 14 Jur. 16.

To an action by an incorporated company for calls, the defendant pleaded that the shares had been declared by the company to be forfeited :—Held, that the plea was bad, as the right of action and the power to forfeit shares on non-payment of calls conferred by 8 & 9 Vict. c. 16, were not alternative but cumulative remedies. *G. N. Ry.* v. *Kennedy*, 7 D. & L. 197 ; 4 Ex. 417. S. P., *Inglis* v. *G. N. Ry.*, 1 Macq. H. L. 112 ; 16 Jur. 895.

A railway act enacted, that any penalty imposed thereby, the recovery of which was not otherwise provided for, might be recovered by summary proceeding, upon complaint before two or more justices :—Held, that this did not bar the party entitled from his remedy by action. *Collinson* v. *Newcastle and Darlington Ry.*, 1 Car. & K. 546.

Action for obstruction by a railway company of a private right of way. No special damage was alleged. Plea, justifying under the private act of the company, and other acts therewith incorporated. Replication, that the way was a road within the Railways Clauses Act (8 & 9 Vict. c. 20), and that the company had interfered with the same within the meaning of that act : —Held, that 8 & 9 Vict. c. 20 takes away the common-law right of action for an interference under the powers of a railway company with a private right of way, except when special damage has been sustained. *Watkins* v. *G. N. Ry.*, 16 Q. B. 961 ; 20 L. J., Q. B. 391.

Where a pecuniary obligation is created by a statute, and a remedy expressly given for enforcing it, that remedy must be adopted. *St. Pancras Vestry* v. *Batterbury*, 2 C. B. (N.S.) 477 ; 26 L. J., C. P. 243 ; 3 Jur. (N.S.) 1106.

By an act, incorporating the Railways Clauses Act, 8 & 9 Vict. c. 20, and the Towns Clauses Act, 10 & 11 Vict. c. 34, certain expenses incurred by the commissioners in paving streets might be recovered as damages. An action having been brought to recover expenses so incurred :—Held, that such action was not maintainable, for that the proper construction of the several acts was that the expenses were to be recovered as damages, upon a proceeding before justices. *Blackburn Corporation* v. *Parkinson*, 28 L. J., M. C. 7 ; 5 Jur. (N.S.) 572 ; 7 W. R. 11.

The 2 Geo. 1, c. 17 (Ir.), s. 4, requires a master to give a discharge (if required) to a servant on leaving his employment ; in case of refusal, s. 5 enables the servant to obtain a discharge from a magistrate :—Held, that the statutory remedy was exclusive. *Handley* v. *Moffat*, Ir. R. 7 C. L. 104 ; 21 W. R. 231.

A private enclosure act gave the commissioners power by their award to direct by whom and in what manner certain necessary drainage works were to be made and maintained. The commissioners having directed by their award that the expenses of the works should be paid by a rate to be levied and recovered by certain surveyors

in the same manner as parish rates were by law recoverable in the parish :—Held, that the rate must be recovered by distress and not by action. *Danby* v. *Watson*, 46 L. J., M. C. 179 ; 36 L. T. 412 ; 25 W. R. 464.

The repealed Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76, s. 60), which gave a summary remedy against a corporate officer, who refuses to comply with the provisions of the act as to giving up to the town council of the borough all documents in the custody of such officer and paying over moneys, did not take away the right of action which the corporation has against such officer for the breach of duty so imposed by that section. *Lichfield Corporation* v. *Simpson*, 8 Q. B. 65 ; 15 L. J., Q. B. 78.

I. WAIVER OF STATUTORY RIGHTS.

By Person benefited.]—A statute, or charter having the force of a statute, may be waived by the party for whose benefit it was enacted, so as to render the acts of persons disregarding it legal. *Goldsmid* v. *G. E. Ry.*, 53 L. J., Ch. 371 ; 25 Ch. D. 511 ; 49 L. T. 717 ; 32 W. R. 341—C. A.

An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it. As to the result of past breaches of the obligation people may come to what agreement they like ; but as to future breaches of it, there ought to be no encouragement given to the making of an agreement between A. and B. that B. shall be at liberty to break the law which has been passed for the protection of A. *Baddeley* v. *Granville* (*Earl*), 56 L. J., Q. B. 501 ; 19 Q. B. D. 426 ; 57 L. T. 268 ; 36 W. R. 63 ; 51 J. P. 822.

Provisions of s. 14 of County Court Act, 1850, 13 & 14 Vict. c. 61 (repealed), requiring party appealing to give notice of appeal and security for costs, held not to be conditions precedent to jurisdiction of the court to hear the appeal, and therefore not to prevent a waiver by the respondent. *Park Gate Iron Co.* v. *Coates*, 39 L. J., C. P. 317 ; L. R. 5 C. P. 634 ; 22 L. T. 658 ; 18 W. R. 928.

"Contract out of" Act.]—A contract with employer by workman for himself and his representatives not to claim compensation under the Employers' Liability Act, 1880, is valid, and a bar to an action by the workman's widow for damages under Lord Campbell's Act. *Griffiths* v. *Dudley* (*Earl*), 51 L. J., Q. B. 543 ; 9 Q. B. D. 357 ; 47 L. T. 10 ; 30 W. R. 797.

J. ENFORCEMENT OF STATUTORY RIGHTS.

General Rules.]—There are three classes of cases in which a liability may be established by statute :—(1) Where a liability existed at common law and was only re-enacted by the statute with a special form of remedy, in such cases the plaintiff had his election unless the statute contained words necessarily excluding the common-law remedy ; (2) where a statute has created a liability, but given no remedy, then the party may adopt an action of debt or other remedy at common law to enforce it ; (3) where the statute creates a liability not existing at common law and gives a particular remedy, here the party must adopt the form of remedy given by the statute. *Vallance* v. *Falle*, 53 L. J., Q. B. 459 ; 13 Q. B. D. 109 ; 51 L. T. 158 ; 32 W. R. 770 ; 48 J. P. 519 ; 5 Asp. M. C. 280.

When an act of parliament imposes a statutory duty, an action does not necessarily lie for the breach of such duty at the suit of any person injured by such breach. *Atkinson* v. *Newcastle and Gateshead Water Co.*, 46 L. J., Ex. 775 ; 2 Ex. D. 441 ; 36 L. T. 761 ; 25 W. R. 794—C. A.

Whether such a right of action exists, depends upon the general scope and object of the particular statute. *Ib.*

By the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 42, the undertakers are at all times to keep charged with water at a certain pressure all their pipes to which fire plugs shall be affixed, and to allow all persons at all times to take and use such water for extinguishing fire without making compensation for the same. By s. 43, if the undertakers neglect to keep their pipes charged at the statutory pressure, they are to be liable to a penalty of 10*l.* for each offence, to be recovered by a common informer. In an action to recover damages against a water company, for not keeping its pipes supplied with water at the statutory pressure, whereby a house was burnt down :—Held, that the action would not lie. *Ib.*

Courts of law and equity can only enforce the rights of parties under acts of parliament by the application of their known rules and principles. If they are inadequate to the purpose, the legislature alone can supply the defect. *Weale* v. *West Middlesex Waterworks Co.*, 1 Jac. & Walk. 371 ; 21 R. R. 183.

Relief cannot be given against a forfeiture created by act of parliament ; but a court of equity will see that the proceedings working the forfeiture have been regular. *Blennerhassett* v. *Day*, 2 Ball & B. 128.

One act giving final jurisdiction, and another act giving jurisdiction subject to appeal, the court cannot proceed on both acts. *Bedford Charity, In re*, 2 Swanst. 518 ; 19 R. R. 107.

Right of Action for Breach of Statute.]—When a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss. *Gorris* v. *Scott*, 43 L. J., Ex. 92 ; L. R. 9 Ex. 125 ; 30 L. T. 431 ; 22 W. R. 575.

A shipowner undertook to carry sheep from a foreign port to England. On the voyage some of the sheep were washed overboard by reason of the shipowner's neglect to take a precaution enjoined by an order of privy council, which was made under the Contagious Diseases (Animals) Act, 1869, s. 75 :—Held, that the object of the statute and the order being to prevent the spread of contagious diseases among animals, and not to protect them against perils of the sea, the owners of the sheep could not recover. *Ib.*

7 & 8 Vict. c. 112, s. 118, required that every ship navigating between the United Kingdom and any place out of the same should keep constantly on board a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages, and in case any default were made in keeping such medicines, the owner of a ship was liable to a penalty at the suit of any person, which was to be applied in part to the informer and as to the residue to the Seamen's Hospital Society : —Held, that the penalty was recoverable for a

breach of the public duty created by the statute, and that the provisions of the statute did not interfere with the common-law right of a seaman serving on board a vessel to maintain an action for special damage resulting to him from the breach of the duty. *Couch* v. *Steel*, 3 El. & Bl. 402; 2 C. L. R. 940; 23 L. J., Q. B. 121; 18 Jur. 515; 2 W. R. 170, questioned in *Atkinson* v. *Newcastle and Gateshead Water Co.*, col. 1958, supra.

Statutory Rights—Provision for special benefit of Individual.]—Where an act of parliament contains a provision for the special protection or benefit of an individual, he may enforce his rights thereunder by an action without either joining the attorney-general as a party or shewing that he has sustained any particular damage. *Devonport Corporation* v. *Plymouth Tramways Co.*, 52 L. T. 161; 49 J. P. 405—C. A.

Where a statute confers a right and annexes penalties for its infringement, an action for damages will not lie against the party infringing the right by the party aggrieved. *Stevens* v. *Jeacocke*, 17 L. J., Q. B. 163; 11 Q. B. 731; 12 Jur. 477. S. P., *Reg.* v. *Beat*, 1 Den. C. C. 157; 2 Car. & K. 179.

Remedy given by Statute, how far Exclusive.]—It is a settled rule that if a statute creates a new right and gives a particular remedy for enforcing it, there is no other remedy. Semble. *West* v. *Downman*, 14 Ch. D. 111; 42 L. T. 340; 29 W. R. 6.

Where a new offence and a penalty for it are created by statute, a person proceeding under the statute is confined to the recovery of the penalty, and no other relief can be asked for. This is true as a general rule, but there are two exceptions to this rule—(1) The ancillary remedy in equity by injunction to protect a right; that is, a mode of preventing that being done which if done, would be an offence. (2) The remedy created by s. 25, sub-s. 8, of the Judicature Act. *Cooper* v. *Whittingham*, 49 L. J., Ch. 752; 15 Ch. D. 501; 43 L. T. 16; 28 W. R. 720.

As a general rule, where a penalty is affixed by an act of parliament to an act or omission, such penalty is the only punishment or loss incurred by the party guilty of such act or omission. *International Patent Pulp Co., In re, Knowle, In re*, 46 L. J., Ch. 625; 37 L. T. 351; 25 W. R. 822.

Where a special remedy is given for the failure to comply with the directions of a statute, that remedy must be followed, and no other can be supposed to exist. *Bailey* v. *Bailey*, 53 L. J., Q. B. 583; 13 Q. B. D. 859—per Brett, M.R.

The general rule must be examined with reference to the terms in which the statute deals with the subject. *Brain* v. *Thomas*, 50 L. J., Q. B. 663—C. A.—per Selborne (Lord), L. C.

Semble, when a statute refers generally to powers to enforce obedience, and does not prescribe any procedure, those powers generally referred to would be the powers of the court in which the proceedings are deemed to be taken. *Green, In re, Green* v. *Penzance (Lord)*, 51 L. J., Q. B. 25; 6 App. Cas. 675; 45 L. T. 353; 30 W. R. 218.

The rule that where a statute creates an obligation, and supplies a remedy for its enforcement, that remedy alone must be followed, is subject to this qualification, that the remedy supplied must cover the whole right given. *Stubbs* v. *Martin*, [1895] 2 Ir. R. 70—C. A.

When an act creates an obligation, and enforces its performance in a specified manner, the performance of it can only be enforced in the manner pointed out by the act, and a person injured by the violation of the obligation so created has no remedy but that given by the act. *Handley* v. *Moffat*, Ir. R. 7 Ch. 104; 21 W. R. 231.

When a statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offence by a particular method of proceeding, that particular method of proceeding must be pursued, and no other. *Reg.* v. *Lovibond*, 24 L. T. 357; 19 W. R. 753.

The penalty provided by s. 29 of the Public Health (London) Act, 1891, for the neglect by sanitary authorities of the duty to remove street refuse is the sole remedy available against sanitary authorities. *Saunders* v. *Holborn District Board of Works*, 64 L. J., Q. B. 101; [1895] 1 Q. B. 64; 15 R. 25; 71 L. T. 519; 43 W. R. 26; 59 J. P. 453.

Indictment Superseded by Peculiar Remedy.]—Where a statute makes a new offence which is not prohibited by the common law and appoints a peculiar manner of proceeding against the offender without mentioning an indictment, the peculiar remedy is a bar to an indictment. *Reg.* v. *Hall*, 60 L. J., M. C. 124; [1891] 1 Q. B. 747; 64 L. T. 394; 17 Cox, C. C. 278.

Whether Criminal Proceedings Bar to Civil Remedy.]—A statute provided that a person who misapplied certain moneys should on summary conviction be liable to a penalty and to be ordered to repay all moneys improperly applied, and in default of such repayment or of the payment of the penalty should be imprisoned:—Held, that an order made under this statute was a bar to an action brought to recover the same moneys. *Vernon* v. *Watson*, 60 L. J., Q. B. 472; [1891] 2 Q. B. 288; 64 L. T. 728; 39 W. R. 520—C. A.

Enforcing Statutory Duty—Mandamus.]—A rule for a prerogative writ of mandamus is not the proper mode for enforcing a statutory obligation which can be made the subject of an action. *Reg.* v. *Lambourn Valley Ry.* (58 L. J., Q. B. 136; 22 Q. B. D. 463) followed. *Reg.* v. *L. & N. W. Ry. and G. W. Ry.*, 65 L. J., Q. B. 516; 74 L. T. 624.

—— **Within Specified Time.**]—A railway company constructed a culvert to carry off water from land adjacent to the railway. No complaint was made by the owner of the land of the insufficiency of the culvert, and no application was made to justices for additional accommodation works within the five years limited by the Railways Clauses Consolidation Act, 1845, s. 73. An injury having subsequently arisen to the land from the insufficiency of the culvert to carry off all the water, an action in respect of such injury was brought by the occupier against the railway company, in which it was alleged that the culvert was insufficient:—Held, on demurrer, that the action would not lie. *Colley* v. *L. & N. W. Ry.*, 49 L. J., Ex. 575; 5 Ex. D. 277; 42 L. T. 807; 29 W. R. 16; 44 J. P. 427.

Remedy—Whether exclusive or cumulative.]—The conservators of the river Tone, in Somerset,

were empowered by special acts, 10 & 11 Will. 3, c. 8, and 6 Anne, c. 9, to levy duties upon goods in barges navigating the river, and "in case of nonpayment the boats, &c., to be stopped till duty paid." A railway company, as successor to such conservators, brought an action of debt at common law to recover unpaid duties:—Held, that they were entitled to do so on the ground that the remedy of the detention of boats and barges given by the act must be taken as a cumulative, and not an exclusive, remedy. *G. W. Ry.* v. *Sharman*, 61 L. J., Q. B. 600; 40 W. R. 643.

Where a new obligation is created, and a remedy to compel performance is given in the same section, as a general rule there cannot be any other mode to compel performance than that specified. *Lamplugh* v. *Norton*, 58 L. J., Q. B. 279; 22 Q. B. D. 452; 37 W. R. 422—per Lord Esher, M.R.

Sect. 11 of the Lunacy Regulation Act, 1862 (repealed), which provided that the Lord Chancellor might make an order for payment of the expenses of and incidental to the presentation of a petition for an inquiry as to the sanity of an alleged lunatic, and that such expenses might be ordered to be paid by the parties who either present or oppose the petition, or out of the estate of the alleged lunatic, was an enabling and not an imperative enactment, and did not take away the previously existing right of a person to bring an action at law against a lunatic so found by inquisition, and his committee, for the expenses so incurred. *Brockwell* v. *Bullock*, 58 L. J., Q. B. 289; 22 Q. B. D. 567; 37 W. R. 455; 53 J. P. 405—C. A.

An act giving a summary remedy, though in terms apparently prescribing such remedy, is cumulative, and does not take away a previous right to sue by action. *Sharp* v. *Warren*, 6 Price, 131.

Subsequent statutes, which only add accumulative penalties, do not repeal former statutes. *Rex* v. *Jackson*, Cowp. 297.

Where a statute gives accumulated damages to the party aggrieved, it is not a penal statute. *Woodgate* v. *Knatchbull*, 2 Term Rep. 154; 1 R. R. 449.

If an act, by general words, purports to confer a power on several donees, one of whom possesses the same power more amply at common law, as incident to his estate, the statute will not be intended to apply to him, so as by implication to abridge his power, and acts of his, therefore, which the statute would have authorised, will be referred to his common-law right. *Clayton, Ex parte*, 1 Russ. & M. 369.

Provision for Special Benefit of Individual.]—Where an act of parliament contains a provision for the special protection or benefit of an individual, he may enforce his rights thereunder by an action without either joining the attorney-general as a party, or shewing that he has sustained any particular damage. *Devonport Corporation* v. *Plymouth Tramways Co.*, 52 L. T. 161; 49 J. P. 405—C. A.

Action, where Special Tribunal Non-existent.]—Where a special tribunal, appointed by statute for ascertaining the compensation to be given for damage sustained by the exercise of compulsory powers, is no longer available, the compensation may be ascertained and enforced by action. *Bentley* v. *Manchester, Sheffield and Lincolnshire Ry.*, 60 L. J., Ch. 641; [1891] 3 Ch. 222; 65 L. T. 22.

Abolition of Superior of two Remedies.]—Where there are two remedies for the non-observance of a right, and the superior remedy is abolished by act of parliament, the necessary result is that the inferior remedy is brought into exercise. *Christie* v. *Barker*, 53 L. J., Q. B. 541—per Brett, M.R.

Statute of Doubtful Construction.]—The court will not grant an injunction to restrain parties from proceeding to deal with property, whose right, if it exists, depends upon the construction of a doubtful statute, where the granting of the injunction would for ever deprive them of an opportunity of exercising the right, especially if no irreparable mischief is to be apprehended from allowing them to proceed. Principles of the court with respect to ex parte injunctions. *Att.-Gen.* v. *Liverpool Corporation*, 1 Myl. & C. 171.

Where the construction of a particular section of an act of parliament is doubtful, the court will not interfere by interlocutory injunction. *Dover Harbour (Warden and Assistants)* v. *L., C. & D. Ry.*, 30 L. J., Ch. 474; 9 W. R. 523.

It is highly inconvenient for the court to grant an injunction to restrain the performance of works "in any other manner than authorised by the words of an act of parliament" unaccompanied by a statement of what, in the opinion of the court, is the right mode of constructing those works. *Ib.*

When Statute gives no Remedy.]—The plaintiff and defendant possessed adjoining collieries in the Forest of Dean, which were gales subject to 1 & 2 Vict. c. 43, and the rules made thereunder. The defendant's gale being drained by a steam-engine, he was bound by r. 19 to work the engine so as to prevent the water of his gale from falling into plaintiff's gale. The defendant stopped his engine, whereby the plaintiff's gale was flooded and damaged. Sect. 29 provides that a person working his gale contrary to the rules shall be liable to forfeit it, and may be evicted by her majesty; and, in addition thereto, "the compliance with such rules may be enforced by and on behalf of her majesty, or by any other person, by injunction of her majesty's court of exchequer, or otherwise, in such manner as the court shall on application think fit":—Held, that the plaintiffs had a statutory private right, which had been violated by non-compliance with the rules on the part of the defendant; that s. 29 gave no specific remedy for such breach of duty, and that the plaintiffs were therefore entitled to maintain an action at common law to recover damages. *Ross* v. *Rugge-Price*, 45 L. J., Ex. 777; 1 Ex. D. 269; 34 L. T. 535; 24 W. R. 786.

—— **Or Prescribes no Procedure.**]—When a statute refers generally to powers to enforce obedience, and does not prescribe any procedure, those powers generally referred to would be the powers of the court in which the proceedings are deemed to be taken—per Lord Selborne, L.C. *Green, In re, Green* v. *Penzance (Lord)*, 51 L. J., Q. B. 25; 6 App. Cas. 675; 45 L. T. 353; 30 W. R. 218—H. L. (E.)

Exclusive Jurisdiction of Judge of Assize.]—An act of parliament provided that in case of any dispute as to the amount of compensation for

working mines, the same should be determined by an issue at law to be tried before the justices of assize for the county in which the cause of action should arise and a special jury :—Held, that the chancery division had no jurisdiction to entertain an action for compensation under the act. *Hanley Coal Co.* v. *North Staffordshire Ry.*, 64 L. T. 656.

Non-appointment of Receiver.]—An act empowered commissioners to borrow money upon the security of the rates for the purposes of local improvements and provided that they should every year pay off 100*l.* at the least of the moneys so borrowed to such of the mortgagees of the rates as should be selected by ballot. All interest upon the mortgages was duly paid, and the prescribed mode of payment of the annual instalments was observed. The mortgagees gave the commissioners notice requiring them to pay off their mortgage in six months. The commissioners refused to do so, and the mortgagees filed a bill to establish their right to be paid off and for a receiver of the rates :—Held, that they had no right to have their mortgage debt paid off, except under the provisions of the act, and that the court had no jurisdiction to appoint a receiver of parish rates, and the bill was dismissed. *Preston* v. *Great Yarmouth Corporation*, 41 L. J., Ch. 310 ; 26 L. T. 235. Affirmed 41 L. J., Ch. 760 ; L. R. 7 Ch. 655 ; 27 L. T. 87 ; 20 W. R. 875.

Special Remedy excluding Ordinary Remedy.]—A private act enacted that in all cases of encroachments of buildings on the streets of P. by projections on the true lines thereof, it should be competent for the corporate council to have the same dealt with and adjudicated upon, on due notice of any such intention given to the owner thereof. The act created a board of assessors with power to award compensation to owners of property :—Held, that the private act ousted the jurisdiction of the courts, and that it was incumbent upon the corporation to proceed under it for the removal of an encroachment on the street. *Pietermaritzburg Corporation* v. *Natal Land Co.*, 57 L. J., P. C. 82 ; 13 App. Cas. 478 ; 58 L. T. 895—P. C.

Private Act—Right of Public to sue upon.]—A private act of parliament, authorising the construction of a railway, imposed upon another railway company, whose line was already in existence, an obligation to carry a particular class of traffic at rates not exceeding a fixed amount :—Held (Lord Morris dissenting), that the regulation was not a matter of contract between the two companies, but that it gave rights to the public upon which traders, who alleged that they had suffered injury owing to rates being charged in excess of the amount authorised, could sue. *Davis* v. *Taff Vale Ry.*, 64 L. J., Q. B. 488 ; [1895] A. C. 542 ; 11 R. 189 ; 72 L. T. 632 ; 44 W. R. 172—H. L. (E.) ; reversing *S.C.*, infra, col. 1964.

Notice of Statutory Obligation, a Condition precedent to enforcement of it.]—When a person is bound by a private act to do certain acts whenever necessary, and the necessity is within the knowledge of the person for whose benefit the acts are to be done, and cannot be ascertained by the person who is to do them, the obligation to do the acts exists only after notice. *L. & S. W. Ry.* v. *Flower*, 45 L. J., C. P. 54 ; 1 C. P. D. 77 ; 33 L. T. 687.

A private act authorised the making of a road under a railway. By the act the defendant was bound to maintain the railway bridge over the road, under the superintendence and to the satisfaction of the engineer of the railway company, and to make good to the railway company all expenses occasioned by reason of the execution or failure of the works, or of any act or omission of the defendant. Repairs became necessary, but the necessity could only be ascertained by entry on and examination of the bridge. The company did the repairs without giving notice to the defendant, and sued for the expenses :—Held, that the company could not recover. *Ib.*

Private Act giving one Company rights as against another Company—Right of Public to benefit of Act.]—The plaintiffs were empowered by their acts to charge certain tolls for conveyance of goods upon their line. The B. railway constructed a line which joined that of the plaintiffs. By the special act of the B. railway it was provided that the plaintiffs should forward goods destined for or coming from the B. railway from or to the junction or any place northward thereof at rates per mile not greater than the lowest rate which should, for the time being, be charged by them for like traffic to or from certain seaports to which the plaintiffs' railway ran :—Held, that this provision was passed for the protection of the B. railway, that it only conferred rights as between the two companies, and did not impose any rights as between the plaintiffs and the public which the latter could enforce ; and that, therefore, the plaintiffs were entitled to charge the public rates for the carriage of goods to the junction from places northward thereof up to the maximum allowed by their own act. *Taff Vale Ry.* v. *Davis*, 63 L. J., Q. B. 347 ; [1894] 1 Q. B. 43 ; 9 R. 82 ; 42 W. R. 215—C. A. ; reversed on appeal, supra, col. 1963.

J. M. L.

STATUTE OF FRAUDS.

How Pleaded.]—*See* PRACTICE (PLEADING).

Validity of Contract Within.]—*See* CONTRACT—LANDLORD AND TENANT—PRINCIPAL AND SURETY—SALE OF GOODS—SETTLEMENT—VENDOR AND PURCHASER.

Creation and Assignment of Trusts.]—*See* TRUST.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STAYING PROCEEDINGS.

In Administration Proceedings.]—*See* EXECUTOR AND ADMINISTRATOR.

Pending Appeal.]—*See* APPEAL.

In Winding-up.]—*See* COMPANY.

In other Cases.]—*See* PRACTICE.

STEALING.

See CRIMINAL LAW.

STEWARD OF MANOR.

See COPYHOLD.

STOCK MORTGAGES.

See MORTGAGE.

STOCKS AND SHARES.

See COMPANY.

STOP-ORDER.

See PRACTICE.

STOPPAGE IN TRANSITU.

See SALE OF GOODS.

STRAITS SETTLEMENT.

See COLONY.

STRANDING.

See SHIPPING (INSURANCE).

STREET.

See LOCAL GOVERNMENT—METROPOLIS—WAY.

SUBMISSION.

See ARBITRATION.

SUBPŒNA.

See EVIDENCE.

SUBSTITUTED SERVICE.

See PRACTICE.

SUCCESSION DUTY.

See REVENUE.

SUICIDE.

See CRIMINAL LAW.

SUMMARY JURISDICTION.

See JUSTICE OF THE PEACE.

SUMMONS.

Writ of.]—*See* PRACTICE.

Magistrates.]—*See* JUSTICE OF THE PEACE.

Debtors.]—*See* BANKRUPTCY.

SUNDAY.

1. *Prohibition as to Working*, 1966.
2. *Effect of Statute on Contracts*, 1968.
3. *Penalties and Convictions*, 1970.
4. *Lord's Day Act*, 1971.
5. *Service and Execution of Process and Proceedings*, 1972.
6. *When Reckoned as a Day—See* TIME.

1. PROHIBITION AS TO WORKING.

Coach Proprietors.]—The owner of a stage-coach is not within 3 Car. 1, c. 1, or 22 Car. 2, c. 7; and therefore an action may be maintained against him for neglecting to take a person as a passenger on a Sunday. *Sandiman* v. *Breach*, 7 B. & C. 96; 9 D. & R. 796; 5 L. J. (o.s.) K. B. 298; 31 R. R. 169.

Drivers.]—The driver of a stage-van is subject to the penalties of 3 Car. c. 1, for travelling on Sunday. *Rex* v. *Middleton, Middleton, Ex parte*, 4 D. & R. 824; 3 B. & C. 164; 2 L. J. (o.s.) K. B. 220.

But the driver of a stage-coach is not. *Sandiman* v. *Breach*, 7 B. & C. 96; 9 D. & R. 796; 5 L. J. (o.s.) K. B. 298; 31 R. R. 169.

—— **Of Cattle.**]—A local act for a parish, in which was a large cattle market, enacted, that it should not be lawful for any drover or other person to conduct or drive through any of the streets in the parish any oxen, sheep, or other cattle during Sunday:—Held, that a person driving a van

with horses, in which were calves being conveyed to the market, was not driving or conducting cattle within the meaning of the statute. *Triggs* v. *Lester*, L. R. 1 Q. B. 259; 13 L. T. 701; 14 W. R. 279.

Farmer.]—A farmer is not within s. 1 of the Sunday Observance Act, 1677, even though he works with his own hands. *Reg.* v. *Silvester*, 33 L. J., M. C. 79; 10 Jur. (N.S.) 360. *S. C.*, nom. *Reg.* v. *Cleworth*, 4 B. & S. 927; 9 L. T. 682; 12 W. R. 375.

Semble, that the term "labourer," in s. 1, extends to an agricultural labourer. *Ib.*

——Work of Necessity.]—Whether haymaking is a work of necessity, is a question of fact on which the finding of the justices before whom a party is convicted under this section must be taken as conclusive. *Ib.*

Barber.]—An apprentice to a barber in Scotland, bound by his indenture "not to absent himself from his master's business on holidays and week-days, late hours or early, without leave," went away on Sundays without leave, and without shaving his master's customers:—Held, that the apprentice could not be lawfully required to attend his master's shop on Sundays for the purpose of shaving the customers, and that work and all other sorts of handicraft were illegal in England as well as in Scotland, not being works of necessity, or mercy, or charity. *Phillips* v. *Innes*, 4 Cl. & F. 234.

Baker.]—Baking puddings and pies and such things for dinner on Sunday is not an offence within the Sunday Observance Act, 1677. *Rex* v. *Younger*, 5 Term Rep. 449; 2 R. R. 638. S. P., *Rex* v. *Cox*, 2 Burr. 785.

But baking bread in the ordinary course of business is. *Ib.*

Solicitor.]—An attorney, who, acting on behalf of his client, agrees to become personally responsible for part of the debt owing by him, does not thereby do any work of his ordinary calling within the meaning of the Sunday Observance Act, 1677. *Peate* v. *Dickens*, 3 D. P. C. 171; 1 C. M. & R. 422; 5 Tyr. 116; 4 L. J. Ex. 28.

Enlistment.]—An enlistment may be made on a Sunday. *Wolton* v. *Gavin*, 16 Q. B. 48; 20 L. J., Q. B. 73; 15 Jur. 329.

Affidavits.]—Quære, whether an affidavit, which appears by the jurat to have been sworn in court on a Sunday, is void. *Doe* d. *Williamson* v. *Roe*, 3 D. & L. 328; 15 L. J., Q. B. 39.

Canal Traffic.]—A power given to a canal company to make by-laws for the government of the company, for the good and orderly using of the navigation, and of warehouses, wharves, &c., and for the well-governing of the bargemen, does not authorise them to close the canal on Sundays by a chain suspended across it; and a by-law for so closing the canal on Sundays is illegal and void. *Calder and Hebble Navigation Co.*, v. *Pilling*, 14 M. & W. 76; 3 Railw. Cas. 735; 14 L. J., Ex. 223; 9 Jur. 377.

Sale of Liquor in Public-houses.]—*See* INTOXICATING LIQUORS.

Workshop—Closing—Exception in Favour of Jews—Workshop "open for Traffic on Sunday."]—The appellant, who is of the Jewish religion, was the occupier of a workshop. He made arrangements with his customers to do certain work at certain prices upon certain articles sent to him. The workshop was closed on Saturday, and was open on Sunday in order that the articles might be sent to and fetched from his workshop in pursuance of such prior arrangements, and for no other purpose whatever:—Held, that the appellant did not keep his workshop "open for traffic on Sunday" within s. 51 of the Factory and Workshop Act, 1878. *Goldstein* v. *Vaughan*, 66 L. J., Q. B. 380; [1897] 1 Q. B. 549; 76 L. T. 262; 46 W. R. 399; 61 J. P. 277.

Charter—Admission to Building.]—A charter of incorporation was granted to the company, on condition that no person should be admitted to a company's building or grounds on the Lord's day in consideration of any money payment, whether made directly or indirectly, unless the sanction of the legislature should be obtained. The company having obtained an act of parliament, authorising their directors to agree with the proprietors of any shares or stock for the conversion thereof into tickets of admission for life or years for such proprietor or his nominee, but providing that nothing therein contained should relieve the company from any condition contained in the charter, advertisements were issued by the directors, offering to accept the surrender of shares in exchange for tickets of admission for a term limited, to be made out to bearer, and to be available for Sundays as well as ordinary days:—Held, that the admission of any person on a Sunday, by means of such ticket as proposed, would occasion a forfeiture of the company's charter, and upon a bill filed by a shareholder, the company was restrained from accepting a surrender of any shares in exchange for such ticket of admission. *Rendall* v. *Crystal Palace Co.*, 4 K. & J. 326; 27 L. J., Ch. 397; 6 W. R. 416.

Act of Bankruptcy.]—Denial on Sunday is not an act of bankruptcy. *Preston, Ex parte*, 2 Ves. & B. 312; 2 Rose, 21.

2. EFFECT OF STATUTE ON CONTRACTS.

In what Cases.]—The Sunday Observance Act, 1677, applies as well to private as to public conduct; therefore, a horse-dealer cannot maintain an action upon a private contract for the sale and warranty of a horse if made on a Sunday. *Fennell* v. *Ridler*, 8 D. & R. 204; 5 B. & C. 406; 4 L. J. (O.S.) K. B. 207; 29 R. R. 278.

A coach proprietor having refused to carry the plaintiff because there were no other passengers, he hired a post-chaise to go to his destination:—Held, that the proprietor was liable for the chaise hire, notwithstanding the contract was made on a Sunday. *Sandiman* v. *Breach*, 7 B. & C. 96; 9 D. & R. 796; 5 L. J. (O.S.) K. B. 298; 31 R. R. 169.

Warranty on Sale.]—But in an action for a breach of warranty of a horse, the seller will not be allowed to set up in answer thereto that he was a horse-dealer, and sold the horse on a Sunday. *Bloxsome* v. *Williams*, 5 D. & R. 82; 3 B. & C. 232; 1 Car. & P. 294; 2 L. J. (O.S.) K. B. 224; 27 R. R. 337.

Not in ordinary Calling.]—A sale of goods made on a Sunday, which is not made in the exercise of the ordinary calling of the vendor or his agent, is not void at common law, or by the statute. *Drury* v. *Defontaine*, 1 Taunt. 131.

When a person sent a mare to a farmer, to be covered by a stallion belonging to him, and the mare was taken to his stables and covered accordingly, upon a Sunday:—Held, that the contract was not void, on the ground of its having been made and executed on a Sunday, it not being made by the farmer in the exercise of his ordinary calling. *Searfe* v. *Morgan*, 4 M. & W. 270; 1 H. & H. 292; 7 L. J., Ex. 324.

As s. 5 of the Sunday Observance Act, 1677, prohibits only the labour, business, or work done in the course of a man's ordinary calling, it does not apply to a contract of hiring; and therefore such a contract for a year made on a Sunday between a farmer and a labourer is valid, and service under it conferred a settlement before the passing of 4 & 5 Will. 4, c. 76, s. 64. *Rex* v. *Whitnash*, 7 B. & C. 596; 1 M. & Ry. 452; 6 L. J. (o.s.) M. C. 26.

Sect. 1 of that statute does not extend to any case where the consideration has been executed, and a property either general or special, has passed in the chattels which are the subject of it. *Ib.*

A guarantee, given by B., a tradesman, to A., another tradesman, for the faithful services of C., a traveller, to be employed by A., is not an act done in the way of the ordinary business of B., within s. 1. *Norton* v. *Powell*, 4 Man. & G. 42; 11 L. J., C. P. 202.

Made by an Agent.]—An action will not lie on a contract entered into on a Sunday, though entered into by an agent, and although the objection is taken by the party at whose request the contract was entered into. *Smith* v. *Sparrow*, 4 Bing. 84; 12 Moore, 266; 2 Car. & P. 544; 5 L. J. (o.s.) C. P. 80; 29 R. R. 514.

Bills of Exchange.]—Where, in an action by an indorsee against an acceptor of a bill of exchange, it appeared that the bill was drawn on a Sunday:—Held, that the bill was not void. *Begbie* v. *Levi*, 1 C. & J. 180; 1 Tyr. 130; 9 L. J. (o.s.) Ex. 51.

Subsequent Promise to Pay.]—Where a contract for the sale of goods, which have been delivered to and returned by the purchaser, was void by reason of its having been made on a Sunday, a subsequent promise to pay will entitle the vendor to recover the value upon a quantum meruit. *Williams* v. *Paul*, 4 M. & P. 532; 6 Bing. 653; 8 L. J. (o.s.) C. P. 280; 31 R. R. 512.

Acceptance of Goods.]—To a count for goods sold and delivered, the defendant pleaded that they were goods sold and delivered to him by the plaintiff in the way of his trade on a Sunday, contrary to the statute. The plaintiff replied, that the defendant, after the sale and delivery of the goods, kept them for his own use, without returning or offering to return them, and thereby became liable to pay the sum mentioned in the plea, being so much as they were reasonably worth:—Held, bad. *Simpson* v. *Nicholls*, 3 M. & W. 240; 6 D. P. C. 355; 1 H. & H. 12; 7 L. J., Ex. 117. *See also* 5 M. & W. 705, n.

A. agreed to purchase of B. a carriage then standing in the shop of B., A. at the same time desiring that certain alterations might be made in it. The alterations having been made, the carriage was, at A.'s request, placed in the back shop. On Saturday, the 14th November, A. called at the shop, and requested B. to hire a horse and man for him, and to send the carriage to his house on the following day, in order that he might take a drive in it; A. having previously intimated his intention to take the carriage out a few times, in order that, as he was going to take it abroad, it might pass the custom-house as a second-hand carriage. The carriage was accordingly sent and used by A. on the Sunday, A paying for the hire of the horse and man. A. afterwards refused to take or pay for the carriage:—Held, that there was a sufficient acceptance of the carriage by A. before Sunday, the 15th November, within s. 17 of the Statute of Frauds, to entitle the plaintiff to recover upon a count for goods bargained and sold. *Beaumont* v. *Brengeri*, 5 C. B. 301.

Contract within Statute of Frauds.]—A plea, that the contract declared upon, being a contract which, under the Statute of Frauds, required the defendant's signature, was entered into with the plaintiff on a Sunday, in the way of the plaintiff's ordinary business, is not supported by evidence that the contract was signed and delivered by the defendant to C. on a Sunday, and delivered by C. to the plaintiff on a subsequent day. *Norton* v. *Powell*, 4 Man. & G. 42; 11 L. J., C. P. 202.

Cloak-room at Railway Station.]—A passenger arriving in London by railway on Saturday evening left a portmanteau at the luggage and clock office of the company, on the up-platform of the Paddington station, and on paying 2*d.* received a ticket acknowledging the receipt, with printed conditions, among which was a notice that the company would not deliver up luggage except to persons producing the proper receipt. On Sunday evening, intending to leave London by another railway, he came to the Paddington station for his portmanteau, and found the office shut. After some time he was told by a porter that the superintendent was on the other side; whereupon he went across to the down-platform, from which a train was starting, and the superintendent sent a porter with a key of the office, and he obtained his portmanteau. He was thus delayed forty minutes, and prevented from leaving London by railway that night:—Held, that by the ticket the company was bound to deliver up the portmanteau on Sunday as well as on other days on a reasonable request and within a reasonable time; and that whether there had been an unreasonable delay was a question for the jury. *Stallard* v. *G. W. Ry.*, 2 B. & S. 419; 31 L. J., Q. B. 137; 8 Jur. (N.S.) 1076; 6 L. T. 217; 10 W. R. 488.

3. Penalties and Convictions.

Jurisdiction — One Penalty for a Day.]—A person can commit but one offence on the same day, by exercising his ordinary calling on a Sunday, contrary to the Sunday Observance Act, 1677; and if a justice of the peace proceeds to convict him in more than one penalty for the same day, it is an excess of jurisdiction, for which an action will lie. *Crepps* v. *Durden*, Cowp. 640.

Written Consent to Prosecute — Commencement of Proceedings.]—A prosecution under the Sunday Observance Act, 1677, by a person other than the chief officer of police, will be invalid unless the written consent to prosecute has been obtained—either from the chief officer of police in the district in which the offence is committed, or from two justices, as required by s. 1 of the Sunday Observation Prosecution Act, 1871—previous to the laying of the information, which must be held to be the institution of the prosecution. *Thorpe* v. *Priestnall*, 66 L. J., Q. B. 248; [1897] 1 Q. B. 159; 45 W. R. 223; 60 J. P. 821.

Mode of Recovery—Distress.]—By ss. 1, 2, of the Sunday Observance Act, 1677, a penalty of 5*s.* is imposed to be levied by distress, and in default of such distress, or in cases of insufficiency or inability to pay the penalty, the offender is to be set publicly in the stocks for two hours. By 11 & 12 Vict. c. 43, s. 18, the amount of costs is to be specified in a conviction, and is to be recoverable in the same manner as any penalty adjudged by such conviction is to be recoverable. A conviction under s. 1 of the act of 1677, adjudged the offender to forfeit and pay 5*s.* and 11*s.* costs, and that the several sums, if not paid, should be levied by distress, and in default of sufficient distress, that the party convicted should be set publicly in the stocks for the space of two hours, unless the several sums should be sooner paid:—Held, that the conviction was bad, as the justice was not warranted in adjudging that the offender should be set in the stocks in default of payment of the costs, that not being a method provided by the act of 1677, for recovering the pecuniary penalty, but a substituted punishment. *Reg.* v. *Barton*, 3 New Sess. Cas. 470; 12 Q. B. 389; 18 L. J., M. C. 56; 13 Jur. 232.

—— **Illegal Order—Action against Justice.**]—Under the conviction, the offender's goods were distrained, but the conviction was afterwards quashed on account of the illegal alternative as to confinement in the stocks, and an action was brought for the distress against the justice:—Held, that the justice was protected by 11 & 12 Vict. c. 44, s. 1, and that s. 2 did not apply to the act of distraining for which the action was brought, being one which the justice had jurisdiction to order. *Barton* v. *Bricknell*, 13 Q. B. 393; 20 L. J., M. C. 1; 15 Jur. 668.

4. Lord's Day Act.

Place of Entertainment—What is.]—A company incorporated by an act of parliament was the owner of the Brighton Aquarium, a building which consisted of chambers below the level of the ground, and a terrace above. The chief part was used as an aquarium, filled with glass tanks for the exhibition of marine fish and animals. The whole was open to the public on Sunday on the payment of 6*d.* each person. A band played sacred music on the evenings of Sunday, and programmes were issued, stating what music the band would play, and at what time the fish would be fed. An action having been brought against the company to recover a penalty under 21 Geo. 3, c. 49, s. 1, for keeping open a place of entertainment or amusement on the Lord's Day or Sunday:—Held, that the aquarium, under these circumstances, was a place of entertainment and amusement within the statute. *Warner* v. *Brighton Aquarium Co.*, 44 L. J., M. C. 175, n.; L. R. 10 Ex. 221. S. P., *Terry* v. *Brighton Aquarium Co.*, 44 L. J., M. C. 173; L. R. 10 Q. B. 306; 32 L. T. 458.

—— **Science Lectures.**]—A place duly and honestly registered as a place of public worship (though that worship is not according to any established or usual form), in which no music but sacred music is performed or sung, where nothing dramatic is introduced, where the discourses delivered are intended to be instructive and contain nothing hostile to religion, where the object of the promoters may be either to advance their own views of religion, or as they allege "to make science the handmaid of religion," is not a place "used for public entertainment or amusement" on the Lord's Day within 21 Geo. 3, c. 49, s. 1. *Baxter* v. *Langley*, 38 L. J., M. C. 1; L. R. 4 C. P. 21; 19 L. T. 321; 17 W. R. 254.

The fact that payment is required for admission to a reserved portion of the place, the doors being open gratuitously, does not deprive the promoters of the protection of 1 W. & M. sess. 1, c. 18, continued by 21 Geo. 3, c. 49, s. 8. *Ib.*

—— **Lectures — Penalties — "Keeper" — Manager.**]—A person who acts merely as the agent for the owner of a hall let for the delivery of lectures on Sundays is not a "keeper" of such hall within s. 2 of 21 Geo. 3, c. 49, although he sanctions the terms on which the hall is let and is the person to whom the licence for such hall from the local authorities is granted. A person who acts merely as chairman at a lecture delivered in a hall on Sunday to which the public are admitted on payment of small sums, and who has no control over the lecturer or the subject of the lecture, and whose sole authority is derived from the audience, is not liable under s. 1 of 21 Geo. 3, c. 49, as the "person managing or conducting such entertainment or amusement." Nor is he liable as "master of the ceremonies," that term being inapplicable to an entertainment in the form of a lecture. Nor is he liable as chairman, as the words in the section relating to a chairman refer only to a chairman of a meeting for public debate, which a lecture is not. *Reid* v. *Wilson*, 64 L. J., M. C. 60; [1895] 1 Q. B. 315; 14 R. 94; 71 L. T. 739; 43 W. R. 161; 18 Cox, C. C. 56; 59 J. P. 516—C. A.

5. Service and Execution of Process and Proceedings.

Indictable Offences.]—The exception in s. 6 of the Sunday Observance Act, 1677, extends to all indictable offences, and is not restricted to treason and felony, and such misdemeanors as involve an actual breach of the peace. *Rawlins* v. *Ellis*, 16 M. & W. 172; 16 L. J., Ex. 5; 10 Jur. 1039.

Service of Process.]—The service of process on a Sunday is absolutely void, and cannot be made good by any subsequent waiver of the defendant by his not objecting till after a rule to plead given. *Taylor* v. *Phillips*, 3 East, 155; 6 R. R. 575.

Where a declaration in ejectment was left at the house of a tenant on Saturday, and received by him on the Sunday:—Held, that this was service of process on a Sunday, and void. *Doe* d. *Warren* v. *Roe*, 8 D. & R. 342. S. P., *Goodtitle* d. *Mortimer* v. *Notitle*, 2 D. & R. 232; 5 B. & C. 764.

Service of notice of plea filed on a Sunday is void. *Roberts* v. *Monkhouse*, 8 East, 547; 9 R. R. 497.

So service of a notice to produce on a Sunday is bad. *Hughes* v. *Budd*, 8 D. P. C. 315; 4 Jur. 150.

When a fi. fa. had been executed on a Sunday, and the execution had been abandoned the next day:—Held, that an entry on the following Thursday to execute a distress warrant was not invalid. *Percival* v. *Stamp*, 9 Ex. 167; 2 C. L. R. 282; 23 L. J., Ex. 25; 2 W. R. 14.

The defendant, who was in custody at Cambridge, received an order on Saturday for his discharge; this was forwarded to the undersheriff, at Wisbeach. On the next day, Sunday, the gaoler received a warrant of detainer under a ca. sa., which had been issued the day before:—Held, that the sheriff was entitled to detain the defendant for a reasonable time after the receipt of the order, for the purpose of searching his office for writs; and that the defendant was not entitled to his discharge on the ground that the service of the warrant on Sunday was void. *Samuel* v. *Buller*, 1 Ex. 439; 17 L. J., Ex. 54.

Supœna served on Sunday irregular; attachment and injunction therefore set aside before appearance, on entering appearance with the registrar. *Mackreth* v. *Nicholson*, 19 Ves. 367.

Arrest.]—Arrest under chancellor's warrant, for contempt of court, good on Sunday. *Whitchurch, Ex parte*, 1 Atk. 55.

Where a prisoner has been arrested on a Sunday, a subsequent detainer by another party, without collusion, is not vitiated by the illegality of the original arrest. *Hooper* v. *Lane*, 6 H. L. Cas. 443.

Where a prisoner has been arrested on a Sunday, a subsequent detainer by another party, without collusion, is not vitiated by the illegality of the original arrest. *Ramsden, In re*, 15 L. J., M. C. 113.

By 5 & 6 Will. 4, c. 76, s. 60, the town council may apply to justices against a town clerk, to compel him to deliver up books, papers and writings in his custody; and, upon his refusal, they are required "to commit such offender to the common gaol" until he shall have delivered up such books, papers and writings. The return to a habeas corpus, directed to a county gaoler, stated that E. was delivered into his custody, under a warrant of two justices, obtained by a town council, for not delivering up accounts and vouchers in his custody as town clerk; and that whilst he was in custody another warrant, under the hands of the same justices, and at the instance of the same parties, was lodged with him:—Held, first, that the breach of duty provided for in s. 60 was not an offence within the exception in 29 Car. 2, c. 7, s. 6; and therefore the arrest (which was shewn by affidavits to have been on Sunday) was illegal. *Eggington, Ex parte*, 2 El. & Bl. 717; 2 C. L. R. 385; 23 L. J., M. C. 41; 18 Jur. 224; 2 W. R. 10, 76.

—— **Taking Sureties for Good Behaviour.**]—The defendant was arrested under a warrant, brought before a magistrate and required to give sureties for good behaviour, or, in default, be imprisoned. The defendant refused, and a warrant was made out, under which he was committed to prison till he should find the sureties. All these proceedings took place on Sunday, and the warrants and entry in the sessions book bore date of that day:—Held, that although the arrest might be good, the taking sureties and committal in default was a judicial act, and therefore void as being done on Sunday. *Reg.* v. *Ramsay*, 16 W. R. 191.

Testing a Writ.]—A writ of summons tested on a Sunday is a nullity; but a copy tested on a Sunday, and service thereof (the writ being correctly tested), are merely irregular, and the irregularity will be waived by laches. *Corrall* v. *Foulkes*, 2 B. C. Rep. 262; 5 D. & L. 590.

Notice of Appeal.] — Service of a notice of appeal on Sunday would be void. *Reg.* v. *Middlesex JJ.*, 3 New Sess. Cas. 152; 2 B. C. Rep. 271; 17 L. J., M. C. 111; 11 Jur. 434.

Notices.]—The 6 & 7 Vict. c. 18, s. 4, enacts, that persons desirous of being put upon the register of voters, shall give or send to the overseers, on or before the 20th of July, a notice in writing; the 20th of July happening to be a Sunday:—Held, that the notice might legally be given upon that day. *Rawlings* v. *West Derby Overseers*, 2 C. B. 72; 15 L. J., C. P. 70. S. P., *Colville* v. *Lewes*, 2 C. B. 60.

Delivery of Nomination Paper.]—By an article of the general orders of the poor-law board, the nomination papers on the election of guardians shall be sent to the clerk of the guardians after the 14th and on or before the 26th March; and by another article, when the day for the performance of any act relating to the election of guardians shall be a Sunday, "such act shall be performed on the day next following, and each subsequent proceeding shall be postponed one day":—Held, that the delivery of a nomination paper to the clerk on the 26th March, being Sunday, might be treated as a delivery on the Monday following, and was valid. *Westbury-on-Severn Union, In re*, 4 El. & Bl. 314. *S. C.*, nom. *Reg.* v. *Poor Law Commissioners*, 1 Jur. (N.S.) 251; 3 W. R. 74.

Of Process—By Post.]—Delivery of process by post on Sunday is not service of process within the Sunday Observance Act, 1677. *Reg.* v. *Leominster*, 2 B. & S. 391; 31 L. J., M. C. 95; 8 Jur. (N.S.) 793; 6 L. T. 216.

Notice to Quit.—A notice to quit, given on a Sunday, is valid. *Sangster* v. *Noy*, 16 L. T. 157.

When Included in Computation of Time.]—*See* TIME.

SUPERFLUOUS LAND.

See LANDS CLAUSES ACT.

SUPERSEDEAS.

See LUNATIC.

SUPPORT OF LAND.

See EASEMENT.

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TACKING SECURITIES.

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Creation of by Will.]—*See* WILL.

See also ESTATE—SHELLEY'S CASE.

TALES.

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TAXATION OF COSTS.

Between Party and Party.]—*See* COSTS.

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Of Election Petitions.]—*See* ELECTION LAW.

TAXES.

See REVENUE.

END OF VOLUME XIII.

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